

COLORADO COURT OF APPEALS
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CASE NUMBER: 2018CA1103

Previous Appellate History:
COLORADO COURT OF APPEALS
Case No. 2017CA000463
Hon. Judge Terry, Hon. Judge Casebolt, Hon. Judge
Carparelli

DISTRICT COURT, WELD COUNTY, COLORADO
Case No. 2015CV30776
Hon. Judge Taylor

Plaintiffs/Appellants:

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/Appellees:

**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, Steven 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.

Attorneys for Plaintiffs/Appellants:

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▲ COURT USE ONLY ▲

Case No. _____

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NOTICE OF APPEAL

Appellants Motherlove Herbal Company, Indianhead West Homeowners Association, Inc., Rockin S Ranch LLC, John Cummings, David Kisker, Gary Oplinger, Wolfgang Dirks, and James Piraino (collectively, the "Appellant Neighbors"), through their attorneys, IRELAND STAPLETON PRYOR & PASCOE, PC, pursuant to C.A.R. 3, submit the following Notice of Appeal:

Preliminary Statement Regarding Previous Appeal

This is an appeal of a final order entered by the Weld County District Court following remand from an earlier appeal to the Colorado Court of Appeals that was successfully pursued by the Appellant Neighbors in this same case at Case No. 2017CA000463. The Appellant Neighbors now challenge the District Court's final order on remand as inconsistent with this Court's November 22, 2017 Opinion in Case No. 2017CA000463 and specifically request that this Court enter full and final relief consistent with the Opinion and in light of subsequent events. In the alternative, the Appellant Neighbors ask this Court to resolve the otherwise dispositive appellate issues that were previously presented to this Court but for which this Court reserved any final judgment. If the District Court's final order on

remand was an appropriate interpretation of this Court's Opinion, then the interests of justice and judicial economy compel this Court to resolve all of the appellate issues that were previously presented and fully briefed before this Court.

I. TRIAL COURT INFORMATION

COURT: District Court

COUNTY: Weld County

JUDGE'S NAME: Hon. Judge Todd Taylor

PARTIES INITIATING THE APPEAL: Plaintiffs Motherlove Herbal Company, Indianhead West Homeowners Association, Inc., Rockin S Ranch LLC, John Cummings, David Kisker, Gary Oplinger, Wolfgang Dirks, and James Piraino

TRIAL COURT CASE NUMBER: 2015CV30776

II. NATURE OF THE CASE AND DISPOSITION IN THE TRIAL COURT

A. Nature of the Controversy:

This is a land use dispute that was originally brought pursuant to C.R.C.P. 106(a)(4) and C.R.C.P. 57. The Appellant Neighbors challenged Appellee The Weld County Board of County Commissioners' (the "BOCC") September 2015 approval of a use by special review application filed by Appellees Martin Marietta Materials, Inc. and Gerard Investments, LLC (collectively, "Martin Marietta"). The BOCC approved Martin Marietta's request to convert 133-acres of land zoned

for agricultural use in rural Weld County into a largescale industrial asphalt and concrete production facility.

After the District Court dismissed the Appellant Neighbors' claim for declaratory relief (on the basis that C.R.C.P. 106(a)(4) provides the exclusive remedy in land use cases), the District Court held that the BOCC did not abuse its discretion in approving the Proposed Use. The Appellant Neighbors timely appealed that final order to this Court and presented five discrete issues on appeal. In Case Number 2017CA000463, a panel for this Court unanimously held that the BOCC abused its discretion in determining that the Proposed Use was compatible with surrounding uses because the undisputed evidence confirmed that the industrial proposal could not comply with the requisite residential noise standard. This Court declined to address the Appellant Neighbors' other issues and issued a mandate returning jurisdiction to the District Court on April 30, 2018.

Thereafter, the District Court immediately entered an order finding in favor of the Appellant Neighbors and ordering the BOCC to deny Martin Marietta's land use application. Both sides then filed motions to amend the judgment. The Appellant Neighbors presented the District Court with undisputed evidence that Martin Marietta knowingly proceeded at its own risk to make industrial improvements to the site before the District Court's judgment and that such

improvements must now be removed. Martin Marietta acknowledged that the Appellant Neighbors prevailed before this Court but nevertheless argued that the District Court was powerless to order the BOCC to deny the land use application. The District Court agreed with Martin Marietta and amended its final judgment to simply order that the previous approval was reversed and that the matter was remanded to the BOCC for further proceedings.

The Appellant Neighbors now timely appeal the District Court's amended final order on the ground that it is inconsistent with this Court's Opinion and contrary to the Weld County Land Use Code. The District Court further erred in refusing to make the Appellant Neighbors whole in light of subsequent events. Alternatively, in the interest of justice and judicial economy, this Court should consider and resolve the dispositive appellate issues that it previously declined to address.

B. Judgment or Order Being Appealed:

The Appellant Neighbors appeal the District Court's June 4, 2018 "Order Granting Defendant Martin Marietta Materials, Inc.'s Motion to Amend Judgment" (which was the final order entered in the District Court) and the District Court's June 4, 2018 "Order Denying Plaintiffs' Motion for Amended Judgment."

The Court of Appeals has jurisdiction over this appeal pursuant to C.A.R. 1(a)(1) and Section 13-4-102(1), C.R.S.

C. Whether the Judgment or Order Resolved All Issues Pending Before the District Court:

The District Court's June 4, 2018 orders resolved all of the issues pending before the District Court with the exception of the Appellant Neighbors' Bill of Costs as the prevailing party (which remains outstanding).

D. Whether the Judgment is Final for the Purposes of Appeal:

The District Court's June 4, 2018 "Order Granting Defendant Martin Marietta Materials, Inc.'s Motion to Amend Judgment" was a final order for the purposes of appeal.

E. The Date the Judgment or Order Was Entered and the Date of Mailing to Counsel:

The District Court's final order was entered on June 4, 2018, and served on counsel via the Colorado Courts e-filing system the same day.

F. Whether There Were Any Extensions Granted to File Any Motion(s) for Post-Trial Relief:

Not applicable.

G. The Date Any Motion for Post-Trial Relief Was Filed:

Not applicable.

H. The Date Any Motion for Post-Trial Relief Was Denied or Deemed Denied under C.R.C.P. 59(j):

Not applicable.

I. Whether There Were Any Extensions Granted to File Any Notice of Appeal:

No extension was requested.

III. **ADVISORY LISTING OF ISSUES TO BE APPEALED**

I. Whether the District Court Erred in Remanding an Unlawful Land Use Decision to the Board of County Commissioners for Further Evidentiary Findings Rather than Ordering the Denial of the Land Use Application Consistent with the Closed Administrative Record.

II. Whether the District Court Erred in Refusing to Make the Prevailing Party Whole Consistent with the Relief Requested and in Light of the Subsequent Undisputed Actions of the Parties.

III. In the Alternative, Justice and Judicial Economy Compel the Court of Appeals to Resolve the Remaining Four Appellate Issues Which Were Fully Briefed and Are Dispositive of this Case.

IV. **WHETHER A TRANSCRIPT OF EVIDENCE IS NECESSARY TO RESOLVE THE ISSUES ON APPEAL**

No transcript will be necessary to resolve the issues raised on appeal.

With respect to the first and second issues on appeal, this Court will review the lawfulness of the District Court's amended final judgment in light of this Court's November 22, 2017 Opinion resolving this case in favor of the Appellant

Neighbors. If the third issue on appeal is considered in the alternative, it will be resolved in light of the appellate record and the briefing of the parties that were previously presented to this Court.

All such materials will be certified as part of the appellate record before this Court.

V. PREARGUMENT CONFERENCE

The Appellant Neighbors do not request a pre-argument conference.

VI. ATTORNEY INFORMATION

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VII. APPENDIX TO THIS NOTICE OF APPEAL

Attached as an appendix are copies of:

- (a) This Court's November 22, 2017 Opinion entered in the previous appeal of this case;
- (b) The District Court's June 4, 2018 "Order Granting Defendant Martin Marietta Materials, Inc.'s Motion to Amend Judgment";

(c) The District Court's June 4, 2018 "Order Denying Plaintiffs' Motion for Amended Judgment."

DATED: June 15, 2018

IRELAND STAPLETON PRYOR &
PASCOE, PC

*This document is e-filed per C.R.C.P. 121, section
1-26.*

/s/ Mark Lacis

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CERTIFICATE OF SERVICE

I certify that on June 15, 2018, a true and correct copy of this NOTICE OF APPEAL was served via email on the following individuals:

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Weld County District Court
via CCEF

*SIGNED ORIGINAL ON FILE AT THE OFFICE OF
IRELAND STAPLETON PRYOR & PASCOE, PC*

/s/ Dawn A. Brazier

Dawn A. Brazier