

SUPREME COURT,
STATE OF COLORADO

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Colorado Court of Appeals

Case No. 13CA1806

Opinion by The Honorable Judge Taubman

Trial Court: District Court, Delta County

Case No. 2012 CV 314

The Honorable Judge J. Steven Patrick

TRAVIS JARDON, CORRINE HOLDER,
SUSAN RAYMOND, MARK COOL, AND
ANDREA ROBINSONG,

Petitioners,

v.

EDWIN HOSTETLER, EILEEN HOSTETLER,
GREG HOSTETLER, CARMEN HOSTETLER,
and DELTA COUNTY BOARD OF COUNTY
COMMISSIONERS,

Respondents.

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Case Number: ___SC___

**PETITION FOR WRIT OF CERTIORARI OF
PETITIONERS-PLAINTIFFS TRAVIS JARDON, CORRINE HOLDER,
SUSAN RAYMOND, MARK COOL AND ANDREA ROBINSONG**

CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition for Writ of Certiorari complies with all requirements of C.A.R. 32 and C.A.R. 53, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The Petition for Writ of Certiorari contains 2,697 words.

/s/ Earl G. Rhodes (original signature on file)

Earl G. Rhodes, #6723

Attorney for Petitioners-Plaintiffs

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I. ISSUE PRESENTED FOR REVIEW

Whether the Court of Appeals' decision must be reversed pursuant to C.A.R. 49 (a)(2) and C.A.R. 49 (a)(3) because the Court of Appeals held that a Master Plan was advisory, not regulatory, which ruling was not in accord with prior Supreme Court pronouncements in *Bd. of County Comm'rs of Larimer County v. Conder*, 927 P.2d 1339 (Colo. 1996), and in conflict with the opinions of two different divisions of the Court of Appeals, *Canyon Area Residents for the Environment v. Bd. of County Comm'rs of Jefferson County*, 172 P.3d 905 (Colo. App. Div. 2, 2006), and *Condiotti v. Bd. of County Comm'rs of La Plata County*, 983 P.2d 184 (1999)?

II. OPINIONS BELOW

The Trial Court, on July 5, 2012, found that the Delta County Master Plan was regulatory and remanded the matter back to the Delta County Board of County Commissioners (hereafter the "Commissioners") for findings consistent with the Delta County Master Plan. **Trial Court Order of July 5, 2012 (Appendix A)**. On March 29, 2013, the Trial Court remanded this matter back to the Commissioners for a second time, since the Commissioners had based their decision on evidence outside the public record. **Trial Court Order of March 29,**

2013 (2012CV314) CD12:179-181. The Trial Court on September 5, 2013, ruled that the Commissioners' land use decisions were arbitrary and capricious because there was no substantial evidence in the record to support the Commissioners' decision that the confined chicken facility was a compatible land use with its neighbors. **Trial Court Order of September 5, 2013 (Appendix B).** Copies of the Trial Court Orders are attached hereto in Appendices A and B. The Trial Court entered an Order directing the County to issue a Cease and Desist Order which has prevented the confined chicken facility from operating. **Trial Court Order of September 5, 2013, at 12 (Appendix B).**

The Court of Appeals entered its Opinion and Judgment on October 16, 2014, which reversed the Trial Court's Orders. *Jardon v. Hostetler*, 13CA1806, attached as **Appendix C.**

III. GROUNDS ON WHICH THE SUPREME COURT'S JURISDICTION IS INVOKED

C.A.R. 49(a)(2) and (a)(3).

IV. STATEMENT OF THE CASE

Pursuant to C.R.S. § 30-28-106 and C.R.S. § 29-20-104, Delta County has land use authority as to the unincorporated areas of the county. It does not have

zoning regulations, but as to certain high impact land use activities, including the confined animal operations at issue in this case, Delta County has adopted the Regulation for Specific Developments (hereafter the “RSD”). **CD2:773-817**. A “specific development” cannot be approved without the Commissioners’ finding that the development promotes the public health, safety, and welfare. Further, the Commissioners’ land use decision must achieve the goals and implement the policies of the Delta County Master Plan. **RSD, Section 4, at 1, CD2:773; Master Plan, CD2:759-772**.

This case involves the Commissioners’ approval of two, confined chicken facilities. Petitioners-Plaintiffs are neighboring real property owners who opposed the facilities. One of the approved confined chicken facilities was constructed and began operating in April, 2012, while the Rule 106(a)(4) action was pending. The facility confines 15,000 chickens in a 50’ x 400’ building. **Trial Court Order of July 5, 2012, at 2 (Appendix A)**. The chickens’ excrement accumulates for fourteen months and eleven industrial-sized fans blow this dry excrement and other pollutants into the neighborhood atmosphere. **CD4:999, 1000**.

The record contained evidence that the confined chicken facility was frequently discharging significant amounts of harmful mold and fungus spores,

ammonia, bacteria, fecal matter, feathers, dander and small particulates. **CD2:118-122; CD4:992-993; CD4:1000-1002; CD4:1010**. Numerous neighbors, including two physicians, filed 22 health complaints against the confined chicken facility with Delta County. **CD2:495-543**. The record contains references to numerous doctors who treated the neighbors for respiratory symptoms or opined as to the harmful consequences connected with the operation of the confined chicken facility. Despite promising the Judge to do so, the County Health Director did not investigate even one of these complaints. **Trial Court Order of September 5, 2013, at 10, 12 (Appendix B); CD2:142-143; CD4:978; CD4:1009**. Adjacent and downwind of the confined chicken facility, Dr. Susan Raymond owns and operates a veterinary hospital and farm. She, her patients and her own livestock were sickened. **CD2:496-497; CD2:502-505; CD2:517-524; CD2:526-527; CD2:542-543**. The mold/fungus/bacteria inoculated her hayfields causing her hay to rot. **CD4:979; CD4:981-987**. The Trial Court found that the above evidence of health complaints from the operation of the confined chicken facility was un rebutted. **Trial Court Order of September 5, 2013, at 9 (Appendix B)**.

V. REASONS FOR GRANTING THE WRIT

The Court of Appeals' Decision Below is Not in Accord With this Court's Opinion in *Bd. of County Comm'rs of Larimer County v. Conder*, 927 P.2d 1339 (Colo. 1996) (Implicating C.A.R. 49(a)(2)).

The Decision is also in Conflict with *Canyon Area Residents for the Environment v. Bd. of County Comm'rs of Jefferson County*, 172 P.3d 905 (Colo. App. Div. 2, 2006) and *Condiotti v. Bd. of County Comm'rs of La Plata County*, 983 P.2d 184 (1999) (Implicating C.A.R. 49(a)(3)).

The Court of Appeals below decided that the Commissioners could have reasonably concluded that the entire Delta County Master Plan is advisory rather than regulatory despite the fact that Delta County's RSD contains Master Plan compliance requirements. *See Jardon*, below, at 9-12. This ruling is not in accord with prior precedent announced by the Colorado Supreme Court in *Conder*, *supra*; and conflicts with *Canyon Area Residents*, *supra*, a decision following *Conder* entered by Division 2 of the Court of Appeals, and *Condiotti*, *supra*, a decision following *Conder* entered by Division 5 of the Court of Appeals.

In *Conder*, the Colorado Supreme Court held that Master Plan provisions, standing alone, are advisory only. However, if the County land use regulations or state statutes contain Master Plan compliance requirements, provisions contained in such a Master Plan become regulatory, subject only to a specificity analysis required for due process considerations. In such cases, legislative bodies and

reviewing courts must “consider explicitly each applicable Master Plan provision pursuant to due process standards relating to specificity.” *See Conder*, at 1350. In conflict with these *Conder* Court requirements, the Court of Appeals’ decision below failed to address the specific Master Plan provisions asserted by the Petitioners-Plaintiffs; and instead, created new generalized reasons to avoid *Conder*.

The Trial Court below, following *Conder*, correctly ruled that the Delta County Master Plan provisions were regulatory. **Trial Court Order of July 5, 2012 (Appendix A); RSD at Article VI, Section 1, CD2:789.**

By reversing the Trial Court, the Court of Appeals’ decision below directly conflicts with *Conder* and its progeny.

In *Jardon*, the Court of Appeals erred by deciding that the Commissioners could have reasonably concluded that their Master Plan, in general, was not specific enough to be deemed regulatory in any way. This conclusion turns *Conder* on its head. *Conder* holds that when a regulation or statute contains a Master Plan compliance provision, all Master Plan provisions are presumptively considered regulatory and valid, subject only to challenges that prove, beyond a reasonable doubt, that a particular Master Plan provision is not specific enough.

Conder, supra, at 1350. With respect to the specificity or “exactitude” required of Master Plan provisions, the *Conder* court stated that Master Plan provisions referenced by regulations must be drafted with sufficient exactitude “to ensure that any action taken by a county in response to a land use proposal will be rational and consistent and that judicial review of that action will be available and effective.” *Conder, supra*, at 1350. The *Conder* court remanded the matter to the District Court, directing the District Court to consider explicitly each applicable master plan provision relied upon by the Larimer County commissioners pursuant to due process standards relating to specificity. *Conder, supra*, at 1350.

In *Jardon*, the Court of Appeals said that if there was a reasonable basis for the Commissioners’ interpretation of the law, that decision could not be set aside on that ground upon review. *Wilkinson v. Bd. of County Comm’rs*, 872 P.2d 1269 (Colo. App. 1993). But in this case, the purported Commissioners’ reasonable interpretation of the law is in violation of *Conder*, and therefore, there is no reasonable basis for it.

It is important to note that land use opponents, as well as proponents, are similarly protected by Master Plan provisions deemed regulatory. In *Canyon Area Residents, supra*, a case cited by the Trial Court in its September 5, 2013 Order, at

9 (**Appendix B**), along with *Conder*, the Jefferson County commissioners approved a cell tower over the objections of neighboring residents. Relying upon *Conder*, Division 2 of the Court of Appeals reversed and remanded to the District Court with directions to remand to the board of county commissioners to make specific findings required by C.R.S. § 24-67-104, a PUD statute that requires “a finding by the county or municipality that such plan is in general conformity with any master plan or comprehensive plan for the county or municipality.” *Canyon Area Residents, supra*, at 910-911. Because Division 1 of the Court of Appeals in the instant action did not perform the *Conder* required specificity analysis to “consider explicitly each applicable Master Plan provision pursuant to due process standards relating to specificity” (*Conder*, at 1350) or remand for that purpose, the Division 1 decision below conflicts with the Division 2 decision in *Canyon Area Residents*.

In *Condiotti, supra*, another Court of Appeals’ opinion, the question before the court was whether a landowner had standing to challenge the provisions of a master plan adopted as part of a zoning resolution by the county commissioners. Citing *Conder*, the court found that under the facts of that case, a master plan was no longer advisory where it contained sufficiently specific provisions and had been

adopted as part of the zoning resolution by the county commissioners. Under these circumstances, the court held that the master plan had been made part of the county regulatory land use scheme, and thus, the master plan could be challenged by a landowner under a Rule 57 declaratory judgment action. The Division 1 decision below conflicts with the Division 5 decision in *Condiotti*.

In the instant case, the neighboring landowners cited and relied upon specific Delta County Master Plan “policies” and “implementation strategies” designed to protect their health and their property interests; *to wit*:

The right to develop and improve private property *does not* constitute the right to physically damage or adversely impact the property or property value or neighboring landowners. - Policy IV.B.

In the implementation of the County’s land use regulations the compatibility of a new development with the existing land uses should be given priority consideration. Implementation Strategy IV.B.1.

In cases where there is incompatibility between an existing and a proposed land use, the property right of the existing use should be given priority.” Implementation Strategy IV.B.2.

Delta County Master Plan, at 11, cited by the Trial Court in its July 5, 2012 Order, at 9 (**Appendix A**), and its September 5, 2013 Order, at 9 (**Appendix B**). The

above-quoted Delta County Master Plan policies and implementation strategies easily comply with due process specificity and are, therefore, regulatory.

The due process specificity considerations referenced by the Supreme Court in *Conder*, at 1350, relate to constitutional due process vagueness standards. *See, e.g., Bell & Pollock, P.C. v. City of Littleton*, 910 P.2d 69 (Colo. App. 1995), and *People ex rel. City of Arvada v. Nissen*, 650 P.2d 547 (Colo. 1982)(A claim that an ordinance is invalid because of vagueness is a constitutional due process challenge. Municipal ordinances are presumed to be constitutional, and the burden is upon the party challenging the ordinance to prove its unconstitutionality beyond a reasonable doubt. If the constitutionality of an assailed ordinance is debatable, the ordinance should be upheld.)

The *Jardon* decision does not explicitly address the three Master Plan provisions above-cited by the neighbors as required by *Conder*; but instead, noted three irrelevant aspects of Delta County's land use regulations: (1) that the RSD does not require compliance with any specific Master Plan provision; (2) that some Master Plan "goals" are broadly worded and aspirational; and (3) that some Master Plan "goals" may be conflicting. *See Jardon*, at 9 -12. These conclusions violate existing case law as set forth immediately below:

(1) That Delta County’s RSD does not require compliance with any specific Master Plan provisions cannot be a basis to make all Master Plan provisions advisory, and in so holding, *Jardon* is not in concert with *Conder*. See *Jardon, supra*, at 10. The Larimer County Subdivision regulations and the state PUD statute (C.R.S. § 24-67-104(1)(f)) involved in *Conder* and *Canyon Area Residents* required only “general conformity with the County’s Comprehensive Plan.” *Conder, supra*, at 1346; and *Canyon Area Residents, supra*, at 910. The Delta County RSD states that the RSD is promulgated to “[a]chieve the goals and implement the policies of the Delta County Master Plan” (**RSD, at 1, CD2:773**); specific developments must be “consistent with the Delta County Master Plan” (**RSD, at 17, CD2:789**); and must comply with its performance standards (**RSD, at 17, CD2:789**). These references are at least as specific as a reference to “general conformity” with the Master Plan required by the subdivision regulations and PUD statute at issue in *Conder* and *Canyon Area Residents*.

(2) That some Delta County Master Plan “goals” are broadly worded and aspirational cannot be a basis to make all Master Plan provisions advisory, and in so holding, *Jardon* is not in concert with *Conder*. See *Jardon, supra*, at 11. In addition to failing to address the *Conder* specificity analysis, this *Jardon* court

conclusion fails because the neighbors in the instant case did not cite to broadly worded goals; they pointed to the specific “policies” and “implementation strategies.” The policies and implementation strategies relied upon by the neighbors in the instant case (as cited hereinabove at page 9), are clear, unambiguous and presumptively valid: developments may not injure neighbors whose existing property rights are to be given priority consideration in land use decisions.

(3) That some Master Plan goals may conflict is not a basis to make all Master Plan provisions advisory and in so holding, *Jardon* is not in concert with *Conder*. While one can speculate that some “goals” of the Delta County Master Plan might conflict, *see Jardon, supra*, at 11 (as the *Jardon* court below attempted), no such actual conflict was present in the instant case. Furthermore, such goal-conflict speculation does not permit the Commissioners or reviewing courts to ignore the non-conflicting, specific Master Plan “policies” and “implementation strategies” cited to them by the neighbors. *Conder*, on the other hand, clearly requires this explicit analysis. Not only does this “goal-conflict test” fail to comply with the *Conder* specificity analysis requirement, it eviscerates *Conder* as any legislative body could easily conjure some conflict between irrelevant master

plan goals to avoid the regulatory effect of relevant, specific master plan provisions that bear upon a particular land use decision.

In the absence of a successful vagueness challenge beyond a reasonable doubt, the Commissioners and reviewing courts are required by *Conder*, *Canyon Area Residents* and *Condiotti* to make explicit findings that the land use decision complies with the specific, regulatory Master Plan provisions asserted by the neighbors so that the neighbors' rights to meaningful Rule 106(a)(4) review are preserved. *Churchill v. Univ. of Colorado at Boulder*, 285 P.3d 986 (Colo. 2012).

If allowed to stand, the Court of Appeals' decision in *Jardon* effectively permits land use regulatory bodies to ignore *Conder*, and deprives landowners of the benefits of properly adopted land use regulations. Further, the decision below conflicts with the decisions in *Canyon Area Residents* and *Condiotti*, which requires this Court's review to resolve.

Master Plan compliance issues are of great importance to the people of Delta County. All people in Colorado have an interest in local governments deciding land use matters in conformance with the opinions of this Court. That a division of the Court of Appeals finds the Master Plan advisory, when in fact it is regulatory, is a matter of state-wide interest.

VI. CONCLUSION

Petitioners-Plaintiffs respectfully request this Court review the Opinion of the Court of Appeals on a Writ of Certiorari to resolve this important issue of law.

RESPECTFULLY SUBMITTED this 5th day of March, 2015.

/s/ Earl G. Rhodes-original signature on file
Earl G. Rhodes, #6723
Attorney for Petitioners-Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Petition for Writ of Certiorari of Petitioners-Plaintiffs Travis Jardon, Corrine Holder, Susan Raymond, Mark Cool and Andrea Robinsong was served this 5th day of March, 2015, via the Integrated Colorado Courts E-Filing System to the following:

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APPENDIX

- A. Trial Court Order on Rule 106 Claim of July 5, 2012 (Case No. 11CV282).
- B. Trial Court Order on Rule 106 Claim of September 5, 2013 (Case No. 11CV314).
- C. Opinion and Judgment of the Colorado Court of Appeals of October 16, 2014.