

FILED

OCT 20 2008

Sharon Ward
CLERK OF THE CIRCUIT COURT OF THE FIFTEENTH
JUDICIAL CIRCUIT JO DAVIESS COUNTY ILLINOIS

HELPING OTHERS MAINTAIN)
ENVIRONMENTAL STANDARDS,)
An Illinois Not For Profit)
Corporation, et al)
)
)
Plaintiffs,)
vs.)
)
A.J. Bos, and Illinois)
Department of Agriculture,)
)
Defendants.)

CASE: 2008 CH 42

PRELIMINARY INJUNCTION ORDER

This matter has been heard on motion of Plaintiffs, by their attorneys, David Albee and Charles Cronauer, for a preliminary injunction, upon notice to, and hearing with, all parties, held July 18 & 29, August 12 & 15, September 29 & 30, and October 10 & 16, 2008, Defendant Bos represented by attorney Thomas Nack and the Department of Agriculture through its attorney, Allan Abinoja. The court, having heard evidence and being otherwise fully advised in the premises **FINDS** as follows:

1. It has jurisdiction of the parties and the subject matter.
2. Pursuant to the Livestock Management Facilities Act (LMFA), 510 ILCS 77/1 et seq, Defendant Bos has applied to the Illinois Department of Agriculture to construct a livestock management facility near Nora, Illinois, in Jo Daviess County. Defendant Bos has been permitted by the Department to construct at a site named

"Tradition South" and an application is pending with respect to a similar, nearby, site named "Tradition North". Plaintiffs claim that operation of a livestock management facility at these sites will result in nuisance and trespass.

3. A preliminary injunction is intended to preserve the status quo pending a decision on the merits of a case. *Nickels v. Burnett*, 343 Ill.App.3d 654, 662, 278 Ill.Dec. 433, 798 N.E.2d 817 (2003). It is an extreme remedy that should be employed only when an emergency exists and serious harm would result if the injunction is not issued. *People ex rel. Klaeren v. Village of Lisle*, 202 Ill.2d 164, 177, 269 Ill.Dec. 426, 781 N.E.2d 223 (2002). A court may not grant a preliminary injunction without a showing that: (1) the party seeking the preliminary injunction possesses a clear right or interest needing protection; (2) the party has no adequate remedy at law; (3) irreparable harm will result if the preliminary injunction is not granted; and (4) there is a reasonable likelihood of success on the merits. *People ex rel. White v. Travnick*, 346 Ill.App.3d 1053, 1060, 282 Ill.Dec. 295, 806 N.E.2d 270 (2004). Also, the trial court must decide whether the balance of hardships to the parties supports granting a preliminary injunction. *Keefe-Shea Joint Venture v. City of Evanston*, 332 Ill.App.3d 163, 169, 266 Ill.Dec. 85, 773 N.E.2d 1155 (2002). A plaintiff seeking a preliminary injunction does not carry the same burden of proof that is required to prevail on the ultimate issue. *Keefe-Shea*, 332 Ill.App.3d at 169, 266 Ill.Dec. 85, 773 N.E.2d 1155. Instead, the plaintiff must make a *prima facie* showing that there is a fair question about the existence of the claimed right and that the circumstances lead to a reasonable belief that the plaintiff will be entitled to the relief sought. *Village of Westmont v. Lenihan*, 301 Ill.App.3d 1050, 1055, 235 Ill.Dec. 318, 704 N.E.2d 891 (1998).

4. Defendant Bos has a fundamental right to devote his property to whatever lawful use he chooses. However, such right must give way to the considerations of public health and safety. See Gore v. City of Carlinville, 9 Ill.2d 296, 301, 137 N.E.2d 368, 371 (Ill.1956)

5. Plaintiffs may maintain the present cause of action for nuisance and trespass without regard to the administrative proceedings contemplated by the LMFA. See Nickels v. Burnett, 343 Ill.App.3d 654, 663, 798 N.E.2d 817, 826) (Ill.App. 2 Dist.,2003)

6. All witnesses testified credibly. However, the testimony of the Plaintiffs' witnesses Panno (eg the proposed livestock management facility is underlain by karst) and Huettl (eg the proposed liners for the waste ponds are therefore inadequate) went more squarely to the issue of whether a nuisance or trespass is likely to stem from operation of the proposed facility. Defendant Bos' witnesses Naugle (eg the site is not underlain by karstified carbonate bedrock), Evans (eg the proposed liners are appropriate to the project and in conformance with industry standards), and Feldmann (eg no likelihood of groundwater contamination) are interested in the proposed facility by virtue of being employed by Defendant Bos for this project and their testimony went more to compliance by Defendant Bos with the requirements of the LMFA and the Department of Agriculture than the likelihood of nuisance or trespass from the operation of the proposed facility.

7. In consideration of all the evidence adduced, Plaintiffs have made a *prima facie* showing that there is a

fair question about the existence of their claimed right not to be subjected to nuisance or trespass by the proposed livestock management facility.

8. Groundwater contamination from Defendant Bos' proposed livestock management facility would constitute a substantial future harm and the proposed facility presents a high probability of creating a public and private nuisance by creating an environment injurious to the health and welfare of surrounding neighbors and the public at large.

9. As such, Plaintiffs have no adequate remedy at law and irreparable harm is likely to result if a preliminary injunction is not granted.

10. The circumstances lead to a reasonable belief that the plaintiffs will be entitled to the relief sought.

11. The balance of hardships, being Defendant Bos' right to lawful use of his properties, known as Tradition South and Tradition North, versus the health and safety of the plaintiffs and the public, favors issuance of a preliminary injunction enjoining Defendant, Bos and his officers, agents, and employees from: 1) operating the proposed livestock management facility as a "concentrated animal feeding operation", as such term is defined in 35 Ill. Adm. Code 307.2201(d) (incorporating 40 CFR 122.23(b) and (c)), 2) stabling or confining any more than 199 mature dairy cows, whether milked or dry, and 3) any use of the above ground waste storage structures, in-ground waste storage structures, or runoff holding ponds for livestock waste containment during the pendency of this proceeding.

12. The issue of bond, per 735 ILCS 5/11-103, has been reserved by the court.

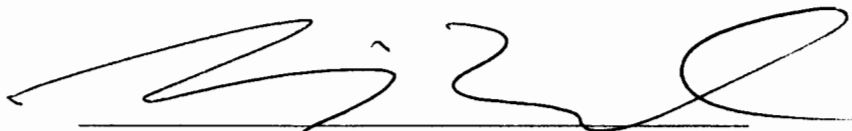
WHEREFORE, it is ordered by the court as follows:

A. A preliminary injunction is granted, restraining and enjoining Defendant, Bos, and his officers, agents, and employees, with respect to the properties known as Tradition South and Tradition North, from:

1) operating the proposed livestock management facility as a "concentrated animal feeding operation", as such term is defined in 35 Ill. Adm. Code 307.2201(d) (incorporating 40 CFR 122.23(b) and (c)), 2) stabling or confining any more than 199 mature dairy cows, whether milked or dry, and 3) any use of the above ground waste storage structures, in-ground waste storage structures, or runoff holding ponds for livestock waste containment during the pendency of this proceeding.

B. This preliminary injunction is granted subject to possible imposition of bond, per 735 ILCS 5/11-103.

DATED THIS 20 day of OCT, 2008.



Kevin J. Ward
Associate Judge