COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, Colorado	
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.	▲ COURT USE ONLY ▲ Case No. 2018CA1103
Attorneys for Plaintiffs/Appellants: Mark E. Lacis, Reg. # 37421 James R. Silvestro, Reg. # 43982 IRELAND STAPLETON PRYOR & PASCOE, PC 717 Seventeenth Street, Suite 2800 Denver, Colorado 80202 Phone: 303-628-2700; Fax: 303-623-2062 e-mail: mlacis@irelandstapleton.com jsilvestro@irelandstapleton.com	

RESPONSE IN OPPOSITION TO MOTION TO DISMISS

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with all requirements of C.A.R. 27 and C.A.R. 32, including all formatting requirements set forth therein. Specifically, the undersigned certifies that:

This Response complies with any applicable word limits.

☒ Not including the caption, table of contents, table of authorities, certificate of compliance, certificate of service, and signature block, it contains **3387** words.

I hereby acknowledge that this Response may be stricken if it fails to comply with any of the requirements of C.A.R. 27 and C.A.R. 32.

By: */s/ Mark Lacis*
Mark Lacis, #37421

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, respectfully submit the following Response in Opposition to Defendant-Appellee Martin Marietta Materials Inc.'s ("Martin Marietta") Motion to Dismiss Appeal (the "Motion"):

SUMMARY

This Court previously "reversed" the Weld County District Court's judgment, which had affirmed the Weld County Board of County Commissioners' ("BOCC") approval of Martin Marietta's application for a use by special review ("USR") permit. That USR permit would have allowed Martin Marietta to construct and operate a heavy-industrial concrete and asphalt facility in an area zoned for agricultural and residential uses.

In the prior appeal (2017CA463), this Court ruled that the BOCC's decision approving Martin Marietta's application for a USR permit must be "overturned." In so doing, this Court did not remand the case for further evidentiary proceedings before the BOCC. Instead, this Court directed the District Court to enter judgment in favor of the Appellant Neighbors and further instructed that the BOCC's

decision be "overturned." Because this Court determined that the BOCC had unlawfully approved the USR, this Court concluded that it did not need to reach the other four potentially dispositive issues presented by the Appellant Neighbors in this earlier appeal.

The District Court subsequently entered judgment and instructed the BOCC "to reverse its approval of the special use permit, USR 15-0027, by denying that permit instead." However, following a Motion to Amend Judgment filed by Martin Marietta, the District Court amended its judgment consistent with Martin Marietta's request, and remanded the case to the BOCC for further proceedings. Such a remand is at odds with this Court's prior Opinion, which did not contemplate further quasi-judicial evidentiary proceedings before the BOCC. The Amended Judgment is a final judgment for purposes of appeal and is ripe for review, as confirmed by well-settled case law that a District Court's final order on remand may be properly reviewed for compliance with this Court's opinions. The Motion should be denied.

BACKGROUND

1. On November 22, 2017, this Court ruled in favor of the Appellant Neighbors on a Rule 106(a)(4) appeal challenging the approval by the BOCC of an application for a Use by Special Review permit filed Martin Marietta. (Exhibit 1,

Opinion dated November 22, 2017).

2. The USR permit would have allowed 132-acres of pastureland (designated as Prime farmland) to be developed into a heavy, industrial use at a site within the Agricultural Zone District and in an area that was exclusively zoned for agriculture and single-family homes. *Id.*, ¶ 2.

3. This Court explained: "[The Appellant Neighbors] contend that the administrative record lacks competent evidence supporting the board's decision to grant defendant corporations a use by special review to carry out the proposed use in an agricultural zone. **We agree and reverse** the district court's judgment affirming the board's resolution." *Id.*, ¶ 6 (emphasis added).

4. Although the Appellant Neighbors raised and fully briefed five issues on appeal, this Court elected not to reach four of those arguments, because it found for the Appellant Neighbors on the issue of noise, which alone was case dispositive. Specifically, this Court held:

> **Because the board's decision must be overturned**, we decline to address [the Appellant Neighbors'] other contentions that the board improperly considered non-adjacent land uses in its compatibility analysis, that there was not competent evidence demonstrating a diligent effort to conserve prime farmland, and that the board engaged in illegal "spot zoning." We also decline to address [the Appellant Neighbors'] contention that the board and defendant corporations' attorneys engaged in improper ex parte communications.

Id., ¶ 20 (emphasis added). Any of these other issues might also have disposed of this case in the Appellant Neighbors' favor.

5. Following the issuance of the Mandate, on May 1, 2018, the District Court entered Judgment for the Appellant Neighbors as follows:

> This case has been remanded by the Colorado Court of Appeals with instructions to reverse this court's previous judgment in favor of the defendants. Accordingly, the prior judgment is hereby vacated, the court enters judgment in favor of the [Appellant Neighbors], and the court orders the Board of County Commissioners for Weld County to reverse its approval of the special use permit, USR 15-0027, by denying that permit instead.

(Exhibit 2, Order Entering Judgment in Favor of the Plaintiffs, at 1).

6. Both Martin Marietta and the Appellant Neighbors filed motions seeking to modify the judgment. Martin Marietta filed a motion asking that the USR approval merely be "set aside" such that it may ask the BOCC to re-open the administrative record and re-approve the USR once Martin Marietta fixes its evidentiary shortcomings. (Exhibit 3, Defendant Martin Marietta Materials, Inc.'s Motion to Amend and for Stay of Judgment). The Appellant Neighbors asked the District Court to modify its final order directing the denial of the USR to also include a mandatory injunction ordering the removal of Martin Marietta's industrial improvements in light of the subsequent and undisputed fact that Martin Marietta

had proceeded with its industrial improvements while this matter was on appeal. (Exhibit 4, Plaintiffs' Motion for Amended Final Judgment Pursuant to C.R.C.P. 59(A)(4)). The Appellant Neighbors presented undisputed evidence that Martin Marietta had knowingly accepted the risk of constructing these industrial improvements and expressly accepted that if the USR were overturned, it could be compelled to remove the improvements at its own expense and with no reimbursement. (Exhibit 5, Letter Dated Dec. 21, 2015 from Counsel for Martin Marietta to Weld County).

7. On June 4, 2018, the district court entered an Order Granting Martin Marietta's Motion to Amend Judgment, in which it explained, it "is improper for the court to direct the Board to deny the special use permit . . . I therefore erred in directing the Board to deny the special use permit, **rather than remanding the case for the Board to decide how to address the deficiency** identified by the Court of Appeals." (Exhibit 6, Order Granting Martin Marietta Materials, Inc.'s Motion to Amend Judgment, at 1-2) (emphasis added). At the same time, the District Court denied the Appellant Neighbors' request for relief consistent with this Court's rejection of the USR, including the Appellant Neighbors' request that Martin Marietta be compelled through a mandatory injunction to remove the now unlawful industrial improvements that it had constructed (at its own express risk)

while this matter was appealed to this Court. (Exhibit 7, Order Denying Plaintiffs' Motion for Amended Judgment).

ARGUMENT

I. THE DISTRICT COURT'S ORDER GRANTING THE MOTION TO AMEND JUDGMENT IS A FINAL ORDER AND IS REVIEWABLE BY THIS COURT.

The Colorado Rules of Civil Procedure define a "Judgment" as "a decree and order to or from which an appeal lies." C.R.C.P. 54(a). Under Rule 58(a), "[t]he effective date of entry of judgment shall be the actual date of the signing of the written judgment." C.R.C.P. 58(a).

Pertinent here, following the issuance of this Court's Mandate, the District Court entered judgment in favor of the Appellant Neighbors on May 1, 2018. *See* Ex. 2. That judgment was subsequently modified on June 4, 2018. *See* Ex. 6. At this time, there is nothing left for the District Court to do and this matter is closed before the District Court. Accordingly, pursuant to Rules 54(a) and 58(a), there is a final judgment which is ripe for review by the Colorado Court of Appeals and the Motion should be denied.

II. THIS COURT *MUST* REVIEW THE DISTRICT COURT'S JUDGMENT FOR COMPLIANCE WITH ITS OPINION.

"Trial Courts have no discretion to disregard binding appellate rulings." *Thompson v. United Secs. Alliance, Inc.*, 2016 COA 128, ¶ 13. "The law of the

case as established by an appellate court must be followed in subsequent proceedings before the . . . court." *People v. Roybal*, 672 P.2d 1003, 1005 (Colo. 1983). Consequently, it is well-settled that this Court must "review de novo whether a trial court has complied with a prior appellate ruling." *City Council of City of Cherry Hills Vill. v. S. Suburban Park & Recreation Dist.*, 219 P.3d 421, 423 (Colo. App. 2009).

Martin Marietta attempts to distract from established case law by arguing that this circumstance is somehow different because it involves an appeal that was brought pursuant to C.R.C.P. 106. Martin Marietta, however, cannot ignore that this Court expressly ordered that the USR approval be "overturned." *See* Ex. 1, ¶ 20. Martin Marietta then cites to inapposite administrative case law and incorrectly assumes that (1) this Court intended for the record to be reopened for further factual findings; and (2) that the Weld County Code permits the reopening of the administrative record to reconsider a "reversed" USR approval. As explained below, neither the Weld County Code nor this Court's Opinion contemplate further evidentiary proceedings in support of the unlawful USR.

III. THIS COURT *SHOULD* REVIEW THE DISTRICT COURT'S JUDGMENT FOR COMPLIANCE WITH ITS OPINION.

Even if, assuming *arguendo*, the District Court's final order is not automatically appealable to this Court, Martin Marietta ignores administrative case

law which confirms that a district court's remand order to an administrative body may nevertheless be a final appealable order under appropriate circumstances. *See Chugach Alaska Corp. v. Lujan*, 915 F.2d 454, 457 (9th Cir. 1990) (a remand order is final where (1) the district court conclusively resolves a separable legal issue, (2) the remand order forces an administrative body to apply a potentially erroneous rule which may result in a wasted proceeding, and (3) review would, as a practical matter, be foreclosed if an immediate appeal were unavailable). Here, an immediate appeal of the District Court's unlawful final order on remand is both necessary and appropriate.

In the prior appeal, the Appellant Neighbors raised five issues, namely: (1) that there is no competent evidence that the proposed industrial use is consistent with existing surrounding agricultural and residential uses; (2) that there is no competent evidence Martin Marietta made a diligent effort to conserve prime farmland when selecting the site; (3) that there is no competent evidence the proposed industrial use can comply with the applicable noise standard; (4) that the proposed industrial use is not "directly related to" agriculture and that the approval constitutes de facto spot zoning; and (5) that *ex parte* communications between Martin Marietta and the BOCC while on remand tainted the proceedings and should have been produced.

This Court found in the Appellant Neighbors' favor on the issue of noise and elected not to reach the remaining four arguments asserted by the Appellant Neighbors, each of which was independently case-dispositive. Although the Court found for the Appellant Neighbors on the issue of noise, that decision did not reflect on the viability of the remaining four issues raised on appeal. *See* Ex. 1, ¶ 20 ("Because the board's decision must be overturned, we decline to address plaintiffs' other contentions . . .").

Martin Marietta disingenuously suggests that "this Court has already determined it need not address" the four issues that the Appellant Neighbors raised in its prior appeal, as though this Court were somehow free to disregard issues that are properly presented before it, when in fact the Court declined to address the remaining issues because it found for Appellant Neighbors on the issue of noise as it affects a determination of compatibility with surrounding uses. *See* Motion at 9; Ex. 1, ¶¶ 10, 20. Martin Marietta then attempts to fault the Appellant Neighbors for not seeking a "rehearing of that ruling" (which was in the Appellant Neighbors' favor) and submits that the Appellant Neighbors "can offer no basis for a second bite at the apple on issues this Court has already declined to consider." Motion at 9.

The Appellant Neighbors, however, are not seeking a "second bite at the apple"—they are simply asking this Court to uphold their first successful bite. This Court's Opinion did not instruct the District Court to reopen the administrative record before the BOCC (which has been lockstep with Martin Marietta throughout this appeal and which has even executed a common interest agreement with Martin Marietta in an attempt to shield communications between the BOCC and Martin Marietta from public disclosure) (*See* Exhibit 8, Common Interest, Limited Information Sharing, and Confidentiality Agreement). Instead, this Court ordered the District Court to "overturn[ ]" the USR approval and close this case. Ex. 1, ¶ 20. Furthermore, this Court did not decline to address the other four potentially dispositive issues properly presented by the Appellant Neighbors because it was expressing any judgment on those issues—instead, it did not address those issues because the noise issue resolved the case and mandated the denial of the USR application. *Id.*; *Thompson*, 2016 COA 128 ¶ 14 ("When determining the meaning of a remand order, we consider the disposition and context of the entire opinion."); *see also In re Marriage of Ashlock*, 663 P.2d 1060, 1062 (Colo. App. 1983) ("The meaning of a remand is to be determined from the reviewing court's disposition of the issues before it.").

If the Court were to accept Martin Marietta's argument, any time the Court of Appeals elected not to reach a specific argument raised on appeal—because it ruled in that party's favor on a separate and discrete issue—that party would be foreclosed from raising those unresolved arguments in subsequent proceedings. Under such circumstances, judicial review would be foreclosed to the Appellant Neighbors on issues that were fully raised and briefed, but which, through no fault of their own, were never fully adjudicated because the Court ruled on a separate, case-dispositive issue. Tellingly, Martin Marietta does not provide any case law that supports its novel "second bite" argument.

Moreover, the District Court's final order does not direct and will not result in the denial of Martin Marietta's application. Instead, it invites the re-opening of additional quasi-judicial proceedings. *See* Ex. 6 at 1-2 (district court explaining that it "is improper for the court to direct the Board to deny the special use permit" and "remanding the case **for the Board to decide how to address** the deficiency identified by the Court of Appeals.") (emphasis added). But this Court did not identify a deficiency that needed to be remedied—it ordered reversal of the District Court's decision affirming the BOCC's resolution and directed that BOCC's decision be overturned because the BOCC abused its discretion in approving the USR application. Ex. 1, ¶¶ 6, 20. Nevertheless, as it has represented to the District

Court, Martin Marietta seeks the opportunity to have its own second bite at the apple so that it can attempt to "cure" the evidentiary deficiencies related to noise. Ex. 3 at 5. But allowing such an improper remand to the BOCC for further quasi-judicial proceedings in contravention of this Court's Opinion would apply a "potentially erroneous rule" and result in a "wasted proceeding" which the *Chuagah Alaska* court cautioned against. *Chugach Alaska Corp.*, 915 F.2d at 457. It also would, as a practical matter, foreclose the Appellant Neighbors from obtaining review and is in direct conflict with this Court's Opinion directing that the BOCC's decision be "overturned."

A remand for further proceedings would also be unlawful as it would violate the Weld County Code ("WCC"). Once an application for a USR permit has been submitted, the quasi-judicial process commences and the BOCC can either approve or deny the application. (*See* Exhibit 9, WCC § 23-2-210(B)(1) ("The authority for making the decision to **approve or deny** the request for a Special Review Permit rests with the Board of County Commissioners.") (emphasis added)). The BOCC does not have discretion to re-open quasi-judicial proceedings—instead, it may only "approve or deny" an application. *Id.* In fact, under the WCC, once a land use application is denied, there is a mandatory five-year moratorium before any new land use application may be submitted, which Martin Marietta acknowledges

in its Motion to Amend Judgment. Ex. 3, at p. 6; Ex. 9, WCC § 2-3-10(A) ("neither an applicant nor his or her successors in interest in property for which a land use application was denied within the preceding five (5) years may submit a land use application or request a rehearing on a previously submitted application . . ."). And while there is a procedure in the WCC to amend a valid, existing land use permit, such provision only applies in the cases where a valid land use permit is in effect. Ex. 9, WCC § 23-2-280. Here, there is no valid permit, and thus, there is no mechanism to allow an amendment, reconsideration, or further proceedings by the BOCC. Therefore, based on this Court's Opinion and following the issuance of the Mandate, the only option for the District Court with respect to the consideration of Martin Marietta's USR application, was to instruct the BOCC to "deny" it in compliance with express provisions of the Weld County Code. *Id.*

Furthermore, a district court's review pursuant to Rule 106(a)(4) is expressly limited. Under Rule 106(a)(4)(I), "Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, **based on the evidence in the record before the defendant body** or officer." C.R.C.P. 106(a)(4)(I). If the administrative body exceeded its discretion, then the decision was unlawful and must be overturned. There is nothing in the rule or the

Weld County Code that allows the district court to remand a Rule 106(a)(4) appeal to expand the record through further evidentiary proceedings.

In fact, the district court's remand powers are expressly circumscribed by rule to address the limited circumstance where the quasi-judicial body fails to make sufficient findings of fact or conclusions of law to facilitate review. *See* C.R.C.P. 106(a)(4)(IX) ("In the event the court determines that the governmental body, officer or judicial body has failed to make findings of fact or conclusions of law necessary for a review of its action, the court may remand **for the making of such findings** of fact or conclusions of law.").

In this case, the District Court previously did precisely that. On August 9, 2016, the District Court entered an Order of Remand because "the BOCC did not make *any* findings of fact" in its initial resolution approving Martin Marietta's USR application. (Exhibit 10, Order of Remand, p. 2). Consequently, the BOCC adopted an Amended Resolution on October 3, 2016, which was then considered in the prior appeal. (Exhibit 11, Amended Resolution). The District Court did not order the BOCC to re-open the quasi-judicial hearing for the receipt of additional evidence. *See* Ex. 10. Instead, the BOCC prepared an Amended Resolution and based its findings of fact solely on the evidence that already existed within the closed administrative record. *See* Ex. 11. Put simply, a quasi-judicial proceeding

that is appealed through Rule 106(a)(4) is a closed proceeding. If the lower governmental body abused its discretion, the only appropriate remedy is to "overturn" the lower governmental body's decision and in this case, deny the USR application. There is no mechanism to allow an unsuccessful applicant to attempt to correct the shortcomings of its application through remand.

Martin Marietta suggests that the Appellant Neighbors' only remedy is to have to wait until the BOCC re-opens quasi-judicial proceedings and considers additional evidence related to the unlawful USR application. Martin Marietta states that the Appellant Neighbors must then file a *new* Rule 106(a)(4) appeal after the BOCC considers additional evidence submitted in support of the USR application. However, doing so would necessarily foreclose the Appellant Neighbors from receiving this Court's consideration of the unresolved four arguments previously appealed. More importantly, it would be manifestly unfair, when the District Court has committed a clear error in interpreting this Court's Opinion, which requires immediate review. The Appellant Neighbors should be afforded a full and final resolution of all issues properly presented before the BOCC attempts to unlawfully re-open the proceedings to consider additional evidence. Those arguments have already been briefed to the Court and even if the BOCC re-opened quasi-judicial proceedings, the USR application would again be

subject to being "overturned" by this Court on any one of the remaining, but unresolved, four arguments.

CONCLUSION

WHEREFORE, the Appellant Neighbors respectfully request this Court deny Martin Marietta's Motion and move forward to review the District Court's final order for consistency with this Court's prior Opinion.

DATED: June 29, 2018

IRELAND STAPLETON PRYOR & PASCOE, PC

/s/ Mark Lacis
Mark E. Lacis, Reg. # 37421
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ATTORNEYS FOR THE APPELLANT NEIGHBORS

CERTIFICATE OF SERVICE

I certify that on June 29, 2018, a true and correct copy of the foregoing **RESPONSE IN OPPOSITION TO MOTION TO DISMISS** was filed and served via the Colorado Courts E-Filing system on the following individuals:

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