

DISTRICT COURT, DELTA COUNTY, COLORADO
Court Address: 501 Palmer Street, Suite 338, Delta, CO 81416
Phone Number: (970) 874-6280

Plaintiffs: Travis Jardon; Corrine Holder; Susan Raymond;
Mark Cool; and Andrea Robinsong;

v.

Defendants: Delta County Board of County Commissioners;
Edwin Hostetler; Eileen Hostetler; Greg Hostetler; Carmen
Hostetler; Anna Hostetler; and Roland Hostetler

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Case Number: 2012 CV 314

Division:

Courtroom:
Hon. J. Steven Patrick

PLAINTIFFS' SUPPLEMENTAL OPENING BRIEF

Plaintiffs, by and through their attorneys, hereby file their Supplemental Opening Brief as follows:

SUMMARY OF THE ARGUMENT

The record contains no competent evidence to support the Board of County Commissioners' (hereinafter "Board" or "BOCC") approval of the subject land use permits. The evidence from the hearing of May 1, 2013 demonstrates the grave health risks that the Hostetler operations pose to their neighbors, and the failure of the County to properly address those. Pursuant to Rule 106(a)(4), Plaintiffs seek an order that the subject land use permits be declared invalid and that the illegal operations of the Hostetlers cease.

STATUS OF THE CASE

Background

On July 5, 2012, this Court issued its Order on Plaintiffs' Rule 106 Claim. The Court determined there were substantial deficiencies in the record and remanded the matter back to the County for another hearing. Specifically, the Court found there was no record support of the County findings on the following:

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

On September 4, 2012, the BOCC held another public hearing, after the remand by the Court. Plaintiffs again made a very substantial record that these cage free hen laying operations were contrary to the terms of the Delta County Master Plan and injurious to their health. Despite this, the County based its decision on several documents, which were not in evidence on September 4, 2012. These documents were:

1. Air Monitoring Survey dated August 27, 2012;
2. Amended Air Monitoring Survey Dated September 28, 2012;
3. Ken Nordstrom memo dated October 12, 2012; and

4. Nuisance Myths and Poultry Farming article from the University of Georgia.

On October 22, 2013, the Board made its decision to re approve the hen laying facility applications. Plaintiffs filed a Motion to Strike evidence which was not a part of the public record. No notice to the Plaintiffs or the public was made of these documents before the decision, nor was there any opportunity to respond to them by Plaintiff. In response to Plaintiff's Motion, this Court again remanded this matter back to the County for a public hearing to allow the Plaintiffs and Applicants to present evidence concerning the documents at issue. This hearing was held on May 1, 2013.

From October 22, 2012 to May 1, 2013, there had been a change in the composition of the Board, with Mr. Lund leaving and Mr. Roeber taking his place. The County took the position that the May 1, 2013 hearing was an opportunity for the Board to re-consider the entire decision, not just the remand matters, because of the presence of the new commissioner. Thus, the BOCC was advised that it had the discretion to deny the applications if it so chose.

The May 1, 2013 hearing

Plaintiffs introduced live testimony at the hearing, six letters by experts in air quality and animal confinement fields, and one cd containing reference documents (265 pages) supporting one of the expert submissions, and additional health reports and photographs. R0973. The six documents Plaintiffs provided at the hearing were scientifically based and produced by persons well respected and considered experts in their fields. The following are some of the highlights of the documents. Careful study of the evidence and testimony itself is essential to understanding the claim.

1. Air Research Specialists, Inc. R0988-0997

Unlike Mr. Lakin who is an industrial hygienist, Mr. Gebhart and Mr. Sherman are experts in air quality monitoring, specifically for industrial clients. R0989. Gebhart and Sherman conclude that the data on emissions was not quantified and no calculations were made as to what was being discharged from the chicken facility. The authors noted that because the “tunnel ventilation mode”, which blows out much more air than the side fans, was not operational, the amount of pollutants coming out of the structure was substantially diminished. The authors further noted the presence of sawdust, which the owner placed in the facility seventy two hours prior to the air survey to dampen down the amount of particulates and pollution being discharged. Thus, the operating conditions at the time of the test were not typical of normal operations that the neighbors had been experiencing. The timing and application of the sawdust was a “clear attempt to minimize air emissions solely for the purpose of the study and produce non-representative and biased study results about the facility air emissions.” R0991-0994.

Even with these conditions, the presence of emissions with potentially harmful health effects were pointed out in the Plateau Inc. Report. All observers agreed there was a “considerable plume of particulates and biological components” coming from the structure. R0992. Mr. Lakin did not provide sufficient information to quantify the mass of omissions, but the emissions which were tested indicated very small particles. The smallness of the pollution makes it more hazardous, because it is inhaled deeply into the lungs of the neighbors, which increases the probability of adverse health consequences. R0992, R1010, R1014-1015.

2. Ms. Pridgen R998-1003

Ms. Pridgen is an Environmental Biologist with thirty (30) years experience in poultry production. R0999.

She concludes that had the tunnel ventilation system been operational at the time of the test, at least eight (8) times the volume of air/fecal matter, bacteria, and the like, within the building would have been expelled to the outside environment. R0999. Further, the addition of sawdust was a way that “Western Slope Layers “stacked the deck in their favor”.” R1001.

There are detrimental effects to human health by the ammonia absorbed by dust particulates carried deep into the lung, even at low concentrations. R1001. Many other potential health problems emerged from the test. One of the bacteria isolated was Gram Negative Lactose Fermenting Rod, which was found to be of the species of Yersenia. R1001. Some members of Yersenia are extremely pathogenic in humans, such as plague and enterocolitis. R1001, R1006, R1072-1074. The further identification of this Yersenia was to be the subject of the amended report, but the County elected not to have Plateau, Inc. pursue the more extensive Polymerase Chain Reaction (PCR) assay, which would have allowed a determination of the pathogenicity of these strains. R1002. One reason for the addendum was for further identification of previously unidentified bacteria on the plates, but was not accomplished. R1002.

3. Dr. Frances Lazear R1008-1010

Plaintiffs introduced into evidence the comments of Dr. Frances P. Lazear, graduate of Cornell Veterinary School, in practice since 1976, with an interest in zoonotic diseases and epidemiology. R1008. Dr. Lazear’s comments detailed the epidemiology of the emissions relative to the pathology on humans and animals. R1008-1010. She further discussed why this facility will never perform properly in this low humidity climate, and why mitigation is not possible. Even smaller facilities can be just as dangerous as a large barn, especially if the setback is not adequate. R1008. This University of Georgia Nuisance Myths Report is of no value

because it is very general, not scientifically based, and its origin is the cooperative extension service, which promotes agriculture, leading to bias in statements in the article. R1008.

She notes that the Health Department has failed to respond properly to the epidemiological health issues that have arisen out of this facility. R1009.

4. Kathy Martin R1011-1020

Comments were received from Kathy Martin, an air, water, and pathogenic emissions environmental engineer. She was called upon to participate in the writing of the Colorado Swine Facility Air Emissions Standards in Colorado. R1015. Ms. Martin indicates that the Plateau Report contained severely flawed methodology in numerous areas, starting with the lack of a critically necessary detailed map of where samples were taken relative to the barn. R1012. She noted many disparities in sample values with no explanation provided by the sampler. R1013. She discusses the inhalable properties of the various sizes of particulates found during sampling. R1014-1015.

5. Dr. Kendall M. Thu R1021-1059

Dr. Thu, professor and Chair of Anthropology at Northern Illinois University, submitted his letter with six references totaling two hundred and sixty five pages, which show that industrial animal feeding operations, whether cattle, swine or poultry, severely degrade the quality of life of those who live within the path of these facilities' discharges and emissions. Dr. Thu's comments totally debunk the assertions of the University of Georgia Nuisance Myths Report. He addresses chicken farm operations from the standpoint of social, environmental, and public health consequences. Chicken farms have a serious adverse impact on the quality of life on neighbors. The neighbors become prisoners in their own homes, because of the pollution

outside. The chicken farm pollution causes health problems for the neighbors, which makes things much worse. Even at great distances from the chicken farm, neighbors will not be able to enjoy their out-of doors lifestyle. R1021-1022.

6. World Poultry- CSES Report on Hen Housing of November, 2012 R1060

This report details the types of hen housing options in the US and differences inherent in each design. It clearly spells out why the cage-free facility's discharge is so much greater than a conventional operation, such as Foster Farms. R1060-1061.

Additional testimony was provided by Dr. Raymond and Travis Jardon. R0977-0987 and R0974-0976.

The Hostetlers' attorney, Karen Budd-Falen then provided testimony. She stated that Delta County is an agricultural area and that because these operations are agricultural, the facilities should once again be approved. R0966. She then cited from the Plateau, Inc. report. R0966. She attempted to compare the chicken operation to other operations in the area, when in fact, there are no other confinement operations in the impacted neighborhoods. R0967. She makes inaccurate factual representations regarding when the sawdust was placed in the facility and the effect that would have on the testing. R0968. Mr. Lakin's report, itself, states the presence of the sawdust in the facility. R0119. She also mentioned the existing operation and two proposed egg operations; in fact, there is only one other proposed operation. R0966. The only new evidence presented by the Hostetlers was an email between their attorney's office and Ken Nordstrom addressing the claimed reasons for the Air Monitoring Survey. R1082-1083.

The decision of May 28, 2013.

The BOCC's decision, made May 28, 2013, was recorded with audio and was then transcribed. This transcription is present in R1084-1089. The comments made by the Board are of great interest, as they determine not only the evidence in the record, relied upon by the Board, but also the tone and underlying feelings of the Board in making these decisions.

Commissioner Atchley gave a short introduction on the history of the case before openly joking that the introduction itself caused him to "need a drink already", and asked for comments from the other Commissioners. R1086. At this point, Commissioner Hovde stated he had reviewed all documents submitted over the past two years, "including those that were submitted the 29th of March or whatever day we had the final hearing." *Id.*

Commissioner Hovde discussed only the documents submitted on the cd and said they talked about swine operations and CAFOs, so essentially, they were irrelevant. R0186-187. However, these documents were only in support of Dr. Thu's previously discussed submission. Commissioner Hovde did not comment on, or reference, any of Plaintiff's other expert submissions.

He stated that he has driven up to the area in question and has not seen the emissions discussed. R0186-187. The visibility of the emissions was acknowledged in the Amended Air Study, as Mr. Lakin discusses that the facility generates a considerable plume of particulates and biological components. R0116, R0122. The MERV Rating Chart explains why many emissions may not be visible. R1016.

Even though Commissioner Roeber was instructed by the Court to base his decision on the regulatory nature of the Master Plan, he simply ignored it and chose, instead, to reference the Right to Farm Statute. R1087. He is the one Commissioner who was not involved in the original

decision. It was his addition to the Board which made this particular decision, as the County claims, unbiased. He stated that there was contradictory evidence on both sides, and he is not sure whether the nature of the neighborhoods in question are agricultural or residential, but because the Air Study “didn’t find anything out of the ordinary,” surmises the facilities to be acceptable. R1087.

Then Commissioner Hovde attempts to explain that Mr. Nordstrom going to the Hostetlers and telling them about the upcoming air survey was not a warning, and certainly not a conspiracy. R0187-0188. He states that there should be 24 hour notification prior to any inspection, but this ignores that the air monitoring survey was not a County inspection as described in any management plans.

Commissioner Atchley did note that had the Specific Development Regulations not been in effect, the facilities could have been built next to the road. Therefore, he recognized that the Regulations are controlling, but refuses to recognize the regulatory requirements of the Master Plan mentioned in the regulations, which was this Court’s purpose of a remand in the first place. R1089. The Commissioners proceeded to reaffirm the Specific Development Agreements. They did however, add one condition. This condition is essentially the same as it relates to the two farms. The original language is noted below.

1. That the Hostetlers “obtain the services of a professional air pollution engineer to evaluate the air pollution emissions and provide a plan for reducing the air omissions from the facility for review and modification if necessary to the Delta County Health Department within 3 months of completion” on Redlands Mesa; and

2. That on Powell Mesa, the Hostetlers “ obtain the services of a professional air pollution engineer to evaluate the air pollution emissions and provide a plan for reducing the air omissions from the facility for review and modification if necessary to the Delta County Health Department no later than August 31, 2013.” R1093.

The imposition of the additional conditions is an admission on behalf of the County that there is clearly an emission problem related to this facility.

ARGUMENTS

1. Plaintiffs have demonstrated that there are grave health risks to the neighbors of the chicken farm.

As long as these operations are making the surrounding neighbors sick, it cannot be said that they are compatible with the surrounding neighborhood. The information provided by the Plateau Report, flawed as it is, is alarming and proves Plaintiffs’ assertions. It showed that large amounts of harmful particulate matter were present in the small quantity of air tested during the “snapshot” air study. R0992-0993,R1000-1002, R1010, R120-122. These included ammonia, a tremendous amount of spores, and many bacteria, of which, one was a gram negative fermenting rod in the Yersinia species. R1000-1002, R1072-1074. Though it would have been possible to determine exactly what species and genome the gram negative lactose fermenting rod was present, the County chose not to do this. R1002. This is significant because certain types of bacterial Yersinia are very harmful to people, and one type is even a member of the Plague family. R1000-1002.

The results prove the dangerous nature of the pollution because the largest portion of pollution consists of the smallest particulate matter, which gets inhaled deeply into the lungs.

R1014-1015; R1010; R0992. Therefore, not only are there some very harmful particulates being produced from this facility, but they are of such a small size that they are more likely to be inhaled deeply and thus provide for increased exposure to sickness for people. There are these problems without even delving into huge quantities of bacteria, mold, fungi, and other toxins identified in the reports. R0992, R1000-1002, R1010, R0114-R0115.

The admitted results of the tests themselves are even more disturbing. Mr. Lakin himself states that the conditions at the facility are highly dynamic, and as such, the testing done may not have been representative of the air and debris particles at any given time. R0122. He admits that some components of the air are potentially hazardous to people and the exposure to the neighbors is undefined. R0122. He strongly advised that a medical specialist be consulted to do further evaluation for health impacts. R0122. However, the County never heeded his advice. Instead, they simply took a few sentences from Mr. Lakin's report, out of context, and based their decision to reapprove the facilities on that on October 22, 2012 and again on May 28, 2013.

R0754-R0756, R1088.

2. Plateau Report testing procedure is fatally flawed.

The test itself is problematic. It does not conform to the original representations made regarding how such a test would even proceed. The original representation was that air samples would be taken at the facility and downwind from the facility, at the property lines. R0110. However, the actual samples were only taken surrounding the facility itself. R0118-0123. Though some of these samples were taken both upwind and downwind from the facility, the results were combined, so it was impossible to determine the full extent of the facility's true downwind impact. R1011, R1013-1014.

These documents show that Mr. Lakin's methodology in collection is flawed. See R0991-0994, R0999-1001, R1011-1017. This suggests that the air monitoring survey is not technically or scientifically sound, and thus should not be relied upon as indicative of the true issues with the facility, something Mr. Lakin even recognizes in his own report. R0122. Another problem pointed to by the Plaintiffs' experts is that the air sampling was done with only three of the smaller fans running, as opposed to the "tunnel ventilation mode" system being operational, which is the cornerstone of this facility's ventilation capability. Thus, problems are significantly greater for those sharing the surrounding air when the facility's fans are running in the "tunnel ventilation mode." See R0119-0120, R0979, R0991-0992, R0999-1000. Further, the placement of sawdust into the facility seventy two hours before the test was performed not only skewed the results, but the timing was such that the results were optimum for concealment of any problems. R0977, R0992, R1000-1001.

All of this evidence scientifically shows that because the air monitoring survey was not sound, its conclusions cannot be relied upon. At the hearing, the Hostetlers and County provided no evidence to the contrary. There is nothing in the record to show that Mr. Lakin is an expert in air quality monitoring. Instead, everything in the record shows that this survey is not scientifically sound, was not indicative of the true situations, and was gamed to achieve favorable results for the Hostetlers. This gaming was achieved by the tunnel ventilation not operating, the curtains open instead of closed, misters being operational, and the addition of sawdust just prior to the test. R0119; R0979; R1000-1001; R1009; R1075.

3. Weighing the evidence.

The record of the May 1, 2013 hearing completely supports Plaintiffs and provides no evidence which can show that these facilities should have been approved. The Hostetlers and the County provide no information refuting any of Plaintiff's scientific evidence regarding the documents. Instead, the Board and Ms. Budd-Falen simply rely on Mr. Lakin's unfounded statement that the findings would be consistent with any agricultural production, though even he admits that he has no basis with which to compare, to show that this is not harmful to anyone. R0121. However, there is nothing that refutes the countless neighbors' complaints that their sicknesses have either started or been exacerbated with the introduction of this facility close to their homes.

Commissioner Atchley once again makes the argument that "ag is ag" and because agriculture has been in that area for some time, this facility is compatible, but completely ignores the Specific Development Regulation which specifically regulates confined animal operations. The Board completely ignores the reality of this situation, that the facility is spewing toxins, bacteria, and molds onto the neighbors and that neighbors are getting sick from this facility. R0120, R0978, R1009. This certainly shows that it simply is not compatible with the surrounding neighborhood and existing uses, and is a prime example of one type of agriculture destroying another. Dr. Raymond describes, who is immediately downwind of the facility, in her testimony, the destruction of many tons of her hay by molds and fungi that she had never before experienced. R0979, R0981-0987. The initial air monitoring report showed that downwind fungal spore counts were twenty six (26) times greater than upwind counts. R0121.

The District Court, in its July 5, 2012 order, stated that there must be substantial evidence that the County Staff is competent to deal with the problems of these facilities. The record

indicates that they are not. Though the County has received numerous health complaints regarding the facility, not once has any representative to the County spoken directly to a single complainant. R0978. Dr. Lazaer states that there is a “distinct cluster of illnesses which has appeared since the henhouse operation began. Timing of the illness cluster should be a red flag and the health department should be addressing the problems aggressively. The serious nature of the health problems should require the shutting down of the operation to see if the illnesses abate over time. Anything short of this reaction constitutes an unconscionable disregard for the health of the neighbors.” R1009. The Specific Development Agreements says when safety, health and welfare are jeopardized, the agreement can be suspended. R1093, R1094. The County should have done this.

Ken Nordstrom’s memo of October 12, 2012 admits and recognizes that there is a problem with the air emissions of the chicken farm. In it, he recommended that they add a condition to their approval requiring further evaluation of air pollution emissions. R0143. However, they did not do this on re-approval. Only after the case was remanded to them, yet again, and both the recommended condition and the fact that BOCC could not even follow their own staff’s recommendations was pointed out by Plaintiff’s counsel, the BOCC adopted it as a condition. Further, the condition imposed is, quite simply put, meaningless. The new condition does not impose any objective criteria or limits regarding these emissions. R1093. Further, the Hostetlers are to provide a plan to reduce emissions from the facility, but there is no requirement that they implement or follow that plan at all. R1093.

Throughout the entire application process, the Plaintiffs were promised a setback of one thousand (1,000) feet. R0979-0980. However, the facility is eight hundred seventeen (817) feet

from Mark Cool's house and less than one thousand (1,000) feet from Dr. Raymonds property, R0979. However, Commissioner Atchley turns eight hundred seventeen (817) feet into "approximately nine hundred (900) feet", and apparently believes this is acceptable. R1088. This is a twenty percent reduction in the setback distance promised. However, he went on to compare setbacks of animal confinement to gas and oil setbacks, which require one thousand (1,000) feet from a school or hospital, and then states that neither exists here. R1088. He completely ignores that Dr. Raymond's veterinary hospital is less than one thousand feet and requires the same sanitary conditions of any hospital. It is abundantly clear that the Board was going to approve these facilities regardless of the Master Plan mandates, the evidence, and the myriad of dangers to the neighbors associated with these facilities.

4. Evidence of Appearance of Impropriety.

In *Churchill v. University of Colorado at Boulder*, 285 P.3d 987, 1006 (Colo. 2012), the Court stated that "[a]ny appearance of impropriety sufficient to cast doubt on the impartiality of the Regents...would be grounds for reversal of the underlying administrative decision to terminate Churchill's employment." Thus, in Colorado, if there is even a hint of impropriety in a quasi-judicial decision, the decision should be reversed. This Court has determined that any evidence of bias should be addressed in a Rule 106(a)(4) action. *See* Court's Order dated June 11, 2013. In this case, the record shows many instances of impropriety of the Board and bias in favor of the applicants.

It is obvious that the Board engaged in rubberstamping of their pre-determined decision to allow these facilities. There is a pattern of approval. The Board has, on three separate occasions, approved these facilities with the neighborhood and adverse impacts on property

values in accordance with the Master Plan regulation. It has consistently completely ignored all of Plaintiffs' evidence regarding the dangerous and incompatible nature of these facilities. There are many instances, in the record, which show the County's support of the applications, to the detriment of the Plaintiffs and their claims.

The Board simply regards Plaintiffs as troublemakers. R0978. During its decision, the individual Board members were joking and nonchalant regarding the information. This clearly demonstrates that the Board does not, and has never, taken Plaintiffs' arguments seriously. There was a predetermination on the Board's behalf to approve these facilities, and there is not any evidence the Plaintiffs can provide that will deter that determination. This is clearly shown by the overwhelming amount of evidence which Plaintiffs have provided showing the detrimental effects to the health and properties of everyone surrounding these facilities. The record is replete with evidence showing that the Board has totally ignored these realities.

Despite direction from this Court regarding the controlling nature of the Specific Development Regulations and Master Plan on the Board's decision, all commissioners have refused to make these decisions based on the merits. Commissioner Roeber stated in his decision that there is a question of whether the neighborhoods surrounding the facilities are agricultural or residential and he does not know the answer to that. R1087. However, it is the Board's job to make that determination, as this Court has instructed the Board to make its decision on compatibility of the facilities with the surrounding area.

As demonstrated in the record, the neighbors have filed numerous health complaints with the County, which the County failed to investigate. These health complaints are extensive, well documented, and clearly evident. The latest health complaints include sinus infections,

respiratory ailments, and emergency room visits for uncontrolled sinus bleeding. R1063-1071.

Under the guise of responding to neighbors' health complaints, the County manufactured evidence for the record by commissioning the Plateau, Inc. report. The fact that the County burdened itself with the procurement and cost of these reports instead of applying it to the applicants proves its constant support of the applicants. The County responded to health complaints by being complicit in gaming the results.

The record shows that the County gave advance notice of the testing to Mr. Hostetler and that he significantly altered the conditions of the chicken farm by bringing in sawdust. Ken Nordstrom visited the Hostetler residence eight days before the survey was completed, after normal hours, under the guise of a site inspection in response to Dr. Raymond's complaint the previous day, but such an inspection requires twenty four hours notice, which was not given for that visit and Dr. Raymond never made such a complaint the previous day. R0977, see videos submitted on September 4, 2012. It was merely two days later that the sawdust appeared, and it was moved into the barn three days before the air monitoring survey. R0977. Sawdust had never been placed in the facility before, and have not been placed in it since. R0978. Further, it is only typical to add sawdust to the ground after one full cycle of birds are removed and before another shipment has arrived, not in the middle of the cycle as done here. R1000. Although Commissioner Hovde vehemently denies that the County warned Mr. Hostetler of the upcoming air survey, the evidence infers exactly the opposite. On the day of the air monitoring survey, several people were present, including the Hostetlers, Ken Nordstrom, and over six (6) other people. R0111. Neither those who complained, nor Plaintiffs were notified of this testing and were not invited to observe it. This survey was not a site inspection, requiring the 24 hour notice.

Even if the 24 hour notice was required for this test, it does not explain the sudden appearance of sawdust several days prior to the test, which rigged the results in favor of the applicants. All this substantiates the appearance of impropriety.

Further, the County did not assure that this survey was done with scientific certainty, and ignores many suggestions by the surveyor himself. Mr. Lakin, in both of his reports, stressed that these results should be discussed with a healthcare professional before interpretation of the results should happen. R0122; R0116. The County ignored this crucial step, which is indicative of the fact that the County was never concerned with the actual health impacts to the neighbors. The reports further state that this survey caught but a moment in time and because the facility was highly dynamic, conditions may be different at any other time. R0122. The County did attend the survey and allowed the applicants to run misters and operate the facility with only three fans running and the curtain open during the entire test. R0979, R0119. Had this truly been done out of concerns for the neighbors, the County would have required the facility to be running at its full capacity during testing and would have required that a medical specialist review the results. It is clear that this survey was not done out of concern for the neighbors and/or their health, but was simply done in order to receive evidence for the record in support of the applications and allow the County to discredit the health complaints as frivolous and non substantive. This is an egregious display of impropriety.

Following the Air Survey, the County then kept the written results away from the Plaintiffs until the day of the hearing, September 4, 2012. Christine Knight inaccurately stated to this Court that the reason Plaintiffs did not receive the report after numerous requests was that the County was not in possession of it until the morning of September 4, 2012. This is clearly

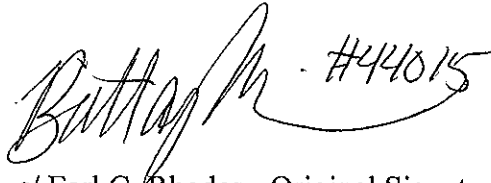
refuted by Ken Nordsrom's email to Josh Tolin, stating that the County received the report the week of August 27, 2012. R1082.

The amendment to the original survey was requested by Plateau, Inc. to expand on the bacteria and the spores found in the original findings, not to create new support for the Board to approve the applications. R0121. However, instead of simple identification and explanation, there was a three page addendum, filled with words, phrases, and "evidence" to support the applicants' positions. The document itself suggests that the County requested that Mr. Lakin include such language and is just one glaring example which supports the assertion that the County has acted inappropriately throughout this entire process.

CONCLUSION

Once again, the record contains no competent evidence to support the Board's approval of the subject land use permits. Instead, the evidence overwhelmingly and scientifically points to why these permits should have been denied. There is ample evidence that, due to the dangers to the neighbors that the hen laying facilities provide, they are simply not compatible with the surrounding neighborhood. The evidence shows a predisposition of the Board to approve these facilities and completely ignore any and all of Plaintiffs' evidence. Neither the applicants, nor the County has provided any competent evidence to support the Board's decision. Further, there are countless examples of impropriety. Thus, pursuant to *Churchill* and Rule 106(a)(4), the underlying decision should be overturned. Plaintiffs seek an order that the land permits are invalid and the Hostetler hen operations cease.

Submitted this 1st day of July, 2013.



s/ Earl G. Rhodes - Original Signature on File

Earl G. Rhodes, No. 6723

Attorney for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 1st day of July, 2013, a true and correct copy of the foregoing **PLAINTIFFS' SUPPLEMENTAL OPENING BRIEF** was served by:

- ICCEs filing
- U.S.Mail, first class postage prepaid
- Email
- Telefax
- Hand delivery

on the following:

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s/ Marianne Cassidy - Original Signature on File

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Filing Party(ies):

Party	Type	Status	Attorney
Travis Jardon	Plaintiff		Earl Gamer Rhodes (Younge & Hockensmith, P.C.)
Corinne Holder	Plaintiff		Earl Gamer Rhodes (Younge & Hockensmith, P.C.)
Susan Raymond	Plaintiff		Earl Gamer Rhodes (Younge & Hockensmith, P.C.)
Mark Cool	Plaintiff		Earl Gamer Rhodes (Younge & Hockensmith, P.C.)
Andrea Robinsong	Plaintiff		Earl Gamer Rhodes (Younge & Hockensmith, P.C.)

Documents :

Document ID	Event	Title	Statutory Fee
8452F159A43FC	Brief	Plaintiffs' Supplemental Opening Brief	\$0.00

Service:

Party	Type	Attorney	Organization	Method
Delta County Board Of County Commissione	Defendant	Christine L Knight	Delta County Attorney	E-Service
Edwin Hostetler	Defendant	Joshua Abraham Tolin	Budd-Falen Law Offices, LLC	E-Service
Eileen Hostetler	Defendant	Joshua Abraham Tolin	Budd-Falen Law Offices, LLC	E-Service
Greg Hostetler	Defendant	Joshua Abraham Tolin	Budd-Falen Law Offices, LLC	E-Service
Carmen Hostetler	Defendant	Joshua Abraham Tolin	Budd-Falen Law Offices, LLC	E-Service
Anna Hostetler	Defendant	Joshua Abraham Tolin	Budd-Falen Law Offices, LLC	E-Service
Roland Hostetler	Defendant	Joshua Abraham Tolin	Budd-Falen Law Offices, LLC	E-Service

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Authorizer: Earl G Rhodes Esq.
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