Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203 Phone: 720-625-5150	
7th Judicial District Court The Honorable J. Steven Patrick Case Number: 2012 CV 314	
Defendant-Appellants: EDWIN HOSTETLER, EILEEN HOSTETLER, GREG HOSTETLER, CARMEN HOSTETLER, ANNA HOSTETLER, and **ROLAND HOSTETLER** v. **Plaintiff-Appellees: TRAVIS JARDON, CORRINE HOLDER, SUSAN RAYMOND, MARK COOL,** and **ANDREA ROBINSONG** and **Defendant-Appellee: BOARD OF COUNTY COMMISSIONERS OF DELTA COUNTY.**	**▲ COURT USE ONLY ▲**
Attorneys for Defendant-Appellants: Joshua A. Tolin (#42716) Karen Budd-Falen (*pro hac vice*) Budd-Falen Law Offices, LLC 300 East 18th Street Post Office Box 346 Cheyenne, Wyoming 82003-0346 (307) 632-5105 Telephone (307) 637-3891 Facsimile joshua@buddfalen.com karen@buddfalen.com	Case Number: 13CA1806

HOSTETLERS' MOTION FOR STAY PENDING APPEAL AND APPROVAL OF THEIR SUPERSEDEAS BOND

Defendant-Appellants Edwin Hostetler, Eileen Hostetler, Greg Hostetler, Carmen Hostetler, Anna Hostetler, and Roland Hostetler (collectively, the "Hostetlers"), by and through their counsel, Joshua Tolin and Karen Budd-Falen, of Budd-Falen Law Offices, LLC, hereby move this Court for a stay pending appeal and approval of their supersedeas bond pursuant to Rule 8(a).

Reasonable notice of this motion is provided to all the parties to the action at the district court via email after its filing with this Court and via U.S. mail with a disc containing a digital copy of this motion and its exhibits.

Background

The Hostetlers applied for two specific development agreements in Delta County, Colorado, to develop one-barn egg-laying operations on their agricultural and rural-residential properties. The Hostetlers followed the public process, and the Board of County Commissioners for Delta County (the "Board") approved the Hostetlers' applications on August 29, 2011.

Since the initial approval with conditions, Edwin and Eileen Hostetler constructed Western Slope Layers and began operations. Also since the initial approval with conditions, the Hostetlers and the Board have been entangled in litigation defending the operations and the Board's approval thereof. The Board has held two additional public hearings to take additional evidence and hear

additional public comment. After the last public hearing, the Board added an additional condition to the Hostetlers' original development agreements.

Plaintiff-Appellees in this case are five Delta County residents (the "Opponents") who sought judicial review of the Board's decision under C.R.C.P. 106(a)(4). On the merits, the district court rejected numerous arguments by the Opponents, but ultimately held the record before the Board was devoid of evidence that the Hostetlers' operations are compatible with the neighborhood. The district court relied on certain "medical evidence" submitted during the public hearings by the Opponents, which the Hostetlers never had an opportunity to specifically rebut with their own medical evidence. Even so, the Board had more than a thousand pages of evidence and public comment (including specific evidence the operations will not create health issues) with significant record support for approval of the applications concerning compatibility with the neighborhood.

In its *Order on Rule 106 Claim*, at ¶ 22, the district court reversed and vacated the Board's decision on the single issue of compatibility.[1] The district court also ordered the Board to issue a cease-and-desist order to the Hostetlers, some of whom have now been operating consistent with the Board-approved development agreements for more than eighteen months. *Id.* at ¶ 23. On September

[1] The relevant district court orders and other filings are attached to this motion in Exhibit A.

30, 2013, the district court entered final judgment on all claims, incorporating its rulings on the merits. *Entry of Final Judgment on All Claims*, at 1.

Stay Denied by District Court

Following the district court's *Order on Rule 106 Claim*, the Board and the Hostetlers sought a stay of execution of the district court's *Order on Rule 106 Claim*, with the Hostetlers requesting approval of their supersedeas bond. The district court granted a temporary stay until it could resolve those motions. *Temporary Order Granting Delta County Board of County Commissioners and Hostetlers' Motions for Stay Pending Appeal and Stay Pending Resolution of Motion for Stay*, at 1. After briefing by all the parties and an oral argument on the issues, the district court denied both motions on September 27, 2013, stating the Board and the Hostetlers failed to satisfy three of the four factors set forth in *Romero v. City of Fountain*, — P.3d —, 2011 WL 1797240 (Colo. App. 2011). *Order on Defendants' Motions for Stay Pending Appeal and Stay upon Appeal* ("*Stay Order*"), at 5. While denying a stay, the district court extended its temporary stay for 21 days to allow the parties to seek relief from this Court. *Id.* Because the district court has denied the Hostetlers a stay, this motion is now ripe for consideration by this Court. C.A.R. 8(a).

Stay Pending Appeal

At the district court, the Hostetlers requested a stay pending appeal pursuant to C.R.C.P. 62(d). Rule 62(d) provides:

> When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay from the trial court subject to the exceptions contained in section (a) of this Rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court.

Id. The courts in Colorado routinely consider the language of C.R.C.P. 62(d) and C.A.R. 8(a) together. *See, e.g., Muck v. Arapahoe Cnty. Dist. Ct.*, 814 P.2d 869, 871–873 (Colo. 1991). Rule 8(a) provides:

> Application for a stay of the judgment or order of a trial court pending appeal, or for approval of a supersedeas bond . . . during the pendency of an appeal must ordinarily be made in the first instance in the trial court. A motion for such relief may be made to the appellate court or to a judge or justice thereof, but the motion shall show that application to the trial court for the relief sought is not practicable, or that the trial court has denied an application, or has failed to afford the relief which the applicant requested, with the reasons given by the trial court for its action. The motion shall also show the reasons for the relief requested and the facts relied upon, and if the facts are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof.

Id. The Colorado Supreme Court has explained the language of C.R.C.P. 62(d) and C.A.R. 8(a) generally requires appellants to post a supersedeas bond in order to obtain a stay. *Muck*, 814 P.2d 869, 871–872.

The Hostetlers Can Meet the Supersedeas-Bond Requirement and Have Filed a Supersedeas Bond with the Clerk of District Court

As required by the rules, the Hostetlers filed a supersedeas bond with the Clerk of District Court for the minimum-required bond, and the Hostetlers will increase the bond amount if this Court determines such is necessary to obtain their stay under Rule 8(a). While there may be some question as to whether a supersedeas bond is required to stay judgment on the merits in a Rule 106(a)(4) judicial review, the local practice standards provide some explanation as to how C.R.C.P. 62(d) works concerning the amount of supersedeas bonds generally:

> Unless the court otherwise orders, or any applicable statute directs a higher amount, the amount of a supersedeas bond to stay execution of a money judgment shall be 125% of the total amount of the judgment entered by the court (including any prejudgment interest, costs and attorneys fees awarded by the court). *The amount of a supersedeas bond to stay execution of a non-money judgment shall be determined by the court.* Nothing in this rule is intended to limit the court's discretion to deny a stay with respect to non-money judgments. Any interested party may move the trial court (which shall have jurisdiction not withstanding the pendency of an appeal) for an increase in the amount of the bond to reflect the anticipated time for completion of appellate proceedings or any increase in the amount of judgment.

C.R.C.P. 121 § 1-23(3)(a) (emphasis added).

The Hostetlers have been unable to locate any Colorado precedent that explains exactly how a court determines the amount of a supersedeas bond of a non-money judgment. *See Muck*, 814 P.2d at 872 n.8 (declining to determine

criteria for setting amount of bond). Ordinarily, in that case, this Court would then look to the federal courts for interpretation, because Colorado Rule 62(d) appears, at first light, as virtually identical to F.R.C.P. 62(d). *Medina v. Conseco Annuity Assur. Co.*, 121 P.3d 345, 348 (Colo. App. 2005). However, interpretation by the federal courts of F.R.C.P. 62(d) directly contradicts Colorado Rule 121 § 1-23(3)(a); therefore, the rules are not "virtually identical." *Compare Hebert v. Exxon Corp.*, 953 F.2d 936, 938 (6th Cir. 1992) (explaining that federal courts have restricted F.R.C.P 62(d)'s automatic stay provision by posting supersedeas bond to final judgments for money), *with* C.R.C.P. 121 § 1-23(3)(a) ("The amount of a supersedeas bond to stay execution of a non-money judgment shall be determined by the court."). Therefore, because Colorado Rule 121 specifically provides that the amount of a supersedeas bond for stay of a non-money judgment *shall be determined by the court*, Colorado Rule 62(d) is applicable to the non-money final judgment in this case, and federal case law is not helpful.

This Court has explained that "C.R.C.P. 62(d) and C.A.R. 8(a) are designed to serve the legitimate purpose of providing assurance that judgments are capable of enforcement at the end of the appellate process." *Stenback v. Front Range Financial Corp.*, 764 P.2d 380, 383 (Colo. App. 1988). Therefore, this Court should determine what amount of a supersedeas bond assures that the district

court's final judgment vacating the Board's decision will be enforceable at the end of the appellate process, if the Opponents prevail. *See id.* Additionally, C.R.C.P. 62(d) and C.A.R. 8(a) "should not be used as unjust or arbitrary screening devices to prevent appeal." *Id.*; *see also, e.g.*, *San Luis Valley Ecosystem Council v. U.S. Fish & Wild. Svc.*, 657 F. Supp. 2d 1233, 1247–1248 (D. Colo. 2009) (recognizing substantial bond should not be required that would impede a party's access to the courts).

The Hostetlers note their requirement under C.A.R. 7 to post, at a minimum, a bond of $250 to secure payment of costs on appeal should the Opponents prevail on appeal.[2] The Hostetlers believe this amount would be sufficient to ensure execution of the district court's judgment against them, because the district court's order only concerns the validity of their development agreements and the requirement of the Board to issue a cease-and-desist order to the Hostetlers.

Should the Opponents prevail on appeal and the Hostetlers be required to comply with the district court's judgment after resolution of the appeal, the only action they must take to comply is to remove the current birds from the chicken barn. While that action would likely cost $14,400, *see Affidavit of Edwin Hostetler*

[2] While there is a difference between a cost bond and a supersedeas bond, *see Hart v. Schwab*, 990 P.2d 1131, 1133–1134 (Colo. App. 1999), a cost bond is not mandatory if the appellant has filed a supersedeas bond that includes security for the payment of costs on appeal, *see* C.A.R. 7.

("*Hostetler*"), attached as Exhibit B, at ¶ 11, if the Hostetlers are granted a stay pending appeal, they will have continuing operating income to pay for that expense should the Opponents ultimately prevail on appeal. Additionally, as a part of their normal operations, the Hostetlers remove all the birds (depopulate) every fourteen months, with the next regularly scheduled depopulation to occur in August, 2014. *Affidavit of Karen Budd-Falen* ("*Budd-Falen*"), attached as Exhibit C, at ¶ 14. Therefore, a ruling on the merits from this Court could come closer to a regularly scheduled depopulation, which would lessen the substantial damage to the Hostetlers that would occur if a stay were not granted at this juncture.

Accordingly, the Hostetlers delivered a check for $250 by hand to the Clerk of District Court on September 20, 2013. *Budd-Falen*, at ¶ 15. Should this Court determine the amount of Hostetlers' supersedeas bond under Rule 8(a) must be more than $250, the Hostetlers will post an increase of that supersedeas bond to

provide assurance that the district court's final judgment will be enforceable following the appellate process, while the final judgment is stayed pending appeal.[3]

Granting a Stay is Necessary to Protect the Hostetlers' Right to Appeal as a Matter of Law

While a supersedeas bond would ensure the district court's judgment will be enforceable at the end of the appellate process, a stay pending appeal would protect the Hostetlers' right to appeal, as granted by Colorado statute and recognized by the Colorado Appellate Rules. *See* C.R.S. § 13-4-102(1) ("[T]he court of appeals shall have initial jurisdiction over appeals from final judgments of . . . the district courts . . . ."); C.A.R. 3(a) ("An appeal permitted by law from a trial court to the appellate court shall be taken by filing a notice of appeal with the clerk of the

[3] While the Hostetlers are able and willing to post a reasonable supersedeas bond to ensure execution of the district court's final judgment and *Order on Rule 106 Claim*, the Hostetlers could not post the bond proposed by the Opponents: an exorbitant $2.3 million apparently meant to compensate the 19 people who complained to Delta County and to compensate Plaintiff-Appellee Susan Raymond for the entire value of her large-animal veterinary business. *Plaintiffs' Response in Opposition to Hostetlers' Motion for Stay of Execution,* at 8.

A supersedeas bond is not some sort of scheme that allows parties and non-parties to profit off the statutorily-guaranteed appellate process. For example, a supersedeas bond for a money judgment does not require a court to take into account potential further economic damages of the non-appealing party while waiting for payment of a money judgment; instead, it only considers the money judgment awarded at the time. *See* C.R.C.P. 121 § 1-23(3)(a). Furthermore, supersedeas bonds "should not be used as unjust or arbitrary screening devices to prevent appeal," *Stenback*, 764 P.2d at 383, which is clearly the purpose of the Opponents' $2.3 million proposal.

appellate court within the time allowed by C.A.R. 4."). Denying a stay on appeal could effectively prohibit the Hostetlers from appealing by decimating them financially before ever having their statutory right of a second court's review of the Board's decision. *Hostetler*, at ¶ 14.

While the district court ruled in favor of the Opponents' claim on the merits for judicial review, on appeal, the district court's ruling will not be granted any deference. Instead, the judicial review claim will be reviewed de novo, with this Court sitting in the same position as the district court in reviewing the Board's decision. *Thomas v. Colo. Dept. of Corrs.*, 117 P.3d 7, 8–9 (Colo. App. 2004). Accordingly, on appeal, the presumption that the Board's decision is proper will be returned. *See Fedder v. McCurdy*, 768 P.2d 711, 713 (Colo. App. 1988). Therefore, it is not the Hostetlers—but the Opponents—who will have the burden to prove an abuse of discretion during the merits of the appeal. *Id.* at 8.

Impacts Concerning Stay Pending Appeal

Because the Hostetlers will be significantly prejudiced if a stay is not granted, this Court should approve the Hostetlers' supersedeas bond and grant a stay of the district court's final judgment. *See Lockhaven Trust & Safe Deposit Co. v. U.S. Mortg. & Trust. Co.*, 74 P.3d 793, 794 (Colo. App. 1903). In this case, the final judgment of the district court should be stayed pending appeal as there are no

proven or dire health effects of the current operations and denying a stay before the Hostetlers can utilize the appellate process would cause significant financial harms to the Hostetlers and others in Delta County.

No Proven or Dire Health Crisis Exists

While the Opponents claim some health impacts from the chicken barn, no dire health crisis exists surrounding the existing chicken barn. As required under the Hostetlers' development agreement, the Hostetlers have obtained the services of an air monitoring specialist and implemented his suggestions. *Hostetler*, at ¶ 7. Additionally, the Hostetlers have conferred with one medical doctor who has observed the chicken barn first hand over an extended period. *Id.* That medical doctor has expressed his serious professional doubts as to the possibility of the chicken barn causing medical issues to anyone in or around the Hostetlers' chicken barn. *Id.* The Hostetlers have also conferred with another medical doctor, one who specializes in occupational and environmental medicine, whose expert opinion is that the record does not prove any negative health effects are caused by the chicken barn. *Affidavit of Don C. Fisher, M.D.* ("*Fisher, M.D.*"), attached as Exhibit D, at ¶ 6 ("[T]he medical evidence in the record *does not* prove the chicken barn is the cause for any illness at this point.").

Edwin and Eileen's daughter, son-in-law, and their three children (aged from two to nine) live approximately 500 feet from the chicken barn. *Hostetler*, at ¶ 8. They have lived in that house for approximately ten years, and—though they are the closest people to the chicken barn—none of them have ever had any breathing problems or any other ill medical issues that could remotely be tied to the timing of the Hostetlers' operations. *Id.* Their three children regularly play outside of their home and the chicken barn during all seasons, ride their bikes on the road between the two, and even sometimes offer their help inside the barn. *Id.* These children have never had any health issues caused by the chicken barn, and the youngest was only fourteen months old when the Hostetlers' first birds arrived. *Id.*

Similarly, Edwin and Eileen and three of their children live approximately 1,000–1,200 feet from the chicken barn. *Id.* at ¶ 9. None of them have ever had a health problem caused by the chicken barn. *Id.* The closest neighbor to the chicken barn who is not a family member similarly has explained that she has not had any health issues that could be caused by the chicken barn. *Id.*

The Opponents did place into the record an email from Plaintiff-Appellee Susan Raymond's doctor stating that Susan has been diagnosed with occupational asthma, and claiming the time correlation to the operations of the chicken barn explain the chicken barn is the cause of Susan's asthma. *See Budd-Falen*, at ¶ 9

(referring to R0336–R0339). However, the record does not contain Susan's medical records substantiating that claim, *id.*, and because this is a Rule 106(a)(4) claim, the Hostetlers do not have a right to conduct a medical examination of Susan's health, *c.f.* C.R.C.P. 35(a). Moreover, the Hostetlers had no opportunity to cross-examine either Susan or her doctor, because the public hearings below are non-adversarial. The Hostetlers had no notice the doctor's email existed or would be placed into evidence and were not given an opportunity to cross-examine Plaintiff-Appellee Susan Raymond or the email's authors concerning its content. *Budd-Falen*, at ¶ 9.

In an effort to provide this Court with expert medical testimony as to the potential harm, if any, to the Opposition or others should this Court grant a stay pending appeal, the Hostetlers contacted an independent medical doctor, an expert in occupational and environmental medicine. *See Budd-Falen*, at ¶ 11; *Fisher, M.D.*, at ¶ 3. Dr. Don Fisher responded that in order for him to determine whether a diagnosis is correct or whether the chicken barn is the cause of ill health effects, he would need access to the medical records relied upon by a doctor making those statements. *Fisher, M.D.*, at ¶¶ 10, 17, 17(a), 19. In this light, the Hostetlers requested permission from the Opposition to obtain the relevant medical records that substantiate their claim the chicken barn is the cause of ill health effects, since

those were not included in the record. *Budd-Falen,* at ¶¶ 9, 12. The Opposition unconditionally rejected that request. *Id.*at ¶ 12.

While Dr. Fisher is unable to provide his expert diagnosis concerning the individuals claiming ill health effects without their medical records, Dr. Fisher was able to review the record to provide helpful testimony to this Court concerning the lack of evidence proving diagnoses or any actual harm caused by the chicken barn. *Fisher, M.D.*, at ¶¶ 17–19. In both its order on the merits and its order denying a stay pending appeal, the district court relied heavily on the email from Drs. Abuid and Knutson, accepting the email's premise that the chicken barn has caused illness to Plaintiff-Appellee Susan Raymond and other unidentified patients. *Stay Order*, at 3; *Order on Rule 106 Claim*, at ¶¶ 18, 18(b)(ix), 21. However, as Dr. Fisher explains, there are numerous serious professional errors in that email. *Fisher, M.D.*, at ¶¶ 8–9, 11–14.

First, Drs. Abuid and Knutson claim to explain the health issue from their perspective as medical doctors. Exhibit D to *Fisher, M.D.*, at 2 ("We have tried our best to make it easy to understand, but feel free to contact us for further detail or explanation."). Immediately after claiming the explanation of problems stemming from poultry operations as their own, Drs. Abuid and Knutson plagiarize their "explanation." *See id.*; *Fisher, M.D.*, at ¶ 9. Drs. Abuid and Knutson plagiarized

nearly word-for-word from a document published by the United Kingdom's government agency, the Health and Safety Executive ("HSE"). *Fisher, M.D.*, at ¶ 9. The one sentence Drs. Abuid and Knutson did not plagiarize from HSE is the lynchpin for their conclusion that the chicken barn has caused Plaintiff-Appellee's asthma, and that statement is not supported by medical literature. *Id.*at ¶¶ 9, 13.

In addition to Drs. Abuid and Knutson's professional dishonesty of plagiarizing and creating support for their conclusion out of thin air, the HSE document does not concern the medical issue in question: whether air emissions from a poultry operation can cause illness to those outside the operation. *Id.* at ¶ 9. Instead, the HSE document specifically concerns poultry workers in the midst of their poultry-work activities inside industrial-sized operations. *Id.*

The failures of Drs. Abuid and Knutson do not stop at their plagiarized and inapplicable "explanation"; instead, that is where their failures begin. As a medical doctor specializing in occupational and environmental medicine and toxicology, Dr. Fisher has testified as an expert more than fifty times, both in support of, and in opposition to, individuals claiming their illnesses were caused by external factors. *Id.* at ¶ 3. In his affidavit, Dr. Fisher explains the complex accepted methodology of determining proper diagnosis, medical correlation, and causation in occupational and environmental medicine. *Id.* at ¶¶ 15–16. Dr. Fisher further explains how Drs.

Abuid and Knutson utterly failed to apply the accepted methodology, instead apparently making diagnoses and conclusions of causation based on temporal correlation and self-reported symptoms. *Id.* at ¶¶ 17–19.

Even the temporal correlation of Plaintiff-Appellee Susan Raymond's claimed issues as diagnosed by Dr. Abuid makes no logical sense from the face of the email. Dr. Fisher explains:

> Concerning the Letter's statements about the diagnosis of Dr. Raymond, the Letter is internally inconsistent on a vital piece of information: Dr. Raymond's medical history with respiratory issues. On R0338, the Letter states, "In the particular case of Susan Raymond, she had never had asthma or respiratory symptoms and developed them shortly after the operation began." This would be an important fact to know for the causation analysis, discussed below. However, the next sentence of the Letter directly contradicts the first statement: "She is a veterinarian with daily exposure to animals and a previous reactive airways response to chicken." If a patient had a "previous reactive airways response," then that patient could not also have "never had asthma or respiratory symptoms."

Id. at ¶ 12.

Dr. Fisher also reviewed the statement referenced by the district court of the other "medical evidence" from Heidi Marlin, M.D., who similarly failed to follow the accepted methodology in this area of medical practice. *Id.* at ¶ 20. Additionally, it appears Dr. Marlin unethically "guarantee[d]" certain illnesses, diagnosed and summarily determined causation of her own medical problems, all contrary to the accepted medical practice of serving as objective professionals. *Id.*

Based on Dr. Fisher's review of the medical evidence in the record of this case, Dr. Fisher is absolutely clear that applying the accepted medical methodology "to the evidence in the record *does not prove the chicken barn has caused illness* to Dr. Raymond or the Letter's unidentified patients." *Fisher, M.D.*, at ¶ 19 (emphasis added); *see also id.* at ¶ 6 ("[T]he medical evidence in the record *does not* prove the chicken barn is the cause for any illness at this point."). Because there is no evidence to prove any harm has come to the Opponents or others by way of the Hostetlers' chicken barn, there is no evidence a stay pending appeal would cause any harm to the Opponents while this Court resolves the appeal.

Furthermore, even if the operating chicken barn ever did begin to cause dire health effects during any part of the judicial process, including the Hostetlers' appeal of the district court's final judgment, the Board could immediately suspend the Hostetlers' development agreement. *See Budd-Falen*, at ¶ 13 (referring to the resolution's language adopting the original development agreement, "[If] the public health, safety or welfare is immediately jeopardized, . . . this Development Agreement may be summarily suspended by the Board of County Commissioners.").[4] Therefore, the Opponents and the public would remain

[4] It is also important to note that the Hostetlers' chicken barn is not considered a confined animal feeding operation "CAFO" by the Environmental Protection Agency ("EPA") or the Colorado Department of Public Health and

protected from any proven or dire health effects caused by the chicken barn even if this Court grants a stay of the district court's final judgment.

The Hostetlers and Others in Delta County Will Be Substantially and Irreparably Harmed Absent a Stay Pending Appeal

If execution of the final judgment is not stayed pending appeal, and the Hostetlers are forced to stop all egg-laying and remove or kill 15,000 chickens, their family will face substantial and irreparable damage. *Hostetler*, at ¶ 10. Their chicken barn is not some large, corporate venture. *Id.* It is a family operation run by Edwin, Eileen, their son-in-law, and three daughters. *Id.*

The immediate and direct losses to the Hostetlers' family in the event a stay is not granted would be approximately $865,548 between the filing of a notice of

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Environment ("Colo. Dept. of Health"), based on its small size and method of operations. 40 C.F.R. § 122.23; 5 Colo. Code Regs. § 1002-81.3.

Because the Hostetlers' chicken barn is not a CAFO, neither the EPA nor the Colo. Dept. of Health has deemed the Hostetlers' operations as potentially toxic to public health and in need of regulation to protect the public interest. Instead, as confirmed by evidence in the record, the Hostetlers' chicken barn will not cause public health risks. See *Budd-Falen*, at ¶¶ 5–6 (referring to R0599 and R0602, the opining by experts that the Hostetlers' small chicken barn will not damage community and surroundings, including public health); *Fisher, M.D.*, at ¶ 6 ("[T]he medical evidence in the record *does not* prove the chicken barn is the cause for any illness at this point.").

appeal and an appellate decision on the merits of the appeal.[5] *See id.* at ¶ 11. Additionally, expenses and liabilities totaling approximately $779,870 would remain outstanding and subject the Hostetlers to default on those amounts. *Id.* at ¶ 12. Finally, the Hostetlers have assets that would be either worthless or have only salvage value, currently valued at approximately $54,853. *Id.* at ¶ 13.

Therefore, without a stay pending appeal, not only will their chicken barn be shut down, but the Hostetlers and their family will be substantially and irreparably harmed. *Id.* at ¶ 14; *see Zoning Bd. of Adjustment v. DeVilbiss*, 729 P.2d 353, 358–359 (Colo. 1986) (recognizing inequity of requiring development be completely removed or radically altered when development took considerable expense and time to work through governmental permit process).The Hostetlers are not in any position to bear these kinds of immense losses while waiting on the judicial process to run its course. *Id.* If a stay is not granted, based on these losses, the Hostetlers could effectively lose their opportunity to appeal, because they we will be too decimated financially to even make it through the appellate process. *Id.*

[5] An average civil appeal in 2005 took 256 days after briefing to issue a decision without oral argument. Colorado Court of Appeals Survey, at ¶ 18, available at <http://www.willamette.edu/wucl/pdf/articles/appellate_courts/colorado.pdf>. Pursuant to the Colorado Appellate Rules, the transmission of record and briefing schedule (without extensions) can take 189 days. *See* C.A.R. 11(a); 31(a).

Moreover, the Hostetlers are not the only Delta County residents who would be substantially and irreparably impacted if a stay pending appeal is not granted. Tom Kay, a local organic corn farmer who contracts with the Hostetlers, would lose in excess of $100,000 in a year if the Hostetlers are required to stop operations while they appeal the district court's final judgment. *Affidavit of Tom Kay,* attached as Exhibit E, at ¶¶ 1, 6, 7. That loss would devastate Tom Kay and his organic farming operation, of which two-thirds of the income stems from his organic corn sales to the Hostetlers. *Id.* at ¶ 10. Additionally, that loss to Tom Kay and North Fork Organics would cause him to terminate his working relationship with the numerous local residents he contracts with for the services they provide to his local agricultural operation. *Id.*

Granting a Stay Will Allow for Continued Positive Environmental Impacts and Continue to Provide for the Protection of the Public's Health

On the other side of the issue, if a stay of execution pending appeal is granted, the Hostetlers will be able to continue their efforts working with professionals to ensure there are no adverse health or other environmental impacts on their surrounding area. *Hostetler*, at ¶ 15. This is not Edwin's first time addressing the potential impacts of agriculture on its surrounding environment. *Id.* at ¶ 16. His previous efforts concerning environmental stewardship have been recognized by the U.S. Forest Service. *Id.* If the Hostetlers are able to continue

operating their chicken barn, they can continue their environmental stewardship. *Id.* at ¶ 15.

Moreover, during the appeal, if the Board determines the Hostetlers' efforts protecting the health and environment do not continue to be successful, but their operations actually immediate jeopardize the public health, the Board may summarily suspend the Hostetlers' development agreement to protect the public. *See supra*, at 19–20.

Weighing of Impacts Necessitates a Stay Be Granted Pending Appeal

Considering the equities, this Court should approve the Hostetlers' supersedeas bond and grant a stay of the district court's final judgment. The Hostetlers have painstakingly complied in good faith with the development regulations, accepting numerous conditions that go above and beyond similar operations. *See Hargreaves v. Skrbina*, 662 P.2d 1078, 1081 (Colo. 1983) (recognizing equity favors those who attempt to comply in good faith with development regulations); *Budd-Falen*, at ¶ 6 (referring to R0599). Additionally, Edwin and Eileen Hostetler have been allowed to continue their operation for eighteen months; shutting it down at this point before they have had a chance to appeal would not be equitable. *See Zoning Bd. of Adjustment v. DeVilbiss*, 729 P.2d 353, 358–359 (Colo. 1986) (recognizing inequity of requiring development be

completely removed or radically altered when development took considerable expense and time to work through governmental permit process).

In addition to the equities, weighing the potential impacts favors the grant of a stay pending appeal. Because the Hostetlers and others in Delta County will be significantly prejudiced if a stay is not granted, whereas there are no proven or dire health effects to the Opposition or others if the current operations continue pending appeal, this Court should approve the Hostetlers' supersedeas bond and grant a stay of the district court's final judgment so that the entire judicial review process may run its course before the parties are required to comply with the district court's final judgment.

Four-Factor *Romero* Test

Applicability

In denying the Hostetlers' request for a stay, the district court ruled the Hostetlers failed to meet three of the four factors espoused in *Romero*, — P.3d —, 2011 WL 1797240. *Stay Order*, at 5. However, in *Romero*, this Court was considering "the standards employed to determine whether a stay should be issued from *an order denying a preliminary injunction*" when it applied the four-factor test. — P.3d at —, 2011 WL 1797240, at *2 (emphasis added). The Hostetlers'

motion does not concern an order denying a preliminary injunction, instead it concerns the result of a Rule 106(a)(4) judicial review ruling on the merits.

Moreover, federal case law concerning this issue is not helpful, as federal law does not permit supersedeas bonds for non-money judgments, whereas Colorado law does. *Compare* C.R.C.P. 121 § 1-23(3)(a) ("The amount of a supersedeas bond to stay execution of a non-money judgment shall be determined by the court."), *with Hebert v. Exxon Corp.*, 953 F.2d 936, 938 (6th Cir. 1992) (explaining that federal courts have restricted F.R.C.P 62(d)'s automatic stay provision by posting supersedeas bond to final judgments for money). Colorado is not alone in allowing supersedeas bonds to affect a stay in non-money judgments. *See, e.g.*, *J.S.A. v. M.H.*, 893 N.E.2d 682, 695 (Ill. App. 2008) (recognizing stay of non-money judgments allowed by 210 Ill. 2d R. 305(b) with potential requirement for bond); *Sena v. Dist. Court*, 240 P.2d 202, 203 (N.M. 1925) ("The only duty of the court and its only discretion consists in fixing the amount of bond to be entered in case of a nonmoney judgment.").

Because *Romero* did not concern the stay of a Rule 106(a)(4) judicial review ruling and the federal case law is unhelpful, this Court should weigh the impacts of a stay, as discussed above, and grant the Hostetlers a stay pending appeal.

Application

However, even if this Court were to apply the four factors discussed in *Romero*, that application still results in a stay pending appeal being warranted under the circumstances. In *Romero*, this Court adopted the Sixth Circuit's formulation of that test, which explains:

> The probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury [the movant] will suffer absent the stay. Simply stated, more of one excuses less of the other. This relationship, however, is not without its limits; the movant is always required to demonstrate more than the mere 'possibility' of success on the merits.

— P.3d at —, 2011 WL 1797240, at *3–*4 (*quoting Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153–154 (6th Cir. 1991)).

First, the Hostetlers are likely to succeed on the merits. On appeal, the Hostelters do not have to prove the district court abused its discretion to reach its ruling on the merits. Instead, this Court will sit in the same position as the district court and review the Board's decision de novo. *Thomas v. Colo. Dept. of Corrs.*, 117 P.3d 7, 8–9 (Colo. App. 2004). Accordingly, on appeal, the presumption that the Board's decision is proper will be returned. *See Fedder v. McCurdy*, 768 P.2d 711, 713 (Colo. App. 1988). Using de novo review, coupled with the presumption the Board acted properly and evidence in more than 1,000 pages of record that the operations with its conditions are compatible with the neighborhood, provide

ample evidence of the Hostetlers' likely success on the merits. *See Budd-Falen*, at ¶¶ 4–8 (referring to R0114–R0140, R0246, R0250, R0251, R0262, R0265, R0269–R0335, R0597–R0602, R0738–R0740, R0842–R0847, R0849, R0895, and R0920 as examples of evidence in the record).

Moreover, the district court's ruling on compatibility contradicts its ruling that ample evidence in the record support the sufficiency of the conditions to address the concerns raised by the Opponents (one of the many of which was that the air quality would harm the neighbors). *See Order on Rule 106 Claim*, at ¶ 10. It is illogical how the district court could recognize competent evidence was presented on remand that proves the conditions are sufficient to address the concerns, then turn around and say the Hostetlers failed to present evidence refuting the Opponents' claim concerning the air quality. There, the district court impermissibly weighed the evidence in the record, giving more weight to the Opponents' "medical evidence" than to the substantial evidence presented by the Hostetlers proving compatibility with the neighborhood, in general, and lack of public health effects, in particular. *See Bd. of Cnty. Comm'rs v. O'Dell*, 920 P.2d 48, 51 (Colo. 1996); *Budd-Falen*, at ¶¶ 4–8. Instead, applying the presumption in favor of the Board and recognizing the ample evidence before the Board, the logical conclusion is that the Hostetlers are likely to succeed on the merits.

Second, the Hostetlers would be irreparably injured absent a stay, because not only will a denial of a stay cause substantial financial loss to the Hostetlers, they would lose the future opportunity to operate their chicken barn by way of the immense losses and potentially unpaid liabilities created by a requirement to shut down operations before having an opportunity to appeal. *Hostetler*, at ¶¶ 10–14.

Third, the other parties to this case would not be substantially injured if a stay were granted. While the Opponents claim some of them have health issues caused by the Hostetlers' operations over the last eighteen months, Dr. Fisher has explained their claim is not medically sound. *Fisher, M.D.*, at ¶ 6. Instead, nothing in the record proves the Opponents have legitimate diagnoses caused by the Hostetlers' chicken barn. *Id.*

On the contrary, the Opponents' claims to medical issues are only "supported" by two doctors who plagiarized their "explanation" of potential effects from an inapplicable document and failed to follow the accepted medical methodology to determine proper diagnosis, medical correlation, and causation, and another doctor who similarly failed to follow the accepted medical methodology and additionally diagnosed and analyzed her own issues. *Id.*at ¶¶ 17–19. Additionally, nothing in the record would suggest a substantial increase even to the Opponents' claimed injury over a handful more months while the appeal is

resolved. Instead, the Hostetlers' compliance with the conditions the district court deemed sufficient to address the Opponents' concerns, coupled with the fact that no dire health crises exists and no proof exists that the chicken barn has caused any health issues, provides sufficient evidence the Opponents will not be substantially injured pending appeal. Moreover, if the operations were to create imminent health concerns during the pendency of the appeal, the Board has authority under the development agreement to summarily suspend the development agreement. *See supra*, at 18–19. Therefore, the Opponents will not be substantially injured if a stay were granted.

Fourth, the public interest supports a stay pending appeal, as the democratically elected Board approved the development agreements. On appeal, their decision is presumed proper, and a stay allows the Hostetlers to defend their development agreement throughout the whole judicial process. Moreover, the public interest continues to be protected from immediate health risks pursuant to the development agreement and the Board's ability to summarily suspend if health issues actually become immediate. *See id.* While the Opponents argue their actions protect the public, the record suggests otherwise. *E.g.*, *Budd-Falen*, at ¶ 8 (referring to R0269–R0335, a petition signed by more than 500 Delta County residents agreeing that the Hostetlers' "operations are compatible with the existing

agricultural and rural residential uses and character of the surrounding areas"); *id.* (referring to R0265, a statement by a neighbor, "While a group of neighbors has been very vocal in their opposition to Western Slope Layers, they do not speak for all neighbors of the facility.").

Accordingly, if this Court were to apply the *Romero* four factors with its formulation of a sliding scale, the result is that the Hostetlers should be granted a stay pending appeal, as only minimal potential injury could come to the Opponents, while substantial damages would come to the Hostetlers, all for the several months of appellate process where the Board's decision is likely to be affirmed by this Court based on the substantial record and the presumption of proper decision-making by the Board.

Conclusion

The Hostetlers care about their family, Delta County, their neighbors, and the environment and would not run an operation that would harm any of them. *Hostetler*, at ¶ 17. In fact, the Hostelters specifically chose this agricultural operation based on its low impact, its benefits to the local community, and its health benefits to all involved. *Id.* By granting a stay pending appeal, this Court would be allowing the Hostetlers to preserve the status quo created by the democratically elected Board, while the parties work through the judicial process.

By denying a stay pending appeal, the Hostetlers would be subject to substantial and irreparable harm before having their opportunity to make their case on the merits to this Court. Therefore, the Hostetlers respectfully request this Court grant a stay pending appeal and approval of their supersedeas bond pursuant to C.A.R. 8(a).

Respectfully submitted this 17th day of October, 2013.

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CERTIFICATE OF SERVICE

I certify that on this 17th day of October, 2013, a copy of this *Hostetlers' Motion for Stay Pending Appeal and Approval of Their Supersedeas Bond* was served on all other parties to the action in the trial court via email. A copy of the motion and its exhibits was also sent via U.S. mail. Service was made to:

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