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:** DELTA COUNTY BOARD OF COUNTY COMMISSIONERS; EDWIN HOSTETLER; EILEEN HOSTETLER; GREG HOSTETLER, CARMEN HOSTETLER, ANNA HOSTETLER; and ROLAND HOSTETLER	**▲ COURT USE ONLY ▲** Case Number: 2013CA1806
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OPENING BRIEF OF APPELLANT DELTA COUNTY BOARD OF COUNTY COMMISSIONERS

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s/Stephen G. Masciocchi
Signature of attorney or party

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ISSUE PRESENTED

Whether competent evidence supported the Commissioners' rulings that (a) a single-barn, cage-free egg farm was compatible with the rural-agricultural neighborhood, and (b) air quality complaints by some neighboring landowners could be addressed by requiring the family farmers to hire a professional air quality engineer to conduct air-quality testing and develop a plan to reduce emissions under County Health Department supervision?

STATEMENT OF THE CASE

Delta County is a rural, agricultural county on Colorado's western slope. The landscape is dotted with over a thousand farms, including hay fields, orchards, vineyards, cattle herds, elk farms, horse pastures, and egg farms. Though the County has no zoning code, it regulates some land uses and requires approval for new operations where animals are concentrated in pens, corrals, or buildings.

The Hostetler family applied to the Board of County Commissioners to build and operate two single-barn cage-free egg farms. The Commissioners found that the barns would be compatible with the existing rural-agricultural neighborhoods and approved them. It did so after holding three public hearings, considering a massive documentary record, and imposing 16 conditions on these small family farms. The final condition required the farmers to hire a professional air quality

engineer to evaluate emissions from each barn and create a plan to reduce them for the County Health Department's review and, if necessary, modification.

Neighboring landowners filed two Rule 106(a)(4) appeals. Relying on complaints by some neighbors, who believed that emissions from the one operating barn were impacting their respiratory health, the trial court ruled that the egg farms were incompatible with the neighborhoods. In so ruling, the court recited only evidence supporting plaintiffs' position that the egg barns were incompatible. It overlooked copious lay and expert evidence of compatibility and disregarded the Commissioners' weighing of conflicting expert opinions.

The trial court also substituted its judgment for that of the Commissioners, who found that the neighbors' complaints could be addressed by conditioning approval on air quality monitoring and reduction of emissions under County Health Department supervision. The court deemed this condition to be insufficient because it did not establish specific ambient air emissions standards or require a medical expert's input. County regulations contain no such requirements.

The trial court's ruling violated bedrock principles requiring deferential appellate review of administrative decisions, which must be upheld unless supported by no competent evidence. The Commissioners therefore ask this Court to reverse the lower court's ruling and reinstate their decision.

STATEMENT OF FACTS[1]

A. The Delta County Master Plan

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." CD#2: 763 (Delta County Master Plan).[2] Including indirect employment, agriculture "accounts for approximately 40 percent of the total workforce." *Id*. The Master Plan sets as its highest priority "[p]reservation of agricultural lands and open space." CD#2: 762. With respect to "incompatibility" of land uses, the Master Plan states, "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." CD#2: 763.

B. The Regulation For Specific Developments

The County does not have a traditional zoning code; instead, it regulates certain types of new developments through the Delta County Regulation for Specific Developments (RSD). CD#2: 773-817. Agricultural activities are exempt

[1] Because the extensive administrative and trial court proceedings are interwoven with the facts, we elaborate on the procedural history and decisions below in the Statement of Facts.

[2] The administrative record comprises 11 CDs. We cite them as CD#_: [page #]. CD's 2 through 4 are consecutively numbered in red, and we cite to the red numbers. There were two district court cases below. We cite those records as follows: CD(11CV282): [page #] and CD(12CV314): [page #].

from the RSD, except for feedlots and "new confined animal operations." CD#2: 774. A confined animal operation is one where animals are concentrated in a "confined corral, pen, enclosure, building" or other structure. CD#2: 793.

Under the RSD, applicants must file a multi-part Specific Development Application and undergo extensive reviews before an Advisory Planning Committee, County Planning Commission, and ultimately, the Board of County Commissioners. CD#2: 779-89. The Commissioners may approve, approve with conditions, or deny the proposed development. CD#2: 788. If they approve, then the Commissioners and applicant enter into a Specific Development Agreement, which sets forth any conditions. CD#2: 789.

C. The Hostetlers Apply To Operate Two Cage-Free Egg Barns.

In 2011, the Hostetler family completed the extensive applications for two Specific Development Agreements to build two single-barn, cage-free egg farms, called Western Slope Layers (WSL) and Rocky Mountain Layers (RML), both in rural Delta County. CD#1: 2-9, 41-66; *see* CD#4: 1092. The applications sought approval for two 400' by 50' barns, each housing 15,000 hens with access to a 335' by 90' outdoor area. CD#1: 3, 42. Edwin and Eileen Hostetler sought to operate WSL, located on Powell Mesa, and Greg and Carmen Hostetler sought to operate RML, located on Redlands Mesa. CD#1: 3, 47, 1027, 1033.

Most of the evidence below pertained to WSL and Powell Mesa. WSL is located on Edwin and Eileen Hostetler's 96-acre property, which at the time of their application had a cattle herd and irrigated fields. CD#1: 48-49; CD#3: 934. Powell Mesa is a rural-agricultural area featuring large-acreage properties, including small farms, ranches, and residential properties. CD#2: 246-47, 259; CD#3: 842-43, 935. Delta County already has many other poultry operations, including two large-scale egg-laying operations—Foster Farms and Whiting Farms. *See* CD#1: 113; CD#2: 251.

D. The First Public Hearing And Approval With Conditions

At a public hearing on August 15, 2011, the Commissioners received numerous written comments, oral presentations, and other evidence from proponents and opponents of the egg barns. CD#1: 110-376, 786-99; CD(11CV282): 470-567. They also visited both properties and plaintiff Susan Raymond. CD(11CV282): 544. They ultimately approved the two applications, subject to 15 separate conditions. CD#1: 1027-38. One condition itself comprised 11 additional requirements, including developing and submitting plans for water quality control, manure and litter control, fly control, noise management, dust and odor control, egg management, solid waste management, a drainage study, erosion control, and the maximum number of chickens. CD#1: 1028-29, 1034-35.

E. The First Rule 106(a)(4) Appeal And Remand

Plaintiffs, who are neighboring landowners, filed a Rule 106(a)(4) action challenging the approval of the egg farms. CD(11CV282): 5-12. On March 15, 2012, while suit was pending, the Commissioners found that the conditions of approval had been met and that the Hostetlers could begin construction of WSL. *Id.* at 583 ¶12. Plaintiffs moved for a preliminary injunction to stop them from building and operating the barn, but the court denied the motion. *Id.* at 608-15.

The district court ultimately ruled in Plaintiffs' favor in two respects. It first held that the RSD requires "compliance with the compatibility component of the Master Plan." *Id.* at 722. It then held that the record lacked competent evidence concerning four issues and remanded so the Commissioners could address them: (1) compatibility of the uses with the neighborhood; (2) impact on property values of the surrounding property; (3) sufficiency of the conditions and undertakings to address the concerns identified in the record; and (4) capability of the Delta County staff to monitor compliance with the conditions and undertakings. *Id.* at 725-26.

F. The County's Inspections And Air Quality Testing

From April to August 2012, while the first suit was pending, Edwin and Eileen Hostetler built and began operating WSL. During this period, the County Engineer, Health Department, and Planning Department conducted multiple

inspections of WSL to ensure compliance with the 15 conditions. *See* CD#2: 53-107, 696; CD#3: 819. The County Engineer conducted four inspections to confirm that the state had approved WSL's storm water design, assure compliance with the drainage plan, and address other issues. CD#2: 90-106. On his last inspection, he noted the absence of erosion, flies, bugs, or dust-build up on the exhaust fans and roof. CD#2: 106. County Environmental Health Director Ken Nordstrom (often accompanied by Planning Department Director Rice) inspected WSL another five times, including in response to complaints by plaintiff Susan Raymond. CD#2: 53-73, 107; CD#3: 818. Nordstrom found compliance problems on two inspections and demanded corrective action; the Hostetlers complied. CD#2: 53-65, 67-89.

In August 2012, in response to some neighbors' claims that emissions from WSL were causing respiratory problems, the Health Department commissioned an air quality study to determine what the barn's fans were emitting. CD#2: 118-41, CD#4: 1082. The study was conducted by Plateau Inc., an independent air-quality engineering firm. *See id*. In sampling, analyzing, and reporting samples, Plateau followed standard procedures in the American Industrial Hygiene Association's Field Guide for the Determination of Biological Contaminants in Environmental Samples. CD#2: 114, 119. Plateau later issued an amended report with a more detailed analysis of three mold species. CD#2: 114-17.

Plateau observed that various fungi, bacteria, chemicals, and particulates are typical products of rural environments and farming activities, including plowing, fertilizing, harvesting, feeding, cleaning pens, and other activities. CD#2: 115. As to WSL's emissions, Plateau concluded that "there is not sufficient information at this time to suggest that these conditions are contextually abnormal, nor that they are sufficient to induce health problems in normal healthy individuals." *Id.*

Environmental Health Director Nordstrom then drafted a detailed memo to the Commissioners. CD#2: 142-43. He analyzed the Plateau study and experts' opinions, noted his limited literature review, referenced the competing evidence, and summarized his conclusions. *See id.* He opined that while he had concerns about neighbors' complaints, the cause of their ailments was unproven, and indeed, there were multiple other possible causes. CD#2: 142. He recommended that to further evaluate and reduce emissions from the WSL barn, the Commissioners require the Hostetlers to hire a professional air quality engineer. CD#2: 143.

G. The Second Public Hearing And Reapproval.

On September 4, 2012, after the first appeal and remand, the Commissioners held a second public hearing. CD#2: 714-51. The parties presented extensive comments and other evidence on the four remand issues, including compatibility with the neighborhood. CD#2: 110-543, 597-690, 714-51. This included petitions

supporting and opposing compatibility. Supporters outnumber opponents by more than 3 – 1. *See* CD#2: 269-333, 461-494. The parties also submitted competing expert reports on whether the WSL barn was or could be impacting neighbors and whether the conditions imposed were sufficient to address some neighbors' health and environmental concerns. CD#2: 110-53, 168-82, 597-613, 625-90.

The Commissioners then reconsidered the applications. Chairman Lund noted that they had "done extensive due diligence with all of the submitted evidence" and took "very seriously the volumes of information presented at the hearings." CD#2: 753. He found that "there is conflicting evidence supplied by both neighbors and experts specific to compatibility." *Id.* at 754. Commissioner Hovde observed that the fungal and bacteria species found in the Plateau study would be the same in any agricultural situation, including dirt movement from disking and plowing. *Id.* at 755. He found that studies presented by plaintiffs and their experts were based on Concentrated Animal Feeding Operations (CAFOs), which are much larger than this small farm. *Id.* at 756. This comparison was "not apples to apples." *Id.* Commissioner Atchley agreed. *Id.* at 756-57. The Commissioners then reapproved the applications with the same 15 conditions and made findings addressing all four items identified by the trial court, but they did not adopt Director Nordstrom's recommendation. CD#3: 934-49.

H. The Second Rule 106(a)(4) Appeal

Plaintiffs sued again. CD(12CV314): 7-15. They complained in part that they had no opportunity to respond to four items of air quality evidence submitted to the Commissioners after the second public hearing: (1) the Nordstrom memo; (2) the Plateau report; (3) the amended Plateau report; and (4) a University of Georgia study. *Id.* at 80-90. The trial court denied their motion to strike this evidence but remanded for the Commissioners to consider plaintiffs' challenges to those four items. *Id.* at 179-81.

I. The Third Public Hearing And The Additional Condition To Monitor And Reduce Emissions

On remand, the Commissioners conduct a third public hearing on May 1, 2013. They heard comments and received additional lay and expert evidence as to air quality. CD#4: 951-1083; CD#5. On May 28, 2013, they issued their final decision. CD#4: 1084-89. Former Chairman Lund had left the Commission. Both new Chairman Hovde and new Commissioner Roeber reviewed all documents submitted in the various public hearings over the preceding two years. CD#4: 1086-87. The Commissioners reiterated that the experts' opinions were contradictory and that studies submitted by the plaintiffs concerned health risks of CAFOs, which are much larger operations than the Hostetlers' egg barn, or swine operations, which are not comparable. *See* CD#4: 1087-89.

The Commissioners again approved the Hostetlers' two development agreements, but this time they added an important new condition. As earlier recommended by Director Nordstrom, they required the Hostetlers to hire a professional engineer to conduct air-quality testing and develop a plan to reduce emissions for the Health Department to review and, if necessary, modify. CD#4: 1089, 1093. They imposed specific time limits for the Hostetlers to comply. *Id.*

J. The Trial Court's Ruling At Issue.

On September 5, 2013, the trial court again overturned the Commissioners' decision. CD(12CV314): 373-85. It ruled that there was competent evidence to support the Commissioners' findings as to three of the four remand issues. It listed both sides' expert reports and held that there was competent evidence to support the finding that the egg barn had had no impact on property values. *Id.* at 380, ¶ 9. It ruled that there was competent evidence, including the opinions of six experts, to support the adequacy of the conditions imposed. *Id.* at 380, ¶ 10. And it held that there was record support that the County Engineer, Environmental Health Director, Planning Director, and Attorney were appropriately monitoring the egg operation and soliciting assistance from the State. *Id.* at 380, ¶11.

But the court reversed on the fourth issue. It found that the egg barn was incompatible with the neighborhood because plaintiffs had presented unrebutted

evidence that the operating barn's emissions were causing respiratory problems. *Id.* at 381 ¶17. It stated that the County Health Department had not pursued the plaintiffs' health complaints by contacting the plaintiffs. *Id.* at 381 ¶ 18. It listed only lay and expert evidence supporting the plaintiffs. *Id.* at 382-84, ¶ 18(b). Critically, the court found that the new condition was insufficient because it "does not require medical input and sets no specific limits on air quality or other reasons for the health consequences of pre-existing uses[.]" *Id*. at 384 ¶ 21.

The court ordered the County to issue a cease and desist order to the Hostetlers. *Id.* at 384 ¶ 23. The County did so, *id.* at 386-87, and eventually, the Hostetlers sold their chickens and ceased operations.

SUMMARY OF ARGUMENT

The Commissioners' finding that the Hostetlers' barns were compatible with the existing neighborhoods was supported by competent evidence. This included public comments that weighed heavily in favor of approving the barns, expert reports, and government agency opinions and inspections. Plaintiffs presented contrary evidence, but the Commissioners weighed that evidence, resolved conflicting expert opinions, and found the barns were compatible. Under the deferential competent-evidence standard, there is no basis to overturn this finding,

particularly given the added condition that the Hostetlers hire a professional air pollution engineer to monitor and reduce emissions from the barns.

In reversing, the trial court erred in three ways. First, the court disregarded copious record evidence supporting the Commissioners' finding of compatibility and relied only on evidence supporting plaintiffs' position. Second, it contradicted itself by ruling that the Commissioners had imposed conditions that both were and were not sufficient. Third, the court effectively required the Commissioners to adopt ambient air quality standards and solicit medical expert opinion. It thus imposed onerous new obligations exceeding those in the Master Plan and RSD and stepped well outside of its assigned role as a reviewing court.

Finally, public policy supports reversal. Both the State and Delta County have declared policies to promote and protect agriculture. And a local land use board must have broad discretion to balance competing interests and enforce its own regulations. The trial court inappropriately impinged on that authority. The court's ruling should be reversed and the Commissioners' decision reinstated.

PRESERVATION OF ISSUES

The issues presented were raised and ruled on below. *See* CD(12CV314): 272-308, 309-35, 373-85. Specific citations to the administrative and trial court records are provided for each issue addressed below.

STANDARD OF REVIEW

This is a C.R.C.P. 106(a)(4) appeal from an administrative ruling by a local government body acting in a quasi-judicial capacity. Appellate review in such proceedings is limited to whether the governmental body's decision "was an abuse of discretion or was made without jurisdiction[.]" *Thomas v. Colo. Dept. of Corrs.*, 117 P.3d 7, 8 (Colo. App. 2004). In conducting this review, this Court "sits in the same position as the district court when reviewing an agency's decision," *id*. at 8-9, and it is not bound "by any determination made by the trial court." *Carney v. Civil Serv. Comm'n*, 30 P.3d 861, 863 (Colo. App. 2001). Appellate review is therefore de novo. *Id*.; *Thomas*, 117 P.3d at 8.

Rule 106(a)(4) review is not a review of the trial court's order to determine whether it was correct. Instead, Rule 106(a)(4) "requires an appellate court to review *the decision of the governmental body itself* rather than the district court's determination regarding the governmental body's decision." *Board of Cnty. Comm'rs of Routt Cnty. v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996) (emphasis added). Thus, on appeal, the Commissioners' ruling is again "accorded a presumption of validity and all reasonable doubts as to the correctness of administrative rulings must be resolved in favor of the agency." *Van Sickle v. Boyes*, 797 P.2d 1267, 1272 (Colo. 1990).

This Court must uphold the Commissioners' decision "unless there is no competent evidence in the record to support it." *O'Dell*, 920 P.2d at 50 (citation omitted). "No competent evidence" means a 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)); *see also CTS Invs., LLC v. Garfield Cnty. Bd. of Equalization*, --- P.3d ----, 2013 WL 979357, at *4 (Colo. App. March 14, 2013) ("competent evidence is the same as substantial evidence" and requires "more than merely 'some evidence in some particulars'") (citations omitted).

In determining whether competent evidence exists, a reviewing court does not weigh the evidence, assess the credibility of witnesses, or resolve any conflicts. *Goldy v. Henry*, 443 P.2d 994, 997 (Colo. 1968); *CTS Invs., LLC*, 2013 WL 979357, at *9. These tasks are left to the Commissioners' sole discretion, and a reviewing court cannot "substitute [its] judgment" for that of the Commissioners. *CTS Invs.*, LLC, 2013 WL 979357, at *8-9; *see Goldy*, 443 P.2d at 997. The Commissioners' fact findings, including its credibility assessments and resolution of conflicting testimony, "may be express or implied." *CTS Invs., LLC*, 2013 WL 979357, at *8; *Burns v. Bd. of Assessment Appeals*, 820 P.2d 1175, 1177 (Colo. App. 1991) (same); *see O'Dell*, 920 P.2d at 51 (noting that, "[a]s indicated by its

decision," board "apparently gave more weight" to Fire Protection District's opinion on accessibility than to Forest Service's contrary opinion).

Applying these deferential standards, the Colorado Supreme Court and this Court have repeatedly reversed rulings where lower courts disregarded record evidence or substituted their judgment for that of a local zoning authority. *See, e.g.*, *O'Dell*, 920 P.2d at 51-53 (ruling that this Court should not have "reweighed the evidence" and reinstating county zoning board's denial of land use application because it was supported by competent evidence); *Fedder v. McCurdy*, 768 P.2d 711, 713 (Colo. App. 1988) (holding that in reversing county zoning board's decision, trial court "improperly substituted its judgment for that of the County Commissioners and ignored competent record evidence"); *Bentley v. Valco, Inc.*, 741 P.2d 1266, 1267-68 (Colo. App. 1987) (reinstating county commissioners' permit for strip mining operation over neighbors' objection because weighing of evidence and determination of facts were "not matters for consideration" by the trial court). The court below likewise overlooked competent evidence, failed to view the evidence in a light most favorable to the Commissioners' ruling, and substituted its judgment for theirs. This Court should therefore reverse the trial court's decision and reinstate the Commissioners' ruling.

ARGUMENT

I. THE COMMISSIONERS' DECISION THAT THE EGG FARMS WERE COMPATIBLE WITH THE RURAL-AGRICULTURAL AREA WAS WELL-SUPPORTED BY COMPETENT EVIDENCE.

The Commissioners' decision that the egg barns were compatible with the existing neighborhoods was supported by ample competent evidence. The Master Plan sets forth guidelines for determining incompatibility, which emphasize the need for other uses to yield to agricultural uses:

> 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.

CD#2: 763 (emphasis added).

The Master Plan guideline informs the RSD's definition of "compatible," which means "[a]ble to exist or act together harmoniously, considering noise levels, odors, potential fire hazard, visual impacts, effects to surface water and groundwater quality/quantity, adequacy of the road system, air quality and surrounding land uses." CD#2: 793. This statement in the Master Plan also expressly informs the RSD's performance standard, which requires new developments to be compatible with adjacent uses:

> Compatibility with Adjacent Land Uses – Comments received from surrounding property owners, other interested persons and existing land use shall be among the factors considered to determine compatibility. The specific development must be consistent with the Delta County Master Plan . . . .

CD#2: 789. Here, the evidence was not only competent but overwhelming that the one-barn cage-free egg farms were compatible with existing land uses.

A. There Was Competent Evidence That The Egg Farms Were Compatible With Existing Land Uses, Including Other Farms And Large-Acreage Properties In The Rural-Agricultural Area.

The RSD performance standard states that "existing land use" is a factor in determining compatibility. *Id.* Western Slope Layers (WSL) is situated on 96 acres in Powell Mesa, and before the Hostetlers applied for their egg farm, they tended irrigated fields and raised livestock. CD#3: 934. The surrounding land uses are rural/agricultural and include both small farms and residential properties ranging from 5 to 40 acres. CD#3: 842-43, 935. Powell Mesa features many other types of agricultural operations, including orchards, vineyards, hay fields, pasture, and cattle and horse ranches. CD#2: 246-47, 259; CD#3: 842-43. WSL blends in with its surroundings. CD#2: 251; CD#3: 842-47 (photos).

The WSL property has irrigated grass and pasture land, well-maintained buildings, and well-kept fences. CD#3: 842-43. Some of the surrounding properties are not as clean or well-maintained, with "old vehicles and junk cars,

trailer houses, manure piles, dilapidated buildings and fences, weeds that are overgrown," and homes, shops, and barns "in disrepair." *Id.* at 843. Neighbor Susan Raymond is a veterinarian who has a dog kennel and raises and sells horses, which generate manure and require a dead animal pit. CD#2: 246-47.

The WSL egg barn is set back more than 800 feet from the nearest neighbor's residence (aside from the Hostetlers' own residence). CD#2: 600-02; CD#4: 961. There are no specific setback requirements in the RSD. The evidence showed that egg barns in Georgia were required to be set back 200 feet from property lines and 500 feet from residences, while those in Illinois were required to have a 1/4 mile (1,320 foot) setback. CD#2: 147, 602. The Hostetlers' barn is in the middle of these ranges. Ken Koelkebeck, Ph.D., Professor at the University of Illinois at Urbana-Champagne and a Poultry Extension Specialist, opined that the roughly 1,000-foot distance to the nearest residence should not pose any concern to neighbors given the egg barn's vegetative cover area. CD#2: 602.

Rocky Mountain Layers is similarly situated on 40 acres on Redlands Mesa. CD#3: 942. It is surrounded by agricultural lands, including a 400-head elk farm and 600-head beef cattle farm less than a mile away. CD#2: 738; CD#3: 943. There was competent evidence, therefore, that both the operating and proposed egg farms were compatible with existing land uses.

B. Public Comments Heavily Favored The View That The Egg Farms Were Compatible With Existing Uses.

Under the RSD performance standard, "[c]omments received from surrounding property owners [and] other interested persons" are relevant factors in determining compatibility. CD#2: 789. The comments received at public hearings strongly supported the Commissioners' finding of compatibility.

Both proponents and opponents submitted petitions from local residents concerning whether the cage-free egg operations would be compatible with the existing agricultural and rural areas. CD#2: 269-333, 461-94. The signatures in support outweighed those in opposition by 523 to 191. *Id.* The actual majority was greater, because the petitions in opposition contain many duplicate signatures. *See, e.g.*, CD#2: 463, 473, 489 (Todd Sheets' signature on three petitions); 464, 476, 483 (Bryan and Carolyn Brady's signatures on three petitions). When duplicate signatures are omitted, the tally was 523 to 147, a more than 3 – 1 ratio in favor of the egg farms' compatibility. *See* CD#2: 269-333, 461-94.

Moreover, numerous residents submitted specific comments supporting the cage-free egg farms' compatibility with existing uses. These comments came from neighbors, realtors, other farmers and ranchers, and State and local farm bureaus. *See* CD#2: 245-68, 737-41. The comments confirmed that the area is home to many similar operations, including poultry and egg farms, cattle ranches, horse

ranches, sheep farms, elk farms, ostrich farms, and other similar venues. *See id.* at 246-47, 250-51, 257, 262-63. Many commenters offered personal observations of the operating egg farm as being a clean, neat, well-designed operation that meshes with existing agricultural uses and does not have odors or emissions that are unusual for the area. *See id.* at 245-47, 250-53, 259, 262, 266-67, 737-38.

The comments in support included the following examples:

- From a grandmother: The Hostetlers have a "very clean operation. There were no feathers and no smell." She "would love to have my grandchildren grow up next to such a clean operation." CD#2: 245.
- From the Colorado Farm Bureau and Delta County Farm and Livestock Bureau: The egg farm is compatible and will have economic benefits. *See* CD#2: 250-52.
- From a beekeeper who collects pollen within 150 yards of the chicken house every Saturday: "I have yet to notice anything that would have an adverse effect on any neighbors. I would be tickled to be a next door neighbor." CD#2: 253.
- From a neighbor of Western Slope Layers: The chicken farm "is compatible with the neighborhood" which is "primarily residences and small farms/orchards." It has not impacted her family's health.

"One of my children suffers from asthma. She had more difficulty playing on the dirt t-ball field" than at home. CD#2: 265.

- Another neighbor drives by the hen house "several times a day at all hours. I have not seen, heard, or smelled anything." CD#2: 266.
- Another resident attended two inspections and described the chicken barn as "an absolute wonder." The fans were "on full bore" and there were few feathers and only a "slight chicken smell." CD#2: 737-38.
- A rancher who lives less than a mile from Rocky Mountain Layers on Redlands Mesa noted that he has 400 elk, 300 dairy cattle, and 600 beef cattle. The proposed facility "is absolutely compatible" with Redlands Mesa. He has asthma and an inhaler. This is a natural part of farming and living in dusty conditions. CD#2: 738-39.
- From a veterinarian who lives on Redlands Mesa: This is a small, compatible operation. A 15,000-chicken barn is equivalent to 300 calves, 150 beef cows, or 100 dairy cows. CD#2: 739.

Other commenters noted the operating egg barn's compatibility with other egg-laying operations. One lives 600 yards from 6 chicken houses, each with 6 fans, and she does not have problems with feathers as claimed by the Hostetlers' neighbors. CD#2: 740. Another drove around County taking pictures of chicken

egg-laying operations, including those of Foster Farms, and found the Hostetlers' operation to be compatible. CD#2: 740-41.

Plaintiffs—adjoining landowners—objected and presented opposing comments from themselves and their supporters. CD#2: 36-460, 729-36, 741-51. They insisted that only the opinions of adjoining landowners counted, and that the opinions of non-adjoining Powell Mesa neighbors and other interested parties was not competent evidence. *See* CD(12CV314): 116. The RSD performance standard, however, makes no such distinction between the voices of immediately adjoining landowners and those of other interested parties. CD#2: 789. Moreover, it is the very nature of a land use dispute that the adjoining neighbors object. If plaintiffs were correct and only the adjoining neighbors' opinions mattered, then a zoning or land use authority could never rule in favor of a new development. Plaintiffs' argument thus fails as a matter of both law and policy.

Finally, it was up to the Commissioners to weigh this competing testimony, resolve any conflicts, and make findings. *Goldy*, 443 P.2d at 997; *CTS Invs., LLC*, 2013 WL 979357, at *8-9. The Commissioners found the cage-free egg farm to be compatible notwithstanding plaintiffs' competing evidence. This finding was well within their discretion.

C. The Commissioners Addressed Adjoining Neighbors' Concerns By Imposing 16 Conditions, Including The Condition Requiring Monitoring And Reduction Of Emissions.

Plaintiffs also alleged that dust, feathers, ammonia, and other emissions from the WSL chicken barn had caused some neighbors to contract, or had exacerbated, respiratory ailments. *E.g.*, CD#2: 336-460, 495-543, 741-42. Plaintiffs and their experts drew this inference from the temporal connection between the Hostetler's operations and the symptoms, and from studies concerning employees of CAFOs. *See* CD#2: 340-43, 625-90, 729-36; CD#4: 990-1059; CD#5. They and their experts also claimed that the chicken barn was emitting fungi and bacteria, such as Salmonella and Yersinia, that could cause disease. *See*, *e.g.*, CD#2: 340-43, 405-08; CD#4: 957-61, 998-1007.

But there was copious contrary evidence. This included evidence from lay and expert witnesses and from government experts and reports. Many neighbors of and visitors to WSL reported that they were *not* getting sick from living near or being in the barn. CD#2: 142, 253, 265. This included the closest "neighbors"—the Hostetler family—who lived and work at the barn. CD#2: 142. County Health Director Nordstrom noted that the family members "appear to be unaffected." *Id.*

Plaintiffs also submitted a crude "health map" showing, with Monopoly® hotels, the locations of neighbors who had made health complaints or who,

according to plaintiffs, had experienced health issues yet had filed no complaints. CD#3: 933. But the map had numerous gaps, indicating that many neighbors of the egg farm had not experienced any health issues. *See id.* And aside from the plaintiffs' own say-so, there was no corroboration that other neighbors, who had never complained to the County of health problems, had experienced such problems or had attributed them to the chicken barn.

To support their view that the Hostetlers' farm was incompatible, Plaintiffs also presented expert opinions and studies, most of which relied on or concerned Concentrated Animal Feeding Operations (CAFOs) or swine feedlots. CD#2: 384, 388, 401, 417, 445-54, 559-76, 643, 682-83; CD#3: 831-32; CD#4: 1001, 1004-05, 1015, 1021-23. But the Hostetlers' operation is not a CAFO, which might have millions of chickens or thousands of much larger animals. WSL is a small, family egg farm consisting of a single 400' by 50' barn housing 15,000 laying hens. After inspecting the site, the Colorado Department of Public Health and Environment (CDPHE) confirmed that the operation is not defined as a CAFO "because it confines less than the CAFO threshold number of 82,000 laying hens." CD#2: 170. In fact, it is not even classified as a "medium" animal feeding operation because it has less than 25,000 hens. *Id.*

The Hostetlers also presented expert opinions that criticized the plaintiffs' experts and countered that the CAFO-based studies, which concern health risks to *employees* of these much-larger operations, were inapplicable. CD#2: 597-613. Health Department Director Nordstrom corroborated this view:

> The complaints from citizens and letters received by the County include letters from doctors expressing concern for the health of persons in the community exposed to the emissions from the henhouse operation. While health problems from occupational exposure to poultry dust and confined animal feeding are documented in industrial hygiene and medical literature, *the complainants have extrapolated the conclusions regarding occupational exposure to ambient environmental exposure*. However, those two types of exposures are quite different and in this department's limited literature review, *deleterious health effects from environmental exposures are not well documented and should not be compared to an occupational exposure*.

CD#2: 142 (emphasis added).

As for bacterial infections, Colorado State University Professor Kristy Pabillonia confirmed that there have been "no known outbreaks of Salmonella transmission from poultry to humans due to airborne transmission" and that an infection required "direct contact" with poultry feces. CD#2: 149. And there was no proof that any plaintiff or Powell Mesa neighbor had contracted Salmonella, Yersinia, or any other bacterial infection from the chicken barn.

The Commissioners considered all this evidence and found that by relying on evidence of health risks to employees of CAFOs and suggesting that neighbors of the chicken barn were exposed to similar risks, plaintiffs were mixing apples and oranges. *See* CD#2: 755-57; CD#4: 1086-87.

Nevertheless, the County was not indifferent to the neighbors' concerns. In response to the neighbors' complaints, the County Health Department commissioned the Plateau air quality study. CD#2: 110-11; CD#4: 1082. The Plateau report concluded in relevant part that the dust, particulates, fungi, and bacteria emitted by the egg barn were common byproducts of agricultural activities and that there was insufficient information to conclude that these emissions were in any way abnormal or could cause illness in healthy people:

> [F]arming activities are considerable sources of bioaerosols, chemicals, and particulates from virtually any of the activities common in this environment. These exposures are consequent to common farming activities, such as, tilling/plowing, hay and grass storage, feeding, harvesting, fertilizing, cleaning pens, and other animal husbandry activities. Currently, there are no standards that we are aware of regarding acceptable exposures to bacterial and fungal propagules. The data from this testing does show that the facility is a generator of a variety of bio-aerosols, organic and non-organic dust, and small amounts of ammonia gas. However, there is not sufficient information at this time to suggest that these conditions are contextually abnormal, nor that they are sufficient to induce health problems in normal healthy individuals.

CD#2: 115.

After the Health Department received this report and the air monitoring studies, Director Nordstrom analyzed them, conducted a literature review, and summarized his conclusions in a memo to the Commissioners. While he had concerns, he found no proven link between some neighbors' health concerns and the egg operating barn and noted many other possible causes:

> The reported health concerns from neighbors surrounding the Western Slope Layer facility generate concern by this Department. . . . [Discusses CAFOs and literature review.] . . . There are many other environmental factors that could exacerbate allergic reactions, asthma, and COPD that have been reported by the complainants. Such causes would include prior exposure to dust, pollen, wildfire smoke, low humidity, and hot summer temperatures as experienced last spring and summer from a variety of other sources.

CD#2: 142. Accordingly, far from ignoring the neighbors' health complaints, the County attempted to determine if their theory could be confirmed.

For their part, plaintiffs both relied heavily on the Plateau report and, in the same breath, claimed it was unsound and unreliable. CD(12CV314): 250-63, 352. Their contradictory position must be rejected. Resolving conflicting evidence was the sole province of the Commissioners. *Goldy*, 443 P.2d at 997; *CTS Invs., LLC*, 2013 WL 979357, at *8-9. The Commissioners acknowledged the conflicts in the evidence, discounted expert opinions that were based on risks to employees of CAFOs, credited Plateau's analysis that the barn was emitting substances typical in

agricultural operations, and found that the barn was compatible. CD#4: 1092. There was easily competent evidence to support this fact finding, particularly when combined with the other evidence of compatibility. *See supra* §§ I.A & B.

The Commissioners, however, added an important new condition to evaluate and mitigate any impact from emissions. They required both the operating and planned egg farms to "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[.]" CD#4: 1089, 1093. They gave WSL less than three months to comply and required the second planned barn, RML, to comply within three months of being populated with chickens. CD#4: 1092-93, 1096, 1099. As with compatibility, their decision to impose this condition was supported by ample competent evidence, including that it was the specific recommendation of the Environmental Health Director. Their decision should be affirmed.

II. THE TRIAL COURT ERRED IN DISREGARDING COMPETENT EVIDENCE AND IN SUBSTITUTING ITS JUDGMENT FOR THAT OF THE COMMISSIONERS.

Sitting as an appellate court reviewing the Commissioners' findings, the trial court conducted the proper analysis with respect to three of the four remand issues. The court noted that despite the existence of contrary evidence, there was record

evidence to support the Commissioners' findings that (1) WSL had not impacted property values, (2) the conditions imposed on and undertakings by the Hostetlers were sufficient to address the concerns in the record, and (3) County staff, including the County Attorney, Engineer, Planning Director, and Environmental Health Director, were capable of monitoring and were in fact monitoring compliance with the conditions and undertakings. CD(12CV314): 380.

But when it came to assessing compatibility with the neighborhood, the trial court abandoned the proper analytical framework. Instead of assessing whether the record contained competent evidence supporting the Commissioners' finding of compatibility, the court listed only contrary evidence. *See* CD(12CV314): 381-84, ¶¶ 17-21. As even plaintiffs observed in responding to the motion for stay pending appeal, the court then made its own "findings" that the neighbors' health problems were directly related to the egg farm and weighed the equities in plaintiffs' favor. CD(12CV314): 381-84; *see* Resp. Br. at 6, 13-14, 16 (13CA1806, Oct. 23, 2013). The court also found that the condition to hire a professional air quality engineer was insufficient because it "sets no specific limits on air quality or other reasons" and did not require "medical input." CD(12CV314): 384.

This approach was flawed in at least three important respects. First, by making findings and weighing evidence, the court stepped outside of its assigned

role. Second, the court contradicted its ruling that the County had the expertise to enforce its regulations and was doing so. Third, it addressed issues not raised by the plaintiffs and imposed onerous duties not contained in the Master Plan or SDA.

A. The Trial Court Improperly Disregarded Competent Evidence Of Compatibility, Made Fact Findings, And Weighed Evidence.

First, the court had no business making findings or weighing equities; that was the Commissioners' job. *O'Dell*, 920 P.2d at 50 (in Rule 106(a)(4) review, the trial court is not the fact-finder and "may not substitute its own judgment" for the zoning board's). Its role was to determine whether the Commissioners' finding of compatibility was supported by competent evidence or was instead "so devoid of evidentiary support" as to be "arbitrary and capricious." *Id.* In evaluating the evidence, the court should have viewed the record as a whole and resolved any doubts in favor of the Commissioners' ruling. *Van Sickle*, 797 P.2d at 1272.

The court took precisely the opposite approach. It listed in bullet points only evidence supporting plaintiffs' position that the WSL barn was causing or could cause health impacts, and therefore, was not compatible. CD(12CV314): 381-84, ¶ 18. It cited the Plateau Report and Nordstrom's memos, but it omitted the facts and opinions in those documents that supported the Commissioners' finding of compatibility. *See* CD(12CV314): 382-83, ¶¶ 18(b)(i-v, vii-viii).

The court thus erred. Instead of itemizing the evidence contradicting the Commissioners' findings, the court should have listed all the evidence supporting their findings and asked whether, taken together, it constituted competent evidence. A contrary presentation of bullet points might have read like this:

- Plateau report's conclusions that bioaeresols are emitted by many rural and agricultural activities and that the barn's emissions could not be deemed "contextually abnormal, nor . . . sufficient to induce health problems in normal healthy individuals." CD#2: 115.
- Health Department Director Nordstrom's opinion that expert reports and doctors' opinions relying on occupational risks to employees of CAFOs could not be extrapolated to ambient air risks for neighbors of the WSL barn. CD#2: 142.
- Nordstrom's opinion that there were many other potential causes. *Id.*
- Opinion of Duane Bundy, Ph.D., P.E., that the ambient air risks "are not high enough to present health issues" and that the conditions imposed on this small farm "go above and beyond" operations of similar size in this and other states. CD#2: 599.

- Opinion of Professor Koelkebeck, who opined that the barn's setback and the conditions imposed are sufficient to address any concerns about WSL's impact on surrounding properties. CD#2: 601-02.
- CSU Professor Pabillonia's confirmation that there are "no known outbreaks of Salmonella transmission from poultry to humans due to airborne transmission. Transmission is through direct contact with poultry or environments contaminated with their feces." CD#2: 149.
- University of Georgia Department of Agriculture and Environmental Sciences, "Nuisance Myths and Poultry Farming," stating that exhaust from a poultry house's tunnel ventilation system "only extends about 50 feet . . . before it is dispersed into the atmosphere." CD#2: 145.
- Mesa Engineering report, stating that the possibility of groundwater contamination from WSL is "extremely remote." CD#2: 182.
- Reports of regulators, who found WSL to be clean and well-maintained. *E.g.*, CD#2: 66-67 (County Health and Planning Departments: "negligible accumulations of hen house dust," "[n]o feathers observed around the building"); 106 (County Engineer: "no flies or bugs," "no discernible dust exhausting" on roof or vents); 171

(CDPHE: “feathers were not observed around or near the ventilation fans”).

- Evidence that many neighbors and visitors found the farm to be clean and well-maintained and that they were unaffected by any health concerns. CD#2: 142, 245-68, 737-41.
- Evidence that a beekeeper who worked near the barn every Saturday found no reason for health concerns. CD#2: 253.
- Evidence that the Hostetler family itself, who lived on the farm and worked in the barn, did not appear to be affected. CD#2: 142.

And so on.

The trial court also relied on the plaintiffs’ health map as proof of causation. CD(12CV314): 384; *see also id.* at 492. But plaintiffs admitted that the map showed that those with health issues were “predominantly” downwind of WSL. CD(12CV314): 353. As noted above, the map also includes some neighbors who never made a health complaint and whose illnesses were never corroborated. CD#2: 729-31. And gaps existed in the supposed swath of illness, confirming what other evidence had established—that many neighbors had experienced no health problems. *See* CD#2: 142, 933. The court thus should have drawn the opposite inference from the map: Given that many neighbors did not have health

complaints and some *upwind* neighbors did, this undermined the claim that the chicken barn was causing health problems. *See Van Sickle*, 797 P.2d at 1272 (all reasonable doubts must be resolved in favor of the agency's ruling).

The court also faulted the Hostetlers for failing to submit *any evidence* tending to *disprove* that the barn was causing health concerns. CD(12CV314): 381-82, ¶¶ 18 ("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."). But under the RSD, the Hostetlers had to prove compatibility with the rural-agricultural neighborhood, not disprove all possible health concerns. Aside from foisting an impossible and inapplicable burden on a small family farm to prove a negative, the court was wrong. A massive record controverted the alleged link between the farm and health concerns. *See supra* Argument §§ I.C. & II.A. The record was overflowing with, not devoid of, evidentiary support.

B. In Finding That The Condition To Monitor Air Quality And Reduce Emissions Was Insufficient, The Court Contradicted Itself And Substituted Its Judgment For That Of The Commissioners.

Second, the court contradicted its own rulings that the Commissioners had imposed sufficient conditions to address the concerns in the record and that the County, including its Environmental Health Director, was capable of monitoring and was in fact monitoring compliance with those conditions. CD(12CV314): 380.

The conditions imposed, especially the final condition requiring air emission monitoring and reduction, addressed the concerns, and it was not the court's place to second-guess the Commissioners' judgment. *See CTS Invs., LLC*, 2013 WL 979357, at *8-9; *see Goldy*, 443 P.2d at 997.

As noted above, the Commissioners imposed 15 conditions of approval. CD#3: 935-37. After the second remand, they again approved the Hostetlers' application, but with an important new condition to mitigate the impacts on neighbors. CD#4: 1093, 1099. They required both the operating and planned egg farms to hire a professional air pollution engineer to evaluate emissions and recommend a plan for reducing them, under Health Department supervision. *Id.* They gave the Hostetlers deadlines to comply. *Id.*

These conditions corroborate that the Commissioners acted within their discretion. *See, e.g.*, *Van Sickle*, 797 P.2d at 1273 (rejecting attempt to second-guess hearing officer's imposition of conditions as "beyond the scope of review permitted in a Rule 106(a)(4) proceeding"); *Bentley*, 741 P.2d at 1269 (reversing trial court ruling and reinstating county commissioners' decision to approve a strip mining operation, because there was sufficient evidence to support the decision, "particularly with the addition of the conditions to issuance of the permit").

The district court brushed aside this new condition because it did not set "specific limits on air quality" or require "medical input" such that it would remedy the supposedly-proven health consequences. CD(12CV314): 384. But those consequences were unproven. And it was eminently reasonable for the Commissioners to leave it up to the County Health Department to determine what measures and modifications might be needed to address the health concerns.

The reasonableness of their decision finds support in the court's own ruling, where it observed that the Environmental Health Director was monitoring the barn and that the County had conducted "extensive inspections" on this "relatively small poultry operation." CD(12CV314): 380; *see* CD#2: 53-107 (collecting records of inspections and demands for corrective action by the County Engineer, Planning Department, and Environmental Health Director). But the court then substituted its view for those of the Commissioners by "finding" that with respect to this one final condition, the Health Department somehow wasn't up to the task.

The Commissioners found otherwise. They required the Hostetlers to comply with the new condition and the Health Department to enforce it. CD#4: 1093. If the Hostetlers failed to comply, the Commissioners retained the power to revoke their approval and shut the operation down. *Id.* ("[a]ny violation of the foregoing conditions may be grounds for the revocation of this approval and the

Development Agreement"). Their finding that the new condition and enforcement mechanisms were sufficient was not subject to judicial second-guessing.

C. The Court Erred By Failing To Apply The Master Plan And RSD, And Instead, Requiring The Commissioners To Adopt Specific Emissions Standards And Retain Medical Experts.

Third, the court imposed enormous and unprecedented obligations on a county land use body, acting in a quasi-judicial capacity, to create specific emissions standards and gather conclusive medical evidence proving that there were, in fact, no adverse health impacts on neighbors. Nothing in the Master Plan or RSD required these measures. Moreover, they are demonstrably impracticable.

Notably, in the court below, plaintiffs never contended that the Master Plan or RSD were too vague to be enforced. Instead, they took the opposite position. They alleged that the Board of County Commissioners "violated its own regulations," made findings "inconsistent with" the Master Plan and RSD, and lacked competent evidence to support its findings. CD(12CV314): 14. They contended that the standard of compatibility with the existing neighborhood was sufficiently specific to be enforceable. CD(12CV314): 347-48.

But instead of applying the compatibility "performance standard" in the RSD and the definition of "incompatibility" in the Master Plan, the trial court found the County's standards to be insufficiently protective. It effectively required

the County to become a mini-EPA and create specific ambient air quality standards for particulates and toxins that are common in rural farming areas, determine what levels are necessary to protect health, and enforce them.

It was unreasonable for the court to expect a small county to do so. Notably, there are no federal or state air quality standards that apply to small agricultural operations like WSL and RML. The Colorado Air Quality Commission cannot regulate agricultural emissions except from certain large swine-feeding operations. C.R.S. 25-7-109(8)(a) (2014); *see* CD#2: 151 (WSL is exempt from stationary source requirements).

The court's attempt to force the County to step into this breach imposed enormous and impractical burdens. The EPA's experience establishing specific standards under the Clean Air Act (CAA) is a telling example of why this is so. The 1990 Amendments to the CAA comprised 800 pages and required the EPA to publish more than 55 new rules within two years. The EPA committed 70 percent of its operating funds to hire 200 new employees to work in the air program, "including scientists, engineers, public policy experts, analysts and writers." *See* William K. Reilly, "*The New Clean Air Act: An Environmental Milestone*," EPA Journal – January/February 1991, located at: http://www2.epa.gov/aboutepa/new-clean-air-act-environmental-milestone.

The court acted beyond its purview by putting a significant and unwarranted judicial gloss on the RSD and MP. The court's ruling morphed the requirement that the barn be compatible with the neighborhood into a requirement for specific ambient air quality limits on a great variety of particulates and toxins. For this small county government to develop such standards would require years of work and millions of dollars. The court erred by creating this onerous new duty.

Moreover, neither plaintiffs nor their experts established any need for such standards. Instead, they relied on the bare correlation between when the chicken barn began operating and when their alleged symptoms arose. *E.g.*, CD#2: 340-42 (opining that "the timeline of symptoms" confirmed "the role of this chicken operation in their illness"); 732-36 (plaintiffs attribute their illness to the barn); 933 (health map). They and their experts committed the fundamental error of equating correlation with causation. *See Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 885 (10th Cir. 2005) ("[a] correlation does not equal causation"); 1 MICHAEL J. SAKS, MOD. SCI. EVID. § 5:24 (2013-14 ed.) ("[C]orrelational relationships . . . tell us only whether one variable is associated with another" but "do not tell us that changes in one of the variables *causes* changes in the other variable. [C]orrelation does not prove causation, although often mere correlations are spoken of as if they established a causal relationship.") (emphasis in original).

Plaintiffs' experts then opined, based on studies of risks to *employees of CAFOs*, that some pollutants *can* cause illnesses, and therefore, could have or did cause them here. *See* CD# 2: 340-42, 625-48; CD#4: 49-54; 59-61. This was junk science. *See Norris*, 397 F.3d at 884-87 (district court properly excluded testimony of plaintiffs' two medical experts that breast implants caused plaintiff's auto-immune illness, when studies did not establish this link); CD#2: 142 (Nordstrom memo, rejecting attempts by plaintiffs and their experts to extrapolate risks to CAFO employees from occupational exposure to risks to chicken barn neighbors from ambient air exposure); CD#2: 149 (CSU Professor's email, confirming that there are "no known outbreaks of Salmonella transmission from poultry to humans due to airborne transmission" and that "direct contact" is required); CD#2: 599 (report of Duane Bundy, Ph.D., P.E., stating that ambient air risks from the barn "are not high enough to present health issues").

While the Commissioners were required to allow plaintiffs to present their "causation" evidence, they were not required to find it credible. *See Goldy*, 443 P.2d at 997 ("the Board was equally entitled to accept the testimony and conclusions of either of [the opposing parties'] expert witnesses"); *CTS Invs., LLC*, 2013 WL 979357, at *8-9 (board has sole discretion to determine the credibility of witnesses and resolution of conflicting evidence). The Commissioners expressly

and impliedly rejected plaintiffs' expert reports and instead relied on the Plateau report, Nordstrom memo, and other record evidence. *See* CD#2: 753-57; CD#4: 1086-89, 1092-93. They had discretion to do so, and the trial court erred by failing to acknowledge or uphold this exercise of discretion.

The trial court's ruling also imposed impractical new duties on the County to hire or require the input of medical experts when it wishes to approve a land use. At plaintiffs' urging, the court faulted the Commissioners because:

- The only medical evidence in the record concerning Plaintiffs' ailments came from their doctors. CD(12CV314): 384.
- The requirement for professional air quality monitoring and reduction did not "require medical input." *Id*.
- Plateau recommended that its conclusions should be approached "with caution and with the input of a qualified medical practitioner." CD(12CV314): 382 (emphasis in original) (quoting CD#2: 116).

These were not off-handed remarks; they were essential to the court's ruling. But requiring the County (or the Hostetlers) to hire medical experts would inject massive amounts of time, effort, and expense into local land use decisions. And the County has no power, in deciding whether to approve new land uses, to compel objecting neighbors to undergo Independent Medical Examinations, force them to

disgorge all their medical records, or subject their doctors to depositions. Finally, requiring medical experts to assist in establishing ambient air quality standards would be only one small piece of a complicated and expensive puzzle.

III. THE COURT'S RULING UNDERMINES BOTH STATE SUPPORT FOR AGRICULTURE AND LOCAL CONTROL OF LAND USE DECISIONS UNDER THE MASTER PLAN AND RSD.

The trial court's unwarranted second-guessing has negative ramifications that extend beyond this case and into future applications. Colorado has "strong agricultural ties" and a "declared policy" to support agricultural operations. *Board of Cnty. Comm'rs v. Vandemoer*, 205 P.3d 423, 427 (Colo. Appl. 2008); C.R.S. § 35-3.5-101 (2014); *see id.* § 35-1-102(1) (agriculture includes "poultry" and "any and all forms of farm products"). The court's ruling undermines this declared legislative policy.

Public policy also supports broad discretion in local land use decisions. The Commissioners have a strong interest in the proper interpretation and enforcement of the Master Plan and RSD and in preserving their discretion to approve or deny development applications. This is particularly true with respect to agriculture, the backbone of the Delta County economy. The Master Plan and RSD require the Commissioners to balance new development with existing uses and to harmonize sometimes competing goals and interests. *See* CD#2: 759-98.

The Commissioners are better suited than a court to weigh those competing local interests. That is a key purpose behind the sensible rule limiting judicial review of this type of decision to whether there is any competent evidence to support it. Reversal is necessary to preserve, both in principle and in fact, the Commissioners' role in setting and implementing local land use policy.

CONCLUSION

For the above-stated reasons, the Commissioners ask the Court to reverse the trial court's ruling and reinstate the Commissioners' decision approving the two Specific Development Applications with conditions.

Respectfully submitted this 21st day of February, 2014.

s/ Stephen G. Masciocchi
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CERTIFICATE OF SERVICE

I certify that on February 21, 2014, I served a copy of the foregoing document to the following by

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