DISTRICT COURT, WELD COUNTY, COLORADO 915 10th Street, Greeley, CO 80631 P.O. Box 2038 Greeley, CO 80632 Phone Number: (970) 475-2400	
PLAINTIFFS: MOTHERLOVE HERBAL COMPANY, a Colorado Certified B Corporation; INDIANHEAD WEST HOMEOWNERS ASSOCIATION, INC., a Colorado Nonprofit Corporation; ROCKIN S RANCH LLC, a Colorado Limited Liability Company; JOHN CUMMINGS, an Individual; DAVID KISKER, an Individual; GARY OPLINGER, an Individual; WOLFGANG DIRKS, an Individual; and JAMES PIRAINO, an Individual v. **DEFENDANTS:** THE BOARD OF COUNTY COMMISSIONERS OF WELD COUNTY, COLORADO (including all of the individual Commissioners in their official capacities: Chair Barbara Kirkmeyer, Pro-Tem Michael Freeman, Sean Conway, Steve Moreno, and Julie Cozad); MARTIN MARIETTA MATERIALS, INC., a North Carolina corporation; GERRARD INVESTMENTS, LLC, a Colorado limited liability company; WELD LV, LLC, a Nevada limited liability company; and WELD LV II, LLC, a Nevada limited liability company	**▲ COURT USE ONLY ▲** Case Number: 2015CV30776 Division 4
Attorneys for Martin Marietta Materials, Inc. Wayne F. Forman, Colo. Atty. Reg. No. 14082 Mark J. Mathews, Colo. Atty. Reg. No. 23749 BROWNSTEIN HYATT FARBER SCHRECK, LLP 410 Seventeenth Street, Suite 2200 Denver, Colorado 80202-4432 Telephone: 303.223.1100 E-mail: wforman@bhfs.com; mmathews@bhfs.com	

DEFENDANT MARTIN MARIETTA MATERIALS, INC.'S MOTION TO AMEND AND FOR STAY OF JUDGMENT

Pursuant to C.R.C.P. 59(a)(4) and 59(f), Martin Marietta Materials, Inc. ("Martin Marietta"), by and through its attorneys, respectfully moves the Court to amend its May 1, 2018 judgment to eliminate the directive that the Board of County Commissioners of Weld County (the "Board") "deny" Martin Marietta's special use permit USR15-0027 (the "USR"). Further, in accordance with C.R.C.P. 62(b), Martin Marietta requests that the Court enter a stay of its judgment until the proper scope of relief is resolved.

Certificate of Compliance

Pursuant to C.R.C.P. § 1-15(8), undersigned counsel certifies that they have conferred in good faith with the other parties regarding this motion. Defendants the Board of County Commissioners of Weld County and Gerrard Investments, LLC consent to the motion. Plaintiffs object to it. Defendants Weld LV, LLC and Weld LV II, LLC have sold their interest in the property and are no longer interested parties.

As grounds for this motion, Martin Marietta states as follows:

1. In its May 1, 2018 Order Entering Judgment in Favor of the Plaintiffs (the "Judgment"), the Court vacated its prior judgment, entered judgment in favor of the Plaintiffs and required the Board to reverse its approval of special use permit USR15-0027 "by denying that permit instead."

2. By this motion, Martin Marietta seeks to have the Court amend the judgment to clarify its intent. If the Court intends by the phrase "denying that permit" to mean that the Board's Amended Resolution approving the USR is invalidated, Martin Marietta concurs that this is the appropriate relief under the Court of Appeals' remand and C.R.C.P. 106(a)(4). If, however, the Court is instructing the Board to deny Martin Marietta's pending application for a USR permit and

to preclude the Board from conducting further hearings on the application, including on the very noise issue which was the sole basis for the Court of Appeals' decision in this case, Martin Marietta respectfully submits that such relief is beyond the scope of the Court's jurisdiction, deprives the Board of its authority and discretion to address the Court's remand, and is not warranted by the Court of Appeals' decision. Accordingly, Martin Marietta requests that the Court issue an amended judgment that clarifies that only the Board's Amended Resolution approving the USR permit is invalidated.

3. Under C.R.C.P. 106(a)(4), this Court is authorized to determine only whether the Board "exceeded its jurisdiction or abused its discretion…." *Accord* C.R.S. § 13-51.5-101 and -103 (judicial review of local government land use decisions conducted under Rule 106 "shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion….").

4. Under this limited standard of review, a trial court must determine whether a lower tribunal exceeded its jurisdiction or abused its discretion. But this Court has no jurisdiction to direct the lower tribunal to take any particular action in response to its ruling. In *Wolf Creek Ski Corp. v. Bd. of Cty. Comm'rs*, 170 P.3d 821 (Colo. App. 2007), for example, the board of county commissioners approved a plan unit development ("PUD"). The trial court reversed that approval under Rule 106(a)(4) because the applicant had failed to demonstrate adequate access to its proposed development. The trial court also directed the board to hold further public hearings once the developer obtained year-round access. *Id.* at 831-32. The Colorado Court of Appeals affirmed the trial court's rejection of the board's approval of the PUD, but reversed the trial court's order directing the county commissioners as to how to address the reversal because the trial court's

instructions to the board exceeded its jurisdiction. *Id.* As the Court of Appeals held, "[o]nce a court finds that an administrative body has abused its discretion, how to address that deficiency on remand is within the discretion of the administrative body." *Id.* at 831.

Similarly, in *Carney v. Civil Service Comm'n,* 30 P.3d 861 (Colo. App. 2001), plaintiffs challenged under Rule 106(a)(4) the personal record evaluation ("PRE") component of a civil service examination. The Court of Appeals affirmed the trial court's invalidation of the test but rejected the trial court's direction to the administrative body as to how to address that decision by giving equal PRE scores to all candidates taking the test. The Court held as follows:

> The authority of the court and the scope of its review in certiorari proceedings is limited to a determination of whether there is any competent evidence to support the decision of the inferior tribunal… Here, the trial court, after finding that the PRE was arbitrary and capricious, directed that candidates be given equal PRE scores, thus neutralizing that component's effect, and that a new list be established. While the court could determine that the test was invalid, it could not direct the Commission to create a new eligibility list. The determination of a remedy is left to the Commission.

30 P.2d at 866-67. *Accord United States v. Saskatchewan Minerals,* 385 U.S. 94, 95 (1966) (*per curiam)* (invalidating district court order that precluded agency from reopening evidence on remand as an "improper limitation on the Commission's duty to reconsider the entire case"); *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 21 (1952) (reversing court of appeals' striking of provision of Commission order because "…the guiding principle…is that the function of the reviewing court ends when an error of law is laid bare. At that point the matter once more goes to the [agency] for reconsideration").

5. In the present case, the Judgment appropriately vacates the Court's prior judgment and enters judgment in favor of the Plaintiffs. However, the Court has no jurisdiction to instruct the Board that Martin Marietta's application for the USR should be denied. The decision of

whether to allow further proceedings to cure the defect identified by the Court of Appeals should be left to the sole discretion of the Board.

6. Indeed, in *Wolf Creek*, the Court of Appeals, even though it had invalidated the PUD decision, fully recognized that there would be further proceedings before the board of county commissioners, as it proceeded to address other grounds challenging the PUD approval "because they may arise on remand." *Id.* at 830. Accordingly, even though it reversed the board's approval of the PUD, it did not require the denial of the PUD application or provide any further instruction to the board. Here too, it is solely within the Board's discretion to determine whether to engage in further hearings with respect to Martin Marietta's pending application or to take some other action.

7. As mentioned, the sole basis for the Court of Appeals' reversal was that it found there was no competent evidence in the record to support the Board's findings that the proposed use could meet the Weld County residential noise standards. Case No. 17CA0463 at ¶ 17. The Court specifically found that "[t]here is <u>currently</u> insufficient support in the record for us to conclude that the proposed use, when running under normal operations, would comply with development standard twenty-four." *Id.*, ¶ 18 (emphasis added). Martin Marietta has now built and tested nearly all of the USR facilities and can now demonstrate empirically that the facility meets the County's noise standards under normal operations. Nothing in the Court of Appeals' opinion impairs the continued validity of Martin Marietta's USR application, compels the denial of the USR permit, or prohibits the Board from exercising its discretion on remand to conduct additional proceedings to correct this evidentiary infirmity. And indeed, under the case law interpreting the standard of review under C.R.C.P. 106(a)(4), neither the Court of Appeals nor this Court has jurisdiction to dictate that result to the Board, a coordinate branch of government. *See*

Chonoski v. State, Dept. of Revenue, Motor Vehicles Div., 699 P.2d 416, 417 (Colo. App. 1985) (court refuses to enjoin agency hearing, finding that "[p]remature judicial interference, whether predicated on C.R.C.P. 106 or § 24-4-106(8)…violates the principle of separation of powers.")

8. Denying the USR application, rather than reversing the Board's Amended Resolution approving the USR, has significant consequences to both Martin Marietta and the County. First, it would require Martin Marietta and the Board to start from scratch, as if the 13-hour hearing had not occurred and none of the substantial evidence addressing the USR criteria had been presented. That would be an intrusion by the judicial branch into the functioning of Weld County, and result in a tremendous waste of resources. Moreover, under the Weld County Code, once a USR application has been denied, the applicant cannot submit a substantially similar application for five years except under limited circumstances. *See* Weld County Code §2-3-10(A). There is no legal justification in the Court of Appeals' remand to so deprive the Board of its jurisdiction to further review Martin Marietta's pending USR application. And it would be extraordinarily inequitable for the Court to jeopardize Martin Marietta's enormous investment in the USR facilities by preventing Martin Marietta from having the opportunity to prove to the Board that the now constructed USR facilities will meet the County noise standards.

9. C.R.C.P. 62(b)(1) provides that the Court may, in its discretion, and on such conditions for security as are proper, stay the execution of, or any proceedings to enforce, a judgment pending disposition of a Rule 59 motion. Such a stay is appropriate here. Although the Judgment is automatically stayed for 14 days under Rule 62(a), resolution of this motion (and of Plaintiffs' Rule 59 motion filed yesterday) will likely require more than two weeks. And because the Judgment could be interpreted as requiring the Board to deny Martin Marietta's USR

application, the Judgment will foster confusion and potential unintended consequences until the Court can clarify the scope of the Judgment. To avoid that result, the Court should stay the Judgment pending resolution of this motion.

WHEREFORE, Martin Marietta respectfully requests that the Court amend the Judgment to provide that: the prior judgment is vacated; judgment is entered in favor of the Plaintiffs as provided in the Court of Appeals opinion; and the Board's Amended Resolution approval of USR 15-0027 is invalidated on the evidentiary ground set forth in the Court of Appeals' opinion.

The Judgment should not command the denial of the USR permit, but rather, should remand the matter to the Board for further action consistent with the Judgment. The Court should further stay the effectiveness of the Judgment until it rules on this motion.

With this motion, Martin has submitted a proposed form of stay order and Amended Judgment.

Respectfully submitted May 4, 2018.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

s/ Wayne F. Forman
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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2018, I filed a true and correct copy of the foregoing document, titled DEFENDANT MARTIN MARIETTA MATERIALS, INC.'S MOTION TO AMEND AND FOR STAY OF JUDGMENT, via Colorado Courts E-Filing which will provide notice of the filing and availability of such document by electronic mail to the following recipients:

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