| DISTRICT COURT, DELTA COUNTY, COLORADO<br>501 Palmer Street, Room 338, Delta, Colorado 81416 | | DATE FILED: August 5, 2013 10:14 AM<br>FILING ID: DC9E915541A09 |
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| Plaintiffs:<br><br><br><br>v.<br><br>Defendants: | **TRAVIS JARDON; CORRINE HOLDER; SUSAN RAYMOND; MARK COOL; and ANDREA ROBINSONG**<br><br><br>**DELTA COUNTY BOARD OF COUNTY COMMISSIONERS; EDWIN HOSTETLER; EILEEN HOSTETLER; GREG HOSTETLER; CARMEN HOSTETLER** | Case Number: **2012 CV 314**<br><br>Division: **A** |
| Attorney for Defendants:<br><br>Address:<br><br>Phone Number:<br>Fax Number:<br>E-Mail:<br>Atty Reg No.: | Christine L. Knight,<br>Delta County Attorney<br>320 W. 5th Street<br>Delta, CO 81416-1610<br>970-874-2090<br>970-874-2094<br>cknight@deltacounty.com<br>34213 | |

**DEFENDANT'S ANSWER BRIEF PURSUANT TO C.R.C.P. 106(a)(4)(VII)**

Defendant, Delta County Board of County Commissioners (hereinafter "BOCC"), by its undersigned County Attorney, respectfully submits the following Answer Brief to the Plaintiff's *Opening Brief* filed March 11, 2013, and the Plaintiff's *Supplemental Opening Brief*, filed July 1, 2013.

## I. INTRODUCTION

On July 5, 2012, this Court entered its order in 2011 CV 282, remanding the case back to the BOCC to take further evidence with respect to four issues: (1) compatibility of the applications with the character of the neighborhood; (2) impact on property values of the surrounding property; (3) sufficiency of the imposed conditions to address the neighbors'

concerns; and (4) capability of the County staff to monitor applicants' compliance with the conditions. The BOCC held a public hearing on September 4, 2012, to take evidence on these four issues. On October 22, 2012, the BOCC announced its new decision, which was again to conditionally approve the two specific development applications for Western Slope Layers and Rocky Mountain Layers. On November 16, 2012, the Plaintiffs filed the present case.

On February 28, 2013, Plaintiffs filed a *Motion to Strike*, seeking to strike certain documents that had been included in the record. Rather than striking the documents, however, this Court once again remanded the matter to the BOCC to allow the Plaintiffs to respond to the disputed documents. The BOCC held a public hearing on May 1, 2013, for that purpose. On May 28, 2013, the Board again announced its decision to conditionally approve the two specific development applications, but added an additional condition.

The Colorado legislature has declared that "the policy of this state is to …provide broad authority to local governments to plan for and regulate the use of land within their respective jurisdictions." §29-20-102(1), C.R.S. *See also* C.R.S. 30-28-101 *et seq.* and 30-28-201 *et seq.* In keeping with its western and agricultural character, Delta County has chosen not to implement traditional zoning codes, but instead regulates commercial activities through the Delta County Regulations for Specific Developments (hereinafter "RSD"). R0773-0817. Agricultural operations, with the exception of confined animal operations and slaughterhouses, are specifically exempted from the RSD. R0774. Confined animal operations are defined in the RSD as: "A confined pen, corral, enclosure, building and/or structure in which animals are concentrated. For purposes of this regulation, rearing of livestock, where offspring raised on the ranch or farm fed out, is not considered a confinement animal operation." R0793. The

definition does not employ the terms "industrial agriculture" or "commercial agriculture," nor are those terms to be found anywhere in the RSD or state statute.

Defendants Hostetler, in seeking to commence their confined poultry operations, applied to the County under the RSD. By doing so, they were required to fulfill the extensive application requirements set forth in the RSD. R0780-0783. In addition to fulfilling the requirements set forth therein, the BOCC imposed a total of fifteen additional conditions on the applicants which had to be fulfilled before the Hostetlers were even allowed to commence construction on the poultry building. R0935-0937. Among these fifteen conditions was the requirement that the Hostetlers adhere to best management practices in the operation of their business, which itself imposed eleven additional requirements including developing and submitting a water quality control plan, a manure and litter management plan, a fly control management plan, a noise management plan, an air quality control plan, a solid waste management plan, an egg management plan, a drainage study including storm water, geotechnical and erosion control completed and signed by a registered professional engineer, and a monitoring plan. R0936-0937. In addition, when the BOCC announced its decision on May 29, 2013, after the second remand from this Court, the BOCC added an additional condition that both operations obtain the services of a professional air pollution engineer to evaluate and provide a plan for reducing the air emissions from the facility for review and modification if necessary to the Delta County Health Department. R1093.

Other than the condition added on May 29, 2013, the conditions imposed were substantially the same as those imposed by the BOCC in its initial approval of the operations. Plaintiffs' allegations in paragraph 23 of their brief that "some conditions were slightly modified

to help the applicants" is not true. The requirement for an augmentation plan for the Blide Spring was removed because the Division Engineer for the State of Colorado Division of Water Resources wrote a letter to the County stating that an augmentation plan was unnecessary. While not having to get an augmentation plan certainly "helped" the applicants, Plaintiffs' implication that this shows some kind of collusion between the County and the applicants is wholly without basis. In addition, the change in condition 9K from "professionally prepared" to "prepared in a neat, legible and professional manner" was changed to more clearly articulate the County's intent that not every item had to be prepared by a professional. In other words, although the requirement that the drainage plan be prepared by a professional engineer was retained, the County never intended that the applicant must, for example, have the fly management plan prepared by a "fly management professional."

The BOCC absolutely denies that it had "pre-determined to approve these applications" or that it "manufactured its own evidence to support the applicants" as Plaintiffs claim, and the Plaintiffs have cited absolutely no evidence in the Record or elsewhere to support this outrageous allegation.

## II. STANDARD OF REVIEW

The procedural remedy set forth in C.R.C.P. 106(a)(4) is the sole method by which a Plaintiff can challenge the quasi-judicial decisions of a lower body. "Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the Record before the defendant body." C.R.C.P. 106(a)(4)(I); *see also* Widder v. Durango Sch. Dist. No. 9-R, 85 P.3d 518, 526 (Colo. 2004). An abuse of discretion occurs when a governmental body issues a decision that is not reasonably

supported by any competent evidence in the Record. Van Sickle v. Boyes, 797 P.2d 1267 (Colo.1990) (emphasis added); Carney v. Civil Serv. Comm'n, 30 P.3d 861 (Colo. App. 2001). "No competent evidence" means that the governmental body's decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." Bd. of County Comm'rs v. O'Dell, 920 P.2d 48, 50 (Colo. 1996) (quoting Ross v. Fire Police Pension Ass'n, 713 P.2d 1304, 1309 (Colo.1986)). The burden of proof rests on the party challenging the action to overcome the presumption that the BOCC's acts were proper. Fedder v. McCurdy, 768 P.2d 711, 713 (Colo. App. 1988).

The district court is not the fact finder and may not substitute its judgment for that of the defendant body; nor may it weigh the evidence or make any determination of facts. O'Dell, 920 P.2d at 50; Bentley v. Valco, Inc., 741 P.2d 1266, 1267-1268 (Colo. App. 1987). The findings of a quasi-judicial body may not be set aside merely because the evidence before that body was conflicting or because more than one inference can be drawn from the evidence. Colo. Municipal League v. Mountain States Tel. and Tel. Co., 759 P.2d 40, 44 (Colo. 1988). Evidence must be viewed in the light most favorable to the defendant body. Id. "The reviewing court cannot consider whether the ... findings are right or wrong, substitute its judgment for that of the commission, or interfere in any manner with the commission's findings if there is any competence evidence to support the same." State Civil Serv. Comm'n v. Hazlett, 201 P.2d 616, 619 (Colo. 1948).

## III. ARGUMENT

### A. Compatibility with the Character of the Neighborhood

Each application proposed the construction of a 400' x 50' building to house 15,000 laying hens. Although 15,000 sounds like a lot of birds, it is actually quite small in terms of egg producing facilities. By contrast, a large "concentrated animal feeding operation" (CAFO), can house in excess of 125,000 birds. A large swine CAFO can have in excess of 10,000 hogs. Officials from the Colorado Department of Public Health and Environment inspected Western Slope Layers on May 9, 2012, and informed everyone involved, including Plaintiff Susan Raymond, that "[t]he facility is not defined as a concentrated animal feeding operation (CAFO) because it confines less than the threshold number of 82,000 laying hens." R0170. In other words, in order to be considered a CAFO, Western Slope Layers would have to have over five times the number of birds than it actually does.

Despite this major difference in numbers between the number of birds housed at this facility versus a large poultry CAFO, however, many comments were made and studies received about CAFOs from the Plaintiffs and their supporters. R0384, R0388, R0401, R0417, R0445-0454. In addition, much of Plaintiffs' evidence not only concerned CAFOs, feed lots, and non-specific "animal operations," but was regarding swine or animals other than laying hens. R0445-0454, R0559-0576, R0643, R0682-0683, R083-0832, R1001, R1004-R1005, R1015, R1021-1023. Thus, much of the evidence in the record citing incompatibility were lumping these 15,000-bird facilities in the same category as a poultry CAFO with 82,000 birds or more, or a swine CAFO containing 10,000 hogs. This is clearly comparing apples and oranges, and makes a significant difference in terms of compatibility, a difference that was not accounted for at all in

the Plaintiffs' evidence. All of the evidence in the record concerning CAFOs therefore cannot be considered competent.

The RSD does require that comments by surrounding property owners and other interested persons are considered in determining whether the application is compatible with the neighborhood. R0789. Both Plaintiffs and Defendants Hostetler included in the record signed petitions that they had circulated supporting their respective positions. R0269-0333 and R0461-0494. Signatures in support of the applications were significantly more numerous than signatures opposed to the applications—523 signatures in support and 191 signatures in opposition. In addition, several of the signatures and petitions in opposition were duplicative of one another, making the number even less. *See, e.g.* R0468 and R0481; R0471 and R0482; R0463 and R0473 (and Todd Sheets' signature again on R0489); R0464 and R0476, duplicative signatures of Mary and Lee Farmer on R0466 and R0470; duplicative signatures of Erin Williams on R0477 and R0483, duplicative signatures of Anne K. Sievers, Barney & Company on R0461 and R0483; duplicative signatures of Nomi Gray on R0479 and R0491, and so on.

There are numerous comments in the record expressing that the hen houses are compatible with the neighborhood. Betty Jo Brooks stated that she would love to have her grandchildren grow up next to such a clean operation. R0245. Kay Clark commented that "I really can't see how anyone could say that the hen house isn't compatible. There is an orchard just across the road. It grows fruits, it sells fruits, this is a business. The next neighbor has a farm that raises horses and sells them, raises hay and has a veterinary practice and a dog kennel." R0246. Troy Bredencamp commented that "the area where Western Slope Layers built their facility is rural and agricultural in nature. The owners have used an existing agricultural

operation and have only changed the commodity that is produced." R0250. Beth Meyer commented that "this is an agricultural area and this [the hen house] is fitting." R0256. Ted Pierce commented that the operation "is built in a farming community and has been for the last 150 years. Whether it is one chicken or 15,000, it is still a farming operation. It is surrounded by fruit orchards, horse facility's [sic], cow ranches and hay fields." R0259. Trish Schmucker asks "what could be more compatible in a traditionally rural, agricultural area of our county than an agricultural enterprise? Are we going to allow a select few to begin defining acceptable agricultural enterprises? .... Horses are okay, but chickens are not?" R0262. Sundee Shoemaker states that "while a group of neighbors have been very vocal in their opposition to Western Slope Layers, they do not speak for all neighbors of the facility. ...I feel that as an agricultural business the operation is compatible with the neighborhood." R0265.

The Plaintiffs argue that "[n]othing in the record refutes that people are getting sick from this chicken farm," and claim that is prima facie evidence that the operations are not compatible. Paragraph 41. The problem with Plaintiffs' claim, however, is that there is no competent scientific evidence in the record to actually prove that it is the chicken facility that is making people sick. Instead, the Plaintiffs and other neighbors conclude that because their symptoms began "around" the time that Western Slope Layers began operations, then ergo, it must be the chicken facility causing it. This is omitting the crucial fourth step of the scientific method which proceeds as follows: 1) form a hypothesis (many people in the neighborhood are experiencing respiratory problems); 2) look for patterns in observations (the illnesses started around the time the chicken facility began operations); 3) formulate a theory (it must be the chicken facility causing the illnesses); and 4) design experiments to test the theory. The fourth step of this

method is critical because to be deemed valid, the theory must be tested to eliminate other possible causes for the observed phenomena. For example, the summer of 2012 was one of the hottest and driest summers on record in Delta County. It was also a summer where many wildfires were burning in the western states, causing many days where the air was smoky and hazy. It is common knowledge that dry smoky conditions can cause or exacerbate respiratory ailments. The undersigned is personally acquainted with several people in Delta County who experienced respiratory ailments for the first time in the summer of 2012, but live nowhere near the chicken operations. However, despite commissioning numerous experts to examine evidence and write reports, the Plaintiffs have provided not a single shred of evidence to actually test their theory by eliminating other causes for the problems the neighbors were experiencing.

Instead, it was the Delta County Health Department—tasked with safeguarding the health of county residents—that actually took action to test the theory by commissioning an air monitoring study to determine what, if any, harmful emissions were being generated by the facility. The study concluded as follows:

> In the consideration of these findings and those from the original report, persons may naturally wish to make interpretations of the suspected hazards associated with exposure to these bioaerosols. We would caution that such interpretations should not be made carelessly. The presence of bioaerosols in the natural environment is common; most especially so in rural environments were [sic] farming activities are considerable sources of bioaerosols, chemicals, and particulates from virtually any of the activities common in this environment. These exposures are consequent to common farming activities, such as, tilling/plowing, hay and grass storage, feeding, harvesting, fertilizing, cleaning pens, and other animal husbandry activities. Currently, there are no standards that we are aware of regarding acceptable exposures to bacterial and fungal propagules. The data from this testing does show that the facility is a generator of a variety of bio-aerosols, organic and non-organic dust, and small amounts of ammonia gas. However, there is not sufficient information at this time to

> suggest that these conditions are contextually abnormal, nor that they are sufficient to induce health problems in normal healthy individuals. R0115.

After the Delta County Department of Health had received the air monitoring studies, Ken Nordstrom analyzed his conclusions and recommendations in a memo to the BOCC:

> The reported health concerns by neighbors surrounding the Western Slope Layers facility generate concern by this Department. The complaints from citizens and letters received by the County include letters from doctors expressing concern for the health of persons in the community exposed to the emissions from the henhouse operation. While health problems from occupational exposure to poultry dust and confined animal feeding are documented in industrial hygiene and medical literature, the complainants have extrapolated the conclusions regarding occupational exposure to ambient environmental exposure. However, those two types of exposures are quite different and in this department's limited literature review, deleterious health effects from environmental exposures are not well documented and should not be compared to an occupational exposure. The burden of proof is quite high and it is difficult to confirm an actual causable link between the henhouse emission and a person's illness or pulmonary difficulties. There are many other environmental factors that could exacerbate allergic reactions, asthma, and COPD that have been reported by the complainants. Such causes would include prior exposure to dust, pollen, wildfire smoke, low humidity, and hot summer temperatures as experienced last spring and summer from a variety of other sources. R0142

Therefore, far from ignoring the neighbors' health complaints, the County instead attempted to see if their theory could be confirmed. Had the air quality testing shown that it was emissions from the facility there were the cause of the illnesses, the County's response would have been quite different. The BOCC, however, reviewed the Plateau report and Mr. Nordstrom's memo and realized that no causal link could be proven. It is easy to criticize the study after the fact, or claim that the County should have done different things or more things, but that in itself does not create a causal link where one has not been found.

The Plaintiffs also argue that the operations are not compatible with the neighborhood because they are causing increased traffic in the area. They complain at paragraphs 37 and 38 of their brief about the semi-trucks that delivered the chickens. However, the operators only replace the birds once every 14 months, so these semi-trucks are far from a daily occurrence. The manure is only hauled out when the birds are replaced, so this also happens only once every 14 months. A truck bringing feed in and a truck taking eggs out come only on a weekly basis, so the additional traffic caused by the facility is actually quite minimal. Plaintiff Susan Raymond herself operates a veterinary clinic and boarding kennel next door which undoubtedly brings far more traffic into the neighborhood on a daily basis than the chicken operations.

In addition, although it is not stated in the RSD, the Delta County Planning staff is required to follow the guidelines of the Delta County Road Standards when analyzing increased traffic caused by a specific development application. That standard requires that if a development will increase traffic by 20% or more, the applicant must commission a traffic study. No traffic study was required for these operations because they came nowhere near this threshold.

## B. Impact on Property Values

Plaintiffs' argument that there is "undisputed" competent evidence in the record that the poultry operations will lower property values in the neighborhood is patently false. What is true is that there is conflicting evidence in the record as to what impact the operations will have on property values. See, e.g., R0544-0556 as compared to R0557-0596. As the trier of fact, it was the BOCC's prerogative as to how to weigh this conflicting information, and this Court may not

substitute its judgment as to credibility for that of the BOCC. Colo. Municipal League v. Mountain States Tel. and Tel. Co., 759 P.2d 40, 44 (Colo. 1988).

Plaintiffs discredit the applicants' property valuation experts as not being qualified as appraisers, and again, this is simply not true. Michael D. Blean is a Certified General Real Estate Appraiser who specializes in appraising rural, agricultural properties. R0544. Moreover, he has experience appraising properties with poultry operations identical to the ones at issue here. Although this Court did previously note that Mr. Blean's expertise is in a different part of the country, Plaintiffs' own real estate expert, John A. Kilpatrick, is a Washingtonian who, under the heading "Comparable Properties," cites studies in North Carolina, Iowa, Minnesota, and several other states. R0568.

Mr. Kilpatrick's report is a scholarly recitation of studies of the impact on property values of "animal operations" from all over North America. Some of these "animal operations" are never identified, so there is no way of knowing if they are small egg facilities or huge industrial feed lots. Where the animals are identified, they are mostly hog farms. Mr. Kilpatrick makes no attempt at all to confine his discussion to "animal operations" that are actually similar to this 15,000 hen facility. In fact, it is readily apparent that Mr. Kilpatrick has never even seen Western Slope Layers at all because that facility is never even mentioned in his report. It is difficult to conceive how a discussion of largely unidentified "animal operations" in locations all over the country could be considered competent evidence with respect to the operations being considered here.

Plaintiffs' other real estate expert, Pamela M. Sant, only viewed Western Slope Layers from the road on a rainy day, stating that, "I could not determine from my personal inspection

any odor, feathers, or the density of the residue." R0557. Instead, she bases her entire analysis on "the website" and DVDs, concluding that "the negative impact cannot be determined without more specific research into similar properties within similar situations." R0558.

In fact, out of the several real estate opinions submitted into the record, the only individual who apparently actually went out and carefully viewed the operation itself and the surrounding neighborhood was Christi Schmidt, a Broker with Colorado Western Realty, LLC. R0549-R0554, in color at R0842-R0847. In contrast to some of the neighboring properties, Ms. Schmidt found the Hostetler property to be clean, well-maintained, and in excellent condition. R0549. Ms. Schmidt included in her report photographs of the Hostetler property and several surrounding properties, demonstrating the similar rural, agricultural character of the entire neighborhood. She concludes that "the Hostetler operation does not affect the value of other properties in the area." R0549.

Although Plaintiffs belittle Ms. Schmidt's report because she is a real estate broker and not a certified appraiser, it seems reasonable to assume that a western Colorado Realtor with actual on-the-ground experience in the Powell Mesa neighborhood has a better grasp on the actual local market conditions than does an out-of-state appraiser speaking in sweeping generalities who apparently has never even seen and never discusses the actual operations at issue.

Another local Realtor did have actual, direct knowledge—as opposed to speculation—of whether or not the chicken facility has negatively affected property values in the area. Cathy Smith writes:

> I have had the property on Powell Mesa which is owned by Gertrude Peet listed at $580,000. I had three separate offers on the property this spring. The prospective purchasers were all very aware of the "Hen House." All three of the offers were over $500,000, unfortunately they all had financing issues, and were not able to close. This is the closest thing to a sale on Powell Mesa for a long time. Considering the times and the down economy, these were very good offers. I do not see the "Hen House" affecting property values at this time. R0267.

### C. Conditions Imposed on the Applicants

Plaintiffs contend that many of the requirements imposed on the applicants by the County were either ignored or were not built to specifications. As with the issue regarding the augmentation plan, however, Plaintiffs again seem to elevate form over function by refusing to recognize that changes can be made in designs and plans that do not compromise functionality. For example, they complain in paragraph 57 that the applicant did not build the southwest retention pond that was contemplated by the engineering plans. However, they fail to mention that the County Engineer made a specific finding that deviating from the original retention pond design did "not compromise the functionality of the drainage." R0091. Instead, they erroneously imply that that Edwin Hostetler was changing plans willy-nilly while the County remained oblivious.

The County required that the applicants have a registered professional engineer provide a "drainage study including stormwater, geotechnical and erosion control." R0936. The applicant complied with the request by engaging Mesa Engineering, Inc. Paul Hendricks, a registered professional engineer, inspected the facility in August 2012 after it was built, and stated that the maximum amount of stormwater generated for a 25-year storm event would be 3,425 cubic feet, and the storage capacity of the facility as designed would contain 3,655 cubic feet. He also

tested the percolation rates in the chicken pen and in the adjacent area and found them adequate. R0181. He concluded that the possibility of groundwater contamination from the facility was "extremely remote." R0182. Plaintiffs' expert, Kathy J. Martin, also a professional engineer, on the other hand, found deficiencies in the engineering plans and opined there was a substantial potential of groundwater pollution. Both individuals are registered professional engineers, yet their conclusions are opposite. Just as the court is often faced with conflicting expert opinions in courtroom testimony and must make a determination which expert is the most credible, so too must the BOCC make such a determination in the face of inopposite conclusions. Moreover, because both individuals are identically credentialed, one cannot conclude that one expert's opinion is competent evidence while the other's is not.

Plaintiffs state at paragraph 58 that the ERO study, authored by Barbara Galloway, concluded that the engineering plans were defective and would not protect the waters of the state. R0885-0896. Ms. Galloway's report is extremely speculative, however, as she discusses what would be required if the facility was designated as a CAFO by the Colorado Department of Public Health and Environment (CDPHE) under their Regulation 61. R0674-0684. She discusses the Best Management Practices (BMPs) that would apply to this facility pursuant to CDPHE Regulation 81 and implies that Western Slope Layers is not following such BMPs. One of her conclusions is that the Hostetlers did not fulfill the requirements of the CDPHE regulations 61 and 81 prior to constructing the facility. R0684. However, Thaine Kramer of the CDPHE initially responded to her report (which she submitted to the CDPHE as a formal complaint) by stating that because the facility had not yet been populated, neither regulation

applied. R0168. Therefore, Ms. Galloway's conclusion that the facility failed to fulfill CDHPE requirements prior to construction was erroneous.

The CDPHE further responded to Ms. Galloway after they inspected the facility on May 9, 2012, after the facility had been populated with laying hens. Mr. Kramer stated that the operation did not quality as a CAFO for two reasons, one, that it did not meet the threshold number of 82,000 birds, and two, that it had a dry manure handling system and was therefore not considered open lot wastewater that could impact waters of the state. R0170. He also stated that although the facility is considered an "animal feeding operation" (AFO), it did not even meet the definition of a medium AFO, which is defined as a facility containing in excess of 25,000 birds. R0170. Mr. Kramer went on to conclude that the facility was, in fact, meeting the requisite BMPs for proper manure and wastewater control systems, practices to divert runoff away from animal confinement areas, practices to decrease open lot surface area, practices to minimize manure transport to surface water, and practices to decrease waste water discharge due to its dry litter manure handling system. R0171. Based upon this determination of the body actually responsible for regulating this facility, one is left with the inescapable conclusion that Ms. Galloway's report was speculative at best, and wildly inaccurate at worst.

One of the conditions imposed on the applicants was to develop a fly control management plan to monitor fly production. R0936. The applicants submitted such a plan (R0215) and despite Plaintiffs' claims to the contrary at paragraphs 64 and 61 ("the fly management plan is bunk"), flies have not been a problem at the facility. During the August 2, 2012, inspection of the facility, Environmental Health Director Ken Nordstrom said that there were very few flies noted at the time of the inspection, he saw none inside the hen building, none

of the fly cards had any specks, and fly paper hanging in the facility for five days had only six flies on it. R0067. Bob Hammon, Area Extension Agent in Agronomy and Entymology, visited the facility on August 24, 2012, and his impression was of a "new, clean, odor and fly-free facility." R0605. He then offers his opinion of the Western Slope Layers fly monitoring and control plan, stating:

> It is comprehensive and covers monitoring, prevention of fly populations, and response to situations in which flies reach nuisance levels. The plan calls for monitoring spot cards which are to be checked on a regular basis. The cards are set as specified in the plan, and there is a record of days they are checked (every other day) in the plan notebook. The spot cards are relatively clean, with an average twelve spots per card in the four months the house has been populated and the cards have been in place. For reference, Penn State University and Cornell University Extension bulletins call for fly control action to be taken when there are 100 spots per week. There were sticky fly tapes set out in the entry room and within the poultry confinement area. The traps in the entry area had been set for several weeks, and had few—less than 10 flies stuck to them. R0605-0606.

Plaintiffs continue to argue at paragraphs 62 and 63 that there are "serious air quality problems" with the facility. However, Chris Lakin of Plateau, Inc., concluded that the bioaerosols emitted from the facility are common in rural, farming areas, and that similar bioaerosols are created by tilling/plowing, hay and grass storage, feeding, harvesting, fertilizing, cleaning pens, and other animal husbandry activities. R0115. Plaintiff Raymond herself operates a horse farm and hay operation where many of these very same activities take place. In their Supplemental Opening Brief, Plaintiffs cite reports from their experts that criticize Plateau's methodology as flawed. They detail the dangers of ammonia and a gram negative fermenting rod in the Yersinia species to human health. Yet none of this obviates the simple fact that Plaintiff Raymond's own facility generates these same sorts of pathogens.

The Plaintiffs also erroneously claim that County staff colluded with the applicants by warning them about the upcoming air monitoring study so that the applicants could apply sawdust on the floor of the facility to minimize the particulates being discharged from the facility. This theory is based entirely on Susan Raymond's observation of Ken Nordstrom, the County's Environmental Health Director, on Powell Mesa Road several days prior to the air monitoring study, and Western Slope Layers receiving a delivery of sawdust two days after that. R0957-0958. See also R0964-R0965, where Plaintiffs' attorney states in an open meeting that Mr. Nordstrom "warned" the applicants about the upcoming air monitoring test. This is yet another example of the Plaintiffs' conjectures not being stated as such, but stated as if they are absolute fact. There is no factual evidence whatsoever in the record to support Dr. Raymond's biased conclusion that Mr. Nordstrom's presence on Powell Mesa Road was connected to any attempt to "warn" the applicants, or "stack the deck in their favor" as stated by Ms. Pridgen, and therefore cannot be considered as credible evidence. R1001.

Plaintiffs' penchant for stating speculation as absolute fact is also evident in Dr. Raymond's claim that that the chicken facility was responsible for her moldy hay crop. R0981-R0987. It is common knowledge that moldy hay is caused by moisture, either because the hay was not properly dried before being baled, or exposed to water after baling. Yet now we are to believe that Dr. Raymond's moldy hay was caused by the chicken facility because she proclaims it to be so. Again, this is totally speculative and as such, is not credible evidence.

Finally, Plaintiffs claim at paragraph 66 that the applicants' representations about dead bird disposal are "inadequate." Yet this statement is absolutely contradicted again by Thaine Kramer of the CDPHE, who noted that the BMPs applicable to the facility require "proper

mortality management." He noted that the facility places dead birds in a freezer and then transports them to the Delta County Landfill, thus achieving "proper mortality management" and acceptable implementation of that BMP. R0171.

**D. Capability of County Staff to Monitor Conditions**

Ken Nordstrom, Delta County Environmental Health Director, inspected Western Slope Layers on June 20, 2012. R0053-0059. Although the facility was in compliance with many of the imposed conditions, there were several things not in compliance. The Planning Department sent Edwin Hostetler a letter on July 2, 2012, listing the items that were not in compliance and requiring Mr. Hostetler to correct them within 30 days. R0060-0061. This notice was properly issued pursuant to the procedures set forth in Article VIII, § 3 D. of the RSD. R0798. Counsel for the Hostetlers responded with a letter detailing all the corrections that had been made. R0062-0065. Mr. Nordstrom conducted a follow-up inspection on August 2, 2012, and confirmed that the facility was substantially in compliance with the conditions. R0066-0072. Nevertheless, the Planning Department followed up with another letter on August 16, 2012, noting a couple of remaining items that still needed to be addressed. R0073. Counsel for the Hostetlers responded on August 31, 2012, detailing the corrective action taken. R0074-0076. This letter noted that the reason the salmonella prevention plan was different than what had been originally submitted was because it had been updated to be in compliance with the latest FDA rule (July 9, 2012) regarding salmonella. R0075.

Mr. Nordstrom also inspected the facility on May 30, 2012, in response to a complaint from Susan Raymond about odors and dust. R107. He noted that there was some dust emanating from the facility but was told this was being minimized with misting. He noted no

detectable chicken odors at all around the hen house and property, and only a very faint order directly in front of the fans.

Bob Kalenak, the County Engineer inspected Western Slope Layers on April 5, 2012. R0090-0096. The chicken house was under construction at that time. Mr. Kalenak discussed with Mr. Hostetler the changes to the drainage plan, confirmed that those changes would not affect the functionality of the drainage, and informed Mr. Hostetler that his engineer would have to provide updated, as-built plans to show the changes. Mr. Kalenak also confirmed that Mr. Hostetler had obtained the storm water discharge permit from the State that was required for the construction. Mr. Kalenak found that facility otherwise in compliance with the engineering design. R0091.

Mr. Kalenak conducted another inspection on April 18, 2012. R0097-0099. Everything appeared to be in order. He made a third inspection of the facility on April 26, 2012. At that time, the poultry building was largely complete and the first chickens had been delivered the night before. Mr. Kalenak confirmed that Mr. Hostetler had contacted Mesa Engineering to update the drainage plans. He also noted that the drainage improvements for the outside pen were not complete, but that the chickens would be confined inside the poultry building until the outside drainage improvements were constructed. He measured decibel levels at the fans and found them to be well within the parameters required by the County.

Mr. Kalenak conducted a fourth inspection on August 2, 2012. R0105-0106. At that time, the County had received the as-built drawings from Mesa Engineering. The outside pen had been completed, and Mr. Kalenak noted the absence of flies and bugs, and any dust build-up around the fans. R0106.

Given this chronology of inspections by County staff, it is difficult to understand how the Plaintiffs can continue to argue that the County is incapable of monitoring this facility. Plaintiffs complain in paragraph 69 that the neighbors have had to "police" the applicants. Yet one of their own witnesses, Barbara Galloway, "lauds" the County for proactively taking baseline water samples. R0381. It is simply unreasonable to expect the County staff to inspect this facility every day to ensure compliance with conditions. Instead, the County has acted in conformance with the RSD by inspecting the facility on a regular basis, issuing notices of non-compliance when needed, and making follow-up inspection to ensure compliance. The Plaintiffs complain that a storm water permit was not timely obtained, yet the County confirmed that the storm water permit had been obtained during their inspection on April 5, 2012. They complain about dust and orders coming from the facility, but when Ken Nordstrom responded to such a complaint on May 30, 2012, he found minimal dust and no odor at all on the Hostetler property.

Plaintiffs complain in paragraph 70 that the County did not follow up on neighbor's health complaints, but conveniently ignore the fact that it was the County who commissioned the air monitoring study in an effort to determine if it was actually emissions coming from the facility that was causing the neighbors' illnesses. They complain in paragraph 71 that the County has paid no heed to Dr. Raymond's evidence of increased flies, but ignore the documents in the record submitted by Ken Nordstrom and Bob Hammon commenting on the somewhat remarkable absence of flies during on-site inspections. R0067, R0605. They also complain in paragraph 71 that the County has disregarded Dr. Raymond's complaints about feathers on her property, but ignore documents in the record submitted by Thaine Kramer and Ken Nordstrom documenting the absence of feathers during on-site inspections. R0171, R0111.

What is even more disturbing, however, is that the Plaintiffs, in their effort to discredit the County, have increasingly resorted to complete fabrication. For example, as was previously discussed, there is no evidence to prove that Ken Nordstrom's presence on Powell Mesa Road on August 8, 2012, was to warn the Hostetlers about the upcoming air monitoring. Yet in paragraph 72, the Plaintiffs blithely claim that even though Mr. Nordstrom said he was there to do an inspection, "[h]e was really there to tell Mr. Hostetler of the upcoming air monitoring test and to advise Mr. Hostetler to get his operation in order." Even more outrageous, they state in paragraph 76, that "[i]n the staff's defense, they are no doubt receiving direction from the commissioners to do everything possible to help the applicants." Where do they come up with this stuff? The only possible answer to that question is "out of thin air," because there is certainly no evidence in the record to support their allegations.

**E. Due Process Rights**

Plaintiffs' argument regarding the air quality monitoring studies is now moot. On March 29, 2013, this Court remanded the matter back to the BOCC in order to allow the Plaintiffs an opportunity to respond to those reports. The BOCC held a public hearing on May 1, 2013, for that purpose. At that hearing, Plaintiffs submitted many documents into the record, which were included in the Second Supplemental Record filed with this Court. Ironically, neither the Hostetler Defendants nor the County had any opportunity whatsoever to respond to those documents. Nevertheless, the Plaintiffs continue to articulate their same fabricated claims about how the County "wanted the Plateau, Inc report changed to better support applicant's position." The first air monitoring report expressly stated that initial tests revealed two species groups of interest, and that "[f]urther analysis of these two groups has been requested by Plateau,

Inc. to determine identification to the species level." R0121. The second report from Plateau was simply to provide the information that the requested analysis had shown.

Finally, the Plaintiffs reiterate their claim of bias by the BOCC against them, but as before, have provided no evidence at all to show that this alleged bias actually exists. They continue to harp on Commissioner Lund's "agenda" to generate a source of chicken manure, even though Commissioner Lund is no longer a member of the BOCC and the organization that Commissioner Lund was allegedly purporting to provide chicken manure for has been defunct for two years now.

**F. Master Plan Compliance**

Although the County believes that the evidence in the record is more than sufficient to uphold the BOCC's decision, this section sets out a supplemental or alternative argument based upon this Court's prior ruling that the record contained insufficient evidence of compliance with the Delta County Master Plan. The County acknowledges that the RSD requires that an application be in compliance with the master plan, and that "black letter law" holds that that makes the Master Plan regulatory instead of merely advisory. It may, however, prove instructive to analyze this conclusion in a little more depth.

A line of Colorado Supreme Court cases has gradually refined the law in Colorado concerning the enforceability of master plan provisions in land use decisions. In Theobald v. Bd. of County Comm'rs, 644 P.2d 942 (Colo. 1982), the court articulated the general principle that "a master plan is a guide to development rather than an instrument to control land use." Id. at 948. However, the court went a step further, stating that a master plan may have a direct effect on property rights if it is implemented through zoning with proper notice and hearing. Id. at 950.

In Beaver Meadows v. Bd. of County Comm'rs, 709 P.2d 928 (Colo. 1985), the court examined conditions imposed by Larimer County on a PUD application; specifically, that the developer pave a 4.73 mile stretch of county road leading into the subdivision and ensure the provision of emergency medical services to the proposed development. The court held that the county had the authority to consider the adequacy of access when reviewing a PUD application, but that its regulations as written were not sufficiently specific to put a developer on notice of what would be required. Specifically, the court found that the regulations contained no standards by which the adequacy of an access road could be evaluated, such as grades, sight distances, widths, shoulders, drainage and so on. Id. at 936-937.

The court refined this concept further and applied it to a master plan compliance provisions in Bd. of County Comm'rs v. Conder, 927 P.2d 1339 (Colo. 1996). In that case, Larimer County subdivision regulations required compliance with the county master plan. The county commissioners denied a subdivision application because it did not comply with the provisions of the master plan, primarily that the subdivision was suburban in character, but was located in a rural area of the county where services were not readily available. The Court of Appeals reversed, finding the County had acted arbitrarily and capriciously in denying the application. The Supreme Court reversed the Court of Appeals, thus upholding the county's decision to deny the subdivision application. The case is noteworthy here, however, not because of its outcome, but because of the Court's reasoning. The Court first reconfirmed the holdings in Theobald and Beaver Meadows that "master plans are purely advisory documents, absent formal inclusion of sufficiently specific master plan provisions in a duly-adopted land use regulation by a board of county commissioners." Conder, 927 P.2d at 1346. The Court then went on to say:

> A county cannot enforce its subdivision regulations, including any master plan compliance provision incorporated into subdivision regulations, simply because a legislative body adopted the regulations consistent with procedural safeguards including notice and hearing. In addition, the provisions that the county seeks to enforce must be sufficiently specific 'to ensure than any action taken will be available and effective [citing Beaver Meadows], and to provide all users and potential users of land with notice of the particular standards and requirements imposed by the county for approval. Id. at 1347-1348.

Therefore, Conder tells us that legislative enactment alone is insufficient; it must also be shown that the master plan provisions are drafted with "sufficient exactitude so that proponents of new development are afforded due process, the county does not retain unfettered discretion, and the basis for the county's decision is clear for purposes of reasoned judicial review." Id. at 1351.

The Delta County Master Plan sets out five major goals which are:

I. Preservation of Agricultural Land and Agricultural Operations;
II. Preservation of the Rural Lifestyle and Landscape, the Natural Environment and Unique Physical Characteristics of Delta County;
III. Encourage New Development to Locate in Areas with Adequate Infrastructure and Require that Development Pay its Own Way;
IV. Protect Private Property Rights;
V. Promote an Economic Climate that Increases Job Opportunity and Overall Economic Well Being. R-0763-0770.

One need only review this list to discern that many of these goals are potentially contradictory to one another. For example, Goal II, preserving the natural environment, could easily contravene Goal V, that requires increasing job opportunities. For this reason, it appears that the Delta County Master Plan may lack the "sufficient exactitude" required by Conder that would give land users a reasonable expectation of what the County will require from them when they submit specific development applications.

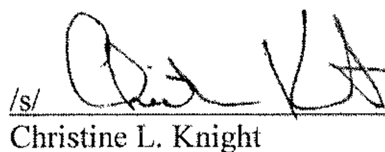
This may seem an odd argument for the County to make, considering that the Commissioners at one time thought it appropriate to make the Master Plan provisions regulatory by including a Master Plan compliance provision in the RSD. But in researching case law on master plans in the course of this litigation, it appears that the Delta County Master Plan may be written in such broad strokes and potentially contradictory terms that it may very well be impossible to require specific development proposals to adhere to all of its terms.

## IV. CONCLUSION

The standard of review in Rule 106 cases sets a high bar for anyone challenging a quasi-judicial decision—there must be no competent evidence in the record supporting the decision. The best that can be said of the plethora of evidence in the record in this case is that it is conflicting. Conflicting evidence, however, is insufficient to overturn a quasi-judicial decision. Colo. Municipal League v. Mountain States Tel. and Tel. Co., 759 P.2d 40, 44 (Colo. 1988).

WHEREFORE, for the above reasons, the Plaintiffs respectfully request that this Honorable Court DENY Plaintiff's complaint pursuant to C.R.C.P. 106(a)(4) and uphold the decision of the Delta County Board of County Commissioners.

Respectfully submitted this 5th day of August, 2013.



/s/

Christine L. Knight

CERTIFICATE OF DELIVERY, FACSIMILE OR MAILING

The undersigned hereby certifies that on August 5, 2013, a true and correct copy of the foregoing DEFENDANTS ANSWER BRIEF PURSUANT TO C.R.C.P. 106(a)(4)(VII) was served by ICCES filing to the following:

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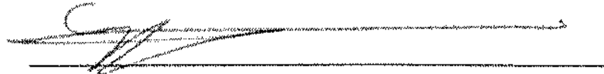

*In accordance with C.R.C.P. 121 §1-26(9), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.*