

<p>DATE FILED: April 8, 2020 3:38 PM FILING ID: 885379A3196A2 CASE NUMBER: 2020CV30012</p>	
<p>DISTRICT COURT, GUNNISON COUNTY, COLORADO Court Address: 200 E. Virginia Avenue, Gunnison, CO 81230</p> <p>ERIC LAWRENCE, an individual, and CHRISTINE LAWRENCE, an individual, Plaintiffs,</p> <p>v.</p> <p>THE TOWN OF MARBLE, through its Public Health Agency, RYAN VINCIGUERRA, TIM HUNTER, LARRY GOOD, EMMA BIELSKI and CHARLES MANUS, in their official capacity as the Board of Trustees of the Town of Marble Public Health Agency Defendants.</p> <hr/> <p>Whitsitt Law Office, LLC Timothy E. Whitsitt 0326 Highway 133, Suite 190 F Carbondale, CO 81623</p> <p>Phone Number: (970) 510-3400 FAX Number: (970) 510-3404 E-mail: tim@whitsittlawoffice.com Atty. Reg. #: 05962</p>	<p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case Number:</p> <p>Div.: Ctrm:</p>
<p align="center">COMPLAINT</p>	

Plaintiffs Eric Lawrence and Christine Lawrence (“the Lawrences”), by and through their attorney, Timothy E. Whitsitt, submit the following for their Complaint against The Town of Marble, through its Public Health Agency; Ryan Vinciguerra, Tim Hunter, Larry Good, Emma Bielski and Charles Manus, in their official capacity as the Board of Trustees of the Town of Marble Public Health Agency (collectively “Marble”). Further in support of their Complaint herein, the Lawrences state and allege as follows.

General Allegations

1. The Lawrences are citizens and residents of the State of Colorado, with a home address of 7959 Highway 133, Carbondale, Colorado 81623. The Lawrences are further the owners, in joint tenancy, of that certain parcel of residential real estate located at 209 Hill Street, Marble, Colorado 81623. The legal description of that parcel ("Subject Property") is:

Lots 1, 2 and 3, Block C, Mason's Addition to the Town of Marble, Colorado, as described in Survey Plat recorded in the Office of the Gunnison County Clerk and Recorder March 21, 1975 in Book 483 at page 305, County of Gunnison, State of Colorado

2. The Town of Marble ("Marble") is a Colorado Municipal Corporation and a political subdivision of the State of Colorado. Ryan Vinciguerra, Tim Hunter, Larry Good, Emma Bielski and Charles Manus, serve as the Board of Trustees of the Town of Marble Public Health Agency and are defendants in their official capacity as Trustees.

3. The Subject Property is located within the Town Limits of Marble and is thus subject to the jurisdiction of Marble, including Marble's Onsite Waste Treatment System ("OWTS") Regulations. Those regulations, authorized by State of Colorado Department of Health Regulation No. 43, govern the installation, maintenance and operation of onsite sewage and wastewater systems within Marble. Those regulations are implemented by Marble's "Local Public Health Agency" ("LPHA") as defined in Section 3.78. of the OWTS Regulations as the Town of Marble itself, through its Town Council.

4. The subject property is, and has since 1941 been, a developed residential property, which has in place an existing single-family residence of approximately Six Hundred Thirty square feet in interior space. This residence has existed in place and been occupied by the owners of the Subject Property since its construction in 1941. At the time of its initial contraction

and ever since that date, the Subject Property has been served with domestic water from the East Extension of the Clarence ditch and has utilized a WPA pit privy for waste disposal, which was an allowed method of waste disposal at the time of its construction.

5. The residence and its domestic water and waste disposal systems on the Subject Property have existed as a pre-existing, non-conforming use in the Town of Marble since the time of the annexation of the Subject Property into the Marble in 1975.

6. The Lawrences purchased the Subject Property from its prior owners in September of 2019. The Lawrences have concluded, based upon expert advice, that their current domestic water system and waste disposal system on the Subject Property are failing and must, pursuant to the provisions of Marble's OWTS Regulation, be replaced or repaired.

7. The Lawrence's inquired with Marble Town officials as to the appropriate course to pursue and were advised that they needed to apply for a permit for the installation of a new onsite waste disposal system, but that to obtain such a permit, they were required to apply for a variance from OWTS requirements. The Lawrence's obtained engineered plans for the installation of an OWTS system which met the minimum requirements of Marble's OWTS Regulations and filed an application for variance to allow them to install that system on September 12, 2019. The only variance which would be required for this installation is the minimum lot size requirement of Section 9.M.1. of the OWTS Regulations.

8. The Marble LPHA held a hearing on October 3, 2019 at the regular Marble Town Board of Trustees meeting regarding the Lawrence's application at which it voted to deny the application.

9. The Lawrences, pursuant to Section 4.M. of the OWTS Regulations, timely filed an appeal of that denial to the Marble Public Health Board. That appeal was heard at a hearing on November 7, 2019, and then continued to a public hearing on January 16, 2020, at which time the Lawrence's filed an amended application for the repair of their existing blackwater and waste disposal systems on the Subject Property. The hearing was continued to February 6, 2020. At the February 6 continued meeting, the Public Health Board voted to deny the Lawrence's applications.

10. A final, written denial by the Marble Board of Trustees was executed and mailed to the Lawrences on March 5, 2020; the Lawrences received the written denial on March 14, 2020. A copy of the written denial is attached and incorporated hereto as **Exhibit A**.

FIRST CLAIM FOR RELIEF
Appeal Pursuant to C.R.S. §24-4-106(4)

11. The Lawrences by this reference incorporate into their First Claim for Relief all of the allegations incorporated in Paragraphs 1 through 10 of this Complaint as if fully set forth herein.

12. The Lawrences are 'persons adversely affected' by the March 5, 2020, denial by the Marble Board of Trustees of their applications filed pursuant to the provisions of Marble's OWTS Regulations, as defined by C.R.S. §24-4-106.

13. This Court has jurisdiction pursuant to Title 24, Article 4 of the Colorado Revised Statutes, to hear an appeal of the March 5, 2020 decision by the Marble Board of Trustees.

14. The Lawrences submit that the March 5, 2020, decision of the Trustees was arbitrary and capricious, denied the Lawrences their statutory rights, contrary to the Lawrence's Constitutional rights, in excess of the statutory jurisdiction of the Marble Board, not in accord

with the procedures or procedural limitations of the CRS, and an abuse of their discretion which must be reversed on appeal.

WHEREFORE, Plaintiffs Eric and Christine Lawrence respectfully pray that this Court find in their favor and against the Marble Board of Trustees, acting as the Marble Local Public Health Agency and Board of Health and reverse its denial of the Lawrence's OWTS permit applications, awarding the Lawrences their costs and attorneys' fees accrued as a result of this appeal.

Dated: April 9, 2020

Respectfully submitted;

WHITSITT LAW OFFICE, LLC

By: Timothy E. Whitsitt
Timothy E. Whitsitt #05962

Attorney for Plaintiffs
ERIC and CHRISTINE LAWRENCE

Plaintiffs' Address:

7959 Hwy 133
Carbondale, CO 81623

Pursuant to the Colorado Rules of Civil Procedure, the original signature of Timothy E. Whitsitt is on file and available for inspection at Whitsitt Law Office, LLC, 326 Hwy 133, Suite 190 F, Carbondale, CO 81623.

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<p>PLAINTIFFS' MOTION TO CERTIFY THE RECORD ON APPEAL PURSUANT TO C.R.S. §24-4-106 (6)</p>	

Plaintiffs, Eric Lawrence and Christine Lawrence ("Lawrences"), by their attorney Timothy E. Whitsitt, submit the following for their motion pursuant to C.R.S. §24-4-106 (6) to certify the record on appeal. Further in support of their motion, plaintiffs state and allege as follows.

1. Contemporaneous herewith, plaintiffs have filed their Complaint pursuant to C.R.S.

§24-4-106 (4) for a judicial review of the decision of defendant Town of Marble, through its Public Health Agency (“Town”) denying the Request for Variance under the Marble OWTS Regulations submitted by the Lawrences on September 5, 2019.

2. On October 3, 2019 a public hearing was held by the Town on the Lawrences’ Request for Variance, after which the request was denied by the Town.

3. Lawrences file an appeal which was heard on November 7, 2019 and tabled to January 16, 2020. The public hearing concluded on February 6, 2020, at which time the Town denied the appeal and variance request.

4. On March 5, 2020 the Board approved the document finalizing the Denial of Appeal Lawrence Request for Variance under the Marble OWTS Regulations (“Denial”).

5. For purposes of the Court’s review of the Denial it is necessary that the Town certify the record with respect to the Denial.

6. Lawrences submit that the record to be certified for the purposes of this review must contain the following:

- a. A copy of the Town of Marble OWTS Regulations;
- b. A copy of the Denial of Appeal-Lawrence Request for Variance under the Marble OWTS Regulations;
- c. Copies of the Board Agenda Packets, including any submittals by Plaintiffs, for meetings held on September 5, 2019; October 3, 2019; November 7, 2019; January 16, 2020; February 6, 2020 and March 5, 2020;
- d. Copies of Minutes for Town meetings held on September 5, 2019; October 3, 2019; November 7, 2019; January 16, 2020; February 6, 2020 and March 5, 2020;

- e. Copy of correspondence dated August 24, 2019 from Plaintiffs to the Town of Marble Board of Trustees and any communications from the Town in connection with the initial correspondence of August 24, 2019;
- f. A copy of the document titled "Variance Information Requests", including the section titled "Variance Hardships" submitted prior to the January 16, 2020 meeting and any communications from the Town in connection with that document;
- g. A copy of the Marble Zoning Code, 2008 and any updates, revisions, amendments, ordinances or resolutions affecting that Zoning Code;
- h. A copy of the Town of Marble Master Plan dated 2000 as well as any updates, revisions, amendments, ordinances or resolutions affecting that Master Plan;
- i. A transcript of all public hearings held by the Town regarding the Lawrences Request for Variance, Appeal of Request for Variance, and any public comments regarding the Request.
- j. Copies of all documents received, submitted for the record and considered by the Town in connection with its review and denial of the Request for Variance.

Dated: April 8, 2020

Respectfully submitted;

WHITSITT LAW OFFICE, LLC

By: Timothy E. Whitsitt
Timothy E. Whitsitt #05962

Attorney for Plaintiffs
ERIC and CHRISTINE LAWRENCE

Pursuant to the Colorado Rules of Civil Procedure, the original signature of Timothy E. Whitsitt is on file and available for inspection at Whitsitt Law Office, LLC, 326 Hwy 133, Suite 190 F, Carbondale, CO 81623.

**Town of Marble
322 West Park St.
Marble CO 81623**

Board of Trustees

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Denial of Appeal of Initial Denial of Request for Variance under the Marble OWTS Regulations

Findings:

1. The Town of Marble has adopted On-Site Wastewater Treatment System Regulations (2018) (the "OWTS Regulations").
2. The Board of Trustees of the Town of Marble ("Board") serves as the local board of health under the OWTS Regulations.
3. Eric A. Lawrence and Christine M. Lawrence ("Applicants") requested for a variance from the minimum lot size requirement in Section 9.M of the OWTS Regulations.
4. The variance request relates to the real property known as Lots 1, 2, and 3, Block C, Mason's Addition to the Town of Marble, Colorado, according to the plat recorded March 21, 1975 in Book 483 at Page 305 in the real property records of Gunnison County, Colorado, a/k/a 209 Hill Street, Marble, Colorado (the "Property").
5. Section 9.M.1 of the OWTS Regulations states: "To be eligible for issuance of an OWTS permit, the subject property must meet the applicable minimum lot size," which for the subject Property is one acre.
6. The subject Property is approximately 10,400 square feet (slightly less than a quarter of an acre).
7. Located on the Property are a residential dwelling, miscellaneous ancillary improvements that do not generate wastewater, a pit privy, and a graywater system. The dwelling, pit privy, and graywater system were all constructed on the Property before the Town adopted OWTS regulations with a minimum lot size in the 1990s.
8. The Applicants desire to upgrade the wastewater treatment on the Property by replacing the existing privy and graywater system with a permitted OWTS that complies with the requirements of the OWTS Regulations (other than the minimum lot size requirement).
9. The Applicants initially contacted the Town in August of 2019 about the possibility of obtaining a variance to allow installation of a new OWTS on the Property. At the time, the Applicants had the Property under contract, but had not closed on the purchase. In correspondence dated August 24, 2019, the Applicants specifically noted that they were looking for direction from the Town on whether a variance would be issued before they spent money purchasing the property or having plans prepared. On September 5, 2019, Ms. Lawrence appeared at a regular meeting of the Board and described the Applicants' desire to purchase the Property and install an OWTS pursuant to a variance. A complete variance application had not been received in time to hold a public hearing a consider a variance request at this meeting. On September 11, 2019, Mr. Lawrence closed on the Purchase of the Property. On September 12, 2019, Mr. Lawrence conveyed the Property to himself and Ms. Lawrence as joint tenants.

10. A public hearing on the variance request was held on October 3, 2019. After receiving input from the Applicants and the public, the Board voted to deny the variance request. A Notice of Denial of a Variance Request was provided to the Applicants, stating the basis for the denial.

11. The Applicants filed an appeal pursuant to Section 4.M of the OWTS Regulations. The appeal was heard on November 7, 2019. The appeal was tabled so that the public hearing on the variance request could be re-opened on January 16, 2020, at 7:00 pm.

12. The re-opened public hearing was held on January 16, 2020, at 7 pm. At the public hearing, the Applicants took the position that they no longer required a variance, but the Board communicated to the Applicants that a variance was required. Public comment was taken, but no formal decision was rendered.

13. The public hearing was concluded on February 6, 2020. Additional information was provided by the Applicants and additional public comment was received.

14. Prior to the January 16, 2020, meeting, the Applicants submitted a document titled "Variance Information Requests" with a Section titled "Variance Hardships," which alleged the following hardships:

- (1) This lot is absolutely constrained on all 4 sides by roads, road easements, the Clarence Ditch to the east and further to the east is the only privately owned property which is outside town boundary;
- (2) It's a hardship to be unable to increase the size of our property when desiring to improve the property;
- (3) The pit privy is over full and septic pumping companies don't pump privies;
- (4) It's a hardship when State and Town regs do not allow pit privies to be updated nor can we dig a new hole for a new privy;
- (5) The pit privy is an out-dated septic system that is not in compliance with current codes; it should be abandoned; it would be a hardship not to have any septic system;
- (6) It's a hardship when State and Town regs do not allow any pit privy alternatives except for a compliant OWTS;
- (7) Kitchen sink graywater flowing free in a yard is considered a contaminant by State standards; so it's a hardship not to be allowed to change the graywater system;
- (8) Marble does not have design criteria for graywater treatment works which creates a hardship to properly dispose of the graywater;
- (9) There's a physical hardship of using a privy after dark, especially in winter.

Conclusions:

1. The Applicants' proposal is not merely repair or replacement of the existing systems. The proposal will also result in expansion of the historical use (e.g. a plumbed toilet) that exceeds the

design flow of the existing systems. The expanded use would not be a "grandfathered" non-conforming use, and a variance is required for the Applicants' proposed system.

2. Section 4.L.3.e of the OWTS Regulations requires the Applicants to provide "A statement of the hardship that creates the necessity for the variance."

3. Section 4.L.4 of the OWTS Regulations mandate that the Applicants have "the burden of proof to demonstrate that the variance is justified..."

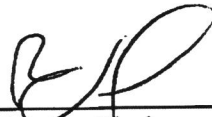
Decision:

By a vote of 3 to 0, on February 6, 2020, the Board DENIED the appeal and the variance request on the grounds that the Applicants did not meet their burden of proof to demonstrate sufficient hardship to justify the issuance of the variance.

This decision document was approved this 5 day of MARCH, 2020, by the Marble Board of Trustees, by a vote of 4 in favor and 0 opposed.



Ryan Vinciguerra, Mayor

Attest: 

Ron Leach, Clerk

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<p>Whitsitt Law Office, LLC Timothy E. Whitsitt 0326 Highway 133, Suite 190 F Carbondale, CO 81623</p>	<p>Case Number:</p>
<p>Phone Number: (970) 510-3400 FAX Number: (970) 510-3404 E-mail: tim@whitsittlawoffice.com Atty. Reg. #: 05962</p>	<p>Div.: Ctrm:</p>
<p align="center">DISTRICT COURT CIVIL (CV) CASE COVER SHEET FOR INITIAL PLEADING OF COMPLAINT, COUNTERCLAIM, CROSS-CLAIM OR THIRD PARTY COMPLAINT AND JURY DEMAND</p>	

1. This cover sheet shall be filed with the initial pleading of a complaint, counterclaim, cross-claim or third party complaint in every district court civil (CV) case. It shall not be filed in Domestic Relations (DR), Probate (PR), Water (CW), Juvenile (JA, JR, JD, JV), or Mental Health (MH) cases. Failure to file this cover sheet is not a jurisdictional defect in the pleading but may result in a clerk's show cause order requiring its filing.
2. Simplified Procedure under C.R.C.P. 16.1 **applies** to this case **unless** (check

one box below if this party asserts that C.R.C.P. 16.1 **does not** apply)

- ☐ This is a class action, forcible entry and detainer, Rule 106, Rule 120, or other similar expedited proceeding, **or**
- ☐ This party is seeking a monetary judgment against another party for more than **\$100,000.00, including any penalties or punitive damages, but excluding attorney fees, interest and costs, as supported by the following certification**

By my signature below and in compliance with C.R.C.P. 11, based upon information reasonably available to me at this time, I certify that the value of this party's claims against one of the other parties is reasonably believed to exceed \$100,000."

Or

- ☐ Another party has previously filed a cover sheet stating that C.R.C.P. 16.1 does not apply to this case.
3. ☐ This party makes a **Jury Demand** at this time and pays the requisite fee. See C.R.C.P. 38 (Checking this box is optional.)

Date: April 8, 2020

WHITSITT LAW OFFICE, LLC

By: /s/ Timothy E. Whitsitt
Timothy E. Whitsitt #05962

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<p align="center">ORDER GRANTING PLAINTIFF'S MOTION TO CERTIFY THE RECORD PURSUANT TO C.R.S. §24-4-106 (6)</p>	


THIS MATTER, having come before the Court on the Plaintiffs' *Motion to Certify the Record Pursuant to C.R.S. §24-4-106 (6)* filed herein on April 8, 2020, and the Court having reviewed the motion and being duly advised in the premises;

IT IS HEREBY ORDERED that Defendant the Town of Marble, through its Public Health Agency shall certify and file with the Clerk of the Court, the record as described in Plaintiffs' Motion, together with a certificate of authenticity, within twenty one (21) days of service ofof this Order;

IT IS FURTHER ORDERED that the Plaintiffs shall tender payment to the Town for the cost of certification of the record.

DATE: April 9, 2020

BY THE COURT:



District Court Judge