COLORADO COURT OF APPEALS

DATE FILED: April 18, 2019
CASE NUMBER: 2018CA1103

Court of Appeals No. 18CA1103
Weld County District Court No. 15CV30776
Honorable Todd L. Taylor, Judge

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; David Kisker; Gary Oplinger; Wolfgang Dirks; and James Piraino,

Plaintiffs-Appellants,

v.

Board of County Commissioners of Weld County, Colorado; and Martin Marietta Materials, Inc., a North Carolina corporation,

Defendants-Appellees.

APPEAL DISMISSED

Division IV
Opinion by JUDGE J. JONES
Román and Lipinsky, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced April 18, 2019

Ireland Stapleton Pyror & Pascoe, PC, Mark E. Lacis, James R. Silvestro, Denver, Colorado, for Plaintiffs-Appellants

Bruce T. Barker, County Attorney, Greeley, Colorado, for Defendant-Appellee Board of County Commissioners of Weld County

Brownstein Hyatt Farber Schreck, LLP, Wayne F. Forman, Mark J. Mathews, Julia E. Rhine, Denver, Colorado, for Defendant-Appellee Martin Marietta Materials, Inc.

¶ 1 Plaintiffs, a group of individuals and companies neighboring property previously owned by Martin Marietta Materials Inc. (Martin),[1] appeal the district court's orders (1) reversing a use by special review (USR) permit and remanding to the Board of County Commissioners of Weld County (the Board) and (2) denying injunctive relief. We dismiss the appeal.

I. Background

¶ 2 A prior division's decision in *Cummings v. Weld County Board of Commissioners*, (Colo. App. No. 17CA0463, Nov. 22, 2017) (not published pursuant to C.A.R. 35(e)) (*Cummings I*), laid out much of the relevant background. We repeat and elaborate on those facts to the extent now necessary.

¶ 3 Plaintiffs filed an action under C.R.C.P. 106(a)(4) seeking review of the Board's approval of a USR permit allowing Martin to develop an asphalt plant, a concrete plant, and a transloading facility in an agriculturally zoned area. The district court affirmed that approval, and plaintiffs appealed to this court. On appeal, the

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

prior division determined that the evidence in the record didn't support the Board's conclusion that the operation would comply with applicable noise level standards. *Cummings I*, slip op. at ¶¶ 13, 18. The division remanded to the district court "for the entry of judgment in favor of plaintiffs." *Id.* at ¶ 19.

¶ 4 On remand, the district court entered judgment ordering the Board to deny the permit. Both sides moved to amend the judgment — plaintiffs arguing that the court didn't go far enough, and the Board and Martin arguing that it went too far. For their part, plaintiffs sought a mandatory injunction that would require Martin to remove the improvements to the property. The district court denied that request. The Board and Martin argued that the district court had authority only to reverse the decision and remand to the Board, not to tell the Board how to proceed. The district court agreed with the Board and Martin, concluding that how to address a deficiency on remand is within the Board's discretion, and amended the order accordingly: "Based on the determination that the Board of County Commissioners of Weld County abused its discretion in approving the special use permit, USR 15-0027, that approval is reversed and this case remanded to the Board for

further proceedings consistent with the opinion of the Court of Appeals."

¶ 5 Plaintiffs appeal. Because we conclude that the appeal is moot and there is no final, appealable order, we dismiss the appeal.

A. The Appeal is Moot

¶ 6 After plaintiffs filed their notice of appeal, Martin abandoned its application for a USR permit and transferred its interest in the property to Rock & Rail LLC. It appears undisputed that there is no pending request for a USR permit.

¶ 7 "Courts must confine their exercise of jurisdiction to cases that present a live case or controversy." *Davidson v. Comm. for Gail Schoettler, Inc.*, 24 P.3d 621, 623 (Colo. 2001). A case is moot when rendering judgment wouldn't have any practical effect on an existing controversy. *Am. Drug Store, Inc. v. City & Cty. of Denver*, 831 P.2d 465, 469 (Colo. 1992); *Zoning Bd. of Adjustment v. DeVilbiss*, 729 P.2d 353, 356 (Colo. 1986) ("The central question in a mootness problem is whether a change in the circumstances that prevailed at the beginning of litigation has forestalled the prospect for meaningful relief.").

¶ 8 The controversy in this case was the Board's approval of Martin's application for a USR permit. Martin no longer has an interest in the property, and it isn't pursuing a USR permit. Neither is its successor. So the controversy giving rise to the appeal no longer exists. *See Nowak v. Suthers*, 2014 CO 14, ¶ 12 ("Generally, an appellate court will decline to render an opinion on the merits of an appeal when events after the underlying litigation have rendered the issue moot.").

¶ 9 Plaintiffs argue that the issue isn't moot because under the Weld County Code, a denial of a USR permit application would prevent any party from filing a similar application for that property for five years. That doesn't change the fact that there is no longer an existing controversy because Martin is no longer pursuing a permit. They also argue that we should review this issue even if moot because the scenario is capable of repetition and evading review. *See, e.g.*, *Grossman v. Dean*, 80 P.3d 952, 960 (Colo. App. 2003). We don't think so.

¶ 10 We therefore dismiss the appeal as moot.

B. Lack of a Final, Appealable Order

¶ 11 We also conclude that the district court's orders remanding to the Board for further proceedings and denying plaintiffs' request for an injunction aren't appealable.

¶ 12 When a district court remands a case to an agency for additional action, the order is a final, appealable order only if it resolves the merits of the controversy. *See Scott v. City of Englewood*, 672 P.2d 225, 226 (Colo. App. 1983). But when the district court doesn't pass judgment on the merits of the controversy, there is no final, appealable order. *Compare Safeway Stores, Inc. v. City of Trinidad*, 31 Colo. App. 75, 76, 497 P.2d 1277, 1277 (1972) (remand instructing city council to make additional findings wasn't a final, appealable order), *with Cline v. City of Boulder*, 35 Colo. App. 349, 352, 532 P.2d 770, 772 (1975) (district court's remand to city council was a final judgment where the council had already made all required findings and the remand reversed the decision as an abuse of discretion). In the latter situation, the matter must be decided by the agency, there must be a challenge to that decision under Rule 106(a)(4) in the district

court, and the district court must finally resolve the matter for this court to have jurisdiction.

¶ 13 Plaintiffs have already appealed the Board's decision, this court has already addressed that appeal, and the Board has yet to take further action. Unless and until the Board takes some further action (which, as discussed above, is now unlikely), and the district court reviews that action, there is nothing further for us to review.

¶ 14 Plaintiffs argue that we can review the district court's action for consistency with *Cummings I*. *See Thompson v. Caitlin Ins. Co. (UK) Ltd.*, 2018 CO 95, ¶ 22 ("Without question, the court of appeals has broad discretion to review compliance with its mandate."). While it's true that the district court must follow this court's mandates, that doesn't change the fact that there is now no final order for us to review in this Rule 106(a)(4) proceeding.

II. Conclusion

¶ 15 The appeal is dismissed.

JUDGE ROMÁN and JUDGE LIPINSKY concur.

Court of Appeals

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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Steven L. Bernard
Chief Judge

DATED: December 27, 2018

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