COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, Colorado 80203 Phone: 720-325-5150 7th Judicial District Court The Honorable J. Steven Patrick Case No. 2012 CV 314 **Defendant-Appellants: EDWIN HOSTETLER, EILEEN HOSTETLER, GREG HOSTETLER, CARMEN HOSTETLER, ANNA HOSTETLER, and ROLAND HOSTETLER** v. **Plaintiffs-Appellees: TRAVIS JARDON, CORRINE HOLDER, SUSAN RAYMOND, MARK COOL, AND ANDREA ROBINSONG** and **Defendant-Appellees: BOARD OF COUNTY COMMISSIONERS OF DELTA COUNTY.**	COURT USE ONLY
Attorneys for Plaintiffs-Appellees: Earl G. Rhodes, No. 6723 P. O. Box 4387, Grand Junction, Colorado 81502 rhodesgjlaw@gmail.com Ph. 970-250-2256	Court of Appeals Case Number: 13CA1806
PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION TO HOSTETLERS' MOTION FOR STAY	

Plaintiffs-Appellees, by and through their attorney, Earl G. Rhodes, hereby file their Response in Opposition to the Hostetlers' Motion for Stay as follows:

SUMMARY

An order granting or denying a stay lies within the Trial Court's discretion. The Court of Appeals will not reverse the Trial Court acting within its discretion unless there has been a clear abuse of discretion. *Bonfils Foundation v. Denver Post Employees Stock Trust*, 674 P. 2d 997 (Colo. App. 1983). Hostetlers cannot prevail on this standard because their argument rests on evidence never submitted to the Trial Court. Further this is a Rule 106(a)(4) proceeding so the Affidavits of Edwin Hostetler, Dr. Fisher and Thomas Kay must be stricken and not considered because they were not part of the Record in the proceeding in front of Delta County District Court. *Abromeit v. Denver Career Service Board*, 140 P. 3d 44 (Colo. App. 2005).

The Trial Court carefully considered the Hostetlers' arguments in the Motion for Stay and correctly applied the four-part test in *Romero v. City of Fountain*, 2011 WL 1792724, No. 11CA0690 (Colo. App. 2011). Hostetlers cannot and have not shown an abuse of discretion by the Trial Court.

For the above reasons, this Court should deny the Hostetlers' request for a stay of proceedings.

INTRODUCTION

Plaintiffs-Appellees are real property owners who own property adjacent to or in the area of the Hostetlers' properties, which properties are the subject of land use applications before Delta County (the "County"). There are two land use applications: one for Powell Mesa and one for Redlands Mesa. The Edwin Hostetler property on Powell Mesa went into operation in April, 2012. It is a 15,000 hen-laying operation in a 400' x 50' building, where the chickens have access to a 335' x 90 area outside of the building. Trial Court Order, July 5, 2012, pg. 2. Attachments referenced in this Response are on a disc mailed to the Court on October 23, 2013.

The County does not have zoning but, as to certain intensive land use activities including confined animal operations, it has adopted the Delta County Regulations for Specific Development ("RSD"). **R0773-0817**. The RSD requires that applications for specific development must be consistent with the County Master Plan, effective October, 1996. **R0759-0772**. Additionally, the RSD requires that the County use the Master Plan "in designing, reviewing, evaluating

and constructing" specific developments. **R0789**, Art. VI, Sec. 1. The RSD states that in approving or denying a land use permit, compatibility of a new development with the existing land uses should be given priority consideration. **R0769**, section IV. B.2. In cases where there is incompatibility between a neighboring, existing use and a proposed land use, the property right of the existing use should be given priority. **R0769**, section 4(B)(2). The Master Plan provides that "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." Master Plan, p. 10, Art. IV.B.

On August 15, 2011, the County had a public hearing on the applications. Trial Court Order of July 5, 2012, p. 2. Notwithstanding the recommendation for denial of the applications by the Leroux Creek Advisory Planning Committee and the Delta County Planning Commission, the Delta County Commissioners approved the applications with conditions. Trial Court Order, p. 2. Plaintiffs filed a Rule 106(a)(4) challenge to this approval in *Jardon v. Delta County*, 2011 CV 282, Delta County, Colorado. The Trial Court, in its Order of July 5, 2012, found that the approval by the County was an abuse of discretion and not supported by competent evidence in the Record. The Trial Court also found that the Master Plan

was regulatory and various requirements of the Master Plan had not been met. Order on Rule 106, July 5, 2012, p. 9. The Trial Court remanded the case back to the County for a second hearing to address the following issues required for issuance of a land use permit:

1. Compatibility of the proposed plan with the character of the surrounding neighborhood;
2. Impact on property values of the surrounding property;
3. Sufficiency of the conditions and the undertakings of the Applicants to address the concerns identified in the record; and
4. Capability and capacity of the County staff to monitor the compliance with the conditions and undertakings.

The County held a new hearing on September 4, 2012, and again approved the land use applications.

Plaintiffs filed a second lawsuit under Rule 106(a)(4) and again challenged the land use approval. *Jardon v. Delta County*, 2012 CV 314, Delta County, Colorado. The Plaintiffs specifically challenged the County's reliance on three documents which were not in the Record in the September 4, 2012 hearing. After briefing in this case, the Trial Court on March 9, 2013, remanded the matter back to the County, requiring a further public hearing based on four documents considered by the County subsequent to the September, 2012 public hearing but prior to the County approval. Trial Court Order dated September 5, 2013, p. 2.

The third public hearing was held on May 1, 2013, in which the Plaintiffs and the Hostetlers addressed the issues raised in the documents relied upon by the County that were not part of the Record. After the public hearing, the County again approved the subject land use applications with conditions.

On September 5, 2013, the Trial Court issued its ruling on Plaintiffs' Rule 106(a)(4) challenge. Although the Trial Court did not agree with all of the arguments presented by the Plaintiffs, it found that there was no evidence in the Record to rebut the evidence presented by the Plaintiffs, that neighbors to the Powell Mesa operations were being made sick from the pollution being discharged by the hen-laying operation. Trial Court Order of September 5, 2013, p. 9. The Trial Court found that the health concerns set forth in the record demonstrated health concerns occurring after the commencement of the Hostetlers' hen-laying operation and directly related to its operations. Id. The Trial Court further found that the County failed to contact any of the complainants and that the Record contained no information to show that the subject health complaints could be attributed to anything other than the operation of the hen-laying operation. Trial Court Order of September 5, 2013, at p. 9-10. Based on this, the Trial Court found that there was no evidence in the Record to rebut the Plaintiffs' proof of their

adverse health effects from the hen-laying operations, and thus the hen-laying operation was incompatible with the neighborhood. Trial Court Order of September 5, 2013, at pg. 12. The Trial Court issued its Cease and Desist Order to shut down the Powell Mesa facility. I The Trial Court's Order became final on September 30, 2013.

Hostetlers filed a motion to amend or alter judgment, which was denied by the Trial Court. The County and the Hostetlers filed Motions for Stay of Proceedings in the Trial Court pending the appeal. Oral argument on these Motions was held on September 26, 2013. Transcript attached. The Trial Court denied these motions on September 27, 2013.

ARGUMENT

1. THIS MATTER IS GOVERNED BY C.A.R. 8

Hostetlers' Motion is governed by C.A.R. 8. Also applicable is C.A.R. 28, which requires in any Court of Appeals action that the Appellant demonstrate where in the Record the argued objection was first presented to the Trial Court.

C.A.R. 8 directs the Appellant to first attempt to obtain the stay of proceedings from the Trial Court. The granting of or denying of a stay of proceedings lies with the discretion of the Trial Court. C.R.C.P. 62, *Romero v. the*

City of Fountain, supra, and Wright and Miller, Federal Practice and Procedure, sec. 29047 (1973). The Court of Appeals will not reverse the Trial Court acting within its discretion unless there has been a clear abuse of discretion. Bonfils Foundation, Denver Post Employees Stock Trust, 674 P. 2d 997 (Colo. App. 1983). See also *Petition of First Interstate Bank of Denver*, 767 P. 2d 792 (Colo. App. 1988); and *In re Marriage of Zebedee*, 778 P. 2d 694 (Colo. App. 1998). The burden is on the Hostetlers to show that there has been an abuse of discretion. *Weaver Construction Co. v. District Court*, 190 Colo. 227, 545 P. 2d 1042 (1976).

2. OBJECTION TO HOSTETLER ATTEMPT TO SUPPLEMENT THE RECORD

Without any legal supporting authority and contrary to clear Colorado Law, Hostetlers are now attempting to supplement the Record in this Rule 106(a)(4) proceeding with the type of evidence which is completely lacking from the Record made at three public hearings. The question before the Trial Court was whether there is competent evidence to support the conclusion of the quasi-judicial body. *See* generally *Board of Commissioners of Routt County v. O'Dell*, 920 P. 2d 48 (Colo. 1996). The Trial Court's decision was to be made solely on the record before the Board. *Lieb v. Trimble*, 183 P. 3d 702 (Colo. App. 2008).

Edwin Hostetler did not testify in the public hearings on either September 4, 2012, or May 1, 2013. The Record contains no information about the health of the Hostetlers' family. Also, there is no reference in the Record to Dr. Fisher. Even though told to do so by its own air monitoring person, the County failed to have its air monitoring test reviewed by an appropriate medical expert. **R0116, R0122**. There is no evidence in the Record where a qualified medical expert reviewed the health complaints of the neighbors. For this reason, the Trial Court ruled in favor of the Plaintiffs because the Record contained no evidence to counter the Plaintiffs' argument that the neighbors on Powell Mesa were getting sick from the pollution coming from the hen-laying operation. Further, as the Trial Court noted, the County did not contact a single neighbor about their health complaints. Nor did Hostetlers make any objections at the administrative hearing as to the admissibility of the evidence which supports the Plaintiffs' claims. Hostetlers failed to make these arguments to the Trial Court because the Affidavit of Dr. Fisher did not exist on the date the Trial Court ruled on Hostetlers' Motion for Stay. Mr. Hostetler's and Mr. Kay's Affidavits were submitted to the Trial Court

in support of the Motion for Stay, but this same information was not put into the Record before the County.

It is impossible to show that the Trial Court abused its discretion as to the information from Dr. Fisher because the Trial Court never saw this information. Since Dr. Fisher's testimony was not in the Record before the County, the Trial Court could not have considered the Affidavit even if it had been timely presented because the Trial Court's determination as to the merits must be confined to evidence in the Record. Having failed to put Dr. Fisher's testimony in the Record and having failed to present it first to the Trial Court, Hostetlers cannot be heard now, for the first time on appeal, to argue that the health complaints are subject to question. The Affidavits of Edwin Hostetler (Exhibit B), Karen Budd-Falen (Exhibit C) to the extent it goes outside the Record, Dr. Fisher (Exhibit D) and Thomas Kay (Exhibit E) should be stricken from these proceedings as outside the Record in this Rule 106(a)(4) action. Plaintiffs will file a separate Motion to Strike these Affidavits from this proceeding.

3. THE TRIAL COURT WAS CORRECT ON THE MERITS

a. **Supersedeas bonds are not required in non-money judgment cases**.

Plaintiffs have obtained a mandatory injunction that the Hostetlers' Powell Mesa hen-laying operation be shut down. Because the relief obtained by the Plaintiffs was non-monetary, Hostetlers were not entitled to a supersedeas bond. C.R.C.P. 62(d) governs the Trial Court issuing a stay upon an appeal. The Rule states that a party may obtain a stay by posting a supersedeas bond. C.R.C.P. 121, sec. 1-23(3)(a) reads: "The amount of a supersedeas bond to stay execution of a non-monetary judgment shall be determined by the court. Nothing in this Rule is intended to limit the Trial Court's discretion to deny a stay with respect to non-monetary judgments." Rule 121, sec. 23(3)(a) is in accord with federal case law as to issuance of stays in non-monetary judgments. *See, e.g., Hebert v. Exxon Corporation*, 953 F. 2d 936 (5th Cir. 1992) where the court said: "Courts have restricted the application of (federal rule) Rule 62(d)'s automatic stay to judgments for money because a bond may not adequately compensate a non-appealing party for loss incurred as a result of the stay of a non-money judgment." Id., at 938. Thus, the Trial Court was authorized to exercise its discretion as to issuance of the stay and was not required to issue the same.

Here, a supersedeas bond is of no value to the non-appealing party. Because the judgment was non-monetary, Plaintiffs would not receive any money from the

bond once the appeal is denied. There is no nexus between the bond amount and the harm which the hen-laying operation is causing the neighbors. The only relief the Plaintiffs have sought or have obtained is to shut down the hen-laying operation and prevent construction of the same-type facility on Redlands Mesa. Since Hostetlers are not required to pay any money to the Plaintiffs, no amount of bond will guarantee their conduct. Instead of being a supersedeas bond, at best it is a forced savings account, where the money will be returned to Hostetlers when the appeal is resolved. Under these circumstances, no amount of money will compensate the neighbors for their continued injuries, which will get worse from continued exposure to pollution for the length of the appeal. Plaintiffs' best and only protection is to shut down the harmful hen-laying operation.

b. *Romero v. City of Fountain* correctly sets forth the four tests that the Trial Court should consider in granting or denying a stay pending appeal. These same criteria guide the Court of Appeals as to whether the Trial Court committed a clear abuse of discretion in denying the Hostetlers' Motion for Stay of Proceedings.

The Trial Court carefully considered the four factors set forth in *Romero v. City of Fountain* before denying Hostetlers' request for a stay pending appeal. It considered the briefs of the parties, held oral argument on September 26, 2013, and issued a detailed Order on September 27, 2013. There is no abuse of discretion.

The *Romero* factors are: 1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; 2) whether the applicant will be irreparably injured absent a stay; 3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and 4) whether the public interest supports the issuance of a stay order.

The Trial Court correctly found that there was no evidence in the record to counter the evidence of the neighbors that they are sick because of the release of pollutants from the hen-laying operation. Further, the financial loss to the Hostetlers from shutting down is less than the exacerbation of health issues to the twenty two neighbors who are presently suffering injuries from the air pollution of the hen-laying operation. The neighbors are promoting the public interest by seeking enforcement of the Delta County RSD and the Delta County Master Plan, which promotes public health, safety, and welfare. Allowing the hen-laying operation to continue to make its neighbors sicker, in violation of the County RSD, is contrary to the public interest.

Hargreaves v. Skrbina, 662 P. 2d 1078 (Colo. 1983) holds that equities should be considered in enforcing government land use regulations. The Trial Court in this case did this. The Trial Court noted that in its Order of March 22,

2012, before the facility was built, that the Hostetlers proceeded at their own risk in constructing and operating the hen-laying facility. The neighbors have always been clear that the hen-laying facility posed a health risk to the neighbors and they have opposed it on this basis through the planning commissions, county hearings, and in court, all before Hostetlers built the hen-laying facility.

Defendants will not succeed on the merits of the case.

The hen-laying operation is in essence a 400-foot long horizontal smokestack which is spewing forth toxins, bacteria, molds, fungus, dander, and other small particulates on its downwind neighbors. All parties agree that the hen-laying operation generates a "considerable plume of particulates and biological components." **R0122**. Mr. Nordstrom, the County Health Officer, in his August 8, 2012 memo, notes that "dust was observed billowing from the henhouse facility." **R0818**. The Raymond videos prove this. See CD #1, CD #2, and CD #4. The hen-laying operation has a fan system which must frequently operate in its powerful "tunnel ventilation mode." The air pollution problems for the neighbors are significantly greater when this occurs. **R0119-0120, R0979, R0991-0992, R0999-1000**. The main problem with the Powell Mesa facility is that it is too

close to its neighbors. It is 817 feet from the Cool house and less than 1000 feet from Dr. Raymond's property and veterinary clinic.

The Plateau Report, commissioned by the County, showed that large amounts of harmful particulate matter were present in its samples. **R0992-0993**, **R1000-1002, R1010, and R120-122**. These included ammonia, a tremendous amount of fungus spores and mold, dander, and many bacteria, of which one was a gram negative fermenting rod in the Yersinia species. **R1000-1002, R1072-1074**. Certain types of Yersinia are very harmful to people, and one type is even a member of the Plague family. **R1000-1002**. The largest portion of this pollution consists of the smallest particulate matter, which gets inhaled deeply into the lungs. **R1014-1015; R1010; and R0992**.

Immediately downwind of the Hostetlers' facility, Dr. Raymond, after the facility began operation, observed that her hay was covered by molds and fungi that she had not seen before. **R0979, R0981-987**. Dr. Raymond submitted into the record a photograph of jars of flies, full fly strips, and horses covered with flies, which flies are now invading her property. She also submitted a jar of down feathers that were blown onto her property from the hen-laying operation, and which came from the interior of her house. **R0916, R0927-932, R0507, R0541,**

R0542, R0732, and **R0733**. Mr. Lakin, for the County, said downstream air tests showed feathers. **R0121**. Dr. Raymond's employees and clients are getting sick. **R0496, R0513, R0517, R0543**. Animals on her property are having severe respiratory issues from the particulates sent out by the hen-laying operation. **R0502,R0504, R0505, R0440**. Her neighbor, Mr. Mark Cool, also has feathers and white dust on his property from the hen-laying operation. **R0366, R0499-0500**. Dr. Raymond's testimony is supported by and consistent with expert opinions in the record. **R0988-0994, R0998-1001, R1004-1007, R1008-1010, R 1014-1017**. Plaintiffs submitted both a health map, which showed the location of the health complaints, and a wind graph, which showed the direction of the prevailing wind, which also was consistent with the location of the health complaints. **R0933, R0624**.

Plaintiffs presented substantial evidence that the neighbors are sick from the operation of the hen-laying facility. The Trial Court found in its Order of September 5, 2013 that the Plaintiffs made a substantial showing of significant health injuries to the neighbors because of the Hostetlers' hen-laying operation. Trial Court Order at pp. 4, 5, 9 and 11. The Record contains substantial evidence of the cause and effect relationship of the operation of the hen-laying facility and

the neighbors' illnesses. These include the health complaints of the neighbors, **R495 to 543, R0836-0837**; notes of Dr. Abuid and Dr. Knutson, **R337-342**; Dr. Lazear's reports, **R404-407,687-690**; **R1008-1010**; letter of Dr. H. Merlin, **R516**; and medical records of neighbors, Raymond and Cool, **R1063-1071**.

The Powell Mesa hen-laying operation went into operation in April, 2012. At the public hearing on September 4, 2012, the neighbors presented evidence that their health was being substantially impacted by the hen-laying operation. At the May 1, 2013 public hearing, the neighbors put into the Record technical reports stating that even though the methodology of the Plateau, Inc. air quality testing was defective, the evidence in the Plateau report showed that the continued operation of the hen-laying operation was a significant health risk to the neighbors. See Air Resources Report, **R0988-0997**; J. Pridgen, **R0998-1007**, Dr. F. Lazear, **R1008-1010**, K. Martin, **R1011-1023**, and Dr. Thu, **R1021-1023**, and **R1060-1062**. Based on the above evidence, the Trial Court found "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." Trial Court Order September 27, 2013, page 4.

Knowing that reliance on Dr. Fisher's report is misplaced, Hostetlers, at the top of page 26 of their motion, list citations to the Record which Hostetlers allege refute the above Trial Court findings. A review of these citations does not support the Hostetlers' contention. All of the information relied upon by Hostetlers was prepared before the September 4, 2012 hearing, when the neighbors first presented their evidence of health impacts from the hen-laying operation; thus, the Hostetlers' citations do not refute the evidence that the neighbors presented on September 4, 2012. Hostetlers presented no evidence to rebut the Plaintiffs' health evidence at the May 1, 2013 hearing when the Plaintiffs' technical reports were made part of the Record before the County. Almost all of the Hostetlers' citations on page 26 of their Motion for Stay filed in this Court do not relate to health issues; to the limited extent that they do, the comments are not made by a nearby neighbor to the Powell Mesa operation and certainly are not by a qualified medical expert. Citations **R849, and 895**, submitted by Hostetler, are opinions by Plaintiffs' experts and do not support the Hostetlers' position. **R920**, also submitted by Hostetler, is a photograph taken by Dr. Raymond which shows the cloud of pollution being discharged from the hen house. None of Hostetlers' citations are

competent evidence to rebut the detailed medical evidence the neighbors presented that they are being made sick from the operation of the hen-laying facility.

Harm to the Plaintiffs

The third factor set forth in *Romero, supra,* is whether the issuance of the stay will substantially injure the Plaintiffs, until such time as the appeal is decided. Plaintiffs proved that the neighbors were suffering actual harm from the operation of the hen-laying facility. Plaintiffs prevailed in the Trial Court because Defendants made no showing that any of this information was incorrect. Trial Court Order of September 5, 2013 at page 12. After considering both the harm to the Hostetlers and harm to the neighbors, the Court ruled that the potential for greater injury to the neighbors outweighed the financial loss to the Hostetlers. Court Order of September 27, 2013 at pp. 4 and 5.

The neighbors have endured enough exposure to the harmful effects of the hen-laying operation. The County heard these health complaints in the public hearing on September 4, 2012, but instead of shutting down the facility, approved again the land use applications. The neighbors have already suffered 18 months with the polluting facility in operation, and now Hostetlers want this health risk to

continue for the duration of their this appeal. Given the illegality of the land use permit, this should not occur.

The public interest favors the Plaintiffs

The fourth factor considered by the Trial Court was whether the public interest was promoted by granting a stay. The Supreme Court in *Hargreaves v. Skrbina, supra,* asserts that there is a vital element of respect for and compliance with government regulations. The Trial Court found that allowing the chicken barns to operate is contrary to the regulations of Delta County and that the Powell Mesa barn is presently injuring the health of its neighbors. To continue with this operation is exactly contrary to the public interest in this matter. The neighbors have acted as private attorneys-general in this matter and only they have applied the provisions of the Delta County Master Plan and the RSD to the facts of this case. The County has done nothing to promote the public interest in this matter. Approval of these land use applications is part of a political position of the County that agricultural business interests must be promoted at all costs. According to the County, neighbor health complaints will not be allowed to trump economic activity. *See* argument of the Delta County Attorney at pages 4-7 in the Transcript of September 26, 2013, as to the County's motion for stay filed in the Trial Court.

The public interest strongly favors the promotion of the public health, safety, and welfare. A citizen vindication of the public rights should not be denied because of the Hostetlers' knowing, defiant decision to proceed with construction and population of the hen-laying facility when they were on notice that their land use approval could be defective. *Zoning Board of Adj. of Garfield County v. DeVilbiss*, 729 P. 2d 353 (Colo. 1988) does not require a different result. Here, the neighbors sought a preliminary injunction to stop the construction of the facility and have consistently opposed it. It cannot be argued that the Plaintiffs have waived their rights to obtain a cease and desist order in this case.

CONCLUSION

By denying the request for stay below, the Trial Court correctly applied the *Romero* criteria and did not abuse its discretion. Accordingly, the Motion for Stay filed in this Court must likewise be denied**.**

Respectfully submitted this 23rd day of October.

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Earl G. Rhodes, #6723
Attorney for Plaintiffs-Appellees
Original signature on file

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION TO HOSTETLERS' MOTION FOR STAY** was served this 23rd day of October, 2013, via the Integrated Colorado Courts E-Filing System to the following:

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