Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203 Phone: 720-625-5150	
7th Judicial District Court The Honorable J. Steven Patrick Case Number: 2012 CV 314	
Plaintiffs-Appellees: Travis Jardon, Corinne Holder, Susan Raymond, Mark Cool, and Andrea Robinsong, **v.** **Defendants-Appellants:** Edwin Hostetler, Eileen Hostetler, Greg Hostetler, Carmen Hostetler, Anna Hostetler, and Roland Hostetler, **and** **Defendant-Appellee:** Delta County Board of County Commissioners.	▲ **COURT USE ONLY** ▲
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REPLY BRIEF OF THE HOSTETLERS	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

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☒ It contains 5,357 words.

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It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R.___, p.___), not to an entire document, where the issue was raised and ruled on.

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It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

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/s/Joshua A. Tolin
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INTRODUCTION

This case is an appeal from the district court's C.R.C.P. 106(a) review of Defendant-Appellant Delta County Board of County Commissioners (the "Board")'s quasi-judicial decision to approve with conditions two specific development applications of Defendants-Appellants Edwin Hostetler, Eileen Hostetler, Greg Hostetler, Carmen Hostetler, Anna Hostetler, and Roland Hostetler (the "Hostetlers"). Plaintiffs-Appellees in this case are five Delta County residents (the "Opponents") who are opposed to the chicken barns.

The Hostetlers followed the lengthy public process in the submission of their applications, wherein the Board approved the Hostetlers' applications on three separate occasions between 2011 and 2012. In this case below on September 5, 2013, the district court ruled against the Opponents and held that competent evidence existed in the record to support three issues on remand, but the district court also reversed the Board's decision based on one issue on remand, finding the chicken barns are incompatible with the surrounding areas. CD12CV314:379-380, 384.

The Hostetlers and the Board appealed the district court's ruling; the Opponents did not appeal any of the district court's adverse rulings. The

Opponents filed their response to the Hostetlers' and the Board's opening briefs, and two amicus briefs filed in support of the Hostetlers and the Board. The Hostetlers' opening brief adequately explains this case, the legal standards to be applied, and the reasons why the district court's judgment should be reversed and the Board's decision should be reinstated. The Hostetlers present this brief simply to reply to numerous inaccuracies presented to this Court by the Opponents and to respond to the new issues raised by the Opponents.

REPLY TO THE OPPONENTS' STATEMENT OF THE FACTS

The Hostetlers ask this Court to refer to their statements of the case and facts in their opening brief for a complete recitation of the facts of this case. *See Opening Brief*, at 1-15. While the Opponents have stated numerous factual points inaccurately, the Hostetlers only reply concerning the more egregious and relevant misstatements:

All Adjoining Landowners Do Not Oppose the Hostetlers

The Opponents incorrectly claim that all the adjoining landowners oppose the Hostetlers, citing to petitions they submitted to the Board. *See Answer Brief*, at 4. The map entered into the record by Planning Department indicates approximately eight properties are adjacent to the Rocky Mountain Layers property, CD2:2, and eleven properties are adjacent to Western Slope Layers

property, CD2:4. The Opponents' properties only total about one-fifth of those adjacent properties. Additionally, comparing the Opponents' citation to their petition to the maps showing adjacent properties proves that not all adjacent property owners are opposed to the Hostetlers. *Compare* CD1:2, 4, *with* CD1:740-773 *and* CD2:461-494. Once again, the Opponents have embellished the record.

Moreover, some adjoining property owners opposed the Hostetlers prior to its operations beginning have now removed themselves from litigation after the operations began, indicating their opposition has subsided. *Compare* CD11CV282:5 (listing Travis Jardon, Reg Cridler, Diane Cridler, Susan Raymond, Mark Cool, Peter Pruett, John Marlin, and Heidi Marlin as plaintiffs), *with* CD12CV384:7 (listing only Travis Jardon, Susan Raymond, and Mark Cool as plaintiffs who were also original plaintiffs).

Sawdust Not Present During Air Quality Test

The Opponents' claim that sawdust had been placed inside the chicken barn prior to the air sampling tests taken on August 16, 2013, is patently false. The only record citations for that allegation are statements by Plaintiffs Susan Raymond and Travis Jardon, neither of whom have set foot inside the chicken barn. *See, e.g.*, CD2:727; CD3:926. All other recitations concerning sawdust are based on their lies. *E.g.*, CD4:991-994, 999-1000. The record evidence of those individuals who

have been inside the chicken barn confirm that the sawdust was not placed inside the chicken barn prior to the air sampling: the report by Plateau describes the conditions of the chicken barn, and does not refer to sawdust covering the floor of the chicken barn. CD2:119-120. Similarly, the Environmental Health Director's report also does not mention sawdust covering the floor. CD2:111. Further, the Hostetlers confirmed on the record with the Board that the sawdust was placed after the air sampling. CD4:968.

Board Did Not Hide Air Quality Report

Admittedly, there exists at least some confusion in the record as to the exact date the Environmental Health Director received the first report written by Plateau. *Compare* CD4:1082 ("The preliminary report by Plateau was received the week of August 27, 2012. I don't have the exact date written down."), *with* CD12CV314:139 ("Between August 27 and September 4 (the date of the public hearing) was a three-day holiday weekend. As a result, the initial Plateau report was not received by the County until the day of September 4, 2012."). However, it is undisputed that the Board received the report during its public hearing on September 4, 2012. CD2:715. The Opponents' charge that "the County" was hiding the report is unsupported by the record. Regardless, the Opponents and the Hostetlers first had equal access to the report itself and to comment on it during the

hearing of September 4, 2012, and even had the opportunity to comment on the report again at the May 1, 2013 hearing.

Delta County Has No Animal Unit Calculations

The Opponents interestingly claim that the Hostetlers' birds equal 183 animal units, and have an animal density 500 times that of Plaintiff Susan Raymond's density of her horses. *See Answer Brief*, at 25. First, animal units are a method used for regulating various aspects of agriculture, including grazing consumption and manure production. Neither Delta County, nor the state of Colorado has a calculation of animal units for operations like the Hostetlers'. *Cf, e.g.*, CD1:619, 671 (computing animal units for certain confined animals in Illinois, but not including layers with dry manure handling); http://www.mda.state.mn.us/animals/feedlots/feedlot-dmt/feedlot-dmt-animal-units.aspx (computing animal units for Minnesota, calculating 15,000 small layers with dry manure handling as 45 animal units compared to 22 animal units for 22 horses). The Opponents' citation to Colorado regulations on the issue does not exist. *See Answer Brief*, at 25.

Record Shows Hostelters' Health Unaffected

The Hostetlers were never notified their health would be an issue in this record; the first time the Opponents' claims to health issues occurred was in the

September 4, 2012, public hearing, which had been noticed concerning compatibility, property values, sufficiency of the conditions, and staff capability. CD2:691. The Hostetlers presented their evidence first, then the opposition had their opportunity, then the hearing closed. CD2:714-751. The Hostetlers have since not been provided the opportunity to place into the record proof of their own health; specifically, at the next hearing on remand, the Board dictated that no evidence of health concerns would be allowed. CD4:952.

Even without testimony by the Hostetlers' concerning their good health, inasmuch as the Opponents' "health map" provides proof of health concerns, it similarly provides that the two houses full of Hostetler adults and children have never had health concerns related to their chicken barn, even though they live closer to the chicken barn than any other people. CD3:933 (indicating health complaints reported with red houses, alleged health issues not reported with yellow houses). Additionally, the Board had the ability to see the Hostetlers' good health in person, even though those perceptions may not be not included in the record.

Record Disputes Proof of Harm

Plaintiff Susan Raymond continues to claim that the Hostetlers' chicken barn has caused her to become sick. *See, e.g.*, *Answer Brief*, at 13. However, in the same letter that claims the Hostetlers are the cause for her asthma, Drs. Abuid and

Knutson explain that Plaintiff Susan Raymond suffered from breathing issues prior to the Hostetlers' chicken barn. CD2:338. Similarly, Mark Cool blamed the Hostetlers for an infection contracted while in his outdoor garden; he then continues by referencing thirty wild turkeys that regularly harass his garden. CD2:735. The Opponents also claim the air quality report shows "that alarming amounts of harmful particulate matter were present in its samples." *Answer Brief*, at 11. In reality, the air quality report provided **no evidence of harmful exposure to adjoining property owners**. CD2:122. After further review, in the report amendment, the industrial hygienist explained, the **"exposures found are consequent to common farming activities such as, tilling/plowing, hay and grass storage, feeding, harvesting, fertilizing, cleaning pens and other animal husbandry activities."** CD2:115.

All Agricultural Uses Not Exempt

The Opponents state that in Delta County, only "confined animal operations or slaughterhouses" require a specific-development agreement under the Delta County Regulation for Specific Developments (the "Regulations"), implying that the Hostetlers' agricultural operation is the exception to the rule. *See Answer Brief*, at 4. However, the definition of "confined animal operations" is the operative provision that explains how much of agriculture is actually covered. The

Regulations define a "confinement animal operation" as any "confined corral, pen, enclosure, building and/or structure in which animals are concentrated. For purposes of this regulation, rearing of livestock, where offspring [are] raised on the ranch or farm fed out, is not considered a confinement animal operation." CD2:793. Therefore, the only agricultural animal uses that are exempt are those "where offspring [are] raised on the ranch or farm fed out." *Id.* Therefore, any agricultural use where animals are confined even by a corral, but whose offspring are not raised on the ranch or farm fed out, are specifically not exempt from the Regulations.

Based on the definition in the Regulations, the Opponents' claim that no other agricultural activities on either mesa require specific-development agreements is highly improbable. *See Answer Brief*, at 5. It might be true that the record does not indicate others have been forced to apply for specific-development agreements, but surely people living nearby have more than one animal confined to a property, whereby they do not raise the animals' offspring or farm feed them out. *See, e.g.*, CD2:246-247 (recognizing Susan Raymond keeps dogs and horses on her property); CD3:843 (referring to chickens and goats in the area); CD1:828 (recognizing chaining up of own dogs likely fits the definition of confined animal operation).

REPLY TO THE OPPONENTS' ARGUMENT

The Opponents' Misstatement of Law

In their argument, the Opponents ask this Court to disregard years of case law concerning Rule 106(a)(4) claims and substitute its own judgment for that of the Board's. *Compare Answer Brief*, at 24 ("[T]he reviewing court must necessarily substitute its judgment for that of the administrative agency."), *with e.g., Kruse v. Town of Castle Rock*, 192 P.3d 591, 601 (Colo. App. 2008) ("We are not the fact finder and, thus, cannot weigh the evidence or substitute our own judgment for that of the Town."); *IBC Denver II, LLC v. City of Wheat Ridge*, 183 P.3d 714, 717 (Colo. App. 2008) (recognizing it "may not substitute its own judgment"); *Bd. of Cnty. Comm'rs v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996) (same); *W. Colo. Cong. v. Umetco Minerals Corp.*, 919 P.2d 887, 891 (Colo. App. 1996) (same).

Additionally, the Opponents criticize the Hostetlers for not citing to *Churchill v. Univ. of Colo. at Boulder*, 285 P.3d 986 (Colo. 2012), in this appeal of a Rule 106(a)(4) case. *See Answer Brief*, at 21-22 (claiming *Churchill* as the most recent interpretation of Rule 106(a)(4)); *c.f. General Steel Domestic Sales, LLC v. Bacheller*, 291 P.3d 1, 6–7 (Colo. 2012) (discussing Rule 106(a)(4) after *Churchill*). The Colorado Supreme Court in *Churchill* did discuss Rule 106(a)(4),

but only in the context of a claim arising under 42 U.S.C. § 1983. *See* 285 P.3d at 1005-1006. In *Churchill*, the plaintiff had failed to bring a Rule 106(a)(4) claim, and therefore, the Court was not actually applying law to a Rule 106(a)(4) claim, only explaining that the plaintiff had potential remedies under Rule 106(a)(4). *See id.*

Insomuch as *Churchill* is applicable to this case for the proposition that the Board's decision may be overturned for reasons besides a lack of competent evidence, the Hostetlers had no reason to raise the other issues, because only the district court's ruling concerning competent evidence is at issue in the Hostetlers' appeal. The Opponents did not appeal or cross-appeal the district court's adverse rulings concerning their other numerous arguments raised below. *See* C.A.R. 4(a); *Valley Nat'l Bank v. Sensitronics, Inc.*, 497 P.2d 354, 357 (Colo. App. 1972) (not considering plaintiff's additional arguments for failure to notice cross-appeal).

Discussion

I. The district court erred in holding that no competent evidence of record existed before the Board that the Hostetlers' family-run, one-barn egg-laying operations are compatible with their agricultural and rural-residential surrounding areas.

Within their argument, the Opponents cite to numerous pieces of evidence they submitted in the record, but which were all properly disregarded by the Board for the reasons discussed in the Opening Brief. *See Opening Brief*, at 34-38. The

question before this Court, however, is not whether it is persuaded by the Opponents' evidence more than the Hostetlers' evidence. The standard of review applicable is whether there was **no competent evidence in the record** to support the Board's decision. *O'Dell*, 920 P.2d at 50.

Comparing the Hostetlers' recitation of the record evidence supporting the Board's decision, *Opening Brief*, at 20-33, with the Opponents' recitation of record evidence purporting to support reversal of the Board's decision, *Answer Brief*, at 25-35, indicates at most there may be a disputed issue of fact. However, in a Rule 106(a)(4) review, the reviewing court is **not charged with reweighing the evidence.** *O'Dell*, 920 P.2d at 50. Therefore, even if this Court would have weighed the evidence different than the Board, it **may not substitute its judgment** for that of the Board. *Kruse*, 192 P.3d at 601. The district court erred in that regard, and its judgment should be reversed; therefore, the Board's decision approving the Hostetlers' operations should be reinstated.

II. The Board did not violate the Opponents' constitutional rights by approving the Hostetlers' family-run, one-barn egg-laying operations.

In their second argument, the Opponents vaguely argue that their constitutional rights have been violated by the Board's decision. *See Answer Brief*, at 35-38. This argument is apparently a rehash of their argument below (denied by the district court and not appealed by the Opponents) that the record indicates the

Hostetlers' operations will harm their property values. The Opponents do not coherently argue how conflicting evidence in the record proves the Board violated their constitutional rights, especially considering the law in Rule 106(a)(4) cases, where the reviewing court is not charged with weighing the evidence. *O'Dell*, 920 P.2d at 50.

Moreover, the citation by the Opponents to John Kilpatrick's submission is rife with the same error as most of the Opponents' submitted evidence: the entire report is based on effects of CAFOs, of which the Hostetlers' operations are definitively not. *See* CD2:559-576. Additionally, the Opponents argue that the record evidence contrary to their position cannot be considered based on certain individuals' credentials; however, these public proceedings, the Regulations, and the Master Plan do not have formal rules or standards for evidence.

Concerning the evidence in the record that contradicts the Opponents' claims, Ms. Schmidt provided her professional opinion that the Hostetlers' operations do not negatively impact surrounding property values. Specifically, she stated:

> My professional opinion is that the Hostetler property does not affect the value of other properties in the surrounding area. The Hostetler property is clean, well maintained and appears to be in excellent condition. The fences are maintained, the grass and pastures are green and appear to be well irrigated and maintained. The chicken facility sits well off the road in a small valley so it slightly obscured

> and from all appearances is well built and is constructed to conform with the other buildings on the property and the landscape. I observed little, if any, noise coming from the facility and no smell or dust at the time I viewed the facility.
>
> There are several of the other surrounding properties that do NOT appear to be as well maintained or as clean. Notable issues on these other properties include old vehicles and junk cars, trailer houses, manure piles, delapidated buildings and fences, weeds that are overgrown and dry unmaintained pastures along with homes and shops and barns that appear to be in disrepair.

CD2:842-843.

In addition to Ms. Schmidt's professional opinion as to the lack of a negative impact on property values, several other pieces of evidence and public comments support the fact that the Hostetlers' operations will not negatively impact surrounding property values:

- Certified general appraiser who "specialize[s] in appraising rural, agricultural properties" explaining that he has not seen "any economic impact on property values directly related" to facilities similar to the Hostetlers. CD2:544.
- Neighbor stating, "It doesn't appear property values will suffer due to the fact of when the owners of the Hen House bought their property they gave fair market value for it even though there was two business next to them that had heavy traffic because of the nature of these

businesses. The orchard attracts lots of insect, rotting fruit causes flies, horse manure causing flies and smelly, etc." CD2:246.

- Local resident stating, "If an owner plans to sell to someone who wishes to carry on an agricultural operation and retain the status the current owner has enjoyed for years, there should be no change in values. If an owner plans to sell to retired baby boomers looking to enjoy a pseudo rural lifestyle, then the property may not bring the inflated values the owner planned to cash in on. I know that I would much prefer the chicken operation on two vacant previously productive agricultural properties that were subdivided that are close to my properties to the weed infested prairie dog colonies they have become." CD2:262.
- Neighbor stating, "I currently have my house for sale and while the value of the home/land has dropped approximately 20% since it was built in 2008 I believe that is consistent with the rest of the North Fork Valley and is not due to the proximity of the egg laying operation." CD2:265.
- Local realtor stating, "I am [an] active realtor in Hotchkiss and on Powell Mesa. . . . I have had the property on Powell Mesa which is

owned by Gertrude Peel listed, at 580,000.00. I had three separate offers on the property this Spring. The prospective purchasers we all very aware of the "Hen House" All three of the offers were over 500,000.00, unfortunately they all had financing issues, and were not able to close. This is the closest thing there has been to a Sale on Powell Mesa for a long time. Considering the times, and the down economy these were very good offers. I do not see the "Hen House" affecting property values at this time."). CD2:267.

- Olathe resident stating, "I'm at 600 yards from 6 chicken houses. Each have 6 fans; 3 per side. . . . I am evidence that property values do not decrease. My property values have not decreased because of 6 chicken houses 600 yards from my house." CD2:740.

Additionally, the Opponents have continued their focus on incurable external obsolesce, but they continue to misunderstand its meaning concerning property value. *See Answer Brief*, at 37. When the district court remanded the property-value issue back to the Board to consider more evidence on the matter, this district court specifically referenced "the appraiser's discussion of the 'incurable external obsolescence' created by these egg-laying operations making mitigation impossible." CD11CV282:10. Evidence in the current record clearly

contradicts the cited misunderstanding of the term of art "incurable external obsolescence." Instead of meaning "mitigation [is] impossible," as alleged by the Opponents' attorney, that term merely means that the cost of a cure is more than the benefit received. *See* CD2: 555.

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

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

Id.

The Opponents cite to contrary evidence presented by Delta County residents concerning the impact on property value, a document concerning "animal

operations" in general and their effects (without a single reference to the specifics of the Hostetlers' one-barn operations), and an appraiser's letter indicating she "could not determine from [her] personal inspection any odor, feathers or the density of the residue," but assuming the truth of Plaintiff Travis Jardon's "report to [her] that the odor, large dense clouds of dust containing pulverized chicken manure and chicken feathers is carried to surrounding properties," then, "this will have a negative effect on surrounding properties."[1] S*ee* CD2:557, 559-596. Under Rule 106(a)(4), the fact that contradictory evidence exists does not leave this Court with the responsibility of weighing the evidence de novo. *O'Dell*, 920 P.2d at 50. Instead, the Court must review the record to confirm whether sufficient evidence exists of the Board's decision, and clearly, the record has sufficient evidence, from both professionals and local residents, to support the Board's finding that the Hostetlers' operations will not negatively impact the surrounding property values. Without more, it is unclear how the Opponents can argue they

[1] Dr. Kilpatrick opined generally on CAFOs and their effects; he did not provide testimony that any Delta County property values have decreased based on the Hostetlers' one-barn (non CAFO) operations. *See* CD2: 559-596. Ms. Sant similarly did not opine that the Hostetlers operations directly affected property values. Instead, she opined that if "odor [and] large dense clouds of dust containing pulverized chicken manure and chicken feathers [are] carried to surrounding properties," then "this will have a negative effect on surrounding properties." CD2: 557. She did not study the Hostetlers' actual operations to determine whether they impact surrounding property values. *See id.*

have been constitutionally violated when the record indicates the Board's decision will not impact their property values. Accordingly, the Board's decision should be reinstated.

III. The district court correctly held the Board was not biased in approving the Hostetlers' family-run, one-barn egg-laying operations.

At the district court, the Opponents argued that the Board's decision should be reversed for bias under Rule 106(a)(4) and *Churchill*. CD12CV314:265. The district court ruled against the Opponents, finding no bias, CD12CV314:380-381, and the Opponents did not appeal or cross-appeal that issue. Regardless, the Opponents' argument has no merit.

Before the district court, the Opponents boldly stated that with "even a hint of impropriety in a quasi-judicial decision, the decision should be reversed." CD12CV314:265. There, the Opponents clearly misstated the law; here, they only generally cite that procedural due process is required. *See Answer Brief*, at 38. The specific law on the issue, *Churchill*, states that "[a]ny appearance of impropriety *sufficient to cast doubt on the impartiality* of the [decision-makers and investigators] would be grounds for a reversal." 285 P.3d at 1006 (emphasis added) (*citing Venard v. Dep't of Corrs.*, 72 P.3d 446, 450 (Colo. App. 2003)). Concerning impartiality, *Venard* states, "Absent a personal, financial, or official stake in the outcome evidencing a conflict of interest on the part of the

decisionmaker, an adjudicatory hearing is presumed to be impartial." 72 P.3d at 449.

The Opponents do not cite to a single piece of evidence from the record of a "personal, financial, or official stake in the outcome" by any of the individual members of the Board. Instead, the Opponents simply list ten alleged facts (failing to cite to any record evidence for three) and assume those facts point to bias. *See Answer Brief*, at 38-41. However, the Opponents do not cite a single authority to support their position. *See id.* Moreover, impartiality concerns individual decisionmakers. *See Venard*, 72 P.3d at 449. Here, the Board's 2011 and 2012 resolutions were passed by Commissioners C. Bruce Hovde, R. Olen Lund, and C. Douglas Atchley. CD2:827, 938, 946.

The Board's most recent decision adopted in 2013 was passed by Commissioners C. Douglas Atchley, C. Bruce Hovde, and J. Mark Roeber. CD4:1093. The Opponents argue that bias exists not only for individual commissioners on the Board, but also for a former commissioner, "the County," the Environmental Health Director, and the County Attorney. *See Answer Brief*, at 38-41. The Opponents utterly fail to explain how their allegations provide any support for a finding of bias under *Churchill.*

The Opponents have continued their claim of individual impartiality against Olen Lund, *see Answer Brief*, at 38-39; however, as a former commissioner, Olen Lund did not participate in the Board's most recent decision. *See* CD4: 1093. Even so, in each resolution, all three commissioners voted to pass the resolutions over the Opponents' objections. *C.f.*, *Venard*, 72 P.3d at 449 (requiring disqualification when decisionmaker was deciding vote against person claiming impartiality).

The Opponents also attempt to claim bias based on "the County's" actions. *See Answer Brief*, at 39-40. Here, the Opponents attempt to confuse the issues in a Rule 106(a)(4) review. The Opponents apparently are claiming the Delta County Engineering Department, Planning Department, and Department of Health acted improperly in carrying out their duties. However, Rule 106(a)(4) concerns quasi-judicial decisions, not discretionary executive actions. *Verrier v. Colo. Dep't of Corr.*, 77 P.3d 875, 879 (Colo. App. 2003) (holding administrative actions carrying out legislative policies not subject to judicial review); *Prairie Dog Advocates v. City of Lakewood*, 20P.3d 1203, 1208 (Colo. App. 2000) ("A city's act that is necessary to carry out existing legislative policies and purposes, . . . characterized as executive, is an administrative act. . . . Like legislative acts, administrative acts are not quasi-judicial acts subject to review under C.R.C.P. 106(a)(4).") (*citing City of Aurora v. Zwerdlinger*, 571 P.2d 1074 (Colo. 1977)).

Moreover, the Opponents' claim that "the County put evidence in the record after the record was closed to promote a legal basis for its conduct" flies in the face of the evidence in the record. The Environmental Health Director refuted the Opponents accusations of manufacturing of evidence, explaining the reasonable circumstances surrounding the air quality evidence:

> The air quality sampling was performed to respond to the complaints by the neighbors of dust coming from the facility. This Department requested that the Board of County Commissioners fund the air quality testing to determine the constituents of the dust being emitted from the facility.
>
> The preliminary report by Plateau was received the week of August 27, 2012. I don't have the exact date written down. The amendment to the initial report dated August 27 was received by this department the week of October 1, 2012.
>
> The purpose of the amendment to the initial report, 8/27, was to explain the mold speciation results mentioned in the initial report as noted on page 4 paragraph 3 and 4 of the report.
>
> There was absolutely no request or any insinuation by this Department of Plateau Inc. to "manufacture evidence in favor of the applicants[.] "

CD4:1082.

Accordingly, the Opponents have utterly failed to apply the evidence in the record to the applicable law concerning bias and an appearance of impropriety. In this regard, the district court was correct in its ruling, and the Board's decision should be affirmed.

IV. The district court erred in holding the Master Plan creates individual regulatory requirements that applicants must affirmatively prove for the first time in its September 5, 2013 ruling.

In response to the Hostetlers' second argument, the Opponents offer no substantive argument. *See Answer Brief*, at 41-42. Instead, the Opponents make two claims that this Court should not hear the argument based on law of the case, and a failure to raise the argument before the Board. First, law of the case concerns rulings of law made in the same proceedings. *See People v. Roybal*, 672 P.2d 1003, 1005 n.5 (Colo. 1983). The ruling not appealed by the Hostetlers was in a separate proceeding, 11CV282, not the proceeding on appeal, 12CV314.

Second, the Opponents cite to *Rantz v. Kaufman*, 109 P.3d 132 (Colo. 2005), for support. *See Answer Brief*, at 41. However, *Rantz* concerns issue preclusion, not law of the case. If the Opponents are actually arguing the Hostetlers are collaterally estopped under the doctrine of issue preclusion, that argument also fails. *Id.* at 138-139. While the district court in 11CV282 did rule that "the Master Plan is regulatory," that issue was not actually litigated by the Hostetlers, as they were in default in that case. CD11CV282:118, 868. *See Huffman v. Westmoreland Coal Co.*, 205 P.3d 501, 507-508 (Colo. App. 2009) (distinguishing default, consent, and confession, to which issue preclusion does not apply, with confession

of summary judgment after substantial discovery, to which issue preclusion does apply).

Third, the Hostetlers' argument concerning the district court's application of the Master Plan did not arise until the district court made its ruling in this case, that not only is the Master Plan "regulatory," but it actually creates individual regulatory requirements that applicants must affirmatively prove. When the district court originally ruled the Master Plan was regulatory, it only required the Board to determine the issue of compatibility "pursuant to the Master Plan." CD11CV282:725. The district court did not cite to any specific provisions of the Master Plan that it considered as specific requirements the Hostetlers were required to prove. *See id.* Therefore, the Hostetlers were not on notice of the affirmative requirements they were required to prove until the district court ruled on September 4, 2103, in this case that they had failed to do so. CD12CV314:381.

Similarly, the Hostetlers could not have made their argument about the district court's improper application of the Master Plan before the Board at the public hearings on remand, because the district court had yet to require them to affirmatively prove any specific requirements. Additionally, the Opponents cite to no authority for the proposition that the Hostetlers were required to object in the

quasi-judicial proceedings which ended in their favor to a ruling that came up in the review of that quasi-judicial decision. *See Answer Brief*, at 41-42.

As the Hostetlers' argument concerning the district court's improper application of the Master Plan in violation of *Bd. of Cnty. Comm'rs v. Conder*, 927 P.2d 1339, 1346 (Colo. 1996), is properly before this Court, and the Opponents have failed to argue its merits, this Court should reverse the district court's judgment and affirm the Board's approval of the Hostetlers' applications.

CONCLUSION

The district court erred in holding that no competent evidence of record existed before the Board that the Hostetlers' family-run, one-barn egg-laying operations are compatible with their agricultural and rural-residential surrounding areas. The Hostetlers presented substantial evidence to support the Board's decision, and the reviewing court may not substitute its judgment, but may only overturn the Board for a record devoid of supporting evidence; such is not the case here. Moreover, the Board neither violated the Opponents' constitutional rights nor was biased when it approved with conditions the Hostetlers' chicken barns. Finally, the district court's application of the Master Plan does not provide sufficient specificity for the provisions listed as goals, policies, and

implementation strategies to create regulatory elements required to be affirmatively proven by applicants like the Hostetlers.

Accordingly, the district court's judgment should be reversed as to its ruling concerning competent evidence and the application of the Master Plan, and the district court's judgment should be affirmed as to its ruling that no bias existed. Therefore, the Board's reasonable interpretation of the law and its decision approving the Hostetlers' chicken barns should be affirmed and reinstated.

Respectfully submitted this 16th day of May, 2014.

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CERTIFICATE OF SERVICE

I certify that on this 16th day of May, 2014, a copy of this *Reply Brief of the Hostetlers* was served on the following via the E-Filing/Service System:

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I also certify that one original and one CD with a PDF copy of the brief was transmitted to the Court via Federal Express.

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