COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue, Denver, CO 80203	
Appeal from the District Court, Delta County, Colorado Honorable J. Steven Patrick Case No. 2012 CV 314	
Plaintiffs-Appellees: TRAVIS JARDON; CORRINE HOLDER; SUSAN RAYMOND; MARK COOL; and ANDREA ROBINSONG, v. **Defendants-Appellants:** EDWIN HOSTETLER; EILEEN HOSTETLER; GREG HOSTETLER; CARMEN HOSTETLER; ANNA HOSTETLER; and ROLAND HOSTETLER, and **Defendant-Appellant** DELTA COUNTY BOARD OF COUNTY COMMISSIONERS.	▲ **COURT USE ONLY** ▲ Case Number: 2013CA1806
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BRIEF OF *AMICUS CURIAE* COLORADO FARM BUREAU IN SUPPORT OF DEFENDANTS-APPELLANTS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the brief complies with C.A.R. 28(g) because it contains 5,056 Words.

The brief complies with C.A.R. 28(K) because it contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the preciste location in the record, not to an entire document, where the issue was raised and ruled on.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

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STATEMENT OF *AMICUS CURIAE* ISSUE

Whether the district court erred in reversing the decision of the Delta County Board of County Commissioners to approve two poultry operations, even though the record before the Board failed to demonstrate that the operations would have a negative impact on neighboring property owners.

IDENTITY AND INTEREST OF AMICUS CURIAE

The Colorado Farm Bureau ("CFB") is a Colorado nonprofit corporation founded in 1919 by a group of farmers, ranchers, veterinarians, rural doctors, shopkeepers and tradesmen. The CFB provides an organization in which members may secure the benefits of united efforts in a way which could never be accomplished through individual effort. The CFB's mission includes correlating and strengthening the member county Farm Bureaus; supporting the free enterprise system and protecting individual freedom and opportunity; promoting, protecting and representing the business, economic, social and educational interests of farmer/rancher members and their communities; and enhancing the agricultural industry in Colorado.

The CFB is further dedicated to helping family farmers and ranchers stay on their land and continue to produce the food, fiber and fuel needed to feed the world. The CFB provides its members with continuous representation at the local, state and federal level, and seeks to enhance marketing opportunities and protect the rural lifestyle. In doing so, the CFB works to strengthen Colorado's farming and ranching families for generations to come. The CFB's membership now comprises over 24,000 Coloradans, including Colorado farmers, ranchers, and other Colorado families and residents who have an interest in maintaining a strong

agricultural industry in this State and in promoting and advancing the interests of Colorado farmers and ranchers.

This case involves a family seeking to use its private property in rural Colorado for agricultural purposes. If affirmed, the district court's decision might set a precedent that will allow complaining persons to shut down agricultural operations without proving that the operation is negligently run or causing damage to neighboring property. The CFB is dedicated to protecting agricultural operations from being needlessly shut down. As *amicus curiae*, the CFB can assist this Court in understanding the broader consequences of this case to the state agricultural community, and will articulate how state and local law protects the property rights of all people, while also protecting agricultural investments that benefit Coloradans.

STATEMENT OF THE CASE

In 2011, Edwin Hostetler, Eileen Hostetler, Greg Hostetler, Carmen Hostetler, Anna Hostetler, and Roland Hostetler ("the Hostetlers") applied for two development agreements in order to conduct poultry operations on their private property.[1] After the Delta County Board of County Commissioners ("Board") received public comments, the Board conditioned approval of the operations on fifteen mitigating conditions, including that the Hostetlers: (a) adhere to best management practices in the operation of their business; (b) develop and submit a water quality control plan; (c) a manure and litter management plan; (d) a fly control management plan; (e) a noise management plan; (f) an air quality control plan; (g) a solid waste management plan; (h) an egg management plan; (i) a drainage study plan; (j) and a monitoring plan. Delta County Resolution No. 2011-R-49, CD1:R001028–29; Delta County Resolution No. 2011-R-050, CD1:R001034–35.

After the Hostelters agreed to the mitigating conditions, the Board orally approved the operations on August 29, 2011. On September 23, 2011, Susan

[1] The operations were located on Redlands Mesa, on a parcel of land 40 acres in size, and Powell Mesa, on a parcel 96 acres in size. Delta County Resolution No. 2011-R-49, CD1:R001027; Delta County Resolution No. 2011-R-50, CD1:R001033.

Raymond, Travis Jardon, Mark Cool, Peter Pruett, and John and Heidi Marlin ("opponents"), Delta County residents opposed to the poultry operations, filed suit against the Board and the Hostetlers, and alleged that the Board's decision to approve the operations was arbitrary and capricious. *See Complaint for Certiorari and Declaratory Relief*, No. 11CV 282 (Delta County District Court Sept. 23, 2011). On October 3, 2011, the Board approved two Resolutions authorizing the operations. Delta County Resolution No. 2011-R-49, CD1:R001028–29; Delta County Resolution No. 2011-R-050, CD1:R001034–35. On March 22, 2012, the district court denied opponents' motion for preliminary injunction, and ruled that the Hostetlers' operations could commence. Order Denying Preliminary Injunction at 6–7, No. 11CV282 (Delta County District Court March 22, 2012).

On July 5, 2012, the district court held that the operations must comply with the County Master Plan and that the record lacked evidence related to several issues. July 5, 2012 Order on Rule 106 Claim at 11–13, CD11CV282:724-26. The court remanded the case to the Board to consider evidence on: (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.

On remand, the Board held public hearings on the issues required by the court's decision. On October 22, 2012, the Board re-approved the Hostetlers' operations. On November 16, 2012, opponents once again filed suit against the Board and the Hostetlers, alleging that the record did not support the decision to allow the operations. On February 20, 2013, after the record was submitted, opponents moved to strike evidence related to air quality because the evidence was presented to the Board after the public hearing. Based on the opponent's motion, the court remanded the issue to the Board to allow for public comment on the air quality evidence. On May 1, 2013, the Board held another hearing in order to receive public comment on the air quality evidence. Opponents alleged that certain health conditions, including allergic rhinitis, conjunctivitis, asthma, and chronic obstructive pulmonary disease, became exasperated around the time the operations began. On May 28, 2013, the Board once again re-approved the operations because the record before it failed to demonstrate a link between the operations and the purported health effects.

On September 5, 2013, the court issued an order on opponents' motion for summary judgment. The court reversed and vacated the resolution approving the

operations "based on the evidence of adverse health impacts in the surrounding area such that the proposed development is incompatible with the neighborhood." September 5, 2013 Order on Rule 106 Claim at 12, CD12CV314:384. Based solely on the fact that these purported health concerns occurred after the operations began, the court held that the operations were incompatible with the neighborhood, and reversed the Board's decision. *Id.* at 9.

SUMMARY OF THE ARGUMENT

The protection of private property is one of the basic functions of government. One of the most important aspects of property ownership is the right to use one's property. Because the right to use property is a fundamental aspect of owning property, the burden of proof is properly placed on those seeking to restrict the use of private property.

Both Colorado and Delta County law recognizes that agricultural use is a valid use of one's property and therefore is presumed to be valid. Based on these principles, the Board approved the Hostetlers' poultry operations because opponents failed to demonstrate that the poultry operations were unreasonable or would negatively impact neighboring property owners.

The district court, however, switched the burden of proof and placed it on the Hostetlers and the County to prove a negative. Because the Hostetlers could

not prove that the operations would not negatively impact neighboring property owners, the district court held that the operations were incompatible with the neighborhood. The district court's decision should be reversed because the Board correctly placed the burden on those seeking to restrict the use of property, and opponents failed to meet that burden.

ARGUMENT

I. STANDARD OF REVIEW.

An appellate court reviews a district court's decision on a Colo. R. Civ. P. 106(a)(4) claim de novo. *Thomas v. Colo. Dept. of Corrs.,* 117 P.3d 7, 8–9 (Colo. App. 2004). "An appellate court sits in the same position as the district court when reviewing an agency's decision." *Id.* (citing *Empiregas, Inc. v. Cnty. Court*, 713 P.2d 937 (Colo. App. 1985)).

Under Colo. R. Civ. P. 106(a)(4), a decision will be set aside only if the governmental body has exceeded its jurisdiction or abused its discretion. Colo. R. Civ. P. 106(a)(4). 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*, 902 P.2d 48, 50 (Colo. 1996) (emphasis added) (internal quotations and citations omitted).

II. AGRICULTURAL USE IS A VALID USE OF PRIVATE PROPERTY.

A. The Right To Use Property Is A Fundamental Aspect Of Property Ownership.

The Framers drafted the Constitution embracing the Lockean view that "preservation of property [is] the end of government, and that for which men enter into society. . . ." John Locke, *Second Treatise on Civil Government,* Ch. XI § 138. James Madison wrote that "Government is instituted to protect property of every sort . . . . This being the end of government, that alone is a *just* government, which *impartially* secures to every man, whatever is his *own* . . . ." *The Complete Madison* at 267-68 (Saul K. Padover ed., 1953), published in *National Gazette* (March 29, 1792) (emphasis in original). As a result, a core function of the government is to protect private property rights. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 61 (1993) ("an essential principle: Individual freedom finds tangible expression in property rights."); *Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552
(1972) ("[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights…. That rights in property are basic civil rights has long been recognized." (internal citations omitted)).

The right to property includes a collection of individual rights that constitute the right one has in his or her property. *United States v. Craft*, 535 U.S. 274, 278

(2002) ("A common idiom describes property as a 'bundle of sticks'—a collection of individual rights which, in certain combinations, constitute property."). One of these rights is the right to free use of one's property. William Blackstone, *Commentaries on the Law of England*, Book I § 191-92; *Bd. of Cnty. Comm'rs of Larimer Cnty. v. Conder*, 927 P.2d 1339, 1352 (Colo. 1996) (Kourlis, J., Dissenting) ("In law schools, property rights are envisioned as a bundle of sticks. Zoning deprives the landowner of some of the sticks in that bundle by reducing the uses to which the land may be devoted."). In order for a property owner to be secure in his or her right to property, he or she must have the ability to choose how that land is used. Larissa Katz, *The Regulative Function of Property Rights*, 8 Econ J. Watch 236, 240 (2011) ("[T]he idea of ownership is found not in the exclusionary function of the right but in the owner's exclusive authority to set the agenda for a resource."); Anna di Robilant, *Property: A Bundle of Sticks or A Tree?*, 66 Vand. L. Rev. 869, 874 (2013) ("The vast majority of property doctrines--from nuisance to adverse possession, from water rules to support rules--focus on use rather than on exclusion . . . .").

Because the right to use property is a fundamental aspect of owning property, the burden is placed on those seeking to restrict the use of private property. For example, in nuisance suits a plaintiff must show that the defendant

unreasonably and substantially interfered with the use and enjoyment of the plaintiff's property in order to establish the existence of a nuisance and restrict the use of private property. See *Lowder v. Tina Marie Homes, Inc.,* 601 P.2d 657, 658 (Colo. App. 1979); *Miller v. Carnation Co.*, 516 P.2d 661, 664 (Colo. App. 1973). To constitute a nuisance, it is not enough that an activity offends one's purported aesthetic sense. *Allison v. Smith*, 695 P.2d 791, 793 (Colo. Ct. App. 1984) (citing *Mathewson v. Primeau*, 64 Wash.2d 929, 395 P.2d 183 (1964)). The unreasonable and substantial interference tests enunciated in *Lowder* and *Miller* necessarily include a consideration whether the questioned activity is reasonable under all the surrounding circumstances. *Id.* (citing *Murray v. Young*, 97 A.D.2d 958, 468 N.Y.S.2d 759 (1983)). As a result, factors such as whether an activity is unreasonably operated, or whether the area is a residential district, are relevant to the determination of whether a nuisance exists and should be abated. *Id.* at 794. This presumption in favor of property use protects the property rights of everyone and ensures that use of one's land will not be unreasonably restricted.

B. Colorado And Delta County Law Presume That Agricultural Use Of One's Land Is Valid.

Colorado law recognizes that agricultural use is a legitimate use of one's property. Colo. Rev. Stat. § 35-3.5-101. "Colorado is a state with strong

agricultural ties which maintains a policy of support for agricultural operations."[2] *Bd. of Cnty. Commissioners of Cnty. of Logan v. Vandemoer*, 205 P.3d 423, 427 (Colo. Ct. App. 2008). The Colorado General Assembly has stated that "[i]t is the declared policy of the state of Colorado to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products." Colo. Rev. Stat. § 35-3.5-101. In order to promote this policy, the General Assembly has passed a "Right-To-Farm" Act, Colo. Rev. Stat. § 35-3.5-101, *et seq.*, in order to "to reduce the loss to the state of Colorado of its agricultural resources" by defining when an agricultural operations can be deemed a nuisance. *Id.* [3]

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[2] Under Colorado law, "agriculture" is defined as "the science and art of production of plants and animals useful to man, including, to a variable extent, the preparation of these products for man's use and their disposal by marketing or otherwise, and includes horticulture, floriculture, viticulture, forestry, dairy, livestock, *poultry*, bee, and any and all forms of farm products and farm production." Colo. Rev. Stat. § 35-1-102(1) (emphasis added); Colo. Rev. Stat. § 35-3.5-102(4) ("As used in this article, 'agricultural operation' has the same meaning as 'agriculture', as defined in section 35-1-102(1)").

[3] Below, the district court held that the Right-To-Farm Act and the Delta County Right-To-Farm Resolution do not "directly apply to this matter" because the act "limits circumstances where pre-existing agricultural uses may be deemed to be a nuisance to surrounding properties." July 5, 2012 Order on Rule 106 Claim at 11, CD11CV282:724. On Powell Mesa, the Hostetlers had livestock and irrigated fields on their property prior to the poultry operations. *See* Delta County Resolution No. 2011-R-050, CD1:R1033. This use qualifies as pre-existing, because the Colorado Right-To-Farm Act expressly provides that "[a]n agricultural operation that employs methods or practices that are commonly or reasonably

The underlying purpose of the Colorado Right-To-Farm Act is to protect agricultural operations from being needlessly and unreasonably shut down.[4] *See* Colo. Rev. Stat. § 35-3.5-101 ("The general assembly recognizes that, when

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associated with agricultural production shall not be found to be a public or private nuisance as a result of . . . *Change in the type of agricultural product produced*." Colo. Rev. Stat. § 35-3.5-102(1)(b)(V) (emphasis added).

Although the district court ignored this pre-existing aspect of one the Hostetlers' operations, it did state that "the Record reflects that the Commissioners were within their authority in considering the underlying policy behind [the Colorado Right-To-Farm Act and Delta County Right-To-Farm Resolution] in evaluating" the Hostetlers' proposed operations. July 5, 2012 Order on Rule 106 Claim at 11, CD11CV282:724 (Delta County District Court July 5, 2012). Therefore, even if the Colorado Right-To-Farm Act does not "directly apply" to this case, the policies reflected in the Act and the Resolution are relevant to the Board's decision and the disposition of this case.

[4] Although the Right-To-Farm Act limits when an agricultural operation can be deemed a nuisance, the act can be viewed as an extension of the common law of nuisance. Margaret Rosso Grossman, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 Wis. L. Rev. 95, 118 (1983) (explaining that many right-to-farm statutes are based on the common law "coming to the nuisance" defense). The act essentially defines when an agricultural activity is reasonable under all the surrounding circumstances. *Allison*, 695 P.2d at 793; Colo. Rev. Stat. § 35-3.5-102 (defining what constitutes an unreasonable agricultural operation). As a result, what may constitute a nuisance in one context may not be unreasonable in an agricultural context. Colo. Rev. Stat. § 35-3.5-101 ("The general assembly recognizes that, when nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits."); Tiffany Dowell, Comment, *Daddy Won't Sell the Farm: Drafting Right to Farm Statutes to Protect Small Family Producers*, 18 San Joaquin Agric. L. Rev. 127, 131-32 (2009) ("Right to farm laws are a response to the unfair outcome that nuisance law can create for producers when people unfamiliar with agriculture move into an agricultural area.").

nonagricultural land uses extend into agricultural areas, agricultural operations often become the subject of nuisance suits. As a result, a number of agricultural operations are forced to cease operations, and many others are discouraged from making investments in farm improvements."). In order to carry out the policy of protecting agricultural operations, the Colorado Right-To-Farm Act requires local governments and courts to presume that an agricultural operation, if properly conducted, is valid. Colo. Rev. Stat. § 35-3.5-101 ("It is the declared policy of the state of Colorado to conserve, protect, and encourage the development and improvement of its agricultural land for the production of food and other agricultural products."); Colo. Rev. Stat. § 35-3.5-102 ("Except as provided in this section, an agricultural operation shall not be found to be a public or private nuisance if the agricultural operation alleged to be a nuisance employs methods or practices that are commonly or reasonably associated with agricultural production."); *Cf. Vandemoer*, 205 P.3d at 430 (Because of state policy in support of the use of implements of husbandry, an absolute prohibition of such use by a county "is unreasonable as a matter of law"). Therefore, the Colorado Right-To-Farm Act places the burden of proving that an agricultural operation is invalid on those seeking to stop the agricultural operation.

Furthermore, the Colorado Right-To-Farm Act explicitly provides that "units of local government may adopt ordinances or pass resolutions that provide additional protection for agricultural operations consistent with the interests of the affected agricultural community, without diminishing the rights of any real property interests." Colo. Rev. Stat. § 35-3.5-101.

In accordance Colorado Right-To-Farm Act, Delta County has followed the direction of the General Assembly and has adopted resolutions "that provide additional protection for agricultural operations consistent with the interests of the affected agricultural community, without diminishing the rights of any real property interests." Colo. Rev. Stat. § 35-3.5-101. Delta County's Right-to-Farm Resolution provides that

> Ranching, farming, orchards, animal feeding, dairies and all other types of agricultural activities and operations in Delta County are necessary for the continued vitality of the County's economy, landscape, culture and lifestyle. Given their importance to Delta County, Western Colorado and the State, agricultural lands and operations are worthy of recognition and protection."

Delta County Resolution 99-R-033, CD1:R000823. Importantly, the Resolution provides that "[u]nder State law and County policy [agricultural] activities may not be considered to be nuisances, so long as they are operated in conformance with the law and in a non-negligent manner." *Id.*

Based on this policy to promote agriculture, the Delta County Master Plan provides that "[a]griculture 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." Delta County Master Plan at 5, CD2:R0763. The Master Plan also recognizes that the right to use one's land is an important aspect of one's right to property and that "[l]and use planning and land use controls . . . limit property rights." *Id.* at 10, CD2:R0768. The Master Plan further protects property rights by requiring an assumption "that a particular division or use of land should be authorized unless the division of land or use would violate existing regulations, would adversely impact neighboring property owners or residents, or contradict the goals and objectives of the Master Plan." *Id.*

Delta County has also adopted regulations for specific developments that set forth the review process for approving operations within the county. Delta County Regulation for Specific Development, CD2:R0773. The purposes of the regulations are, *inter alia*, to protect property rights and to protect the agricultural land, lifestyle and economy of Delta County. *Id.* at Article I, Section 4, CD2:R0733. Granted, the regulations for specific developments place the initial burden of proving compliance with the regulation on the applicant. *Id.* at Article I,

Section 8, CD2:R0775. Yet, as demonstrated above, the Board does not have the authority to prevent agricultural operations solely because of effects commonly associated with agricultural operations.[5] Colo. Rev. Stat. § 35-3.5-101 (Policy of the state of Colorado to conserve, protect, and encourage the development and improvement of its agricultural land); *Cf. Vandemoer*, 205 P.3d at 430 (When Colorado has a policy in favor of a use, an absolute prohibition of that use by a county "is unreasonable as a matter of law"); Master Plan at 10, CD2:R0768 (Master Plan requiring an assumption that a particular use of land is valid).

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[5] The regulations exempt all "[a]gricultural 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," from the requirements of the regulations. Delta County Regulation for Specific Development at Article I, Section 5, CD2:R0774. Although the Board clearly believes that it has some control over how some agricultural operations can be operated, the regulations do not suggest that the Board can deny an application for an agricultural operation that will operate under standard industry procedures. *See Id.* at Article VI, Section 2, CD2:R0789 (Regulations providing that a "specific development must be consistent with the Delta County Master Plan."); *Id.* at Article VI, Section 2(J), CD2:R0791 (Regulations providing that operations should mitigate nuisances and industrial developments should be conducted in a manner that does not unreasonably impact surrounding lands); *See also Vandemoer*, 205 P.3d at 430 (A county is empowered only to abate a nuisance to the extent reasonably necessary (citing *Echave v. City of Grand Junction*, 118 Colo. 165, 171 (1948)).

III. THE BURDEN OF PROOF IS ON THOSE SEEKING TO RESTRICT USE OF PRIVATE PROPERTY.

A. The Board Correctly Placed The Burden Of Proving That The Hostetlers' Agricultural Operations Are Invalid On Those Seeking To Stop The Agricultural Operation.

The Board correctly considered state and local law on agricultural use of property when it approved the Hostetlers' operations. *See* CD1:R001027; CD1:R001033; July 5, 2012 Order on Rule 106 Claim at 11, CD11CV282:724 ("[T]he Record reflects that the Commissioners were within their authority in considering the underlying policy behind [the Colorado Right-To-Farm Act and Delta County Right-To-Farm Resolution] in evaluating" the Hostetlers' proposed operations). As demonstrated above, both Colorado and Delta County law reflect a policy of encouraging agricultural development and protecting agricultural operations from being needlessly shut down. As a result, the Board was required to presume that the Hostetlers' poultry operations were a valid use of their property and correctly placed the burden on those seeking to prevent the operations.

The Board held numerous hearings to gather evidence about the purported effects of the proposed poultry operations. The Board required some changes to the proposed plan to ensure that any effects to neighboring property would be mitigated. Delta County Resolution 2013-R-026, CD4:R1092–3. The Board did not require any immediate mitigation of air emissions because the record before

the Board did not demonstrate that any immediate mitigation measures were necessary.[6] *See id.*

As demonstrated above, the Board was required to presume that the Hostetlers' poultry operations were a valid use of their property. The Board took into account the effect of the operations on neighboring property, but opponents were unable to demonstrate that the Hostetlers' poultry operations injured any neighbors or neighboring property. *See* Christopher A. Lakin, Inspection and Air Testing, Hostetler Poultry Farm, Amendment, CD2:R0114–117; *See* Christopher A. Lakin, Inspection and Air Testing, Hostetler Poultry Farm, CD2:R0118–141; Delta County Resolution 2013-R-026, CD4:R1092–3. Because agriculture operations are presumed to be valid in Colorado and Delta County, and because the record before the Board did not demonstrate that the poultry operations would violate the rights of the Hostetlers' neighbors, the Board correctly approved the Hostetlers' poultry operations.

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[6] Although opponents failed to demonstrate that the operations were causing any of the purported health effects, the Board required the Hostetlers to hire an air pollution engineer within three months to study the air quality around the operations. Delta County Resolution 2013-R-026, CD4:R1093. Then, if necessary, the Hostetlers would be required to submit a plan for reducing air emissions. *Id.*

B. The District Court Incorrectly Required The Hostetlers To Prove That Their Agricultural Operations Were A Valid Use Of Their Land.

The district court's decision should be reversed because the district court applied the incorrect standard of review and switched the burden of proof by placing it on the Hostetlers and the Board. A decision will be set aside if the governmental body has exceeded its jurisdiction or abused its discretion. Colo. R. Civ. P. 106(a)(4). 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*, 902 P.2d 48, 50 (Colo. 1996) (emphasis added) (internal quotations and citations omitted).

The court relied on evidence that opponents purportedly became sick around the start of the poultry operations to conclude that the decision to authorize the operations was arbitrary and capricious. September 5, 2013 Order on Rule 106 Claim at 9, 12, CD12CV314:381, CD12CV314:384. Both opponents and the court, however, failed to explain the connection between the poultry operations and any purported illnesses. It is a fallacy to conclude that because event A was followed by event B, that event A caused event B. *See* Webster's New Twentieth Century Dictionary Unabridged 1407 (Second Edition) ("post hoc ergo propter hoc" is defined as "the fallacy of thinking that a happening which follows another

must be its result"); *Cf. Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 885 (10th Cir. 2005) ("A correlation does not equal causation."); *City of Aurora v. Weeks,* 152 Colo. 509, 515, (1963) ("The mere happening of the accident does not raise a presumption of negligence").

In fact, the Delta County Health Department commissioned a study to investigate whether there was a link between the air quality and the purported health effects complained of by opponents. *See* Christopher A. Lakin, Inspection and Air Testing, Hostetler Poultry Farm, Amendment, CD2:R0114–117; *See* Christopher A. Lakin, Inspection and Air Testing, Hostetler Poultry Farm, CD2:R0118–141. Christopher Lakin, an industrial hygienist and author of the study, was unable to conclude that the Hostetlers' poultry operations caused any of the purported health effects. Christopher A. Lakin, Inspection and Air Testing, Hostetler Poultry Farm, Amendment, CD2:R0114–117. Mr. Lakin found that there were no unusual fungal isolates in the environment around the Hostetlers' poultry operations. *Id.* at 2, CD2:R0115. He also compared the air quality around the Hostetlers' poultry operations to studies of other agricultural operations around the world. *Id.* The other studies showed comparable, or greater, levels of bacteria in the atmosphere. *Id.*

Importantly, the study concluded that "[d]ue to the proliferation of such activities in a rural environment an analysis of the health effects should be approached with caution . . ." and any further evaluation "should at least consider confounding factors, individual medical history (including atopy), lifestyle, etc." *Id.* at 3, CD2:R0116. Opponents did not provide a study that took into account these confounding factors, or other factors that may have caused the purported health effects. *See* Kenneth Nordtrom, Western Slope Layers Air Emissions, CD2:R0142 (Memo from Ken Nordstrom stating that "the burden of proof is quite high" to prove a causal link between the operations and the purported health effects and concluding that other causes such as "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" could also lead to opponent's purported health effects). As a result, opponents did not supply data that was used, as Mr. Lakin's study implored, "in a scientific manner." Christopher A. Lakin, Inspection and Air Testing, Hostetler Poultry Farm, Amendment at 3, CD2:R0116. Based on the evidence before it, the Board could reasonably infer that factors other than the Hostetlers' chicken operations caused the purported health effects. *O'Dell*, 902 P.2d at 50.

The district court, however, did not take into account opponents' failure to provide a scientific study that proved the Hostetlers' poultry operations caused the purported health effects. Instead, the court flipped the burden of proof to the Hostetlers and required them to prove that the operations were valid and did not cause adverse health effects. September 5, 2013 Order on Rule 106 Claim at 9–10, CD12CV314:381-82 ("There is a lack of any record to suggest the health concerns which arose subsequent to commencement of operations on Powell Mesa are not a result of the operation"). As a result, the district court did not apply a standard that respects the use of private property. The court also failed to apply the correct standard of review in a Rule 106 proceeding. *Municipal League v. Mountain States Tel. and Tel. Co.* 759 P.2d 40, 44 (Colo. 1988) (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). Accordingly, this Court should reverse the decision of the district court.

CONCLUSION

For the forgoing reasons, the decision of the district court should be reversed, and the Board's decision to approve the Hostetlers' poultry operations should be reinstated.

DATED this 21st day of February 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 21st day of February 2014, the foregoing document was filed with the Colorado Court of Appeals and true and accurate copies of the same were served on all other counsel of record via the Integrated Colorado Courts E-Filing System.

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