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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REPLY BRIEF OF APPELLANT DELTA COUNTY BOARD OF COUNTY COMMISSIONERS

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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).

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s/Christina F. Gomez
Signature of attorney or party

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SUMMARY OF ARGUMENT

Plaintiffs fail to apply the deferential standard for reviewing administrative decisions under C.R.C.P. 106(a)(4), instead insisting that their evidence is "better" than the evidence upon which the Commissioners relied. They also encourage a dangerous precedent whereby courts could upset land use decisions—even in the critical area of agriculture, where state and local laws favor development to support local economies—simply because an agency, in its discretion, chose not to require a particular form of evidence, chose to weigh the evidence and competing interests differently than a court might have weighed them, or chose to impose some conditions but not other, more rigid and administratively burdensome ones.

Applying the appropriate, deferential review standard, the Commissioners' decision to approve the Hostetlers' proposed egg farms at Western Slope Layers (WSL) and Rocky Mountain Layers (RML) in rural Delta County was based on competent evidence and should be affirmed. The Commissioners appropriately recognized that Colorado's Nuisance Liability of Agricultural Operations Act (Right to Farm Act), while not directly applicable, provided the background policy that agricultural operations are not a nuisance unless they are operated negligently. The Commissioners also appropriately considered the evidence from lay witnesses and experts on both sides, determined issues of credibility, weighed the competing

interests, and decided the proposed farms were compatible with the existing rural-agricultural neighborhoods.

Plaintiffs have offered no reason why the Commissioners' discretionary determination of these matters should be overturned. Plaintiffs cite evidence supporting their position, but fail to show why the contrary evidence—which was voluminous—was too insubstantial to support the Commissioners' decision. They claim WSL emissions led some neighbors to suffer respiratory ailments, but fail to show why the contrary evidence—including evidence that WSL employed best management practices and was unlikely to cause health concerns—was insufficient to support the Commissioners' decision, particularly given the Commissioners' final condition imposing new emissions monitoring and reduction requirements. And they argue the Commissioners' decision violates their due process rights and is the result of bias, but fail to establish any constitutionally-protected right, lack of due process, or bias.

Accordingly, this Court should reverse the lower court's ruling and reinstate the Commissioners' decision.

ARGUMENT

I. PLAINTIFFS FAIL TO APPLY THE APPROPRIATE, DEFERENTIAL STANDARD FOR REVIEWING THE COMMISSIONERS' DECISION.

Plaintiffs' response ignores evidence supporting the Commissioners' decision, explains why Plaintiffs believe their evidence is "better," and pursues other arguments more appropriate for a fact-finder than for an appellate court reviewing agency decision-making under Rule 106(a)(4).

Plaintiffs acknowledge that this Court sits in the same position as the trial court and reviews the agency's decision, not the trial court's decision. Ans.Br. 21. Yet they abandon this standard in arguing for affirmance based on their claim that the trial court "properly found" incompatibility due to health concerns and that "[n]umerous pieces of non-testimonial evidence supported this conclusion." Ans.Br. 26. They also ignore the presumption of validity and deference to agency decision-making that apply to appellate review under Rule 106(a)(4). Instead, they cite other, irrelevant review standards and focus on the word "substantial" in the "substantial evidence" standard in urging the Court to substitute its judgment for that of the Commissioners. Ans.Br. 24.

First, Plaintiffs chastise the Commissioners for not addressing *Churchill v. University of Colorado at Boulder*, 285 P.3d 986 (Colo. 2012). Ans.Br. 21-22, 24.

But *Churchill* is not relevant here. There, the Court did not apply Rule 106(a)(4), as the plaintiff did not bring a Rule 106(a)(4) proceeding; instead, he filed a claim under 42 U.S.C. § 1983 alleging that the termination of his employment violated his constitutional rights. 285 P.3d at 994. The Court held that Rule 106(a)(4) would have provided an adequate forum for reviewing the termination decision, as a decision can be set aside under the Rule if a challenger shows that it "violates a party's constitutional rights" (including through proof that the stated reason was "merely a pretext for an unconstitutional purpose") or that the "decision-makers held some institutional bias or personal grudge against [him]." *Id.* at 1006. Plaintiffs made no such showing here. *See infra* at 21-26.

Second, Plaintiffs fault the Commissioners for not directly addressing cases considering whether an agency misconstrued or misapplied the law or amended its regulations in the guise of interpreting them. Ans.Br. 22-24. Yet Plaintiffs fail to cite any misconstruction, misapplication, or amendment of the applicable land use provisions. Their complaint is not with the Commissioners' *interpretation* of these provisions; it is with the Commissioners' *application* of the provisions to the egg farms. That application is governed by Rule 106(a)(4). At any rate, as Plaintiffs' cited cases demonstrate, so long as "there is a reasonable basis for [an agency's] interpretation of the law," a "decision may not be set aside on those grounds."

Save Park Cnty. v. Bd. of Cnty. Comm'rs, 969 P.2d 711, 714 (Colo. App. 1998), *aff'd*, 990 P.2d 35 (Colo. 1999). *See also infra* at 9-11.

Finally, Plaintiffs suggest the Commissioners mis-cited the Rule 106(a)(4) standard and erroneously advocated that "*any* evidence" supporting an agency's decision is sufficient. Ans.Br. 23. To the contrary, the Commissioners cited and applied some of the same authorities Plaintiffs cite, and they explained, among other things, that the Court must uphold the decision "'unless there is no competent evidence in the record to support it,'" and that "'competent evidence is the same as substantial evidence' and requires 'more than merely some evidence in some particulars.'" Comm'rs Op.Br. 15 (quoting *Bd. of Cnty. Comm'rs v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996) and *CTS Invs., LLC v. Garfield Cnty. Bd. of Equalization*, --- P.3d ---, 2013 WL 979357, at *4 (Colo. App. Mar. 14, 2013)).

Plaintiffs' other cited authorities (Ans.Br. 23) further demonstrate that the scope of review is narrow and deferential, and that a challenger bears the burden of overcoming the presumption of validity. *City of Colo. Springs v. Givan*, 897 P.2d 753, 756, 758-60 (Colo. 1995) (challenger failed to overcome presumption); *Lieb v. Trimble*, 183 P.3d 702, 704-06 (Colo. App. 2008) (same). *But see Colo. Mun. League v. Mountain States Tel. & Tel. Co.*, 759 P.2d 40, 45-46 (Colo. 1988) (record was devoid of any evidence to support decision).

II. PLAINTIFFS' POSITION CONFLICTS WITH THE PURPOSE OF THE STATE AND LOCAL RIGHT TO FARM ACTS.

Plaintiffs urge that Colorado's Right to Farm Act, which the Commissioners cited at page 43 of their Opening Brief and the amicus parties highlighted in their briefs, is irrelevant to this appeal. Ans.Br. 43-46. Not so.

The Right to Farm Act reflects the state's "policy of support for agricultural operations." *Bd. of Cnty. Comm'rs v. Vandemoer*, 205 P.3d 423, 427 (Colo. App. 2008) (citing C.R.S. § 35-3.5-101). In an effort to protect and encourage agricultural operations, the Act declares that "an agricultural operation shall not be found to be a public or private nuisance if [it] employs methods or practices that are commonly or reasonably associated with agricultural production." C.R.S. § 35-3.5-102(1)(a); *see id.* § 35-3.5-101 (stating the Act's purposes). The Act allows local governments to adopt additional protections, *id.* § 35-3.5-102(7), which Delta County has done through a Right to Farm and Ranch Policy resolution. R. CF1, p.823.[1] This resolution provides, among other things, that "agricultural lands and operations are worthy of recognition and protection"; residents "must be prepared to accept the effects of agriculture and rural living," including "dust from animal pens," "odor from animal confinement," and "flies"; and agricultural "activities

[1] The administrative record comprises 11 CDs. We cite them as R. CF#, p.#. For CDs 2 through 4, we cite the red page numbers. For the two district court cases, we cite the records as R. CF(11CV282), p.# and R. CF(12CV314), p.#.

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.*

In urging this Court not to consider these provisions, Plaintiffs omit critical language from an earlier court order and ignore the Commissioners' reliance on the policy underlying the Right to Farm Acts. Plaintiffs quote from the trial court's unappealed July 5, 2012 order stating that the Colorado and local Right to Farm Acts "do[] not directly apply to this matter." Ans.Br. 44. But Plaintiffs omit the very next sentence, which provides: "Nevertheless, the Record reflects that the Commissioners were within their authority in considering the underlying policy behind those [acts] in evaluating these proposals." R. CF(11CV282), p.724(¶7).

While the Right to Farm Acts do not *directly* apply to the Commissioners' decision on the land use applications, the Acts' underlying policies are relevant. Indeed, Commissioner Roeber commented at the final hearing:

> I guess I would go back to the Right-to-Farm Statute of the state which states that, you know, *it's not a nuisance in an agricultural community unless it's operating negligently, and I think that is probably the number one thing we have to look at*. I don't believe that the air quality, the tests going back to these four things that this remand was about, the Plateau stated that it was just a moment in time that they tested but, you know, they didn't really find anything out of the ordinary . . . .

R. CF4, p.1087 (emphasis added). *See also Vandemoer*, 205 P.3d at 430 (Right to Farm Act was relevant in considering commissioners' restrictions on agricultural operations considered to be a nuisance, even though the parties did not rely on it).

The Commissioners' approval of the egg farms was consistent with these policies, because the evidence demonstrated that WSL complied with state and local regulations, implemented best management practices, and was subject to conditions far more restrictive than similarly-sized operations in other areas. *See, e.g.*, R. CF2, p.115, 142, 171, 599, 753.

As the amici warn, overturning the Commissioners' approval based on conflicting evidence about possible nuisance-like impacts undermines the Right to Farm Act. Br. of Gov. John W. Hickenlooper, Colo. Dep't of Pub. Health & Env't, and Colo. Dep't of Agric. at 6-7; Br. of Colo. Farm Bureau at 3. It enables parties to use Rule 106(a)(4) to evade the Act anytime an agency is required to pre-approve an agricultural operation, without making the requisite showing that the agency's decision is unsupported by competent evidence or that the operation is run negligently or is violating regulatory requirements. Yet preserving agency discretion is particularly critical in the area of agriculture, which is supported by the state and is critical to the county's economy. *See* R. CF2, p.763(§I).

III. PLAINTIFFS MISCONSTRUE THE DISCRETIONARY LANGUAGE IN THE RSD AND MASTER PLAN.

Plaintiffs admit that local governments have broad powers to establish and enforce their own land use regulations. Ans.Br. 3. Yet they try to constrain the Commissioners' authority, both by challenging the Commissioners' weighing of competing evidence and interests and by overstating the binding nature of the Delta County Regulation for Specific Developments (RSD) and Master Plan.

Plaintiffs focus on the language of the trial court's earlier, unappealed order holding that the RSD requires compliance with the Master Plan. Ans.Br. 41-42; *see also* R. CF(11CV282), p.722(¶2). However, the fact that compliance with the RSD and Master Plan is required does not transform the discretionary standards in these documents into inflexible mandates that must be applied in a particular way.

The RSD provides that "developments that may create noise, odor, glare or dust shall be required to have an adequate setback and may be screened so as not to adversely affect surrounding property owners," and that "[d]evelopment shall not interfere with the normal operating of existing agricultural operations." R. CF2, p.791(§§VI.2.J.1, VI.2.M). It also defines "compatible" as "[a]ble to exist or act together harmoniously," considering, among other things, odors, water and air quality, adequacy of the road system, and surrounding land uses. *Id.*, p.793(§VII.2). And it directs the Commissioners to consider comments from

surrounding property owners and other interested persons, among other factors, in determining compatibility. *Id.*, p.789(§VI.2.A).

However, the RSD does not otherwise require the Commissioners to consider or more heavily weigh any particular type of evidence (for instance, medical records). Nor does it restrict the Commissioners' discretion in determining, based on the evidence, what is an "adequate" setback, what causes "interference" with other agricultural operations, what water and air quality impacts are acceptable, or what uses are "compatible."

The Master Plan offers additional guidelines for determining compatibility and states that "[i]f 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." *Id.*, p.763(§I). It also offers, as implementation strategies for protecting property rights, that "compatibility of a new development with the existing land *should* be given priority consideration," and that where there is incompatibility, "the property right of the existing use *should* be given priority." *Id.*, p.769(§IV.B.1-2) (emphasis added).

Plaintiffs cite these implementation strategies as if they were rigid dictates. Ans.Br. 3, 30-31, 35. Yet the Master Plan's hortatory language confers discretion on the Commissioners in deciding how to prioritize uses and weigh compatibility

in a specific instance. *See Sheridan Redev. Agency v. Knightsbridge Land Co.*, 166 P.3d 259, 264 (Colo. App. 2007) (use of "should" in development plan conferred discretion, as "'should' generally indicates discretion" and the plan elsewhere used "the mandatory terms of 'will' and 'shall,'" indicating different meanings were intended); R. CF2, p.768(§§IV.A & IV.A.1) (Master Plan elsewhere uses the mandatory terms "will" and "must"); *id.*, p.763 ("[t]he implementation strategies are recommended actions"). And even if these were real requirements, it was the Commissioners' job to determine whether they were met.

Accordingly, the Commissioners acted well within their discretion in applying the RSD and Master Plan to find the farms compatible with existing uses. *See Widder v. Durango Sch. Dist. No. 9-R*, 85 P.3d 518, 528 (Colo. 2004) ("the [agency] should be entitled to some autonomy in applying [its] code—provided that its decision is supported by evidence in the applicable record"). *But see Anderson v. Bd. of Adjustment for Zoning Appeals*, 931 P.2d 517, 520 (Colo. App. 1996) (cited at Ans.Br. 22-23) (zoning board misapplied ordinance allowing non-conforming uses to continue only with "no change whatsoever" in the use when it allowed a non-conforming gas station to add a car wash).[2]

[2] Plaintiffs dispute who bore the burden of proof under these provisions. Ans.Br. 3, 43. Regardless of who bore that burden, the only issue now is whether competent evidence supports the Commissioners' finding of compatibility.

IV. THE COMMISSIONERS' DETERMINATION OF COMPATIBILITY IS WELL-SUPPORTED BY COMPETENT EVIDENCE.

The Commissioners' Opening Brief cited copious record evidence supporting their decision that the egg farms were compatible with the existing neighborhoods, including, among other things, comments from neighbors and others about compatibility; the existence of other nearby agricultural operations, including orchards, vineyards, hay fields, pasture, cattle and horse ranches, sheep, elk and ostrich farms, and other poultry and egg farms; and evidence that WSL was clean, well-run, and unlikely to cause concerns for neighbors. Comm'rs Op.Br. 5, 18-28, 32-34; *see also* Hostetlers' Op.Br. 21-36 (citing evidence). The brief also described the many conditions the Commissioners imposed on the egg farms, including, among others, measures for air and water quality control, manure and litter control, fly control, and dust and odor control. Comm'rs Op.Br. 5, 11, 29; *see also* R. CF3, p.944(¶9) (requiring adherence to best management practices).[3]

Plaintiffs ignore most of this evidence, instead focusing on other evidence supporting their position. But it was the Commissioners' province to consider the conflicting evidence and decide the issue of compatibility. *See, e.g.*, *Goldy v.*

[3] As even the trial court recognized, competent evidence supports the Commissioners' determinations on the other three issues. *See* R. CF(12CV314), p.380(¶¶9-11); *see also* R. CF2, p.753-57 (Commissioners' discussion of these issues). Plaintiffs do not seem to challenge these determinations in their response, except to address property values in their constitutional argument. *See infra* at 23.

Henry, 443 P.2d 994, 997 (Colo. 1968) ("the credibility of witnesses as well as the weight of the testimony are peculiarly within the province of the commission to whom a statute entrusts the fact-finding process"); *CTS Invs.*, 2013 WL 979357, at *8 ("[t]he [agency], not a reviewing court, has the task of weighing the evidence and resolving any conflicts").

A. Competent Evidence Contradicts Plaintiffs' Claim Of Incompatibility With The Surrounding Area.

Plaintiffs recite assorted evidence that might have supported a finding of incompatibility. But the Hostetlers presented contrary evidence on these issues, supporting the Commissioners' decision. *See O'Dell*, 920 P.2d at 50. And even if they had not, it would not compel a different decision, as the Commissioners had discretion to decide what constitutes a "compatible" use. *See supra* at 9-11.

For instance, Plaintiffs claim the egg farms "obviously" were a "much more intense use of the land than traditional agriculture." Ans.Br. 25. Other evidence showed otherwise. R. CF2, p.739 (WSL was "a small operation," equivalent to a 100-150 cow operation).

Plaintiffs also cite "a cloud of dust and pollutants," jars of flies and feathers, and moldy hay they attributed to WSL. Ans.Br. 8, 10-13, 26, 34. But regulators inspecting the farm found minimal feathers around the building and fans, very few flies, and negligible amounts of dust. R. CF2, p.66-67, 106, 171; R. CF3, p.818.

And Commissioner Atchley noted that "[m]any molds mentioned in the Plaintiffs [sic] testimony are common to rural areas and agriculture." R. CF4, p.1088.

Plaintiffs argue the WSL facility was too close to its neighbors. Ans.Br. 11. But the RSD and Master Plan do not require any particular setback; the setback was within the range required in other states; and a poultry expert opined that the distance, combined with the "vegetative buffer system," was sufficient to address any issues. R. CF2, p.147, 601-02.

Plaintiffs state that all landowners adjacent to WSL opposed the application, while some of the many proponents may have been neighbors but were not adjacent. Ans.Br. 7. This statement is untrue. *See* R CF2, p.2-4. Moreover, the RSD's provision for public comments does not distinguish between adjacent neighbors and other neighbors or interested parties. R. CF2, p.789(§VI.2.A). Thus, it was up to the Commissioners to decide how to weigh each comment.

Plaintiffs claim Health Director Nordstrom warned the Hostetlers about the emissions test, and the Hostetlers took actions to prepare for it. Ans.Br. 9, 32, 39. For this claim, Plaintiffs cite only Nordstrom's trip to the property over a week prior to the test, a delivery of sawdust, the presence of other persons during the test, and their own speculation. *Id.* Their speculation is not evidence; and, even if it were, it was the Commissioners' role to weigh it against the emissions results.

Plaintiffs argue the road infrastructure was inadequate to support the egg farms. Ans.Br. 29. But other evidence indicated the farms would only minimally increase truck traffic and would not pose any issues, R. CF1, p.4, 46, 88, 801-02; the Commissioners addressed the concern with a condition that the Hostetlers maintain the access road or agree to share the responsibility with other users, R. CF3, p.943; and inspectors monitored the traffic control, R. CF2, p.57, 70.

Finally, Plaintiffs make various evidentiary arguments, such as: Health Director Nordstrom, despite his 30 years' experience in air quality matters, was not qualified to render an opinion about air quality, Ans.Br. 31-32; R. CF2, p.45; the emissions test sample was unreliable because it was taken only once, after sawdust was delivered and when the fans were not blowing, Ans.Br. 11, 32; the test showed "alarming" amounts of particulate matter, despite Plateau Inc.'s conclusion that the results were normal, *id.* at 11; the Plateau Report was not reviewed by a medical expert, *id.* at 32; there are weaknesses in the Hostetlers' lay and expert testimony, *id.* at 32-34; and their own experts supported their position and identified supposed flaws in the emissions data, *id.* at 6, 13, 15-18, 31.

The Commissioners heard all this evidence on both sides, and ultimately found in favor of the Hostetlers. That was within their sole province under Rule 106(a)(4). *See, e.g.*, *Goldy*, 443 P.2d at 997; *CTS Invs.*, 2013 WL 979357, at *8.

B. Competent Evidence Contradicts Plaintiffs' Claim Of Incompatibility Due To Alleged Adverse Health Effects.

Plaintiffs further attempt to show incompatibility by citing evidence that WSL emissions may have led to respiratory ailments. Again, the evidence was contradictory, competent evidence supports the decision, and the Commissioners had discretion to decide compatibility. *See O'Dell*, 920 P.2d at 50; *supra* at 9-11.

For instance, Plaintiffs cite twenty-two health complaints filed against WSL. Ans.Br. 1, 8, 13, 26-27. Yet more than half of these complaints were lodged by Plaintiffs themselves, or by Plaintiff Raymond's staff and customers. R. CF2, p.496-97, 499-500, 502-07, 513, 517-27, 532-43. The Commissioners may not have found all the reports credible. *See Goldy*, 443 P.2d at 997; *CTS Invs.*, 2013 WL 979357, at *8; *see also* Hostetlers' Op.Br. 37-38 (citing evidence calling opponents' credibility into question).

The same holds true for Plaintiffs' focus on the "health map" supposedly showing that neighbors downwind of WSL were affected. Ans.Br. 14-15, 26-27 (citing R. CF3, p.933). Raymond created the map herself, with no corroboration that the neighbors marked actually had health concerns or attributed their concerns to the egg farm, and many of them in fact did not lodge complaints. R. CF2, p.729-31. Other evidence showed gaps indicating that many neighbors—and even the Hostetlers—were unaffected. *E.g.*, *id.*, p.142.

The Commissioners likewise may not have found a credible link between the health complaints and WSL. Plaintiffs tried to establish the link based on the complainants' allegations that their symptoms started after WSL began operating; a letter by Plaintiff Raymond's doctor citing a study of the effects of much larger Concentrated Animal Feeding Operations (CAFOs) on agricultural workers (but saying nothing about the effects of small operations on neighbors); a veterinarian speculating about a possible causal relationship; and CAFO studies. *Id.*, p.340-43, 438-40, 495-543, 687-88; R. CF4, p.990-1071; Ans.Br. 13-14, 30-31; *see also* R. CF4, p.1086-88 (Commissioners' comments that CAFO studies were inapposite, the Plateau Report showed nothing "out of the ordinary," and other evidence showed setbacks were sufficient); R. CF2, p.755-57 (Commissioners' similar comments from earlier hearing).

Lots of record evidence called this link into question. Many WSL neighbors and visitors had no health problems, R. CF2, p.142, 253, 265; the Hostetlers were not sick, *id.*, p.142; regulators found WSL clean, well-maintained, and employing best management practices, *id.*, p.66-72, 106, 142, 171; the Plateau Report found the air quality typical for a rural farming area, and found nothing suggesting the conditions were "sufficient to induce health problems to normal healthy individuals," particularly those living off-site and not working in the chicken barn,

id., p.115, 122[4]; Nordstrom opined, after reviewing the Plateau Report and other materials, that the health issues could be attributed to other factors and that studies of risks to CAFO employees were inapplicable, *id.*, p.142-43; experts critiqued Plaintiffs' experts' opinions and reliance on CAFO studies and opined that the air quality was "not high enough to present health issues" and that the setback and conditions alleviated any health concerns, *id.*, p.597-613; *see also id.*, p.145; and other evidence indicated that dust and asthma are common in farming areas and that Raymond had a pre-existing sensitivity to chicken, *id.*, p.338, 739. *See also* Comm'rs Op.Br. 24-28, 32-34 (citing evidence); Hostetlers' Op.Br. 30-33 (same).

Plaintiffs discount all this evidence, complaining that it does not directly refute their claimed link, Ans.Br. 26-28, and that the county commissioned and paid for an air quality study, rather than calling the complainants or seeking their medical records, *id.* at 1, 8, 30-32. But Nordstrom appropriately chose to obtain an independent review of the air quality issues cited by the complainants, R. CF2, p.118; R. CF4, p.1082, and the Commissioners appropriately relied on that review to support their decision, R. CF2, p.755; R. CF4, p.1087. Nothing in the RSD or

[4] Plaintiffs suggest impropriety in Plateau's amended report citing additional evidence favorable to the Hostetlers. Ans.Br. 10. But Nordstrom confirmed "[t]here was absolutely no request or any insinuation by this Department of Plateau Inc. to 'manufacture evidence in favor of the applicants.'" R. CF4, p.1082.

Master Plan requires the Commissioners to require epidemiological studies, review medical records, or rely on any particular form of evidence. Indeed, doing so would inject massive time and expense into local land use decisions, and would raise serious privacy concerns under HIPAA.

Therefore, the Commissioners' decision on compatibility is supported by competent evidence. *See, e.g.*, *Save Park Cnty.*, 969 P.2d at 716-17 (evidence supported finding that applicant met requirements for planned subdivision, despite concerns about radioactivity); *Fedder v. McCurdy*, 768 P.2d 711, 712-13 (Colo. App. 1989) (evidence supported finding that applicant met requirements for concrete plant, despite neighbors' concerns about dust and traffic).

C. Competent Evidence Supports the Commissioners' Determination That The New Condition Would Address Any Health Concerns.

Plaintiffs argue that the Commissioners' final condition—which would have required the Hostetlers to hire a professional air pollution engineer to evaluate and develop, in conjunction with the Health Department, a plan for reducing emissions, R. CF4, p.1089, 1093—was insufficient. They say the condition failed to provide air sampling methodology, set minimum emissions standards, or provide meaningful review of future studies. Ans.Br. 19, 28-29, 33-34. But they fail to

acknowledge that the Commissioners could revoke their approval if they were not satisfied with the Hostetlers' compliance with the condition. *See* R. CF4, p.1093.

Moreover, Plaintiffs' arguments—like the trial court's requirement of pre-set emissions limits, R. CF(12CV314), p.384(¶21)—far exceed the requirements of the RSD and Master Plan. They also would transform land use decisions involving a discretionary determination of "compatibility" into complex battles over air quality standards, and would turn the county into a mini-EPA charged with setting and enforcing ambient air quality standards for rural operations whose negligible emissions are not regulated by federal or state authorities.[5]

Nor is it any solution, as Plaintiffs suggest, that air quality conditions can be omitted or the cost borne by applicants. Ans.Br. 30. The Commissioners must have the discretion to approve a land use, even if others raise air quality concerns, and to impose emissions testing and reduction requirements as conditions to alleviate those concerns. Likewise, they must have the discretion and flexibility to leave the details of the testing methodology and reductions to a professional engineer, working in consultation with the Health Department. While applicants

[5] Plaintiffs urge the court to ignore the substantial burdens EPA faced in implementing the Clean Air Act, as improper extra-record evidence. Ans.Br. 27. The Commissioners cited the EPA's experiences not as evidence relevant to the underlying decision, but simply to highlight the fallacies of the trial court's order.

might pay for such testing, they hardly could take on the task of setting minimum emissions standards for rural farming operations.

Plaintiffs cite *Wolf Creek Ski Corp. v. Board of County Commissioners*, 170 P.3d 821 (Colo. App. 2007), as suggesting the new condition is "meaningless." Ans.Br. 28-29. *Wolf Creek* simply held that a requirement that subdivision plans provide for state highway access to all lots would be meaningless if applicants only had to address how access *might* be obtained in the future. 170 P.3d at 826. Planning for road access is far different from addressing emissions that already have been found to be within normal limits.

Ultimately, the Commissioners' imposition of the emissions testing and reduction condition, along with their other conditions, supports their finding of compatibility. *See Bentley v. Valco, Inc.*, 741 P.2d 1266, 1268-69 (Colo. App. 1987) (imposition of conditions to protect neighbors from effects of a gravel strip mine supported decision that applicant met zoning requirements).

V. PLAINTIFFS HAVE NOT ESTABLISHED ANY OTHER BASIS FOR OVERTURNING THE COMMISSIONERS' DECISION.

Relying on *Churchill*, Plaintiffs claim the Commissioners' decision is arbitrary and capricious because it violates their constitutional rights and is the result of bias. Ans.Br. 21-22, 35-41. Under *Churchill*, Plaintiffs bore the burden of proving such violation or bias. 285 P.3d at 1006. Plaintiffs proved neither.

A. Plaintiffs Failed To Show Any Violation of Their Constitutional Rights.

Plaintiffs rely on *Hillside Community Church, S.B.C. v. Olsen*, 58 P.3d 1021 (Colo. 2002) to support their constitutional argument. Ans.Br. 35-36. *Hillside* demonstrates precisely why their argument fails.

The *Hillside* Court held that, to prove a procedural due process violation, plaintiffs must establish (1) a property right, (2) government action amounting to a deprivation, and (3) lack of due process. 58 P.3d at 1025. The Court also held that neighbors' challenge to the issuance of a special use permit failed for lack of a constitutionally-protected property right. *Id.* at 1025-29. The neighbors had no right to notice of and an opportunity to participate in a special use permit hearing, even if the city violated required procedures, because "[a] state procedural failure alone . . . does not create a violation of constitutional proportions." *Id.* at 1026-27. They also had no right to denial of the permit, because the building code gave city regulators discretion and did not obligate them to deny the permit. *Id.* at 1027-29.[6]

For the same reasons, Plaintiffs here have no constitutionally-protected right. They have no protected right to any particular procedures in the RSD and Master Plan. They also have no protected right to denial of the Hostetlers' applications,

[6] *Eason v. Board of County Commissioners*, 70 P.3d 600 (Colo. App. 2003), cited at Ans.Br.35, is inapposite. It simply holds that owners may have a right against zoning changes if they detrimentally rely on a permitted use. *Id.* at 605-06.

because the Commissioners have discretion to decide such applications. *See, e.g.*, R. CF2, p.789(§VI.1) (the Commissioners "shall use the performance standards contained herein and the [Master Plan] in designing, reviewing, evaluating and constructing new and expanding specific developments"). *See also JJR 1, LLC v. Mt. Crested Butte*, 160 P.3d 365, 370-71 (Colo. App. 2007) (rejecting similar arguments by neighbors challenging issuance of building permit under § 1983).

Plaintiffs' argument ignores this discretion. It also misreads the Master Plan's statement that "'[t]he right to develop and improve private property does not constitute the right to physically damage or adversely impact the property or property value or neighboring landowners.'" Ans.Br. 36 (quoting R. CF2, p.769(§IV.B)). This statement does not guarantee landowners' right against any adverse impacts, but simply allows the Commission to limit one owner's right to develop property based on potential impacts on others. Nor does it guarantee against impacts on quiet enjoyment or property value. Ans.Br. 36-38. At any rate, competent evidence supports the Commissioners' finding that the egg farms would not lower neighboring property values. R. CF2, p.544-56 (opinions by realtors and other experts that property values would not be affected).

Finally, even if Plaintiffs had a constitutionally-protected right, they did not show any deprivation without due process. In particular, they fully participated in

the proceedings leading up to the decision, including attending hearings and presenting evidence. Ans.Br. 6-7, 13-19 (describing procedure). Therefore, Plaintiffs failed to establish any constitutional violation.

B. Plaintiffs Failed To Show Any Bias By The Commissioners.

Plaintiffs cite *Scott v. Englewood*, 672 P.2d 225 (Colo. App. 1983) to support their claim of bias, but fail to apply the standards set forth in that case. Ans.Br. 38. The *Scott* Court explained that "[t]here is a presumption of integrity, honesty, and impartiality in favor of those serving in quasi-judicial capacities," which a challenger can overcome only "by a showing that there is a conflict of interest on the part of a participating decision-maker." 672 P.2d at 227. Under *Churchill*, the presumption also may be overcome by showing institutional bias or personal grudge. 285 P.3d at 1006.

Plaintiffs' assorted complaints fall far short of making any such showing. Plaintiffs allege Commissioner Lund was biased because he was president of the Delta County Farm Bureau, which submitted comments and testimony in support of the Hostetlers. Ans.Br. 39. But Lund's mere involvement in a group whose other members participated in the administrative process does not create a conflict, particularly given that Lund recused himself from all Farm Bureau discussions and actions regarding the Hostetlers' applications. R. CF2, p.251. *See also Scott*, 672

P.2d at 227-28 (decisionmaker's limited involvement in a petition drive opposing a proposed massage parlor did not create a conflict in deciding whether to grant the parlor a license). At any rate, Lund left the Commission and did not participate in the final decision. R. CF4, p.1084-89, 1093.

Evidence that the Commissioners separately drove by the WSL farm and that one of them spoke with Hostetler and his representative likewise does not demonstrate any conflict or bias. *See* Ans.Br. 5, 38-41. It merely shows the Commissioners' attempts to gain a better perspective on the issues, not unlike a Supreme Court justice's review of Google Maps before a recent oral argument in *United States v. Apel*, Transcript at 38-39 (Dec. 3, 2013) (No. 12-1038), located at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-1038_d18f.pdf. Notably, the Commissioners also spoke with Plaintiff Raymond. R. CF(11CV282), p.544. And the trial court held in its earlier, unappealed July 5, 2012 order that it was "not persuaded that the communication of one commissioner during site visits with the Applicant or the Applicant's representative violate th[e] standard" of due process. *Id.*, p.725(¶8).

Plaintiffs' remaining complaints take issue with the county's enforcement of the conditions, their own speculation that Nordstrom told the Hostetlers about the upcoming emissions testing, the County Attorney's failure to provide copies of the

Plateau Report prior to one of the hearings (although the hearing immediately followed a three-day weekend, and the report was mailed only the week before, R. CF(12CV314), p.159-60)(¶12)), and the county's and Commissioners' actions generally. Ans.Br. 9-10, 39-41. The record—far from showing a conflict of interest, institutional bias, or personal grudge—reflects that the Commissioners held multiple hearings and reviewed a multitude of materials; the Commissioners imposed more onerous requirements on the egg farms than most farms of similar size are subject to in other areas; and county officials inspected WSL multiple times and demanded corrective action where they identified compliance issues. R. CF2, p.53-107, 599, 753; R. CF3, p.819; R. CF4, p.1086-87.

CONCLUSION

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

Respectfully submitted this 16th day of May, 2014.

s/ Christina F. Gomez
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CERTIFICATE OF SERVICE

I certify that on May 16, 2014, I served a copy of the foregoing document to the following by

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