DISTRICT COURT, DELTA COUNTY, COLORADO Court Address: 7th Judicial District Court 501 Palmer Street, Ste. 338 Delta, CO 81416 Phone: (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.**	▲ **COURT USE ONLY** ▲
Attorneys for Hostetler Defendants: Joshua A. Tolin (#42716) Karen Budd-Falen (*pro hac vice*) BUDD-FALEN LAW OFFICES, LLC 300 East 18th Street Post Office Box 346 Cheyenne, Wyoming 82003-0346 (307) 632-5105 Telephone (307) 637-3891 Facsimile joshua@buddfalen.com karen@buddfalen.com	Case Number: 2012 CV 314 Div.: Ctrm.:
HOSTETLERS' ANSWER BRIEF	

Defendants Edwin Hostetler, Eileen Hostetler, Greg Hostetler, Carmen Hostetler, Anna Hostetler, and Roland Hostetler (collectively, the "Hostetlers"), by and through their counsel, Joshua Tolin and Karen Budd-Falen, of Budd-Falen Law Offices, LLC, hereby submit their answer brief, pursuant to C.R.C.P. 106(a)(4)(VII), and request that the May 28, 2013, decision by Defendant Delta County Board of County Commissioners (the "Board") be affirmed by this Court.

Summary of the Case

The Hostetlers applied for two specific development agreements in 2011 in the names of Rocky Mountain Layers (located on Redlands Mesa Road) and Western Slope Layers (located on Powell Mesa Road) in Delta County, Colorado. *See* R1092. The Hostetlers followed the process called for under the specific development regulations, and after the Board of County Commissioners for Delta County, Colorado ("the Board") received public comment on both sides of the issue, the Hostetlers agreed to condition their development agreements based on a number of conditions created to address the concerns of the opposition. *Id.* With these conditions, the Board approved the Hostetlers' applications on August 29, 2011. *Id.* Susan Raymond, Travis Jardon, Mark Cool, Peter Pruett, and John and Heidi Marlin immediately filed suit against the Board and the Hostetlers, claiming an array of violations by the Board. *See Complaint for Certiorari and Declaratory Relief*, Case No. 2011 CV 282, Delta County District Court (Sept. 23, 2011). The Hostetlers and the Board entered into written development agreements on October 3, 2011, and began preparations for Western Slope Layers. R0696.

After filing their third amended complaint, the plaintiffs in the original case also moved for a preliminary injunction to prohibit the Hostetlers from operating Western Slope Layers. *Plaintiffs' Motion for a Preliminary Injunction*, Case No. 2011 CV 282, Delta County District Court (Mar. 16, 2012). After a hearing on the motion for preliminary injunction, this Court denied the motion for preliminary injunction. *Order*

Denying Preliminary Injunction, Case No. 2011 CV 282, Delta County District Court (Mar. 22, 2012).

After briefing on the merits, this Court denied some of the original plaintiffs' complaints; however, this Court found in their favor in two regards: first, this Court held that Specific Development Regulations require "compliance with the compatibility component of the Master Plan," a set of county guidelines passed by the Board in 1996. *Order on Rule 106 Claim* ("*July 5 Order*"), at 9, Case No. 2011 CV 282, Delta County District Court (Jul. 5, 2012). Second, this Court held that while the Board had more than 1,100 pages of record before it, the record lacked competent evidence concerning four issues. Therefore, the Court remanded to the Board to consider evidence on those four issues: (1) compatibility of the uses with the neighborhood; (2) impact on property values of the surrounding property; (3) sufficiency of the conditions and undertakings of the Hostetlers to address the concerns identified in the record; and (4) the capability of the Delta County staff to monitor the compliance with the Hostetlers' conditions and undertakings. *Id.* at 12.

While on remand to the Board, the original plaintiffs asked this Court twice to grant additional relief and force the Hostetlers to cease their operations or force the Board to do so. *Plaintiffs' Motion for Supplemental Orders*, Case No. 2011 CV 282, Delta County District Court (Jul. 23, 2012); *Plaintiffs' Motion for Entry of Judgment Against Delta County, Colorado*, at 2, Case No. 2011 CV 282, Delta County District Court (Oct. 12, 2012). This Court denied those requests. *Order on Motion for Supplemental Orders*, Case No. 2011 CV 282, Delta County District Court (Aug. 7,

2012); *Order re: Entry of Judgment Against Delta, Colorado as to Plaintiffs' Rule 106(a)(4) Claim*, Case No. 2011 CV 282, Delta County District Court (Nov. 1, 2012).

Also while on remand, the Board noticed the public of a hearing limited to only those four issues the Court determined were lacking in the original record. R0691–R0692. The Board held that public hearing on September 4, 2012, and took evidence and heard comments from the Hostetlers, the opposition, and the public. R0693–R0702. The Board then took the matter under advisement. R0702. The Board returned to the public on October 22, 2012, and held the Hostetlers had met their burden and provided competent evidence concerning the four issues on remand. R0710–R0712. Therefore, the Board re-approved the Hostetlers' development agreements with conditions. R0712.

Again, immediately, Plaintiffs filed suit against the Board and the Hostetlers. *Complaint for Certiorari and Declaratory Relief as to Public Hearing on September 4, 2012* (Nov. 16, 2012). After the Board had certified the Rule 106(a)(4) record and a supplemental record, Plaintiffs moved to strike four pieces of evidence ("air quality evidence") contained in the record because Plaintiffs complained they did not receive one piece of evidence prior to the public hearing and because the other three pieces of evidence were presented to the Board by Delta County staff after the public hearing. *Plaintiffs' Motion to Strike Improper Evidence Considered by the Board of County Commissioners During, and Evidence Introduced After, the September 4, 2012, Public Hearing* (Feb. 28, 2013). Soon after, Plaintiffs filed their opening brief on the merits. *Plaintiffs' Opening Brief Under Rule 106(a)(4)* ("*Opening Brief*") (Mar. 11, 2013). Based

on Plaintiffs' motion to strike, this Court remanded the issue back to the Board to allow for public comment on the four pieces of air quality evidence. *Order on Motion to Strike* (Mar. 29, 2013).

Following the Court's remand to allow for additional public comment, Plaintiffs demanded to take depositions on its Rule 57 declaratory judgment claim prior to the Board's next public hearing. *Notice of Depositions* (Apr. 15, 2013); *Response to Defendant Delta County Board of County Commissioners' Forthwith Motion for Protective Orders Pursuant to C.R.C.P. 26(c)* (Apr. 17, 2013). *Order on Motion for Protective Order* (Apr. 23, 2013). The Court struck the deposition demand and bifurcated the two issues. *Id.* at 2. The Hostetlers filed a motion for partial judgment on the pleadings concerning Plaintiffs' attempt to go beyond the exclusive remedy provided in Rule 106(a)(4); this Court granted that motion. *Hostetlers' Motion for Partial Judgment on the Pleadings* (Apr. 19, 2013); *Order on Defendants Hostetlers' Motion for Partial Summary Judgment* (Jun. 11, 2013).

Again on remand, the Board heard comments and received additional evidence with respect to the four pieces of air quality evidence. R0951–R0972. The makeup of the Board at this public hearing had changed based on the regular election cycle. Chairman Lund, who had been a member of the Board during the initial approval and re-approval and the target of Plaintiffs' repeated claims of impropriety had since retired from the Board. *See* R0827; R0938; R0946. The Board during the 2013 remand consisted of Commissioners C. Douglas Atchley, C. Bruce Hovde, and J. Mark Roeber. R1093.

After hearing the evidence during the May 1, 2013 public hearing, in addition to reviewing the evidence from the prior public hearings, the Board on May 28, 2013, issued its decision on remand. R1084–R1089. The Board again re-approved the Hostetlers' develop agreements, though this time adding an additional condition for air-quality testing. R1089.

Based on a stipulated schedule, the Board certified a second supplemental record after its May 28, 2013, decision conditionally approving the Hostetlers' applications. *Submission of Second Supplemental C.R.C.P 106(a)(4)(III) Record* (Jun. 17, 2013). Plaintiffs then filed a supplemental opening brief (pursuant to a stipulated schedule), *Plaintiffs' Supplemental Opening Brief* ("*Supplemental Brief*") (July 1, 2013), and the Hostetlers now respond on the merits.

Legal Standard

Rule 106(a)(4) is the exclusive remedy for quasi-judicial decisions. *Grant v. Dist. Court*, 635 P.2d 201, 202 (Colo. 1981); *Norby v. City of Boulder*, 577 P.2d 277, 280 (Colo. 1978). Rule 106(a)(4)(I) explains: "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 or officer."

The Colorado Supreme Court has "long held that in a Rule 106(a)(4) action, a reviewing court must uphold the decision of the governmental body 'unless there is no competent evidence in the record to support it.'" *Bd. of Cnty. Comm'rs v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996) (*quoting and citing Sellon v. City of Manitou Springs*, 745 P.2d 229, 235 (Colo.1987); *Board of County Comm'rs v. Simmons*, 494 P.2d 85, 87 (Colo.

1972); *Marker v. Colorado Springs*, 336 P.2d 305, 307 (Colo. 1959)). " '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.' " *Id.* (*quoting Ross v. Fire & Police Pension Ass'n*, 713 P.2d 1304, 1309 (Colo. 1986)).

A court in a Rule 106(a)(4) proceeding "is not the fact finder and may not substitute its own judgment for that" of the decisionmaker. *Id.* at 51. As such, this Court's proper role does not include "reweigh[ing] the evidence in a Rule 106(a)(4) action instead of applying the 'competent evidence' standard of review." *Id.*

Argument

The issue before the Court is whether the Board abused its discretion in re-approving the Hostetlers' development applications (with conditions). Specifically, the four issues before the Board on remand were: (1) compatibility of the uses with the neighborhood; (2) impact on property values of the surrounding property; (3) sufficiency of the conditions and undertakings of the Hostetlers to address the concerns identified in the record; and (4) the capability of the Delta County staff to monitor the compliance with the Hostetlers' conditions and undertakings. The record before the Board contains competent evidence concerning each of the issues to support its decision; therefore, this Court should affirm the Board's decision.

The Hostetlers object to this Court's ruling on July 5, 2012, that a specific development applicant be in compliance with the Master Plan, insofar as it requires applicants to affirmatively prove certain "requirements" which have been listed as

guidelines in the Master Plan. While the Hostetlers agree that the specific development agreement (and a Board's decision granting that agreement) must be "*consistent* with the Delta County Master Plan," Delta County Regulation for Specific Developments ("Regulations"), art. VI, § 2(A), the Hostetlers object to applicants being forced to prove requirements not contemplated as such in the Regulations or Master Plan. Recognizing that objection, the Hostetlers presented sufficient evidence on remand to meet those requirements, consistent with this Court's *July 5 Order*.

Compatibility

The first issue on remand was whether the Hostetlers' uses are compatible with the neighborhood pursuant to the Master Plan. *July 5 Order*, at 12. The Master Plan itself specifically states it "is an advisory document only and has no regulatory or restrictive powers." R0759. However, in the *July 5 Order*, this Court read the statement, "The specific development must be consistent with the Delta County Master Plan," R0789, as creating an additional requirement of "compliance with the compatibility component of the Master Plan." *July 5 Order*, at 9.

Therefore, we must look to the Master Plan. The Master Plan provides its goals as follows:

> Delta County is an agricultural County where the importance of the agricultural economy is real and not merely a symbol of a western life style. In 1995 the market value of agricultural products grown in Delta County was $44,593,000. The total economic impact of agriculture and related industries was an estimated $134,760,840. Agriculture, including forestry, and agricultural related business directly employ an estimated 23 percent of the total County workforce. Agriculture accounts for approximately 40 percent of the total workforce, when indirect employment is included.

> Agriculture is critical to the economy of Delta County. . . . [A]ny threats to the agricultural base resulting from development could be a major detriment to the overall economic well being of the County. [A]griculture, more than any other factor, defines the rural character of the County.

R0763.

Concerning the protection of private property rights, the Master Plan explains that implementation of land use regulations *will assume the land use is authorized* unless the use violates existing regulations, adversely impacts neighbors, or contradicts the goals and objectives of the Master Plan. R0768 ("Implementation of . . . County land use regulations will assume that a particular . . . use of land should be authorized unless the . . . use would violate existing regulations, would adversely impact neighboring property owners or residents, or contradict the goals and objectives of the Master Plan."). Therefore, the "burden of proof" as described by the Master Plan, lies with opponents of the proposed land use.[1] *Id.*

Continuing its guidelines concerning private property rights, the Master Plan explains:

> In the implementation of the County's land use regulations the compatibility of a new development with the existing land uses should be given priority consideration. In cases where there is incompatibility between an existing and a proposed land use, the property right of the existing use should be given priority.

R0769.

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[1] The Hostetlers only argue this burden of proof, as described in the Master Plan, concerns what the Court referred to as the "compatibility component of the Master Plan." The Hostetlers recognize their burden below concerning compliance with the requirements in the Regulations. R0775.

While the Master Plan does not further describe "compatibility," it does describe "incompatibility":

> **Incompatibility**. If maintaining a critical mass of agricultural land use is the County's highest priority, the County must be willing to restrict other uses that are incompatible with agriculture and related business. This means residential subdivisions and other types of development adjacent to agricultural operations may have to be denied or required to mitigate adverse impacts on existing agricultural land use.

R0763.

Plaintiffs attempt to skew the compatibility of the Hostetlers' one-barn egg laying operations to the area by referring to their agricultural operations as something other than "traditional farming and agriculture." *See, e.g., Opening Brief*, at ¶¶ 14, 25, 26. However, the Master Plan does not create subsets of agriculture. Instead, when discussing "Agricultural Land and Agricultural Operations," the Master Plan refers to "agricultural economy," "agriculture and related industries," "agriculture, including forestry, and agricultural related business." R0763.

Moreover, the Regulations themselves do not consider some types of agricultural "traditional" and others not so. For example, the Regulations state: "**Protection of Agricultural Operations** - Development shall not interfere with the normal operation of existing agricultural operations including, but not limited to, dairies, feed lots, fruit orchards, onion sheds, crop and livestock production and other agricultural activities." R0791.

While the Regulations do require a specific development agreement for some specific agricultural operations, the Regulations still recognize the operations as agricultural. *See id.* For example, in the provision of the Regulations that exempts

certain agricultural operations from the Regulations, it exempts: "Agricultural uses of the land that produce agricultural and livestock products that originate from the land's productivity for the primary purpose of obtaining a monetary profit, except for new confined animal operations and commercial animal slaughter and rendering facilities." R0774. Therefore, any agricultural use that does not meet that exemption is regulated by the Regulations. *See id.* Consider a family who keeps a couple of dairy cows on their property for their own use. Few would argue raising dairy cows is not an agricultural use. However, because the family does not keep the cows "for the primary purpose of obtaining a monetary profit," that agricultural use is not exempt from the Regulations. *See id.*; *see also* R0793 (defining "confined animal operation" as "[a] confined corral, pen, enclosure, building and/or structure in which animals are concentrated").

With the Master Plan's numerous references to promoting agriculture and its definition of incompatibility in mind, we turn to whether the Hostetlers' egg-laying barns are compatible with the surrounding areas. The Regulations, article VI, § 2.A. state: "Comments received from surrounding property owners, other interested persons and existing land use shall be among the factors considered to determine compatibility." R0789.

First, it is important to remember that Delta County does not have zoning, R0761; therefore, there is no legislative declaration of the type of neighborhood where the Hostetlers live and have their operations. However, the Board has described its county as "an agricultural County where the importance of the agricultural economy is real and not merely a symbol of a western life style." R0763; *see id.* ("[A]griculture,

more than any other factor, defines the rural character of the County."). Second, the surrounding areas of both operations are agricultural and rural residential, as established by numerous Delta County residents. *See, e.g.*, R0269–R0335 (recognition by more than 500 Delta County residents that the surrounding areas are "agricultural and rural residential"); R0246 (describing area surrounding hen house as agricultural in public comment); R0248 (describing agricultural nature of Delta County in public comment); R0250 (describing surrounding area as "rural and agricultural in nature" in public comment); R0251 (describing surrounding area as "rural and agricultural in nature" in public comment); R0262 (describing "traditionally rural, agricultural area" in public comment); R0265 (describing neighborhood as "residences and small farms/orchards"); R0375 (describing "agriculture related areas" in opposing public comment); R0401 (describing "traditional subsistence / low density agricultural neighborhoods" in opposing public comment); R0409 (describing area's "existing agricultural and domestic land uses" in opposing public comment); R0464, R0467, R0468, R0472, R0473, R0481 (describing "residential and traditional agricultural areas" in opposing petition); R0701 (describing "agricultural community" in public comment during hearing; R0840 (describing "North Fork Valley [a]s a boutique farm and cattle ranch area with emphasis on healthy, sustainable, scenic, farms and ranches" in opposing public comment); R0963 (describing "adjacent agricultural uses on both Powell Mesa and Redlands Mesa" by Plaintiff in public comment).

In addition to the comments by the many neighboring and other Delta County residents discussed above, the record also includes numerous photographs that provide

sufficient evidence to recognize the agricultural and rural nature of the surrounding areas. R0844–R0847 (depicting surrounding area in twenty photographs by professional broker). Even photographs presented by Plaintiffs establish the agricultural nature of the surrounding area. *See, e.g.*, R0849, R0895 (depicting aerial view of surrounding area during construction).

Moreover, a local real estate broker gave her professional opinion that the area is "RURAL/AGRICULTURAL." R0843. The professional, Christi Schmidt, has been licensed in Colorado for more than ten years, owns Colorado Western Realty, LLC, and has earned designations of "GRI (Graduate REALTOR Institute) ABR (Accredited Buyer Representative) SRS (Seller Representative Specialist) and SFR (Short Sale and Foreclosure Representative)." *Id.* Additionally, Ms. Schmidt has "been member of the National Association of REALTORS for 12 years," "been on the Board of Directors for the Delta County Board of REALTORS for over 8 years and have served as Secretary/Treasurer, President-elect and President in 2009." *Id.* Ms. Schmidt currently serves as "the Northwest District Vice President for the Colorado Association of REALTORS." *Id.* Corroborating Ms. Schmidt's professional opinion is the opinion of an appraiser's report presented by Plaintiffs. *See* R0557 (describing areas as having "a strong rural, agricultural atmosphere with residential use combined" in appraisal report submitted in opposition).

As the record clearly establishes the nature of the Hostetlers' surrounding areas as agricultural and rural residential, the next question is whether a one-barn egg-laying operation is compatible with agricultural and rural residential uses. Again, sufficient

evidence exists in the record to support the Board's decision that the Hostetlers' agricultural operations are compatible with their surrounding areas. Many of the same pieces of evidence that establish the nature of the surrounding area support the fact that the Hosteters' agricultural operations are compatible with their surroundings.

Numerous Delta County residents agreed in petitions and in public comments at the hearing. *See, e.g.*, R0269–R0335 (agreeing that the Hostetlers' "operations are compatible with the existing agricultural and rural residential uses and character of the surrounding areas" in petition signed by more than 500 Delta County residents); R0246 ("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 fruit, sells fruit, this is a business. The next neighbor has a farm that raises horses and sells them, raises hay and has a veterinarian practice and a dog kennel. (probably very noisy). As you continue down the road you will find numerous farms raising and selling hay, some board horses and pasture cows. Looks like agriculture to me."); R0250 ("The owners have used an existing agricultural operation and only changed the type of commodity that is produced. The laying operation has the appearance of being a well-designed, maintained, and managed operation that blends in with its surroundings."); R0251 ("The Hostetler's have used an existing agricultural operation and only changed the type commodity that is produced. The laying operation has the appearance of being a well designed, maintained, and managed operation that blends in with its surroundings."); R0262 ("What could be more compatible in a traditionally rural, agricultural area of our county than an agricultural enterprise? . . . I live on Rogers Mesa and farm on Barrow Mesa and in both

places would not object to the neat, clean chicken operation I see on Powell Mesa being located next door."); R0265 ("I am a resident of Hanson Mesa and a neighbor of the Western Slope Layers operation on Powell Mesa. While a group of neighbors has been very vocal in their opposition to Western Slope Layers, they do not speak for all neighbors of the facility. I would like to address some of the specific areas of concern. First, I feel that as an agricultural business the operation is compatible with the neighborhood. The neighborhood is primarily residences and small farms/orchards. One of the primary opponents has a veterinary business. If you find against Western Slope Layers on the premise that it is not compatible with the neighborhood I would request that you issue a cease and desist order to all other businesses in the neighborhood."); R0738 ("I live less than a mile from the proposed facility on Redlands Mesa. . . . I have to say is that it is absolutely compatible with Redlands Mesa. In fact, within a mile, we've got 400 head of elk; we've got a dairy with 300 head of cows; we've got a beef operation with 600 head of beef cows; and we have my operation with 250 head of bison and elk. So I think it's absolutely compatible."); R0739 (describing Hostetlers as running an agricultural operation in an agricultural community, which is why residents live in the community, in public comment by neighboring veterinarian); R0740 (describing and providing pictures of egg-laying operations throughout the county, in various areas like those at issue, where the operations are compatible with their surroundings in public comment).

Beyond the comments of neighbors and other Delta County residents, the photographs that establish the agricultural and rural nature of the surrounding areas

similarly provide sufficient evidence concerning the Hostetlers' operations being compatible with the areas. R0844–R0847 (depicting surrounding area in twenty photographs by professional broker). Based on those photographs, it would be difficult to tell which property is being claimed as incompatible with the neighborhood. Even the aerial photographs and photographs taken from one of Plaintiffs' agricultural operations depict the compatibility of the Hostetlers' agricultural operations with their surroundings. *See, e.g.*, R0849, R0895, R0920.

Finally, Ms. Schmidt, the local broker who studied the Hostetlers' operations and surrounding area gave this professional opinion that corroborates the other evidence that the Hostetlers' operations are compatible with the surrounding rural and agricultural area:

> I based my research on an approximate 1 mile radius from this property but also have noted some observations in regard to the Hotchkiss area in general. I have also included an evaluation as to whether the subject property specifically "fits" with the surrounding properties.
>
> Beginning with properties along Hanson Mesa Road as you exit Hotchkiss to the north the majority of the properties are small farm/residential properties. Acreages vary from 2 to 35 acres and most are older homes (some updated, some not) with the exception of the Brezonick property which is a single family residence built in 2009. The area however is still regarded as agricultural and rural. There are horses and cattle grazed on these properties and hay production and pasture. As you turn on to Powell Mesa Road and get to the mesa the acreage sizes increase and are more sparse. The first property on the right is an orchard/vineyard property with several outbuildings and a new garage/shop under construction. As you look to the north east you observe a contemporary home with a yert and directly to the west is a tree farm with a small older outdated home. Across the road and to the west is the subject property which by observation is hay production, cattle and the chicken facility. Directly to the north is the property that is a Veterinary Clinic and horse facility. As you progress along Powell Mesa Road you find more of the same type of properties with acreages from 5 to 40 acres or

more with hay production, pasture, cattle or horses. As you make the bend to the point where Powell Mesa Road loops around and re-joins Hanson Mesa Road you pass more 40-70 acre properties plus a property that has approximately 24 acres and an huge indoor arena that sits right next to Powell Mesa Road. Although this property is currently vacant it is obviously a larger horse facility. Please refer to the pictures on pages 3, 4 and 5 for a slides how of the properties.

. . .

There are several of the other surrounding properties that do NOT appear to be as well maintained or as clean. Notable issues on these other properties include old vehicles and junk cars, trailer houses, manure piles, delapidated buildings and fences, weeds that are overgrown and dry unmaintained pastures along with homes and shops and barns that appear to be in disrepair.

. . .

My professional opinion is also that the Hostetler property is absolutely conforming to the rest of the "neighborhood" and the surrounding area. This is a RURAL/AGRICULTURAL area including as I mentioned previuosly cattle, horses, hay production and pasture. There are also orchards, vineyards and most likely pig farms in the area. I would also venture to say that there are chickens and goats on these properties as well.

R0842–R0843.

Therefore, the record contains countless pieces of evidence that establish two points: (1) the surrounding areas are rural and agricultural; and (2) the Hostetlers' one-barn egg laying agricultural operations are compatible with the surrounding rural and agricultural areas. As the record is rife with this evidence, the Board did not act arbitrarily or capriciously. *O'Dell*, 920 P.2d at 50 (explaining government acts arbitrarily only when "no competent evidence" exists to support the decision).

While Plaintiffs point to evidence in the record that arguably contradicts the evidence of compatibility, the role of this Court is not to weigh the evidence or act as a "zoning board of appeals." *Id.* at 50–51 (*quoting Sundance Hills Homeowners Ass'n v. Bd. of Cnty. Comm'rs*, 534 P.2d 1212, 1215–1216 (Colo. 1975)). Instead, this Court must verify whether evidence exists in the record to support the Board's finding. *Id.* at 50.

Regardless, at least a few points concerning some of Plaintiffs' arguments should be addressed. Plaintiffs claim the Hostetlers' operations are not compatible with the neighborhood because neighbors like Plaintiffs Susan Raymond now complain of symptoms of asthma after the Hostetlers brought in their birds. *Opening Brief*, ¶ 29.

First, the argument of *post hoc, ergo propter hoc*, that one event caused another event occurring after the first event is a logical fallacy. *Black's Law Dictionary* (9th ed. 2009). While Plaintiff Susan Raymond complains of the effects on her, the record does not prove her diagnosis of asthma was caused by the Hostetlers operations. While Dr. Abuid diagnosed Susan Raymond with occupational asthma based on the time-correlation to the Hostetlers' opertions, that diagnosis is based on her own self-serving claim that she never had asthma prior to the Hostetlers' operations. Even if true, those statements provide time-correlation to their operations, but not causation.

Second, the record does provide several pieces of evidence that put Plaintiff Susan Raymond's credibility in question. For example, she has made

numerous complaints concerning the Hostetlers' operations that end up not being corroborated. *See, e.g.*, R0818 (comparing Susan's claim of fugitive feathers to personal observation of Health Department of no feathers northwest of the barn); *compare* R0927 (claiming white feather on window caused by Hostetlers' operations), *with* R0601 (describing the Hostetlers' birds as "brown layers").[2] Moreover, her staunch opposition to the operations from the start (and failure to disclose her conflict of interest when acting as a member of the Leroux Creek Advisory Planning Committee) coupled with the Board's approval of the operations over the Advisory Planning Committee's recommendations further provides record evidence of her lack of credibility. *See Venard*, 72 P.3d at 449 (recognizing impartiality of a decisionmaker with a personal stake in the outcome of an issue before it); Record, Case No. 2011 CV 282, Delta County District Court, at R-000025, R-000100 (noting Plaintiff Susan Raymond's making motion and seconding a recommendation to deny the applications in her role with the Leroux Creek Area Advisory Planning Committee).

Plaintiff Susan Raymond has even let religious discrimination slip into her written comments opposing the applicants. *See e.g.*, R0438, R0909 (complaining about the "Mennonite vehicles" present at the Hostetlers' operations); R0979 (describing her concerns with manure handling and specifically describing one involved individual as "a Mennonite," following up with "should you not be

[2] Another Plaintiff, Mark Cool, similarly blames the Hostetlers for an infection contracted during his activities in his outdoor garden. R0735. However, at the same time, he references the thirty wild turkeys that regularly harass the garden on his property. *Id.*

concerned?"). All of these references in the record could reasonably discredit testimony given by Plaintiff Susan Raymond.

Even so, the Board has clearly heard the concerns raised by Plaintiff Susan Raymond and the other plaintiffs. The members of the Board have reviewed thousands of pages of record and did not simply approve the Hostetlers' specific development applications. R1087. Instead, the Board approved the applications only with conditions, which "are sufficient to address any concerns about the impact of this operation on the surrounding properties."[3] R0602. Moreover, the conditions added in response to Plaintiffs' concerns "go above and beyond operations of this size of operation in other locations in state and in other states." R0509. Therefore, the record before the Board includes more than sufficient evidence that the Hostetlers' operations are compatible with their surroundings.

Impact on Surrounding Property Values

Concerning the right to development in Delta County, the Master Plan states: "The right to develop and improve private property does not constitute the right to . . . adversely impact the . . . property value or neighboring landowners." R0769.

Accompanying her professional opinion regarding the compatibility of the Hostetlers' operations with the surrounding area, Ms. Schmidt, provided her professional opinion that the Hostetlers' operations do not negatively impact surrounding property values. Specifically, she stated:

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[3] Concerning Plaintiffs' complaints about the roads on Redlands Mesa, the development agreement addresses this issue via the site plan and access requirements. R0943. The Hostetlers are currently in the process of meeting those requirements and working with the Planning Department to ensure compliance.

> My professional opinion is that the Hostetler property does not affect the value of other properties in the surrounding area. The Hostetler property is clean, well maintained and appears to be in excellent condition. The fences are maintained, the grass and pastures are green and appear to be well irrigated and maintained. The chicken facility sits well off the road in a small valley so it slightly obscured and from all appearances is well built and is constructed to conform with the other buildings on the property and the landscape. I observed little, if any, noise coming from the facility and no smell or dust at the time I viewed the facility.
>
> There are several of the other surrounding properties that do NOT appear to be as well maintained or as clean. Notable issues on these other properties include old vehicles and junk cars, trailer houses, manure piles, delapidated buildings and fences, weeds that are overgrown and dry unmaintained pastures along with homes and shops and barns that appear to be in disrepair.

R0842–R0843.

In addition to Ms. Schmidt's professional opinion as to the lack of a negative impact on property values, several other pieces of evidence and public comments support the fact that the Hostetlers' operations will not negatively impact surrounding property values. R0544 (explaining that he has not seen "any economic impact on property values directly related" to facilities similar to the Hostetlers by certified general appraiser who "specialize[s] in appraising rural, agricultural properties"); R0246 ("It doesn't appear property values will suffer due to the fact of when the owners of the Hen House bought their property they gave fair market value for it even though there was two business next to them that had heavy traffic because of the nature of these businesses. The orchard attracts lots of insect, rotting fruit causes flies, horse manure causing flies and smelly, etc."); R0262 ("If an owner plans to sell to someone who wishes to carry on an agricultural operation and retain the status the current owner has

enjoyed for years, there should be no change in values, If an owner plans to sell to retired baby boomers looking to enjoy a pseudo rural lifestyle, then the property may not bring the inflated values the owner planned to cash in on. I know that I would much prefer the chicken operation on two vacant previously productive agricultural properties that were subdivided that are close to my properties to the weed infested prairie dog colonies they have become."); R0265 ("I currently have my house for sale and while the value of the home/land has dropped approximately 20% since it was built in 2008 I believe that is consistent with the rest of the North Fork Valley and is not due to the proximity of the egg laying operation."); R0267 ("I am a active realtor in Hotchkiss and on Powell Mesa. . . . I have had the property on Powell Mesa which is owned by Gertrude Peel listed, at 580,000.00. I had three separate offers on the property this Spring. The prospective purchasers we all very aware of the "Hen House" All three of the offers were over 500,000.00, unfortunately they all had financing issues, and were not able to close. This is the closest thing there has been 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.").

When this Court remanded this issue back to the Board to consider more evidence on the matter, this Court specifically referenced "[t]he correspondence from Attorney Steven Harper (pages 918 through 927 of the Record) noting particularly the necessity to comply with the Master Plan and the appraiser's discussion of the 'incurable external obsolescence' created by these egg-laying operations making mitigation impossible." *Order*, at 10. Evidence in the current record clearly contradicts Mr.

Harper's misunderstanding of the term of art "incurable external obsolescence." Instead of meaning "mitigation [is] impossible," as alleged by the opponents' attorney, that term merely means that the cost of a cure is more than the benefit received. *See* R0555.

James M. Bittel, President of Wildrose Appraisal Incorporated and a Colorado Certified General Appraiser, explained the term of art as follows:

> Obsolescence may arise from within a property or from factors external to a property. In the case of the neighbors of [the Hostetlers'] property, if they were to experience an adverse change in their property value as a result of the poultry, this would be considered external obsolescence (as the origin of the obsolescence is external to their property).
>
> Whether a factor of obsolescence is internal to a property or external to that property, it is classified as economically curable or incurable. It is considered curable if the "cost to cure" is equal to or less than the resulting increase in value to the obsolescence being cured. If the "cost to cure" is greater than the resulting increase in value to the obsolescence being cured, then it is considered economically incurable.
>
> Please note that "incurable" does not mean that it cannot be cured, it merely means that the cost of said cure is more than the benefit received. When the obsolescence cured is to the property of another, it may be beneficial to the property owner to cure it, even if it is economically incurable.

Id.

Plaintiffs cite to contrary evidence presented by Delta County residents concerning the impact on property value, a document concerning "animal operations" in general and their effects (without a single reference to the specifics of the Hostetlers' one-barn operations), and an appraiser's letter indicating she "could not determine from [her] personal inspection any odor, feathers or the density of the residue," but assuming the truth of Plaintiff Travis Jardon's "report to [her] that the odor, large dense clouds of dust containing pulverized chicken manure and chicken feathers is carried to

surrounding properties," then, "this will have a negative effect on surrounding properties."[4] Opening Brief, ¶¶ 43–50; *see* R0559–R0596; R0557. Again, the issue for this Court is not to decide *de novo* whether Plaintiffs' claim of a negative impact outweighs the contrary evidence discussed above of no negative impact; the Court must review the Record to confirm whether sufficient evidence exists of the Board's decision.

Accordingly, the record has sufficient evidence, from both professionals and local residents, to support the Board's finding that the Hostetlers' operations will not negatively impact the surrounding property values.

Sufficiency of the Conditions and Undertakings

In the record before the Board are five expert opinions, which provided the Board with plenty of competent evidence to find the conditions imposed upon and undertakings of the Hostetlers are sufficient to address the concerns raised by the opponents. The first expert opinion is authored by Dr. Ken W. Koelkebeck, Ph.D., Professor and Poultry Extension Specialist, Department of Animal Sciences, University of Illinois at Urbana-Champaign, who reviewed the Hostetlers' development plans and agreement in light of the concerns specified by this Court in its *July 5 Order*. Dr.

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[4] Plaintiffs boldly misrepresent evidence in their Opening Brief when they state: "The Plaintiffs' expert testimony, from Dr. Kilpatrick and Ms. Sant, is that property values have plummeted because of the operation of the chicken farm." ¶ 84. Instead, Dr. Kilpatrick opined generally on CAFOs and their effects; he did not provide testimony that any Delta County property values have decreased based on the Hostetlers' one-barn (non CAFO) operations. *See* R0559–R0596. Ms. Sant similarly did not opine that the Hostetlers operations directly affected property values. Instead, she opined that if "odor [and] large dense clouds of dust containing pulverized chicken manure and chicken feathers [are] carried to surrounding properties," then "this will have a negative effect on surrounding properties." R0557. She did not study the Hostetlers' actual operations to determine whether they impact surrounding property values. *See id.*

Koelkebeck has been with the Department of Animal Sciences for over 25 years, and his "area of expertise is poultry environmental physiology and management." R0601. Dr. Koelkebeck concluded in his professional opinion that "this small cage-free/organic poultry operation will [not] physically damage the surrounding properties." R0602. Dr. Koelkebeck further concluded "the conditions of the development agreement are sufficient to address any concerns about the impact of this operation on the surrounding properties." *Id.*

The second expert opinion in the record before the Board concerning the Hostetlers' development agreement conditions was that of Dr. Dwaine S. Bundy, Ph.D., P.E., and Agricultural Engineer.

> [Dr. Bundy's] background is in agricultural structures and animal environment. He received his doctorate from Iowa State University and was on the faculty from 1974 to 2004 at Iowa State University. He is presently a consulting engineer working in the area of light frame building structures, ambient levels of odorous gases and odors in the community of livestock and poultry facilities, and the design of ventilations systems for livestock and poultry facilities throughout the United States. He has in the past worked with the Department of Health in Colorado on odors generated from anaerobic lagoons. He has a patent on an olfactometer to evaluate odors and developed an olfactometer laboratory while a professor at Iowa State University.

R0600.

Dr. Bundy reviewed the development conditions and operation plans, as well as the issues raised and referenced by the Court's *July 5 Order*. R0597–R0599. After doing so, Dr. Bundy reached the following expert opinion:

> A development list of conditions are covered in the monitoring and support documents relating to the issues listed above that are required by the County. The conditions listed in the plans go above and beyond operations of this size of operation in other locations in state and in other

> states. These conditions of monitoring are not typically required to be carried out in the state for most other animal species. The owner-operator also covers how the management plan will be addressed that meets the Delta County and other regulatory agencies. Based upon my experience and the above discussion, it is my opinion that all the concerns of the neighbors have been addressed and are met in the conditions agreed on in the development agreement.

R0599.

In addition to those experts in poultry management and environment who are qualified to address all of those conditions in the Hostetlers' development agreements, also in the record before the Board were expert opinions overlapping some of the specific issues. For example, Bob Hammon, an entomologist with Colorado State University, gave his expert opinion concerning the Hostetlers' operations and fly management with respect to those concerns cited in the *July 5 Order* related to Plaintiffs' fear of flies. Mr. Hammon knows the area quite well, as he serves the Tri River Area in his current position; moreover, he has previously consulted regarding fly management with another confined poultry operation in Delta County and am familiar the environments conducive to nuisance fly populations." R0605.

The entomologist reviewed the fly management plan as required by the development agreement and also made a visit to the operation for an on-site review. In his professional opinion, "the threat of large numbers of flies being produced by the facility is minimal if the conditions of the fly management plan are adhered to. If conditions occurred that would lead to increased fly populations, they would be relatively short term and manageable. I do not see flies arising from the Powell Mesa egg production facility as a neighborhood affecting issue." R0606.

In response to the soil issues raised in the *July 5 Order*, Edwin Blosser, President and Founder of Midwest Bio-Systems, a company specializing in integrating humus compost production and application as fertilizer in sustainable agriculture markets, reviewed the development conditions, the Hostetlers' manure management plan, the comments addressing soil concerns, and soil tests from the area. R0603. Mr. Blosser opined that "[t]he phosphorus and nitrogen levels in the soil are low enough that actually need the raw manure as opposed to the applied chemical fertilizer as is mostly apply by the neighboring farmers." R0604. He further concluded:

> The conditions stated by the county board of commissioners more than adequately [address] those concerns [as stated by Gregory D. Lazear, Sandra G. Pridgen, and Kathy J. Martin, PE] that are truly valid concerns. For example the application of the raw manure being determined by accepted agronomic reviews and rates is certainly best management practices that will enhance the environment as opposed to wreaking havoc.

R0604.

The Board also reviewed the expert opinion of Paul Hendricks, a Colorado Licensed Professional Engineer with Mesa Engineering and Surveying Co., Inc., concerning the alleged threat of groundwater contamination. R0181. Explaining the Hostetlers' development design for water management, Mr. Hendricks came to his expert conclusion that "the possibility of ground water contamination [are] extremely remote." R0181–R0182. Concerning the water consumption alleged, at least two experts pointed out Ms. Martin's error in calculations. R0604; R0613.

Finally, before the Board were written comments by Joseph Kropf, of Fairfield Specialty Eggs, Inc., who specifically reviewed the comments cited in the *July 5 Order*

made by Sandra G. Pridgen, Gregory Lazear, and Kathy J. Martin, addressing the numerous factual issues with their comments. R0610–R0613.

Therefore, the Board had before it ample evidence to support its conclusion that the development agreement conditions it placed on the Hostetlers were sufficient to mitigate any potential fear or harm to surrounding properties and neighbors and satisfy those concerns. As such, the Board could not have acted arbitrarily or capriciously in its decision.

Capability of Delta County Staff

The fourth issue on remand is the "[c]apability of the County staff to monitor compliance with the conditions and undertakings." *July 5 Order*, at 12. Present in the record are numerous pieces of evidence proving the Delta County Staff have the capability to oversee the development agreement conditions set by the Board.

For example, between construction beginning on the Powell Mesa operation and the September 4, 2012 hearing on remand, County Engineering, Planning, and Health Departments have conducted at least ten documented, onsite inspections. *See* R0090–R0096 (finding compliance with development agreement in areas reviewed on April 5, 2012, inspection by Engineering Department); R0097–R0099 (finding no reason to believe there will be noncompliance with drainage condition on April 18, 2012, inspection by Engineering Department); R0108–R0109 (taking water samples on April 24, 2012, by Health Department and providing to laboratory for testing); R0100–R0104 (noting fans measured below 55db less than twenty feet from fans and items needing addressed for compliance with drainage condition on April 26, 2012, by Engineering

Department); R0107 (observing no odors around facility and property, except for within the direct exhaust fan emissions at 30 feet from the fan and visible dust less than 20% opacity in response to complaint from Plaintiff Susan Raymond on May 30, 2012, by Health Department); R0053–R0059 (detailing inspection report and perceived condition deficiencies noted on June 20, 2012, inspection by Health, Engineering, and Planning Departments); R0060–R0061 (describing perceived condition deficiencies and providing 30-day notice to cure as prescribed by the Regulations in July 2, 2012, letter to Hostelters from Planning Department); R0062–R0065 (responding to Planning Department's letter listing condition deficiencies); R0066–R0072 (detailing inspection report and noting no flies or bugs, no discernible dust exhausting from the vents, evidenced on the roof, or seen in vicinity of vents, no signs of erosion or water build up after recent storms, and the deficiencies corrected on August 2, 2012, inspection by Health, Engineering, and Planning Departments); R0073 (responding to Hostetlers after August 2, 2012 inspection by Planning Department); R0074–R0076 (responding to Planning Department's letter); R0818 (noting no dust or feathers to the northwest of facility and noting no evidence of improper dead chicken disposal during August 8, 2012, inspection by Health Department in response to complaint from Susan Raymond); R0111 (noting facility appears to be operated satisfactorily according to best management practices while air samples taken on August 16, 2012, inspection by Health Department and joined by Plateau Environmental); R0114–R0141 (reporting to Health Department results of air testing conducted on August 16, 2012, and subsequently

tested); R0142–R0148 (discussing air testing reports in memo to Board by Health Department).

In addition to the numerous and thoroughly documented onsite inspections by County staff to ensure compliance with the development agreement conditions, the record also includes numerous pieces of evidence proving the responsiveness to concerns raised by Plaintiffs by its own staff and other statewide staff. *See, e.g.*, R0142–R0143 (responding to air quality concerns and recommending Board include additional condition for further testing and management by Health Department); R0149–R0167 (discussing concerns with Salmonella transmission through the operations); R0818 (inspecting facility in response to specific complaints); R1082–R1083 (explaining air testing conducted in response to complaints); R0168–R0169 (responding to concerns raised to local government by Colorado Department of Public Health and Environment); R0170–R0173 (noting results of onsite assessment conducted May 9, 2012, by Colorado Department of Public Health and Environment).

Therefore, the record before the Board includes ample evidence that the Delta County staff members are fully capable to ensure compliance with the development conditions imposed on the Hostetlers. As such, the fourth issue raised in this Court's *July 5 Order* is satisfied in the record. Moreover, the record indeed shows the Delta County staff are not only capable, but have fulfilled their roles and responsibilities in

doing so; any argument that they have given the Hostetlers a free pass is contrary to the overwhelming evidence in the record.[5]

Response to Issues Not on Remand

In addition to the four issues on remand based on this Court's *July 5 Order*, Plaintiffs have raised numerous other issues in their opening and supplemental opening briefs.

Specific Findings

For example, Plaintiffs complain that the Board's decision does not contain specific findings as to the operations' consistency with the Master Plan. *Opening Brief*, ¶ 53. That complaint fails, as the Board need not make specific findings. *Mayerle v. Civil Svc. Comm'n*, 738 P.2d 1198, 1199 (Colo. App. 1987). Instead, all that must be shown is the record contains competent evidence to support the Board's decision. *Id.*; *O'Dell*, 920 P.2d at 50.

Appearance of Impropriety

Plaintiffs also claim that the fact the Board re-approved the Hostetlers' specific development applications is enough to prove bias under Rule 106(a)(4) and *Churchill v. Univ. of Col. at Boulder*, 285 P.3d 987 (Colo. 2012). *Supplemental Brief*, at 15.

Plaintiffs boldly state that with "even a hint of impropriety in a quasi-judicial decision, the decision should be reversed." *Supplemental Brief*, at 15. Plaintiffs clearly misstate the law. Instead, *Churchill* states that "[a]ny appearance of impropriety

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[5] While the record provides such evidence, this is a Rule 106(a)(4) review of the Board's quasi-judicial decision approving the Hostetlers' applications. This case is not a judicial review of the performance of Delta County staff involved in compliance checks and responding to complaints.

sufficient to cast doubt on the impartiality of the [decision-makers and investigators] would be grounds for a reversal." 285 P.3d at 1006 (emphasis added) (*citing Venard v. Dep't of Corrs.*, 72 P.3d 446, 450 (Colo. App. 2003)). Concerning impartiality, *Venard* states, "Absent a personal, financial, or official stake in the outcome evidencing a conflict of interest on the part of the decisionmaker, an adjudicatory hearing is presumed to be impartial." 72 P.3d at 449.

Plaintiffs do not cite to a single piece of evidence from the record of a "personal, financial, or official stake in the outcome" by any of the individual members of the Board. Instead, Plaintiffs claim the Board, as a whole, was impartial based on its "a pattern of approval" over Plaintiffs' objections. However, Plaintiffs do not cite a single authority to support their position. Moreover, impartiality concerns individual decisionmakers. *See id.* Here, the Board's 2011 and 2012 resolutions were passed by Commissioners C. Bruce Hovde, R. Olen Lund, and C. Douglas Atchley. R0827; R0938; R0946. The Board's most recent decision adopted in 2013 was passed by Commissioners C. Douglas Atchley, C. Bruce Hovde, and J. Mark Roeber. R1093.

Plaintiffs' only claim of individual impartiality is in their Opening Brief against Commissioner R. Olen Lund. ¶ 85. However, Commissioner Lund did not participate in the Board's most recent decision. *See* R1093. Even so, in each resolution, all three commissioners voted to pass the resolutions over Plaintiffs' objections. *C.f., Venard*, 72 P.3d at 449 (requiring disqualification when decisionmaker was deciding vote against person claiming impartiality).

Plaintiffs also attempt to claim bias based on the "County's" actions. *See Supplemental Brief*, at 17–19. Here, Plaintiffs attempt to confuse the issues in a Rule 106(a)(4) review. Plaintiffs apparently are claiming the Delta County Department of Health acted improperly in carrying out its duties. However, Rule 106(a)(4) concerns quasi-judicial decisions, not discretionary executive actions. *Verrier v. Colo. Dep't of Corr.*, 77 P.3d 875, 879 (Colo. App. 2003) (holding administrative actions carrying out legislative policies not subject to judicial review); *Prairie Dog Advocates v. City of Lakewood*, 20P.3d 1203, 1208 (Colo. App. 2000) ("A city's act that is necessary to carry out existing legislative policies and purposes, . . . characterized as executive, is an administrative act. . . . Like legislative acts, administrative acts are not quasi-judicial acts subject to review under C.R.C.P. 106(a)(4).") (*citing City of Aurora v. Zwerdlinger*, 194 Colo. 192, 571 P.2d 1074 (Colo. 1977)).

Moreover, Plaintiffs' claims that the "County" manufactured evidence fly in the face of the evidence in the record. Ken Nordstrom, Director of Environmental Health, Delta County Health Department refuted Plaintiffs' wild accusations of the manufacturing of evidence, explaining the reasonable circumstances surrounding the air quality evidence:

> The air quality sampling was performed to respond to the complaints by the neighbors of dust coming from the facility. This Department requested that the Board of County Commissioners fund the air quality testing to determine the constituents of the dust being emitted from the facility.
>
> The preliminary report by Plateau was received the week of August 27, 2012. I don't have the exact date written down. The amendment to the initial report dated August 27 was received by this department the week of October 1, 2012.

> The purpose of the amendment to the initial report, 8/27, was to explain the mold speciation results mentioned in the initial report as noted on page 4 paragraph 3 and 4 of the report.
>
> There was absolutely no request or any insinuation by this Department of Plateau Inc. to "manufacture evidence in favor of the applicants[.] "

R1082.

Remand Concerning Air Quality Evidence

During the initial merits briefing stage of this case, this Court remanded back to the County to allow for public comment on four documents in the record concerning air quality testing: one document that was introduced at the September 4, 2012, hearing, and three documents presented to the Board by its staff after the hearing. This Court remanded so that public comment could be received concerning those pieces of evidence. *Order on Motion to Strike*, at 3.

On remand, the Board took additional evidence. R0951–R0972. Plaintiffs presented reports by Air Resource Specialists, Inc., R0988–R0997, Sandra Pridgen, R0998–R1007, Frances Lazear, R1008–R1010, Kathy Martin, R1011–R1020, and Kendall Thu, R1021–R1059. Each of these pieces of evidence either directly concerns or relies on literature concerning concentrated animal feeding operations ("CAFOs"). *See, e.g.*, R0990, R0994 (relying on NALBH report characterizing potential impacts, including air quality, entitled, "Understanding Concentrated Animal Feeding Operations and Their Impact on Communities"); R1001 (discussing ammonia levels and "health risks from air pollution due to CAFO's"); R1009 (relying on "Health Effects of Airborne Exposures from Concentrated Animal Feeding Operations" to support her statements);

R1015 (discussing her efforts in passing regulations for swine CAFOs); R1021 (discussing "[a]irborne emissions from CAFOs").

Plaintiffs attempt to use this evidence against the Hostetlers, even though the Record clearly proves their operations **specifically are not CAFOs**. The Colorado Department of Health and Environment stated so definitively. R0170 ("The facility is not defined as a concentrated animal feeding operation (CAFO) because it confines less than the CAFO threshold number of 82,000 laying hens (based on the facility's manure handling system.)"); *see* 40 C.F.R. § 122.23(b)(2) (defining "concentrated animal feeding operation ('CAFO')"). Because those pieces of evidence concern CAFOs and not facilities like the Hostetlers' facilities, the Board did not abuse its discretion by discrediting their findings.

And while the Board may have not fully accepted the expert reports concerning CAFOs presented by Plaintiffs, the Board clearly did not wholly disregard all of their content. On May 28, 2013, when the Board re-approved the Hostetlers' specific develop applications with conditions, the Board added an additional condition not previously included. R1089. The Board added a condition to each of the development agreements 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 emissions from the facility for review and modification if necessary to the Delta County Health Department." R1093; R1096. This additional condition comes straight from one of Plaintiffs' experts, who stated, "[f]urther testing would be prudent." R1010.

Now that the Board heeded advice presented by Plaintiffs, Plaintiffs turn around and complain that the Board did so. *See id.; also compare Opening Brief*, at ¶ 79 (complaining that the Board did not impose any air quality obligations on the applicants), *with Supplemental Brief*, at 14 (complaining about the added condition). The record continues to show that sufficient evidence exists that the Board did not abuse its discretion; instead, the Board acted within its discretion, approving the Hostetlers' one-barn egg laying operations with conditions.

Conclusion

Throughout this whole process, the Board has taken very seriously the accusations of the opponents, that the Hostetlers' one-barn agricultural operations will seriously harm their health and property values. In response, the Board weighed the concerns and granted the applications, so long as the applicants satisfied numerous conditions aimed at addressing the concerns of the opponents. The record shows that those conditions, in fact, satisfy those concerns. The record provides ample evidence of the compatibility of the operations with its surroundings, the lack of impact on the neighborhood, and the County staff's ability to ensure compliance with the conditions so that neighbors' legitimate concerns are addressed. Competent evidence exists in the record, and as such, the Board's decision is not arbitrary and capricious. Therefore, Colorado law confirms review of the Board's quasi-judicial decision under Rule 106(a)(4) should result in its decision being affirmed by this Court. As such, the Hostetlers respectfully request this Court affirm the Board's May 28, 2013, decision approving their development agreements with conditions.

Respectfully submitted this 5th day of August, 2013.

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CERTIFICATE OF SERVICE

I, the undersigned hereby certify that on the 5th day of August, 2013, a copy of the foregoing **HOSTETLERS' ANSWER BRIEF** was served by:

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