Boulder County

# Community Planning & Permitting

Courthouse Annex • 2045 13th Street • Boulder, Colorado 80302 • Tel: 303-441-3930

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Brian J. Connolly
Andrew L.W. Peters
Rebecca C. Sokol
Otten Johnson Robinson Neff + Ragonetti PC
950 Seventeenth Street, Suite 1600
Denver, CO 80202
Via email only: bconnolly@ottenjohnson.com; RSokol@ottenjohnson.com; apeters@ottenjohnson.com

James R. Silvestro
Ireland Stapleton Pryor & Pascoe, PC
717 Seventeenth Street, Suite 2800
Denver, CO 80202
Via email only: jsilvestro@irelandstapleton.com

**Re: Reconsideration and Reversal of April 11, 2018 Lapse Determination**

Dear Mr. Connolly, Mr. Peters, Ms. Sokol, and Mr. Silvestro:

On April 1, 2021, the Colorado Court of Appeals reversed the judgment of the district court in this matter and remanded the decision to me for further consideration. *Save Our Saint Vrain Valley, Inc. v. Boulder Cty. Bd. of Adjustment*, 2021 COA 44. After reviewing the opinion and information submitted by both parties, I have determined that the Special Use approved in Docket SU-96-18 has lapsed. Accordingly, I am reversing my April 11, 2018 decision.

## Background

Martin Marietta's ("Marietta") predecessor in interest, Western Mobile Boulder, Inc. ("Western Mobile") received a Special Use Permit from Boulder County in 1973 to mine gravel on the subject property. The Boulder County Board of County Commissioners ("BOCC") amended the permit several times, and in 1998, approved the currently applicable permit, SU-96-18 ("Permit"), in Resolution 98-32.

Between 1998 and 2006, Western Mobile and its successor in interest, Lafarge West, Inc. ("Lafarge") engaged in mining and reclamation activities. No active mining has occurred on

the site since at least 2006. In 2011, Marietta purchased the mining lease from Lafarge and continued to engage in reclamation activities.

In 2016, Marietta submitted a modification request to slightly change the location of certain accessory facilities previously approved by the Permit. A Boulder County planner found that the modification request was in line with the original buildings contemplated in the Permit, thus eliminating the need for an additional land use process. However, the planner reminded Marietta that a site plan demonstrating the locations of the contemplated buildings was required per the Permit. Marietta submitted the site plan, and it was recorded on January 3, 2017.
I received a request from Save Our Saint Vrain Valley, Inc., Amanda Dumenigo, Richard Cargill, Barbara Cargill, and Matt Condon (collectively, "SOSVV") in 2017 to determine whether a lapse in activity occurred under the Permit. I asked Marietta to provide documentation of the activities it had engaged in under the Permit. I also retained the services of Eric Heil, an attorney with experience in land use planning, to provide an opinion on whether the Permit had expired pursuant to the lapse provision in the Boulder County Land Use Code ("Code") Article 4-604.C. On April 11, 2018, I issued a determination concurring with the opinion of Mr. Heil, that the special use permit had not lapsed.

SOSVV appealed to the Boulder County Board of Adjustment ("BOA"), and subsequently the district court, both of which affirmed my determination. SOSVV then appealed to the Court of Appeals, which reversed and remanded my decision for further consideration. Based on the direction provided by the Court of Appeals, I have two issues to address: 1) Whether any activity directly related to the special use itself, or any authorized accessory uses, occurred so as to prevent a lapse; and 2) whether equitable considerations dictate a finding that the permit has not lapsed. I will address each in turn.

## Discussion

### A. Whether any activity directly related to the special use itself, or any authorized accessory uses, occurred so as to prevent a lapse.

The Code provides that once approved, a special use must not remain inactive for a continuous period of five or more years, or the permit will lapse. Specifically, Article 4-604.C of the Code provides that:

> Any approved use by Special Review which commences operation or construction as required under Subsection 4-604.B., immediately above, shall lapse, and shall be of no further force and effect, if the use is inactive for any continuous five-year period or such shorter time as may be prescribed elsewhere in this Code or in a condition of a specific docket's approval. If this period of inactivity occurs, the use may not be recommenced without a new discretionary approval granted under this Code. An

> approved special use shall be deemed inactive under this Subsection 4-604.C. if there has been no activity under any portion of the special use permit for a continuous period of five years or more as a result of causes within the control of the special use permittee or agent.

In my prior determination, I considered not only mining operations, but also the activities to plan and prepare for mining as well as post-mining reclamation activities, as sufficient to prevent lapse. I specifically noted that reclamation work had continued on the site without a five-year lapse. However, the Court of Appeals disagreed with my interpretation of the lapse provision.

In its opinion, the Court of Appeals expressly considered what type of activity would prevent the lapse of a permitted special use under the Code. The Court concluded that the lapse provision "unambiguously requires activity **directly related** to the special use itself, or any authorized accessory uses, to prevent a lapse." *Save Our Saint Vrain Valley, Inc.*, 2021 COA at ¶ 5 (emphasis added). The Court distinguished activities under the special use from conditions in the resolution, explaining that "'activities under any portion of the special use permit' refers to activities under the special use that was permitted rather than anything within the four corners of the approved resolution." *Id.* at ¶ 32. The Court explained that the phrase "special use permit" refers to the permission given by an approval resolution, but not the resolution itself. *Id.* at ¶¶ 35-38. The permission for the special use here is to mine gravel, and as such, only open pit gravel mining itself constitutes the special use. *Id.* at ¶¶ 44, 52. The Court expressly rejected the argument that reclamation constitutes the special use, holding instead that reclamation is a condition, and not sufficient on its own to prevent lapse. *Id.* at ¶¶ 50-52.

The Court also determined that the special use could include accessory uses authorized under the resolution. *Id.* at ¶¶ 46, 54. Accessory uses are defined under the Code, as well as Colorado caselaw as (1) uses permitted "by implication"; (2)"clearly incidental, subordinate, customary to, and commonly associated with operation of a primary use"; and (3) "so necessary or commonly to be expected in conjunction with the primary use that no ordinance could be interpreted in a way to prevent it." *Id.* at ¶ 46 *citing Colo. Health Consultants v. City & Cnty. of Denver*, 429 P.3d 115, 2018 COA 135, ¶ 23; *see also* Article 4-516 of the Code.

It is undisputed that no active mining has occurred on the property since 2006. *Save Our Saint Vrain Valley, Inc.*, 2021 COA at ¶ 15. While reclamation activities such as fertilizing and reseeding lakes, prairie dog control, noxious weed removal, preparation and filing applications for conditional water storage rights, wetland work, designing processing plant improvements, obtaining permits for future buildings, conveyor line building, surveying, and several other activities in preparation for additional mining operations have occurred at times on the site, these activities are not directly related to the special use itself. Rather,

they pertain to conditions under the Resolution, which are distinct from the permission to mine gravel—the special use that was approved. As such, these activities are not sufficient to prevent lapse. While Marietta now asserts that it conducted testing excavations in 2015, those excavations occurred more than five years since mining last occurred on the site. Even if I were to consider the testing excavations to be activities directly related to the special use, which I do not, a five-year lapse period still exists prior to 2015.

Because no mining has occurred for over fifteen years, it follows that accessory uses have also not occurred. "An accessory use must be a use customarily incidental to and on the same parcel as the main use." Article 4-516 of the Code. An accessory use therefore cannot exist separate and apart from the principal use. For example, the Code allows an accessory structure on a property, so long as its use "is incidental and accessory to that of the Principal Use." 4-516.L.I of the Code. The mere fact that an additional structure exists in a property does not make it an accessory structure if it is not being used as an accessory to the principal use.

The accessory uses approved by the Resolution include "[o]utside storage, and the storage of fuel, oil, and grease, as well as the repair of equipment and machinery, and portable offices" and "use of a portable crusher and screen, and accessory processing of sand and gravel including crushing, screening, washing, and stockpiling." In order to comply with the Code, these uses must be customary and incidental to the principal use of the property, which is gravel mining. The mere fact that items were stored on the site, or that these uses may have occurred in some form, does that make them authorized accessory uses under the Resolution, absent them being customary and incidental to the main use of the property.

It would not align with the Court's reasoning regarding the definition of "activity under the special use permit" to allow the mere storage of equipment in absence of any actual mining activity to be able to prevent the permit from lapsing. As the Court explained, "[i]f activity is defined very broadly, to include activities not directly related to the special use, then the special use would not be inactive, within the meaning of the Code, even when the special use itself is inactive but there is activity not directly related to the special use. This interpretation of the definition expands the meaning of inactive special use well beyond the words it defines." *Save Our Saint Vrain Valley, Inc.*, 2021 COA at ¶ 39. Other uses that are not customary and incidental to the main use of gravel mining are not authorized accessory uses under the Code, and therefore cannot prevent lapse of the special use permit.

In order to accord with the Court's interpretation of the lapse provision, I reverse my prior decision and conclude that no activities directly related to gravel mining have occurred on the site for a period of at least five years, nor have any authorized accessory uses. As such,

the special use permit has lapsed due to lack of activity under the special use permit for at least five consecutive years.

**B. Whether equitable considerations dictate a finding that the permit has not lapsed.**

The Court of Appeals noted that Eric Heil's opinion, with which my prior determination concurred, also considered the equitable consideration of Marietta's "understanding of, and reliance upon, the county's interpretations that [the approval resolution] had not lapsed." *Id.* at ¶ 55. The Court therefore left open the option for me to consider equity in my analysis, even if I determined that no activity under the special use permit had occurred for at least five years. Although I considered and concurred with Eric Heil's opinion in making my initial determination, I did not base that determination on equitable considerations. Instead, as stated above, I determined that the permit had not lapsed because reclamation activities had occurred continuously on the site. Upon review of the equitable considerations presented by Marietta, I disagree that such considerations require me to determine that the permit has not lapsed.

"The doctrine of equitable estoppel is founded on principles of fair dealing and is designed to aid the law in the administration of justice where, without its aid, injustice might result." *Colo. Health Consultants*, 429 P.3d at 125. The party alleging equitable estoppel must establish three factors: 1) that it changed its position, to its detriment, in justifiable reliance on the other party's conduct; 2) that the estopped party intended its representations to be acted on so that the other party was justified in relying on the represented facts; and 3) that the party alleging estoppel was ignorant of the actual facts and reasonably relied, to its detriment, on the other party's conduct or misrepresentation. *Id.* at 125-26.

On October 17, 2006, the county sent Lafarge a letter in response to its request to eliminate phase I of the approved mining plan. The letter indicated that the modification was approved, and also specifically noted "that Subsection 4-604.C. [of the Code] requires that a special use permit expires if the use is inactive for any continuous five-year period. While we do not now have information that such a lapse has occurred, it could occur in the future. Lafarge and any subsequent owner should be aware of this limitation." Thus, in addition to the lapse provision being contained in the Code, Marietta's predecessor was specifically informed, as early as 2006, that lapse could occur. Although I do not have information on the sale of the property to Marietta, reasonable due diligence prior to the sale would have informed Marietta of the existence of the lapse provision in the Code and this correspondence. In addition, the Code provision was publicly available, and the correspondence would also have been available to Marietta via an inspection of the docket file, which is a public record.

Marietta lists a variety of communications with the county, which it asserts support a finding of equitable estoppel. The first is a November 9, 2011 letter addressing zoning violations on the property. The letter states in part that, "[t]here do not appear to be any outstanding/open zoning or building code violations that apply to the subject property AT THIS TIME. Although there are no zoning violations on record at this time, this statement does not guarantee that there are no violations on the property." This statement merely confirms the contents of the county's records at that time and was accurate. Specifically, the county was not investigating or enforcing a zoning violation on the property as of the date of the letter. The lapse of a special use permit is not a zoning violation. A zoning violation is an activity or use on a property that violates the terms and conditions of the Code. Further, the county had not received information in 2011 about an alleged lapse. The request from Save Our Saint Vrain was not made until 2017.

On December 23, 2016, Marietta submitted a request to modify SU-96-18. The request stated that Marietta "proposes slightly modifying the location of structures at the processing site, all of which were approved through SU-96-18. The purpose of the relocation is to place all activities and structures on Martin Marietta-owned property. Since SU-96-18 was approved, the parcel on which the scale and scale house were located has been sold to Boulder County for open space purposes. Also, Martin Marietta wishes to cluster its buildings and operations." This request did not seek a determination as to whether the permit had lapsed, but rather focused on the relocation of structures onto Marietta-owned property.

Staff's response noted: "Based on my research of the docket and the information you provided to me, Special Use review is not required for the structures you propose. Everything you are proposing was contemplated and approved during SU-96-18—only the location is being slightly modified." Staff's review was clearly limited to the minor modifications to the structures' locations. Staff did not review the history of mining activity on the parcel to determine whether the Permit had lapsed.

On January 24, 2017, county staff sent a letter informing TetraTech, on behalf of Marietta, of the BOCC's decision regarding the modification request. This letter stated that all conditions of the 1996 special use approval were still in effect. Importantly, the letter states: "This department sent a letter to Steven T. Brown with Lafarge in October 17, 2006, interpreting some of [sic] conditions of approval based on the situation at that time. This letter remains in effect as well (enclosed)." Not only was the 2006 letter informing Lafarge of the potential for lapse referenced in the 2017 letter, it was also enclosed for reference. Thus, Marietta was again reminded of the lapse provision prior to expending any resources related to the requested modification. Further, because the 2017 determination was only considered a minor modification, and because it made no mention of lapse, neighbors and other interested parties would not have been on notice to provide comment and or appeal a decision that would affect whether the permit lapsed. Marietta therefore cannot

establish the first element of equitable estoppel—that it changed its position, to its detriment, in justifiable reliance on the county's conduct. Nor can it show the remaining two elements. Since the county made no representations related to lapse, and instead reminded Marietta multiple times of the lapse provision, it certainly did not intend for Marietta to conclude that no lapse had occurred. Moreover, Marietta was not ignorant of the actual facts; instead, it was the entity in the best position to know that mining had not taken place on the site since 2006. Marietta was also aware of the lapse provision, and thus any reliance on the communications cited by Marietta as a basis for determining the permit has not lapsed was not justifiable.

The county does not have the ability to monitor the thousands of special uses approved in the county to determine whether those approvals may have lapsed. Rather, it often has to rely on complaints to be made aware of a lapse. Here, it was not until SOSVV raised the potential for lapse that the county conducted an analysis of the historical activities on the site to determine whether the special use had lapsed. Because lapse was not at issue in the county's 2017 determination, and because Marietta and/or its predecessor in interest was on notice as early as 2006 of a potential lapse, Marietta's asserted reliance on the county's 2017 decision that mining activities could be reinstated was not reasonable.

**Conclusion**

For the above reasons, I determine that the special use permit approved though docket SU-96-18 has lapsed. Because the permit has lapsed, Martin Marietta is required to apply for a new special use permit prior to initiating further gravel mining activities on the property. In the absence of a new special use permit with different requirements, Martin Marietta must complete all reclamation activities required under the original permit.

My determination that the special use permit has lapsed is appealable to the Boulder County Board of Adjustment under Article 4-1200 of the Code. An appeal must be in writing, accompanied by a statement of the basis for the appeal and the required appeal fee. In addition, you must file the appeal with the me no later than 30 days after the date of this determination. The county will consider this determination final if it is not timely appealed.

For additional information or questions, you may contact me directly at 720-564-2604 or via email at dcase@bouldercounty.org.

Regards,

Dale Case