

District Court, Delta County, State of Colorado 501 Palmer Street, Room 338 Delta, CO 81416 Telephone: (970) 874-6280	<p style="text-align: right; color: blue;">DATE FILED: September 27, 2013</p> <p style="text-align: center;">▲ COURT USE ONLY ▲</p>
TRAVIS JARDON, et al, Plaintiff(s), v. DELTA COUNTY BOARD OF COUNTY COMMISSIONERS, et al, Defendant(s).	Case No.: 12CV314 Div.: 2
ORDER ON DEFENDANTS' MOTIONS FOR STAY PENDING APPEAL AND STAY UPON APPEAL	

This is an action brought by Plaintiffs, property owners near the two 15,000 hen-egg laying operations in Delta County proposed by Defendants Hostetlers challenging Defendant Board of County Commissioner's approval of the operations. This matter was previously litigated (11-CV-282) with the Court remanding the matter back to the Board of County Commissioners for further findings. Following those proceedings, and approval with an additional condition, the second lawsuit was initiated. During the pendency of the first Rule 106 litigation, one of the hen operations, the one located on Powell Mesa, commenced operating.

On September 5, 2013 the Court concluded that as to one item, health concerns of individuals in the vicinity of the hen operation, there was no competent evidence in the record to support the approval by the County based on the uncontroverted medical evidence of health issues in the neighborhood since commencement of the operations, thereby constituting incompatibility with the neighborhood. The Court ordered the Defendant Board of County Commissioners to issue a cease and desist order to the Applicants. The County did issue such an order the day following the ruling. The requested relief is to stay those actions pending appeal.

Plaintiffs had identified 19 neighbors who had expressed health complaints, provided medical records of Dr. Raymond and Mr. Cool, and had the opinions of three medical doctors and one veterinarian concerning the increase in pulmonary related medical issues in the neighborhood since the commencement of operations by Applicants which they attributed to the hen operation. The record reflected that the County's investigation of the complaints filed with the Department of Health were to speak with the Applicants and on occasions travel to the location of the operations. No interviews of the complainants or other investigation of the complaints were undertaken. See September 5, 2013 Order Conclusions ¶¶17-19 pp. 9-10 and ¶ 21 p.12.

Defendant Delta County has filed a motion to stay pursuant to Colorado Rules of Civil Procedure Rule 62 (b) and Defendants Hostetlers have filed motions to stay, both pursuant to Rule 62 (b) and (d). The matter has been fully briefed and oral argument occurred on September 26, 2013.

Defendant Delta County Board of County Commissioners argues that applying the four factors set forth in *Romero v. City of Fountain*, 307 P. 3d 120 (Colo. App. 2011), a stay should be granted. They assert that they are likely to succeed on the merits on appeal, as the Court only found one narrow item that warranted its ruling and that they will prevail on that on the *de novo* review on appeal, that they and the Applicants and the public generally will be irreparably injured absent a stay and that the public interest of encouraging agricultural development supports granting of the stay. Pursuant to subsection (e) of the same Rule, they argue that no bond should be imposed as to the County.

Defendants Hostetlers have posted a \$250.00 bond as either a cost bond or as the appropriate amount for a supersedeas bond. They concur with the arguments of the County, explain the substantial irreparable harm to the Applicants should they be forced to shut down the hen operation and probability that they will not be able to afford to reinstitute the business

should they thereafter prevail on appeal. Further they argue that the four factor analysis does not apply in this matter.

Plaintiffs argue that the factors set forth in *Romero, supra*, weigh in their favor, particularly as to likelihood of success, as well as injury based on the continued health risks and other injuries which will inure to the Plaintiffs and other neighbors if a stay is granted and that the public interest in public health weighs in their favor. Further, they note that in denying a preliminary injunction early in the proceedings, the Court made clear to the Applicants that they proceeded to complete construction and commence operations prior to resolution of this dispute at their own risk.

At oral argument, the Court posed questions concerning the information in paragraph 7 of the affidavit submitted by Defendant Edwin Hostetler attached to the briefing, that an air monitoring system is now in place, consistent with the County's additional provision included in the 2013 County approval following the remand.

The Court previously found that there is no record support to contradict the health concerns identified by Plaintiffs in the record. The argument by Defendants is that Plaintiffs were required to prove correlation between the health condition and the hen-egg operations and that they failed to do so. As noted previously, three doctors in the area (Abuid, Knutson and Merlin) and a veterinarian had opined that there was a correlation between commencement of the operations and the illnesses. A visual example of that is the record on Page 933, an aerial photograph depicting the location of the hen operation and noting neighboring owners with medical concerns marked in red on that map. Further, the record reflected a total of 37 complaints submitted to the Department of Health after operations commenced. The Court is not persuaded that Defendants can stand on the declaration Plaintiffs did not prove causation rather than presenting some competent evidence that there were not health risks associated with the proposed development.

The previous Order noted that the additional condition imposed by the Board in 2013 failed to set any meaningful criteria on the air quality monitoring or definition of any minimal requirements from the medical expert. Paragraph 7 of the Hostetler Affidavit sheds no additional light on those subjects. Further, there has been no indication as to what enforcement actions can or would be taken by the Department of Health based on the air monitoring data or further health complaints.

Romero, supra, was a case involving an effort to obtain an injunction to prevent release of criminal justice records. While this was a Rule 106 matter, the Court's final Order was to order the Defendant Board to issue a cease and desist order. The Court concludes that the four factor analysis is equally applicable to this situation.

Romero, supra and the case it relies on, *Michigan Coalition of Radioactive Material Users Inc. v. Griepentrog*, 945 F. 2d 150 (6th Cir. 1991), suggests that the four factors are interrelated and may be weighted on an inverse relationship. The Court concludes that Defendants do not have a strong likelihood to succeed on the merits for the reasons articulated above and set forth in the original Order. The Court earlier referenced paragraph 21 of the order, which in part states, "The only medical evidence in the record is from three medical doctors and one veterinarian . . . that the health of neighbors is and will continue to be adversely impacted."

The Court does recognize that Defendants Hostetlers in particular will be irreparably injured absent a stay. To the extent the County makes a similar argument, this Order has no application to existing agricultural uses, and further that other pending applications requiring approval of the Board in a quasi-judicial setting would only be analogous to this situation where the development was operating prior to final approval and there was medical testimony that health impacts had occurred after commencement of the operation.

The Court, however, finds that the neighboring property owners will continue to be injured, more particularly, that their health will continue to be put at risk were a stay to be

granted. Finally, the Court concludes that the public interest is best served by protection of public health rather than permitting continued operation of this hen-egg operation at the risk of public health.

Defendants have sustained one of the four factors, injury to the Applicants, however fail on likelihood of success, the issue of harm to others should the stay be granted and public interest. Rule 62 (b) is a discretionary stay pending appeal. For the reasons discussed, those Motions are denied. Similarly, Rule 62 (d) when taken together with the language from Rule 121 Section 1-23 3. states in relevant part:

Nothing in this Rule is intended to limit the court's discretion to deny a stay with respect to non-monetary judgments.

Accordingly, that motion is also denied for the same reasons. The cost bond of \$250.00 is approved for purposes of the appeal. The Court will stay the enforcement of this ruling for an additional 21 days to enable Defendants to seek relief from the Court of Appeals.

Dated this, the 27th day of September, 2013.

BY THE COURT:



J. Steven Patrick
District Judge

cc: Knight, Tolin, Rhodes