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DISTRICT COURT, WELD COUNTY, COLORADO 915 19th Street Greeley, Colorado 80631	
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, 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. 2015CV30776 Division: 4
Attorneys for Plaintiffs: Mark E. Lacis, #37421 James R. Silvestro, #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 E-mail: jsilvestro@irelandstapleton.com	

PLAINTIFFS' COMBINED REPLY IN SUPPORT OF MOTION FOR AMENDED FINAL JUDGMENT PURSUANT TO C.R.C.P. 59(A)(4)

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

Piraino (collectively, "Plaintiffs"), through undersigned counsel IRELAND STAPLETON PRYOR & PASCOE, PC, respectfully submit this Combined Reply in support of their Motion for Amended Final Judgment Pursuant to C.R.C.P. 59(a)(4) ("Motion") and state as follows:

INTRODUCTION

The BOCC's Response to Plaintiffs' Motion strikes at the very heart of our justice system and demonstrates that Weld County has no intention of following the law or this Court's Orders. The BOCC takes the position that "[a]pplication of the Weld County Code is discretionary" and brazenly asserts that "the process of enforcing zoning ordinances is within the discretion of the County, and cannot be compelled by specific groups of citizens through the courts." (BOCC Response, at pp. 4-5). Martin Marietta similarly argues that this Court lacks jurisdiction to enforce its orders and argues that it would be inequitable to have to remove industrial improvements it constructed despite the fact that it expressly assumed the risk of doing so while the approval of its USR permit application was challenged on appeal. (*See* Exhibit A to Motion.) Despite these positions, Plaintiffs have prevailed in this action and are entitled to a meaningful remedy, not a pyrrhic victory. Martin Marietta and the BOCC cannot be allowed to thwart this Court's judgment and render Rule 106(a)(4) review meaningless.

ARGUMENT

I. The Weld County Code is Not Discretionary.

Chapter 23 of The Weld County Code codifies zoning law in Weld County and expressly provides that its purpose is to provide a "unified regulatory system" to "promote the health, safety, . . . and welfare" of the County's residents. WCC § 23-1-40(A). To carry out this purpose, it sets forth "minimum requirements" necessary to protect "public health, safety, . . . and welfare" which

"shall be regarded as remedial" and "shall be liberally construed to further its underlying purposes." WCC § 23-1-60.

Despite the fact that the Weld County Code contains the express purpose of providing a "unified regulatory system," the BOCC states—without any legal basis—that "[a]pplication of the Weld County Zoning Code is discretionary," thus conceding that it intends to apply the Weld County Code in a manner that is wholly arbitrary and capricious. (BOCC Response, at p. 4). The BOCC asserts that it "may enforce" the Weld County Code however it so chooses, without concern for the public. (BOCC Response, at p. 5). The BOCC further asserts that "[t]here is no obligation on the County to prosecute" all land use violations and proclaims that "the process of enforcing zoning ordinances is within the discretion of the County, and cannot be compelled by specific groups of citizens through the courts." *Id.*

Despite the BOCC's willingness to ignore the Court of Appeals' Opinion and this Court's judgment, the Weld County Code expressly provides that "[i]t is unlawful to erect, construct, reconstruct, alter or use any BUILDING, STRUCTURE or land in violation of this Chapter." WCC § 23-10-40(A). Martin Marietta's improvements are unlawful. Section 23-10-30(A) of the Weld County Code expressly provides that unlawful uses may properly be enjoined, abated, or removed through injunction, mandamus, or other appropriate proceeding. WCC § 23-10-30(A).

Courts have compelled local governments which have neglected to enforce zoning laws and ordered the removal of buildings and improvements erected in violation of zoning ordinances. *See, e.g.*, 5 Am. Law. Zoning § 44:3 (5th ed.) (collecting cases where mandatory injunctive relief appropriately required removal of unlawful improvements and/or restoration of land). Thus,

despite the BOCC's apparent willingness to flout court orders and its own County Code, equitable relief is available and necessary to compel the BOCC to follow the law.

II. This Court Can Enforce its Orders.

Although the BOCC suggests that meaningful relief is beyond this Court's jurisdiction, "[i]t is fundamental that trial courts are vested with certain inherent powers necessary for courts to act efficiently. These inherent powers include all powers reasonably necessary to allow the court to efficiently perform its judicial functions and to make its lawful actions effective." *Laleh v. Johnson*, 2016 COA 4, ¶ 14 (citing *Peña v. Dist. Court*, 681 P.2d 953, 956 (Colo. 1984)).

In support of its argument that this Court lacks jurisdiction to enforce its judgment, Martin Marietta rehashes the same argument that it makes in support of its May 4, 2018 Motion to Amend and For Stay of Judgment. For the reasons articulated in Plaintiffs' May 25, 2018 Response in Opposition to Defendant Martin Marietta Materials, Inc.'s Motion to Amend and For Stay of Judgment, all of the cases upon which Martin Marietta relies are inapposite. *See, e.g., Wolf Creek Ski Corp. v. Bd. of Cnty. Comm'rs*, 170 P.3d 821, 832 (Colo. App. 2007) (affirming trial court reversal pursuant to Rule 106(a)(4) while giving "directions to remand to the board for further proceedings consistent with this opinion."); *Carney v. Civil Service Comm'n*, 30 P.3d 861, 866-67 (Colo. App. 2001) (upholding trial court determination that personnel evaluation was arbitrary and capricious, with directions to give plaintiffs equal scores to neutralize effect of arbitrary and capricious exam, but reversing directive to commission to create new eligibility test); *United States v. Saskatchewan Minerals*, 385 U.S. 94, 95 (1966) (reversing appellate court that set aside order of Interstate Commerce Commission dismissing complaint and which directed Commission to grant relief to appellee while precluding additional evidence as to "whether the rates challenged

by the appellee are in fact unreasonably preferential in violation of" the Interstate Commerce Act.); *Federal Power Comm'n v. Idaho Power Co.*, 344 U.S. 17, 20 (1952) (holding that appellate court had power to "affirm, modify, or set aside" decision of Federal Power Commission, but removing conditions amounted to exercising "an essentially administrative function" which was solely within the province of the Commission under Section 10(a) of the Federal Power Act.); *Chonoski v. State, Dept. of Revenue, Motor Vehicles Div.*, 699 P.2d 416, 417 (Colo. App. 1985) (affirming trial court dismissal of complaint to enjoin Department of Revenue from conducting driver's license revocation proceeding because "trial courts lack jurisdiction to enjoin administrative agencies from performing their statutory functions" and noting that "premature judicial interference … violates the principle of separation of powers.").

This Court has the authority under Rule 106(a)(4) to grant meaningful relief to the Plaintiffs. None of the cases cited by any of the parties limits this Court from doing what is necessary and appropriate under the circumstances: ordering denial of Martin Marietta's USR application and ordering the removal of the unlawful improvements, either by ordering the BOCC to enforce its laws or by ordering Martin Marietta to remove the improvements it knowingly assumed the risk of constructing.

III. Equitable Relief is Necessary Under the Circumstances.

In a December 21, 2015 letter to Weld County, Martin Marietta expressly assumed the risk of proceeding with constructing its industrial improvements notwithstanding the fact that its application for a USR permit was being challenged on appeal. Specifically, Martin Marietta's counsel wrote: "Martin Marietta acknowledges that, in the event the litigation results in an invalidation of the approval of its Use by Special Review ("USR") permit for the Project, that it

may have to cease activity, or remove improvements that have been installed pursuant to approved permits." (Exhibit A to Motion (emphasis added).)

Martin Marietta knowingly assumed the risk and acknowledged that it might have to remove the improvements it intended to construct, because it is well-settled:

> Where a building has been erected in violation of the provisions of an ordinance, a court may order its demolition, either completely or to the extent necessary to make it conform to the requirements of the ordinance . . . Since an illegal nonconforming use is violative of a comprehensive plan, it adversely affects the community as a whole. The damage it does to the future development of a community cannot be compensated for by payments to one property owner, albeit the nearest and most directly affected. When a continuing use violates a valid zoning restriction, it may be enjoined unconditionally.

4 *Rathkopf's The Law of Zoning and Planning* § 65:13 (4th ed.)

Despite the fact that it knowingly assumed the risk of proceeding with construction, while acknowledging in a public document that it might have to remove the improvements, Martin Marietta cites to *Zoning Bd. of Adj. v. DeVilbiss*, to suggest that requiring the removal of its unlawful improvements would be inequitable. 729 P.2d 353, 359 (Colo. 1986). *DeVilbiss* is inapplicable.

In *DeVilbiss*, the Court considered an appeal of a decision of the Board of County Commissioners for Garfield County approving a *variance* that permitted the construction of a taller structure than otherwise was allowed by right in the zone. *Id.* at 360. As a preliminary matter, the Court stated that it did not intend for its decision to be broadly applicable, instead, it expressly intended to "limit [its] holding to the particular facts of this case." *Id.* The Court reasoned that "under the circumstances of this case" the decision to allow for "construction of a coal-loading

facility fifty-five feet in height in area in which zoning restrictions limited all structures to twenty-five feet in height" was not an abuse of discretion. *Id.* at 354.

Subsequent cases that have considered *DeVilbiss* have uniformly refused to extend it. *See Russell v. City of Central*, 892 P.2d 432, 436 (Colo. App. 1995) ("We note at the outset that the supreme court limited its holding in *DeVilbiss* to the particular facts of that case. *DeVilbiss* addressed a height variance whereas the issue here is whether the use is permitted . . . If the amending ordinance is invalid, then not only is the present zoning action invalid but any future action premised on the amendment would likewise be invalid.") (internal citation omitted)); *see also Save Cheyenne v. City of Colorado Springs*, 2018 COA 18 (refusing to extend *DeVilbiss* as "specifically limited" to "the particular facts of that case.") (internal citations omitted).

Unlike *DeVilbiss*, this case does not involve a *de minimis* violation of a height ordinance due to an allegedly unlawful variance. Here, Martin Marietta knowingly proceeded with construction of its industrial facility despite Plaintiffs' appeal challenging the lawfulness of that intensive industrial land use. The difference between presumptively permissible agricultural land use at the site and Martin Marietta's proposed asphalt and concrete factory is a difference of kind, not degree. *See Russell*, 892 P.2d at 435-36 (declining to apply *DeVilbiss* and finding that a zoning challenge was not moot despite the construction of what was ultimately an unlawful land use.) Thus, any reliance on *DeVilbiss* is misplaced.

Martin Marietta next cites to *Hargreaves v. Skrbina*, 662 P.2d 1078 (Colo. 1983). In *Hargreaves*, the Court considered the doctrine of relative hardship in a suit between neighboring private parties involving enforcement of a setback ordinance. *Id.* at 1079-80. In refusing to require demolition of a building whose foundation extended beyond the city's 110-foot setback limitation,

but was otherwise compliant with zoning regulations, the Court explained "that the real problem in this case was the City's negligence . . . in issuing a building permit to the defendants." *Id.* at 1081. The Court further noted that both parties were "innocent" and that there was no adverse impact on the plaintiff due to the setback violation. *Id.* Thus, *Hargreaves* is similarly inapposite.

Here, on the other hand, there is a substantial adverse impact to the Plaintiffs if Martin Marietta's unlawful industrial use is allowed to remain unabated: residential property values will be negatively impacted, the commercial Plaintiffs' businesses will suffer, prime farmland will have been removed from production, and the site will become a public nuisance—an incompatible industrial facility will unlawfully remain in an area zoned for residences and agriculture.[1] *Hargreaves* does not warrant keeping an unlawful industrial site in an agricultural zone. To the contrary, Martin Marietta's unlawful use "adversely affects the community as a whole" and consequently, "[w]hen a continuing use violates a valid zoning restriction, it may be enjoined unconditionally." 4 *Rathkopf's The Law of Zoning and Planning* § 65:13 (4th ed.).

Both parties fault Plaintiffs for not challenging the permits that were all predicated upon an unlawful land use application. But as the Court of Appeals articulated in *Russell v. City of Central*, "[i]f the amending ordinance is invalid, then not only is the present zoning action invalid but any future action premised on the amendment would likewise be invalid." 892 P.2d at 436

[1] Contrary to Martin Marietta's suggestion, Plaintiffs are not "mistaken" about the Court of Appeals' holding with respect to incompatibility. (MMM Response, at p. 3.) The Court of Appeals expressly held in favor of Plaintiffs because "the [BOCC's] conclusion that the project would be compatible relied on an unsupported conclusion that the proposed use would mitigate noise to a residential level." (Nov. 22, 2017 Opinion, at p. 5.) Plaintiffs own property adjacent to the proposed site, have always had standing to challenge the BOCC's unlawful approval, and will be injured if the neighboring site is not completely remediated through the removal of the unlawful, incompatible land use.

(emphasis added). The BOCC then attempts to fault Plaintiffs for not seeking a stay or posting a bond, but ignores the fact that it was reasonable to rely on Martin Marietta's public acceptance of risk letter, which indicates that the improvements would be removed if the approval of its USR application was reversed. (Exhibit A to Motion). The BOCC further ignores that, as the prevailing party in this litigation, the Plaintiffs would now be entitled to a return of any posted bond. Consequently, the BOCC's repeated focus on an unpaid bond (that was never required) is a red herring.

Martin Marietta curiously states "nothing in Court of Appeals opinion impairs the continued validity of Martin Marietta's USR application." (MMM Response, at p. 7). But the Court of Appeals was quite clear in its November 22, 2017 Opinion, when it held that "[b]ecause the board's decision must be overturned, we decline to address plaintiffs' other contentions…" (Nov. 22, 2017 Opinion at 9) (emphasis added). There was nothing equivocal in the Court of Appeals' decision and it did not invite additional proceedings by an obviously biased BOCC to salvage Martin Marietta's unlawful USR application. Thus, Martin Marietta's arguments that it can now address the deficiencies related to noise are unavailing and ignore the fact that even if Martin Marietta were able to cure the noise issue, Plaintiffs would still have four arguments which were not addressed at the Court of Appeals. The Court of Appeals declined to address Plaintiffs' other issues on appeal because it correctly believed that its holding on the noise/compatibility issue would completely resolve of this case and Martin Marietta's unlawful proposed land use.

Lastly, Martin Marietta claims that it "did not begin to construct any of the USR Facilities until after the trial court affirmed the Board's Amended Resolution approving the USR permit." (MMM Response, at pp. 8-9). As the Court is aware, this Court's initial decision affirming the

BOCC's Amended Resolution was issued on January 27, 2017. Martin Marietta cannot dispute that it sent the County a letter in December 2015 explaining that it would proceed under the approved USR permit at its own risk and, in the event that the USR permit was invalidated, "remove improvements that have been installed pursuant to approved permits." (Exhibit A to Motion.) Although Martin Marietta now suggests (without explanation) that it is somehow significant that it did not begin to construct any of the "USR Facilities" until after the trial court affirmed the BOCC's Amended Resolution, this claim is directly contradicted by numerous public records created by Martin Marietta and the BOCC.

For example, the minutes of a Community Working Group session confirm that onsite material hauling (of 22,000 yards of material), grading, berm construction, utility relocation, and traffic improvement work began as early as May 18, 2016. (May 18, 2016 Minutes from Highway 34 Development Community Work Group (attached hereto as Exhibit 1).) This work continued through at least August 2016. (Aug. 1, 2016 Minutes from Highway 34 Development Community Work Group (attached hereto as Exhibit 2).) Martin Marietta (through Defendant Gerard Investments LLC) first filed a building permit with the County to construct a "Ready Mix Concrete Plant" at the site on August 17, 2016. (Aug. 17, 2016 Commercial Building Permit Application (attached hereto as Exhibit 3).) On August 30, 2016, the County issued a warning to Martin Marietta regarding credible reports that it had received over Martin Marietta's failure to employ dust control measures while engaged in significant construction activities at the site. (Aug. 30, 2016 Letter from J. Taloumis to W. Wright (attached hereto as Exhibit 4).) A publicly available image from Google Earth (attached hereto as Exhibit 5) confirms that Martin Marietta had performed extensive grading work as of September 7, 2016, pursuant to its USR permit. While

some of this infrastructure and "dirt work" might not rise to the level of Martin Marietta's narrow definition of "USR Facilities," all of this work was the necessary precursor to Martin Marietta's industrial improvements and it would appear to be nothing more than a coincidence that Martin Marietta could not begin building its "USR Facilities" until 2017. Martin Marietta was moving forward at the site long before this Court's January 2017 order.

Regardless, Martin Marietta always knew that Plaintiffs were entitled to an appeal as of right to the Court of Appeals. Martin Marietta knowingly converted the proposed site from Prime farmland to a heavy industrial site while explicitly accepting the risk that it could one day be required to remove any improvements at its own expense. That day has now arrived, and the Court is well within its authority to both order the denial of Martin Marietta's USR application and to order the expeditious remediation of the site to return the property and all parties to the status quo ante.

CONCLUSION

What are the consequences when parties claim they are not bound by lawful court orders? What are the consequences of finding an abuse of discretion in a land use decision? If the Rule 106 process—an equitable process—it to have any effect, it must provide courts with the authority to enforce local land use laws and to reverse the unlawful acts of local governments and land use applicants. Martin Marietta knowingly assumed the risk of constructing a heavy industrial use on land zoned for agriculture, notwithstanding the fact that the approval of its USR permit was being challenged on appeal. Now that the appeal has been conclusively resolved against it, Martin Marietta challenges this Court's jurisdiction and suggests the Court has no power to enforce its own orders. The BOCC claims it has absolute discretion to ignore its own County Code and states

that it will not enforce its own laws against Martin Marietta. Martin Marietta and the BOCC should not be permitted to undermine the Court of Appeals' and this Court's judgment. To hold otherwise would render judicial review under Rule 106 a legal nullity, and would leave appellate courts devoid of any power to enforce their orders and administer justice.

WHEREFORE, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion and enter an amended final judgment which denies Martin Marietta's USR application, order all improvements removed and the property restored to the condition preceding the adoption of the unlawful Resolution within one year, order the BOCC to enforce all applicable land use regulations at the property, and grant such other relief as the Court deems just and proper.

DATED: May 29, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on May 29, 2018, a true and correct copy of this **PLAINTIFFS' COMBINED REPLY IN SUPPORT OF MOTION FOR AMENDED FINAL JUDGMENT PURSUANT TO C.R.C.P. 59(A)(4)** was filed and served via the Colorado Courts e-filing system on the following:

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