COURT OF APPEALS, STATE OF COLORADO 2 East 14 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
Attorneys for Appellant Board of County Commissioners of Delta County: Christine L. Knight, #34213 Delta County Attorney 320 W. 5th St. Delta, CO 81416-1610 Telephone: (970) 874-2090 Facsimile: (970) 874-2094 E-Mail: cknight@deltacounty.com Stephen G. Masciocchi, #19873 Holland & Hart LLP 555 Seventeenth Street, Suite 3200 Denver, Colorado 80202 Telephone: (303) 295-8451 Facsimile: (303) 295-8261 E-mail: smasciocchi@hollandhart.com	

DELTA COUNTY BOARD OF COUNTY COMMISSIONERS' RESPONSE TO AND JOINDER IN THE HOSTETLERS' MOTION FOR STAY PENDING APPEAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

INTRODUCTION

Delta County is a rural, agricultural county on Colorado's western slope. The landscape is dotted with over a thousand farms, including orchards, cattle herds, elk farms, and egg-laying operations. The sole merits question is whether the County Commissioners abused their broad discretion in finding that the Hostetlers' small, family-run, cage-free egg farm consisting of a single barn was compatible with the existing neighborhood. The Commissioners reached this decision after holding three public hearings, considering a 1,100-page administrative record, and imposing 16 conditions on this small farm. The final condition required the Hostetlers to hire a professional engineer to evaluate emissions from the barn and provide a plan to reduce emissions for the County Health Department's review and, if necessary, modification.

Relying on complaints of some neighbors that emissions from the egg farm were impacting their respiratory health, the trial court held that the egg farm was incompatible with the neighborhood and compelled the County to issue a cease and desist order. In so ruling, the court disregarded copious evidence of compatibility and 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 under County Health Department supervision.

The Commissioners agree with the Hostetlers that the Court should stay the cease and desist order pending appeal. They apply a somewhat different analysis and thus join many, but not all, of the Hostetlers' arguments. As shown below, there is evidence of irreparable harm; there are at least serious questions going to the merits; the Plaintiffs will suffer no significant harm; and the public interest favors upholding the Commissioners' broad discretion over land use approval.

FACTUAL AND PROCEDURAL BACKGROUND

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." R. 763 (Delta County Master Plan).[1] Including indirect employment, agriculture "accounts for approximately 40 percent of the total workforce." *Id*. The County does not have traditional zoning codes but instead regulates commercial activities through the Delta County Regulation for Specific Developments (RSD). R. 773-817. Agricultural activities, with the exception of feedlots and "new confined animal operations," are exempt from the RSD. R. 774.

In 2011, the Hostetlers applied under the RSD for two specific development agreements to build two cage-free egg operations, called Western Slope Layers and

[1] All "R." citations are to the administrative record. The Commissioners are filing and serving on all parties a CD containing the entire administrative record, which encompasses pages R. 1 – 1099.

Rocky Mountain Layers, both in rural Delta County. *See* R. 1092. The applications sought approval of two 400' by 50' barns, each housing 15,000 hens with access to a 335' by 90' outdoor area.

The Hostetlers were required to complete an extensive application set forth in the RSD. R. 780-83. After a public hearing, the Delta County Commissioners approved their application, subject to 15 separate conditions. R. 935-37. The condition to follow best management practices 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. R. 936-37.

Plaintiffs, neighboring landowners, then filed their first suit challenging the approval of the egg farms. *See* Case No. 2011 CV 282 (Delta County Dist. Ct., Complaint dated Sept. 23, 2011). They moved for a preliminary injunction to stop Western Slope Layers from conducting operations, but the court denied the motion, and Western Slope began operating. *See id.*, March 22, 2012 Order.

The district court ultimately ruled in Plaintiffs' favor in two respects. It first held that RSD requires "compliance with the compatibility component of the Master Plan." July 5, 2012 Order at 9. 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 12.

The Commissioners held a second public hearing limited to those four issues on September 4, 2012. R. 691-92. In response to Plaintiffs' claims that the one operating egg farm was causing neighbors to suffers respiratory problems, the County Health Department commissioned an air quality study, *see* R. 110-23, and the County Environmental Health Director analyzed the results and drafted a memo to the Commissioners summarizing his conclusions. R. 142-43. He opined that while he had concerns about the neighbors' complaints, the cause of their ailments was unproven. *Id.* at 142. The Commissioners then reapproved the Hostetlers' application, with conditions, and made findings addressing each of the four items identified by the court. R. 710-12.

Plaintiffs sued again, and the trial court remanded again for the Commissioners to consider public comment on the air quality evidence. Mar. 29, 2013 Order. On remand, the Commissioners heard comments and received

additional evidence, R 951-72, and on May 28, 2013, they issued their final decision. R. 1084-89. They again approved the Hostetlers' development agreements, but this time, they added an important new condition. They required the Hostetlers to hire a professional air pollution engineer to conduct air-quality testing and develop a plan to reduce emissions for the County Health Department to review and, if necessary, modify. R. 1089.

In a September 5, 2012 Order, the district court again overturned the Commissioners' decision. It ruled that there was competent record evidence to support the Commissioners' findings as to three of the four issues it had remanded. Sept. 5 Order at 8. But it reversed on the fourth. It found there was no evidence that the cage-free egg farms were compatible with the rural, agricultural neighborhood, because Plaintiffs had presented unrebutted evidence that the operating barn's emissions were causing respiratory problems. *Id.* at 9-12. It ordered the County to issue a cease and desist order to the Hostetlers. *Id.*

STANDARD FOR GRANTING A STAY

Contrary to the Hostetlers' contentions, Motion at 23-24, *Romero v. City of Fountain*, 307 P.3d 120 (Colo. App. 2011) sets forth the proper framework for considering a stay pending appeal from a cease and desist order. In *Romero*, this Court adopted the "traditional standard" to be applied "when considering whether

to stay an order denying or granting an injunction." *Id*. at 122. This standard encompasses a four-factor test:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. (citation omitted).

It is logical to apply this standard in considering a motion to stay the trial court's cease and desist order. A cease and desist order is the functional equivalent of an order granting an injunction.

In determining how to apply the test, this Court adopted the Sixth Circuit's balancing approach, under which "[t]he probability of success that must be demonstrated is inversely proportional to the amount of irreparable injury [the movant] will suffer absent the stay. Simply stated, more of one excuses less of the other." *Id*. at 123 (quoting *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentorg*, 945 F.2d 150, 153-54 (6th Cir. 1991)). This relationship "is not without its limits; the movant is always required to demonstrate more than the mere 'possibility' of success on the merits." *Id*. at 123 (quoting *Michigan Coalition*, 945 F.2d at 153). Thus, even if a movant demonstrates irreparable harm that outweighs any potential harm to the non-movant, "he is still required to show,

at a minimum, serious questions going to the merits." *Michigan Coalition*, 945 F.2d at 153-54 (citation and quotation marks omitted).

The Romero test is easily met here. The Hostetlers have made a powerful showing of irreparable injury, which the Plaintiffs do not contest. And there are serious merits questions at issue. Application of the *Romero* factors therefore militates strongly in favor of granting a stay pending appeal.

I. The Decimation Of The Hostetlers' Business And The Possible Mooting Of This Appeal Establish Irreparable Harm.

A movant satisfies the irreparable harm prong "by demonstrating a danger of real, immediate, and irreparable injury that may be prevented by the requested relief." *Romero*, 307 P.3d at 123. The Hostetlers have made a compelling case of irreparable harm. The cease and desist order will decimate their family-owned, cage-free egg farm, shutter their business, expose them to creditors' claims, and cause estimated losses of more than $1 million for which they have no remedy at law. *See* Motion at 19-21. In their response brief, the Plaintiffs never contest that the Hostetlers proved irreparable injury and thus concede the point. The trial court too found that the Hostetlers satisfied this element. Sept. 27 Order at 4.

The Hostetlers further warn that absent a stay, they will likely be unable to proceed with their appeal given that they will be deprived of the resources to fund

it. Motion at 20; Edwin Hostetler Aff. ¶ 14.[2] This dire prospect would impact the Commissioners as well. The Hostetlers' involuntary compliance with the cease and desist order alone would not moot this appeal. *See Thomas v. Lynx United Grp., LLC*, 159 P.3d 789, 792 (Colo. App. 2006) (mere acquiescence in court-ordered foreclosure does not render an appeal moot); *FCC Constr., Inc. v. Casino Creek Holdings, Ltd.*, 916 P.2d 1196, 1198 (Colo. App. 1996) (same). But if they drop their appeal and abandon this dispute, the County's appeal would likely become moot, because reversal "would have no practical legal effect upon the existing controversy." *Van Schaack Holdings, Ltd. v. Fulenwider*, 798 P.2d 424, 426-27(Colo. 1990) (appellate challenge to dissolution order became moot when appellant was forced to agree to dissolve the corporation while the appeal was pending). This would cause significant, irreparable injury to the County, which has a strong interest in ensuring the proper enforcement of its land use rules and preserving its traditional discretion to make these types of decisions—discretion that the trial court usurped.

[2] Hostetler's affidavit was submitted to the district court in support of the motion for stay pending appeal. It is thus part of the record and is properly considered by this Court on the issue of irreparable harm.

II. The County And The Hostetlers Have Shown A Likelihood of Success, And At A Minimum, Have Raised Serious Questions Going To The Merits.

Given the powerful evidence of irreparable injury, the Hostetlers and the Commissioners need only show they have raised "serious questions" concerning the merits. *Michigan Coalition*, 945 F.2d at 153-54. There are multiple reasons why this appeal raises serious questions, and in fact, will likely succeed, beginning with the deferential standard and limited scope of appellate review.

A. This Court Exercises De Novo Review And Decides Not Whether The Trial Court Was Correct But Whether The Commissioners' Decision Was Supported By Any Competent Evidence.

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. Colorado Dept. of Corrections*, 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 County Comm'rs of Routt County 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)).

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 the 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. The Commissioners and the Hostetlers therefore have a strong likelihood of success.

B. The Trial Court Improperly Considered Only Whether There Was Evidence Of Negative Health Impacts And Disregarded Evidence Supporting The Commissioners' Decision That The Egg Farm Was Compatible With The Rural Neighborhood.

The trial court conducted the proper analysis with respect to its first three rulings. The court noted that despite the existence of contrary evidence, there was record evidence to support the Commissioners' findings that (1) the egg farm had not impacted property values, (2) the conditions imposed on and undertakings by the Hostetlers were sufficient to address the concerns identified in the record, and

(3) County staff, including the County Attorney, Engineer, Planning Director, and Environmental Health Director, were capable of and were in fact monitoring compliance with the conditions and undertakings. Sept. 5 Order at 8, ¶¶ 9-11.

But when it came to assessing compatibility with the neighborhood, the court abandoned the proper analytical framework. Instead of combing the record for competent evidence supporting the Commissioners' finding of compatibility, the Court (1) focused on one sub-issue—plaintiffs' health concerns—and (2) listed only evidence supporting those concerns. *Id.* at 10-12. As Plaintiffs themselves observe in their response brief, the court then made "findings" that the neighbors' health problems were directly related to the egg farm and weighed the equities in favor of the neighbors. Response Br. at 6, 13-14, 16; *see* Sept. 5 Order at 10-12.

This approach was flawed in important respects. First, the court had no business making findings or weighing equities; that was the Commissioners' job. *O'Dell*, 920 P.2d at 50 (in review under Rule 106(a)(4), the trial court is not the fact-finder and "may not substitute its own judgment" for the zoning board's). The court's role was merely to determine whether the Commissioners' finding of compatibility was supported by any competent evidence. *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.

Hargreaves v. Skrbina, 662 P.2d 1078 (Colo. 1983), cited by Plaintiffs (Resp. Br. at 13), is not to the contrary. That case involved a neighbor's private injunction lawsuit against a builder for violation of a permit, not a Rule 106(a)(4) challenge to the city's granting of the permit. *Id.* at 1079. The trial court in an injunction suit must find facts and weigh equities; in a Rule 106(a)(4) proceeding, it acts as an appellate court and cannot weigh or balance evidence or equities.

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. Sept. 5 Order at 8. 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.

Third, the court imposed enormous and unprecedented obligations on a county land use body, acting in a quasi-judicial capacity, to hire experts and gather conclusive medical evidence proving that there were, in fact, no adverse health impacts on neighbors. Each of these three errors is addressed more fully below.

C. The Record Contained Competent Evidence Supporting The Commissioners' Finding That The Egg Barn Was Compatible With The Neighborhood.

The Master Plan, in addressing "incompatibility," provides that "agricultural land use is the County's highest priority" and that the County is willing to restrict "other uses that are incompatible with agriculture and related businesses." R. 763. The RSD states that comments from "property owners, other interested persons and existing land use shall be among the factors considered to determine compatibility." R. 789.

The record evidence supporting the Commissioners' finding of compatibility under these standards was legion. Both proponents and opponents provided petitions from local residents concerning whether the cage-free egg operation would be compatible with existing agricultural and rural development. R. 269-333, 461-494. The signatures in support outweighed the signatures in opposition by at least 523 to 191. *Id.* The actual majority was greater, because the petitions in opposition contain numerous duplicative signatures. *See, e.g.*, R. 463, 473, 489 (Todd Sheets' signature on three petitions); 466, 470 (Mary and Lee Farmer's signatures on two petitions).

Moreover, numerous residents submitted comments supporting the cage-free egg farm's compatibility with existing uses. R. 245-68. These comments came

from neighbors, realtors, other farmers, and State and local farm bureaus. *See id.* The comments confirmed that the local area is home to many similar operations, including poultry operations, cattle-feeding operations, sheep farms, elk farms, horse farms, ostrich farms, and other similar venues. *See id.* at 246-47, 250-51, 257, 262-63. Many comments described personal observations of the Hostetlers' farm as being a clean, well-designed, and well-maintained operation that blends in well with existing agricultural uses and does not have smells or emissions that are unusual for the area. *See id.* at 245-47, 250-51, 253, 262, 266-67.

To support their view that the Hostetlers' farm was incompatible, Plaintiffs also presented comments and studies, many of which concerned conventional Concentrated Animal Feeding Operations (CAFOs), including swine feedlots. R. 384, 388, 401, 417, 445-54, 559-76, 643, 682-83, 831-32, 1001, 1004-05, 1015, 1021-23. But this evidence mixed apples and oranges. The Hostetlers' operation, though subject to approval under the RSD, is not a CAFO. It is a relatively small, family-owned, cage-free egg farm consisting of a single 400' by 50' barn housing 15,000 laying hens. After inspecting the site, the Colorado Department of Health and Environment confirmed that the operation is not defined as a CAFO "because it confines less than the CAFO threshold number of 82,000 laying hens." R. 170.

In fact, it is not classified as even a "medium" animal feeding operation because it has less than 25,000 hens. *Id.*

Plaintiffs also claimed that the dust, feathers, and emissions from Hostetlers' farm was causing some neighbors to suffer from, or was exacerbating, respiratory ailments. Plaintiffs drew this inference from the temporal connection between the Hostetler's operations and these symptoms.

The County was not indifferent to these concerns. The Delta County Health Department commissioned an air quality study by a professional engineering firm, Plateau, Inc. The Plateau report concluded in relevant part that the dust, chemicals, and particulates emitted by the egg barn were common byproducts of agricultural activities and that there was insufficient information to conclude that they were in some way abnormal or could cause illness in healthy individuals:

> The presence of bioaerosols in the natural environment is common; most especially so in rural environments were [sic] farming activities are considerable sources of bioaerosols, chemicals, and particulates from virtually any of the activities common in this environment. These exposures are consequent to common farming activities, such as, tilling/plowing, hay and grass storage, feeding, harvesting, fertilizing, cleaning pens, and other animal husbandry activities. Currently, there are no standards that we are aware of regarding acceptable exposures to bacterial and fungal propagules. The data from this testing does show that the facility is a generator of a variety of bio-aerosols, organic and non-organic dust, and small amounts of ammonia gas. However, there is not sufficient information at this time to suggest that these conditions are contextually

> abnormal, nor that they are sufficient to induce health problems in normal healthy individuals.

R. 115. After the Health Department received this report and the air monitoring studies, the Director of Environmental Health analyzed them, conducted a literature review, and summarized his conclusions in a memo to the Commissioners. He opined that while he had concerns, any alleged link between the neighbors' health problems and the Hostetlers' operations remained unproven:

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

R. 142. Accordingly, far from ignoring the neighbors' health complaints, the County attempted to determine if their theory could be confirmed. The Plateau

report and the Director's memo, however, showed that no causal link had been established.[3] And there was ample evidence that the cage-free egg farms were otherwise compatible with existing uses. The Commissioners' approval was thus supported by ample competent evidence.

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

The trial court also erred in substituting its judgment for the Commissioners' as to what conditions were necessary to address the neighbors' concerns. As noted above, the Commissioners imposed 15 conditions of approval on the Hostetlers. R. 935-37. After the second remand, where they heard evidence challenging the Plateau report, the Commissioners again approved the Hostetlers' application, but with an important new condition to mitigate the impacts on neighbors. R. 1093. The Commissioners 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

[3] Plaintiffs also submitted a "health map" showing the locations of neighbors who made health complaints. R. 933. The trial court relied on the health map as proof of causation. Sept. 5 Order at 12; Sept. 27 Order at 3. But the map showed that most neighbors of the egg farm made no health complaints. *See* R. 933. The court thus should have drawn the opposite inference from the maps. *See Van Sickle*, 797 P.2d at 1272 (all reasonable doubts must be resolved in favor of the agency's ruling).

review and modification if necessary to the Delta County Health Department[.]" *Id*. They gave the Hostetlers until August 31, 2013—less than three months—to comply with this new condition, and required that the second planned barn comply within three months of the time it was populated with chickens. *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 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 "require medical input" or set "specific limits on air quality" such that it would remedy the supposedly-proven health consequences. Sept. 5 Order at 12. But those consequences were unproven. And it was eminently reasonable for the Commissioners to leave it to the expert—the Delta County Health Department—to determine what measures and modifications might be needed to address the health concerns identified in the record. The reasonableness of their decision finds support in the court's own ruling, where it concluded there was record support that

the County Environment Health Director was monitoring the operation and that the County had conducted "extensive inspections" on this "relatively small poultry operation." *Id.* at 8; *see* R. 53-107 (collecting records of inspections and demands for corrective action by the County Planning Department, County Engineer, and County Environmental Health Director). But the court then substituted its view for those of the Commissioners by impliedly "finding" that with respect to this one condition, the Health Department somehow wasn't up to the task.

The Hostetlers have since complied with this requirement, and the Health Department has the duty to monitor compliance, evaluate any continuing concerns, and require any necessary modifications. If the Hostetlers fail to comply, the Commissioners retain the power to revoke their approval and shut the operation down. R. 1093 ("[a]ny violation of the foregoing conditions may be grounds for the revocation of this approval and the Development Agreement"). The trial court erred by "finding" that the air quality condition and the attendant enforcement process were insufficient.

E. The Court's Ruling Undermines Local Control Of Land Use Decisions And Imposes Enormous And Inappropriate Evidentiary Burdens On Zoning Bodies Acting In A Quasi-Judicial Capacity.

The trial court's ruling imposes onerous and unpractical new requirements on the County. At Plaintiffs' urging, the court repeatedly faulted the County for failing to hire and pay for medical experts.

- The court noted that Plateau had recommended that the conclusions in its air monitoring report should be approached "with caution and with the input of a qualified medical practitioner." Sept. 5 Order at 10 (emphasis in original) quoting R. 116.
- The court observed that the only medical evidence in the record concerning Plaintiffs' ailments came from their doctors. *Id.* at 12.
- The court noted that though the Commissioners added a requirement for professional air quality monitoring and reduction, supervised by the Health Department, it did not "require medical input." *Id.* at 12.

These were not mere off-handed remarks; they were essential to the court's ruling. But requiring the County (or the applicant) to hire medical experts would inject significant time, effort, and expense into local land use decisions. It would also be impractical. The County has no power, in considering whether to approve a land use application, to compel objecting neighbors to undergo Independent

Medical Examinations or disgorge all their medical records. The court's unwarranted second-guessing thus has negative ramifications that extend well beyond this case and into future applications.

III. Plaintiffs Cannot Show They Will Suffer Serious Harm Pending Appeal, And The Commissioners Retain The Power To Enforce Their Condition Concerning Air Quality Monitoring And Abatement.

As noted above, Plaintiffs proved no more than a bare correlation between their respiratory problems and the Hostetlers' egg barn. And many other neighbors have suffered no such ill effects. In any event, the County responded to their concerns by requiring an air quality monitoring and a control plan, with which the Hostetlers have complied. And the County retains power to close down the egg farm if the Hostetlers fail to comply. The Hostetlers supply additional reasons why this element favors imposition of a stay pending appeal.

IV. A Stay Will Serve The Public Interest By Confirming The Commissioners' Discretion In Applying Their Own Land Use Guidelines.

Finally, the Commissioners have a strong interest in the proper interpretation and enforcement of the RSD and Master Plan and in preserving their discretion to approve or disapprove development applications. This is particularly true with respect to agriculture, the backbone of the Delta County economy. The Master Plan requires the Commissioners to balance new development with existing uses

and to harmonize sometimes competing goals and interests. The Commissioners are better suited than a district court judge to weigh those competing interests. That is the very purpose behind the sensible rules limiting judicial review of their decisions to whether there is any competent evidence to support them. Granting a stay will thus preserve, both in principle and in fact, the Commissioners' role in setting and implementing local land use policy.

V. There Is No Legal Or Factual Basis To Require The Posting Of Security.

Under C.A.R. 8(c), the County Commissioners are not required to post a bond in order to obtain a stay. Likewise, it makes no sense to force the Hostetlers to post a supersedeas bond when the Plaintiffs have no damages claim against them. Plaintiffs have conceded this. *See* Resp. Br. at 10-12. The Court should therefore decline to require a bond.

CONCLUSION

For the reasons set forth above, the Commissioners ask the Court to stay the district court's cease and desist order pending appeal.

Respectfully submitted this 30th day of October, 2013.

s/ Stephen G. Masciocchi
Stephen G. Masciocchi
Christine L. Knight

ATTORNEYS FOR DEFENDANT-APPELLANT BOARD OF COUNTY COMMISSIONERS OF DELTA COUNTY

CERTIFICATE OF SERVICE

I certify that on October 30, 2013, I served a copy of the foregoing document to the following by

☐ U.S. Mail, postage prepaid
☐ Hand Delivery
☐ Fax
☒ Electronic Service by ICCES

Earl G. Rhodes
Attorney at Law
Younge & Hockensmith, P.C.
743 Horizon Ct., Suite 200
Grand Junction, CO 81516

Karen Budd-Falen
Joshua Tolin
Attorneys at Law
Budd-Falen Law Offices, LLC
P.O. Box 346
Cheyenne WY 82003

s/ Stephen G. Masciocchi