STATE OF NEW MEXICO
EIGHTH JUDICIAL DISTRICT COURT

CHAMBERS OF
JEFF FOSTER McELROY
CHIEF DISTRICT COURT JUDGE
DIVISION III

105 ALBRIGHT ST. SUITE N
TAOS, NEW MEXICO 87571
PHONE: (575) 751-8624
FAX: (575) 751-3353

February 9, 2015

Christopher L. Graeser
Matthew McQueen
Post Office Box 220
Santa Fe, New Mexico 875704-0220

Floyd W. Lopez
Town of Taos Attorney
400 Camino de la Placita
Taos, New Mexico 87571

Robert J. Malone
Taos County Attorney
105 Albright Street, Suite G
Taos, New Mexico 87571

RE: *John T. Nichols, et al. v. Town of Taos and the Board of County Commissioner of Taos County,*
D-820-CV-2014-325

Dear Counselors:

The Plaintiffs have brought a Complaint for Declaratory Judgment, Writ of Mandamus and Injunction against the Defendants, the Town and County of Taos, seeking to force the Town of Taos to submit the runway expansion project for review under the County's Land Use Regulations (Counts One through Four). They also seek an injunction prohibiting the County from approving the runway expansion project application unless the affected area around the airport is properly planned and zoned (Count Five). The Plaintiffs are all residents of Taos County situated in some way to be adversely impacted, according to their complaint, by the runway expansion project.

The airport is owned by the Town of Taos and is situated in the County. Since the filing of this case on September 8, 2014 the Town of Taos has submitted an application to the County under the procedures of Article 4.1 of the County's Land Use Regulations for an Administrative permit. The County has since approved that permit and the approval has been appealed to the County's Zoning Commission by the Plaintiffs (and presumably others). At a scheduling conference before the Court the Plaintiffs conceded that Counts One through Four are moot, since the Town has applied for the permit and the County has acted on the application under the County's Land Use Regulations. This leaves only Count Five which asks this Court to enjoin the

County's consideration of the application until the County has properly planned and zoned the area around the airport taking into consideration the impact of the airport on the surrounding land.

Currently before the Court is the Plaintiffs' Motion for a Preliminary Injunction seeking immediate relief while the permanent injunction is pending. The parties agree that to obtain a preliminary injunction the Plaintiffs' must show that "(1) [they] will suffer irreparable injury unless the injunction is granted, (2) that the threatened injury outweighs any damage the injunction might cause, (3) issuance of the injunction will not be adverse to the public's interest and (4) there is substantial likelihood [they] will prevail on the merits." *LaBalbo v. Hymes*, 1993-NMCA-010, paragraph 11. A preliminary injunction is an extraordinary remedy; the right to relief must be clear and unequivocal. *SCFC ILC, Inc. v. Visa USA, Inc.*, 936 F.2d 1096, 1098 (10th Cir. 1991).

The first three factors are problematic in this case – the outcome depending on where one stands on the value of the project and the consequences of the impact on the community once the expanded runway is complete. The evidence before the Court conflicts with respect to the impact of the new runway and the anticipated use of the new runway. The greatest impact is on the Plaintiff whose house is in very close proximity to the new runway. The impact on the other Plaintiffs is more tangential and the Court heard little evidence as to the severity of impact on those other Plaintiffs.

The Plaintiffs relied almost exclusively on drawings from Armstrong Consultants (Plaintiff's Exhibit 14B). The Defendants presented testimony (from those who prepared the documents as part of Armstrong Consultants) that the impacts diagramed on that exhibit were prepared for a preliminary zoning project when the Town of Taos was considering annexing the airport property, it was preliminary only and that it did not reflect actual impacts. More reliable, it appears to the Court, was the results of the Federal Final Environmental Impact Statement which, according to argument and testimony, found the impact of the runway's expansion to be in the acceptable range on all existing uses, including houses in the area.

Because the Court cannot determine the level of irreparable injury to the Plaintiffs and what adverse impact there would be on the public if the runway expansion was delayed, it is hard to determine if the irreparable injury would outweigh the adverse impact to the public. The first three of the four factors are inconclusive. This uncertainty itself could lead the Court to find against the Plaintiffs since it is their burden to demonstrate, clearly and unequivocally, that the irreparable injury outweighs the adverse impact to the public.

However, it is the final factor – substantial likelihood that the Plaintiffs will prevail on the merits – that is at the heart of the Court's ruling that the Plaintiffs' Motion for a Preliminary Injunction should be denied. There are several reasons why the Plaintiffs do not have a substantial likelihood of prevailing on the merits.

First, and most importantly, the Plaintiffs have not exhausted their administrative remedies. The application for the permit is currently under consideration by the County. The Acting Planning Director, after consideration of the application and public input, has granted the permit. There are two administrative levels of review – to the County's Zoning Commission and the County Commissioners. Only after a record has been established in the administrative process should this matter come before the Court.

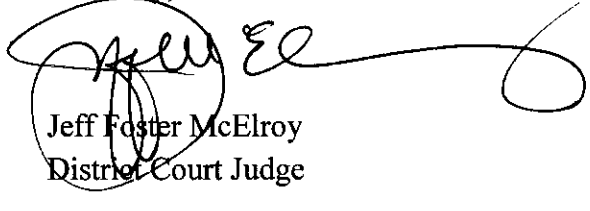
Secondly, the Plaintiffs' are not likely to prevail with their primary argument in favor of the injunction. They argue that the County, by approving the application, is engaged in "back door" zoning, meaning that by approving the application they are not considering the impact on the uses that already exist in and around the airport. They ask this Court, as part of the injunction, to direct the County to engage in zoning specific to the airport. The law is not on the Plaintiffs' side. The laws regarding zoning are permissive not mandatory. If the County, as a result of the political process, chooses to not specifically zone uses in and around the airport, there is no requirement that they do so.

Further, Section 4.7(A) of the existing Land Use Regulations requires exactly the type of consideration these Plaintiffs seek. If the Plaintiffs are unhappy with the result of the permit process and are convinced that the County did not comply with the requirements of Section 4.7(A) then they are free at that time to file an appeal in the district court. It is not the purview of this Court to interfere in the application process for a permit, whether the considerations are political or administrative. Ultimately, the responsibility lies with the County to hear the arguments of these Plaintiffs. The County may choose to ignore or act on the Plaintiffs' concerns, but they should be free to do so unfettered by the interference of this Court.

That is not to say that the Plaintiffs could not ultimately prevail. This ruling merely holds that there is not a substantial likelihood that they will prevail on the merits based on what is currently before the Court. For this reason, the Motion for a Preliminary Injunction is denied.

The Defendants should prepare an order reflecting this Court's ruling and circulate it to the Plaintiffs' attorney for approval as to form. Please then present the Order to this Court for signature.

Sincerely,



Jeff Foster McElroy
District Court Judge