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| COLORADO COURT OF APPEALS<br>2 East 14th Avenue<br>Denver, Colorado 80203<br>Phone: 720-325-5150<br><br>7th Judicial District Court<br>The Honorable J. Steven Patrick<br>Case No. 2012 CV 314<br><br>**Defendant-Appellants: EDWIN HOSTETLER, EILEEN HOSTETLER, GREG HOSTETLER, CARMEN HOSTETLER, ANNA HOSTETLER, and ROLAND HOSTETLER**<br><br>v.<br><br>**Plaintiffs-Appellees: TRAVIS JARDON, CORRINE HOLDER, SUSAN RAYMOND, MARK COOL, AND ANDREA ROBINSONG**<br><br>and<br><br>**Defendant-Appellee: BOARD OF COUNTY COMMISSIONERS OF DELTA COUNTY.** | COURT USE ONLY |
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| **PLAINTIFFS-APPELLEES' ANSWER BRIEF** | |

## 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): it contains 9,314 words; and it complies with C.A.R. 28(k).

*/s/ Earl G. Rhodes (original signature on file)*
Earl G. Rhodes, #6723
*Attorney for Plaintiffs-Appellees*

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## STATEMENT OF THE CASE

Plaintiffs filed a Rule 106(a)(4) lawsuit to challenge land use approvals for construction and operation of chicken barns in unincorporated Delta County, Colorado. While the lawsuit was pending, Hostetlers started construction of the chicken barn on Powell Mesa. Plaintiffs moved for a preliminary injunction, and a hearing was held on March 21, 2012. In the course of the hearing, the County Health Director adamantly swore that he would investigate any health concerns that the neighbors had. **CD2:47**. As shown below, despite 22 health complaints being filed, he failed to contact any of the complainants. **CD2:142-143; CD4:978; CD4:1009**. The Court denied the preliminary injunction, but found that it was likely that the Plaintiffs would prevail on the merits. The Court warned Mr.

Hostetler that he proceeded at his own risk. **Order Denying Preliminary Injunction, March 22, 2012; (2011CV282) CD12:613-614.**

The trial court ruled in Plaintiffs' favor on July 5, 2012, held the Master Plan as regulatory, and remanded the matter for additional findings in accordance with the Master Plan. **Trial Court Order of July 5, 2012; (2011CV282)CD12:722-726.** After the next public hearing, the Trial Court remanded the matter yet again because the County had considered evidence outside the public record. **Trial Court Order of March 29, 2013; (2012CV314)CD12:179-181.** After the third public hearing on this matter, the Trial Court ruled again in Plaintiffs' favor and found the County decision arbitrary and capricious. **Trial Court Order of September 5, 2013; (2012CV314)CD12:373-385.**

## STATEMENT OF FACTS

This case involves two chicken barn land use applications: one for Powell Mesa and one for Redlands Mesa in unincorporated Delta County, Colorado. The chicken barn on Edwin Hostetler's property on Powell Mesa went into operation in April, 2012. It is a 15,000 hen-laying operation in a 400' x 50' building, where the chickens have access to a 335' x 90 area outside of the building. **Trial Court Order, July 5, 2012, p. 2. (2011CV282)(CD12:715)** Plaintiffs are real property

owners who own property adjacent to or in the immediate area of the Hostetlers' properties.

The Colorado legislature has expressly delegated to local governments broad powers to establish and enforce zoning and land use regulations which regulations are generally upheld as valid exercises of the police power to regulate public health, safety and welfare. C.R.S. §30-28-101 to 139 and C.R.S. §29-20-101 to 108. *City of Colorado Springs v. Securcare Self Storage, Inc.*, 10 P.3d 1244 (Colo. 2000).

The County does not have zoning but, as to certain intensive land use activities including confined animal operations, it has adopted the Delta County Regulations for Specific Development ("RSD"). **CD2:773-817**. The RSD provides that the burden of proof is on the applicant to show that the proposed land use application is in compliance with the RSD and the County Master Plan. **CD2:775; CD2:768; CD2:789**. The RSD requires that specific developments, such as confined animal operations, must comply with a number of typical land use performance standards; and also requires that developments have an adequate setback so as not to adversely affect surrounding property owners (Art. VI, Section 2.J.1), and that they shall not interfere with the normal operation of existing agricultural operations. (Section 2.M.) **CD2:791.**

Significantly, the Master Plan provides that "the 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." **CD2:769, IV.B.** The Master Plan states that in approving or denying a land use permit, "compatibility of a new development with the existing land uses should be given priority consideration." **CD2:769, IV.B.1.** In cases where there is "incompatibility between an existing and a proposed land use, the property right of the existing use should be given priority." **CD2:769, IV.B.2.**

Article VI, Section 2(A) of the RSD requires compatibility with adjacent land uses. **CD2:789, Article VI, Section 2.A.** "The Applicant and Board of County Commissioners shall use the performance standards contained herein and the Delta County Master Plan in designing, reviewing, evaluating and constructing new and expanding specific developments as listed in Article II, Section 4 in the unincorporated area of Delta County." **C D 2 : 789, Article VI, Section 1**. The only agricultural operations which require a special use permit under the RSD are confined animal operations or slaughterhouses. **CD2:774; CD2:779**. All other agricultural uses are expressly exempt from RSD provisions.

Following public comment, both the Leroux Creek Area Advisory Planning Committee and the County Planning Commission recommended denial of the applications. **CD1:379-380; CD1:545-546.** The Planning Commission found that the applications did not promote the health, safety and general welfare of the residents of Delta County and were not compatible with adjacent land uses. **CD1:426-429**.

Before the first hearing, all the commissioners went to the subject properties. Commissioner Hovde went to both Redlands Mesa and Powell Mesa and spoke with Kelly Yeager, the representative for the applicants, and then with Edwin Hostetler, the applicant. **Hearing transcript August 15, 2011, p. 1-2; (2011CV282) CD12:Exhibit A.20, part 1:543-544**. No record was made of these *ex parte* conversations and there was no notice to the neighbors of these contacts before it occurred. ***Id.***

**First Hearing August 15, 2011**.

All parties agreed that the neighborhoods are rural residential intermixed with traditional agricultural operations. **CD2:246; CD2:248; CD2:250; CD2:370; CD2:377; CD2:409; CD2:840**. There are no other large confined animal operations on either mesa. **CD2: 370; CD2: 384.** No other agricultural activities on Powell Mesa or Redlands Mesa require RSD permits. **CD1:798**.

In the public hearing in August 15, 2011, numerous neighbors have filed complaints to the County, not only regarding their own health and safety, but the overall character of the land. **CD2:370-371; CD2:349-350; CD2:353-354; CD2:378-379; CD2:396; CD2:616-619.**

Plaintiffs introduced into the record specific information of the potential health risks that the chicken barn posed to humans and animals: Avian diseases transmissible to humans, **CD1:269,** cryptosporidosis, **CD1:358, CD1:272, CD1:738, CD2:405,** vaccination schedules, **CD1:447,** and Eastern Equine Encephalitis, **CD1:271.** Dr. Lazear, a veterinarian with an interest in zoonotic diseases and epidemiology, wrote about health threats of bacteria E. coli and Salmonella, and protozoan parasite cryptosporidium, which are carried by poultry. **CD1:734.** She wrote that certain strains of E. coli Salmonella and cryptosporidium are "highly pathogenic to humans," and there "is no vaccine for any of these organisms." ***Id.*** It was pointed out to the County that high density poultry operations were very vulnerable to disease. ***Id.***

The RSD provides that the County is to consider the effect of the application on surrounding landowners, other interested parties and existing land uses. **CD2:789**. Common sense shows that neighboring land owners

are the most affected and should be given the greatest consideration in land use matters. This is in accord with Colorado law that only adjacent and affected landowners have standing to sue as to a land use decision. *City of Thornton v. Bd. of County Comm'rs,* 595 P.2d 264 (Colo. App. 1979). All adjoining land owners opposed the chicken barns by petition and letters. **CD1:740-773; CD2:461-494**. Throughout their briefs, the Defendants claimed there was a large majority of proponents based on petitions submitted. But no proponents were adjacent landowners.

Hostetlers, at page 7 of their Opening Brief, described Plaintiffs as a "noisy few." Plaintiffs, adjoining landowners and others resent this characterization. This type of pejorative rhetoric has no place in this briefing process. They are simply fighting for their lives and livelihoods against an ill-advised County land use decision.

**First Decision August 29, 2011**.

During the County proceedings on August 29, 2011, Commissioner Lund discussed at length but then dismissed the applicability of the Nuisance Liability of Agricultural Operations Statute and County resolution. **CD1:1006-1012; (2011CV282) CD12, Exhibit A.22 part 1:443-446.** Commissioner Atchley said

that the Master Plan "is an advisory document only and has no regulatory or restrictive powers." **CD1:1011; (2011CV282) CD12, Exhibit A.22 part 1:458.** Further, Commissioner Atchley thought that the subject applications amounted to a use by right because "ag is ag." **(2011CV282) CD12, Exhibit A.22 part 1:460.**

**The Powell Mesa chicken barn goes into operation.**

On April 26, 2012, the Powell Mesa chicken barn received birds and began operating. **CD2:53**. The barn began emitting a cloud of dust and pollutants which descended upon the neighbors, and neighbors started having health problems. **CD3:920; CD2:342; CD8:MOV017**. By September, 2012, twenty-two health complaints were filed with the County. **CD2:495-530; CD3:836-837.**

Contrary to his testimony at the preliminary injunction hearing, County Health Officer Nordstrom did not follow up on these health complaints by even talking to the complainants or asking them for their medical records. **CD4:1009; CD4:978**. Instead the County decided it would obtain a snapshot air quality sample to respond to the neighbors' health complaints. **CD2:110**. The County never said why it, and not the applicant, was gathering this air emissions information.

On August 8, 2012, during the evening, purportedly to respond to a complaint, County Health Director Nordstrom visited the Hostetlers' residence eight days before the air emissions survey was performed. **CD3:818**. But Mr. Nordstrom's own records do not list his contact of August 8, 2012 as an inspection. **CD3:819**. Dr. Raymond denies making any complaints immediately before August 8, 2012, and contrary to the conditions of approval, no notice of a purported inspection was given to the applicant. **CD4:977**. Two days after the Nordstrom visit, sawdust, which significantly dampens particulate emissions from the facility, was brought to the site and moved into the barn three days before the air emissions survey. **CD4:977; CD3:926**. Sawdust had never been placed in the facility before. **CD4:978**. On the day of the air monitoring survey, several people were present, including the Hostetlers, Ken Nordstrom, and six (6) other people, which shows that the date of the test was common knowledge to Hostetlers and their friends. **CD2:111**. Neither Plaintiffs nor those with health complaints were notified of this testing and were not invited to observe it.

Plaintiffs found out about the air testing activity and made repeated demands on the County for the results. **CD4:978**. But the County kept the written results

from the Plaintiffs until the day of the hearing, September 4, 2012. Christine Knight, County Attorney, inaccurately stated to the Court that the County was not in possession of the air test results until the morning of September 4, 2012. **Defendants' Response; (2012CV314)CD12:139.** This is clearly refuted by Ken Nordsrom's email to Josh Tolin, attorney for the Hostetlers, stating that the County received the report the week of August 27, 2012. **CD4:1082**.

After the public hearing of September 4, 2012, an amendment to the original air survey report was requested by Plateau, Inc. to expand on the bacteria and the spores found in the original findings. **CD2:121**. However, instead of a simple identification and explanation, the author, Mr. Lakin, curiously wrote a three page addendum, filled with words, phrases, and "evidence," to further support the applicants' positions. **CD2:114-117**. The County relied on this information in its second decision of approval.

**Second Hearing September 4, 2012**.

All parties agree that the hen-laying operation generates a "considerable plume of particulates and biological components." **CD2:122**. Mr. Nordstrom wrote in his August 8, 2012 memo that "dust was observed billowing from the henhouse facility." **CD3:818**. *See* Dr. Raymond's videos of the pollution

produced by the Powell Mesa barn. **See CD 9:MOVO1F, MOV01E; CD8:MOV17; 01A; 02E; 046; 003; 016; 034; and 03C**. The hen-laying operation has a system of eleven fans which must frequently operate in its powerful "tunnel ventilation mode to cool and ventilate the building." **CD2:218-219; CD4:979; CD4:999-1001**. This mode was not functioning during the Plateau air sample snapshot, although the air pollution problems for the neighbors are significantly greater during tunnel ventilation. **CD2:119-120; CD4:979; CD4:991-992; CD4:999-1000**. The main problem with the Powell Mesa facility is that it is too close to its neighbors. It is 817 feet from the Cool house and less than 1000 feet from Dr. Raymond's property and veterinary clinic. **CD4:979**.

Even though the methodology was flawed, and sawdust dampened the air emissions, the Plateau Report showed that alarming amounts of harmful particulate matter were present in its samples. **CD4:992-993; CD4:1000-1002; CD4:R1010; CD2:120-122**. These included ammonia, a tremendous amount of fungus spores and mold, dander, and many bacteria, of which one was a gram negative fermenting rod in the Yersinia species. **CD4:1000-1002; CD4:1072-1074**. Certain types of Yersinia are very harmful to people, and one type is a member of the Plague family. **CD4:1000-1002**. The largest portion of this pollution consists

of the smallest particulate matter, which can embed deeply into the lungs. **CD4:1014-1015; CD4:1010; CD4:992**. The hen-laying operation is in essence a 400-foot long horizontal smokestack which is spewing forth toxins, bacteria, molds, fungus, dander, and other small particulates on its downwind neighbors.

Immediately downwind of the Hostetlers' facility, and immediately after the chicken barn began operating, Dr. Raymond's clinic and her horse breeding operations were severely disrupted. Dr. Raymond observed that her hay was covered by molds and fungi that she had not seen before and rendered it unusable. **CD4:979; CD4:981-987**. Dr. Raymond submitted into the record photographs of rotting hay, jars of flies, jars of white feathers and brown feathers from her clinic's swamp cooler, full fly strips, and horses covered with flies, which flies were invading her property. She also submitted a jar of down feathers that were blown onto her property from the hen-laying operation, and which came from the interior of her house. **CD3:916; CD3:927-0932; CD2:541; CD2:542; CD2:732; CD2:733; see also CD8:MOV34 where birds are in outside pen and you can see the white down undercoat feathers**. The Plateau Report confirms the presence of feathers outside the facility. **CD2:121**.

Dr. Raymond herself, her employees and clients were getting sick from the operation of the chicken barn. **CD2:496; CD2:513; CD2:517; CD2:543**. Animals on her property were having severe respiratory issues from the particulates sent out by the hen-laying operation. **CD2:502; CD2:504-505; CD2:440**. Her neighbor, Mr. Cool, also had feathers and white dust on his property from the hen-laying operation. **CD2:366; CD2:499-500**. Dr. Raymond's testimony is supported by and is consistent with expert opinions in the record. **CD4:988-994; CD4:998-1001; CD4:1004-1007; CD4:1008-1010; CD4:1014-1017**.

At the remand hearing on September 4, 2012, Dr. Fran Lazear, a licensed veterinarian, informed the County that Redlands Mesa and Powell Mesa are not appropriate locations for a chicken barn of this type, due to the risk of contamination by runoff water, dust, and flies, and the fact that both Mesas are populated and irrigated. **CD2:405-408.** Therefore, persons living in those areas may be exposed to pathogens such as E-coli, Salmonella, and Campylobacter, and mitigation strategies cannot entirely eliminate these problems. ***Id.***

Doctors provided the County with a letter outlining the actual risk of harm to those closely associated with confined poultry operations. They said they had

treated patients in the same area who have experienced exacerbations of conditions, deterioration of lung disease, or asthma which correlate with the timing of the chicken barn. **CD2:340-343.** Dr. Raymond testified she was sick because of the chicken barn operation. This timing confirms that her illness was caused by the Hostetlers' poultry operation. **CD2:340-343; CD2:438-439.**

Neighbors complained of increased ear, nose, throat and eye irritations, difficulty breathing, and increased allergies and infections. All of these complaints note that the symptoms began after the time of the chicken barn's arrival. **CD2:378-379; CD2:495; CD2:496; CD2:497; CD2:498; CD2:499-500; CD2:501; CD2:504-505; CD2:508; CD2:5l0-512; CD2:513; CD2:514; CD2:515; CD2:516; CD2:528-530; CD2:531; CD2:532-539; CD3:918; CD2:543; CD2:347-348; CD3:836-837.**

A Health Map was put into the record which outlined the surrounding area of the poultry operation and the health complaints since it began. **CD3:933.** This Health Map shows those neighbors in a 270 degree arc who are affected by the chicken debris and explains why some residents on Powell Mesa are not affected. ***Id.*** The wind graph accompanying the Health Map shows the predominant wind directions in the surrounding area, when the fans are operating

to ventilate, cool, and discharge ammonia from the chicken barn. **CD2:624; CD2:728-730.**

**Second Decision October 22, 2012**.

On October 22, 2012, the County made a decision after the public hearing of September 4, 2012. Commissioner Lund cited the air quality monitoring test as a basis for approval of the applications. **CD2:755.** He admitted that the County had paid for the tests, and considered information outside of the public hearing of September 4, 2012. ***Id*.** Commissioner Hovde also relied on the air quality monitoring test results as a basis for approving the subject applications. **CD2:755-756.**

**Third Hearing May 1, 2013**.

Plaintiffs testified at the hearing (**CD4:977-987; CD4:974-976**), submitted six letters by experts in air quality and animal confinement fields, and one CD containing reference documents (265 pages) supporting one of the expert submissions, and additional health reports and photographs. **CD4:973**. The six documents Plaintiffs provided at the hearing were scientifically based and produced by persons well respected and considered experts in their fields.

Unlike Mr. Lakin, who is an industrial hygienist, Mr. Gebhart and Mr. Sherman of Air Research Specialists, Inc. are experts in air quality monitoring, specifically for industrial clients. **CD4:988-997**. Gebhart and Sherman concluded that the data on emissions was not quantified and no calculations were made as to what was being discharged from the chicken barn. The experts noted that because the "tunnel ventilation mode," which blows eight times more air than the side fans, was not operational, the amount of pollutants coming out of the structure was substantially diminished. **CD4:999-1000**. The authors further noted the presence of sawdust, to dampen down the amount of particulates and pollution being discharged. The timing and application of the sawdust was a "clear attempt to minimize air emissions solely for the purpose of the study and produce non-representative and biased study results about the facility air emissions." **CD4:991-994**.

Ms. Pridgen is an Environmental Biologist with 30 years of experience in poultry production. **CD4:998-1003.** She concluded that had the tunnel ventilation system been operational at the time of the test, at least eight (8) times the volume of air/fecal matter, bacteria, and the like, within the building would have been expelled to the outside environment. **CD4:999**. Further, the addition

of sawdust was a way that "Western Slope Layers stacked the deck in their favor." **CD4:1001**. She said there are detrimental effects to human health by the ammonia absorbed by dust particulates carried deep into the lung, even at low concentrations. ***Id.***

Dr. Lazear detailed the impact of the emissions relative to the pathology on humans and animals. **CD4:1008-1010**. She further said this facility will never perform properly in this low humidity climate, and why mitigation is not possible. Even smaller facilities can be just as dangerous as a large barn, especially if the setback is not adequate. **CD4:1008**. She explains why cage-free chicken barns in low-humidity will never operate properly without higher humidity. Manure dries quickly, is pulverized by the hens, and is discharged in numerous ways. **CD4:1009**.

She notes that the Health Department has failed to respond properly to the epidemiological health issues that have arisen out of this facility. **CD4:1009**.

Ms. Martin, who is an environmental engineer, said that the Plateau Report contained severely flawed methodology in numerous areas, starting with the lack of a critically necessary detailed map of where samples were taken relative to the barn. **CD4:1011-1020.** She noted many disparities in sample values with no

explanation provided by the sampler. **CD4:1013**. She discusses the inhalable properties of the various sizes of particulates found during sampling. **CD4:1014-1015**.

Dr. Thu, professor and Chair of Anthropology at Northern Illinois University, submitted his letter with six references totaling 265 pages, which show that industrial animal feeding operations, whether cattle, swine or poultry, severely degrade the quality of life of those who live within the path of these facilities' discharges and emissions. **CD4:1021-1059**.

The World Poultry-CSES report detailed the types of hen housing options in the US and differences inherent in each design. It clearly spells out why the Hostetler chicken barn's discharge is so much greater than a conventional operation. **CD4:1060-1061**.

Hostetlers, at page 38 of their Opening Brief, complained that they did not have the opportunity to rebut Plaintiffs' evidence. But the Plaintiffs' evidence was presented in the September 4, 2012 hearing. Hostetler made no effort to present counterevidence either in the September, 2012 or May, 2013 hearings, or request a continuance, or during the public hearing process, seek additional medical information from the neighbors.

**Third Decision May 28, 2013**.

Commissioner Hovde stated that he had driven up to the area in question and had not seen the emissions discussed. **CD4:1086-1087**.

Commissioner Roeber was not sure whether the nature of the neighborhoods in question was agricultural or residential, but because the Air Study "didn't find anything out of the ordinary," he surmised that the facilities would be acceptable. **CD4:1087**.

The Commissioners proceeded to reaffirm the Specific Development Agreements, and added a condition purporting to address air pollution. The imposition of an additional condition is an admission on behalf of the County that there is clearly an air pollution emission problem related to this facility. However, the condition does not contain any methodology as to how air samples are to be taken, nor any minimum standards for protection of the neighbors.

## SUMMARY OF THE ARGUMENT

A land use which is making its neighbors sick is not compatible with its neighbors. A land use that interferes with the normal operations of an existing neighboring farm and veterinary clinic is incompatible and clearly violates the County's RSD. This Court should affirm the Trial Court Order because neither the

applicant, nor the County, in its advocacy efforts on behalf of the applicant, presented any testimony to counter the neighbors' testimony that they are sick because of the operation of the chicken barn nor that counters the significant evidence of the disruption and interference of Dr. Raymond's existing agricultural operations. Further, the Master Plan confers Constitutional property rights upon the neighbors, which the County violated by approving the land use applications. In addition, the record is replete with evidence of bias on the part of the Delta County Commissioners.

Hostetlers did not make a record of any objection to the applicability of the Master Plan to the County's approval of their land use application. This Court cannot now hear Hostetlers' objections to the Master Plan. Both the parties and the Trial Court determined that the Nuisance Liability of Agricultural Operations Statute was not an issue in this case. The *amicus* parties cannot now argue that the Court should have limited the County's authority based on the Nuisance Liability of Agricultural Operations Statute.

## PRESERVATION OF THE ISSUES FOR REVIEW

The issues presented were raised and ruled on below. **Plaintiffs' Complaint of September 23, 2011, (2011CV282) CD12:5-11; Plaintiffs' Complaint of**

**November 16, 2012, (2012CV314)CD12:7-15; CD2:389-391; CD1:213-218; CD1:639-640; CD1:918-927; CD1:734; CD2:404-408; CD2:687-688; CD4:1008-1010; CD2:495-543; CD2:342-345;; CD2:515; CD4:1063-1071; CD2:624; CD3:933; CD2:435-458.**

## STANDARD OF REVIEW AND APPLICABLE LAW

This Court reviews the District Court's decision *de novo*. *Thomas v. Colo. Dept. of Corrs.*, 117 P.3d 7, 8-9 (Colo. App. 2004). "An appellate court sits in the same position as the district court when reviewing an agency's decision." ***Id.*** (citing *Empiregas, Inc. v. County Court*, 713 P.2d 937 (Colo. App. 1985).

Legal issues cannot be raised for the first time on appeal. *See, e.g., CTS Investments, LLC v. Garfield County Bd. of Equalization*, _____ P.3d ____, 2013 WL979357, para. 14 (Colo. App. 2013); *Abromeit v. Denver Careers Serv. Bd.*, 140 P.3d 44 (Colo. App. 2005)*; Prairie Dog Advocates v. The City of Lakewood*, 20 P.3d 1203 (Colo. App. 2000). Colorado law is clear that this court is not to consider issues raised by an *amicus* party when they have not been raised by the parties to the case. *Gorman v. Tucker*, 961 P.2d 1126, 1131 (Colo. 1998).

*Churchill v. University of Colorado at Boulder*, 285 P.3d 986 (Colo. 2012), is the Colorado Supreme Court's most recent interpretation of Rule 106(a)(4)

review. It is noteworthy that none of the Defendants cite or address *Churchill* at all. *Churchill* explicitly states that "lack of evidence" is only one basis for a reviewing court to find an administrative decision arbitrary and capricious under Rule 106(a)(4) review. 285 P.3d at 1006. In *Churchill*, the Colorado Supreme Court pointed out other reasons a Rule 106(a)(4) reviewing court may overturn an administrative decision; *e.g.*, if the decision: (1) violates a party's constitutional rights; (2) is merely pretext for improper motive; (3) or demonstrates retaliatory motives, institutional bias, personal grudge or the appearance of impropriety. ***Id.***, at p. 1006. Plaintiffs submit that all three of these review methods are implicated in the instant action and support affirmance.

In addition to the reasons mentioned in *Churchill*, and specifically relevant to the instant action, a reviewing court must also determine whether an agency misconstrued or misapplied the law and whether the agency's interpretation of its own regulations does not amend its regulations in the guise of interpreting them. *See Save Park County v. Bd. of County Comm'rs of County of Park*, 969 P.2d 711 (Colo. App. 1998); *Anderson v. Bd. of Adjustment*, 931 P.2d 517 (Colo. App.1996). Again, it is noteworthy that none of the Defendants address this review authority or

the case law supporting it. Plaintiffs submit that this basis also clearly supports affirmance of the District Court's ruling below.

The Rule 106(a)(4) "lack of evidence" standard is not a determination of whether there is *any* evidence in the record to support the County's decision, but rather the existence of *competent* evidence in the record to support its decision. *See Lieb v. Trimble,* 183 P.3d 702 (Colo. App. 2008). A reviewing court must set aside decisions based on a record which contains "no competent evidence" supporting the decision. *Bd. of County Comm'rs of Routt County v. O'Dell,* 920 P.2d 48, 50 (Colo. 1996).

In *Colorado Mun. League v. Mountain States Tel. & Tel. Co.,* 759 P.2d 40, 44 (Colo. 1988), the court said: "For purposes of judicial review of administrative decisions, competent evidence is the same as substantial evidence." *See City of Colorado Springs v. Givan* 897 P.2d 753, 756 (Colo. 1995). *See also, CTS Investments., LLC v. Garfield County Bd. of Equalization, supra* ("competent evidence is the same as substantial evidence" and requires "more than merely 'some evidence in some particulars'")(citations omitted).

## ARGUMENT

### I. The County's Approval of the Subject Land Use Permits was Arbitrary and Capricious.

The County's and the Hostetlers' briefs are entirely focused upon the "lack of evidence" review by a Rule 106(a)(4) reviewing court. In their effort to support the County Commissioners' decisions in favor of the chicken barns, both the County and the Hostetlers repeat the assertion that a Rule 106(a)(4) reviewing court may not substitute its judgment for that of the administrative body. This assertion is incorrect. Even as to review limited to competent evidence, the reviewing court must decide if the evidence proffered in support of the administrative decision is "substantial." Under the standards set forth in *Churchill*, court review is meant to be meaningful and not just a list of some evidence which supports the County's decision. But especially when a reviewing court applies the other reasons for review identified in *Churchill* and *Save Park County, supra*, the reviewing court must necessarily substitute its judgment for that of the administrative agency. This Court, as the *de novo* reviewing court, must review the record that was before the County for substantial evidence supporting the County's decision, but may also evaluate the evidence to determine whether the

County failed to properly interpret and apply its own regulations or violated the neighbors' constitutional rights, engaged in a pretext efforts, or was biased. The Plaintiffs contend that, for many different reasons, the record evidence supports the District Court's determination that the Commissioners' decisions approving the chicken barns was arbitrary and capricious and an abuse of discretion.

**a. There was No Competent Evidence to Rebut Plaintiffs' Evidence that the Operation of the Chicken Barn was a Health Hazard, Interfered with Existing Agricultural Operations and was Incompatible with the Neighborhood.**

Defendants argue that the hen-laying operation is compatible with the neighbors, but the hen-laying operation is obviously a much more intense use of the land than traditional agriculture. **CD2:779**. The Hostetlers' confined chicken barns equals 183 animal units ("AU") on less than one half acre. 5 C.C.R. 1002-8. In comparison, on the Raymond property across the road, there are 22 horses (44 animal units) on 60 acres. **CD2:440; CD2:732**. As to intensity of use, this is 366 AUs per acre on the Hostetlers' property to .73 AUs per acre on the Raymond property. This ratio is 500 to 1.

Defendants argue that there is competent evidence in the record to support the County's decision. But the record contains undisputed evidence in favor of the

Plaintiffs, which the County is not free to ignore. The Trial Court, in its Order of September 5, 2013, ruled in Plaintiffs' favor because there was no contradicting expert medical evidence from the County or the Hostetlers that the neighbors were not getting sick from the chicken barn. The Trial Court properly found that the public health in the vicinity of the chicken barn was being degraded, and this is contrary to the public health, safety and welfare. Numerous pieces on non-testimonial evidence supported this conclusion: videos of a plume of pollution from the chicken barn, photos of jars full of flies, jars of white feathers, moldy hay, fly tape full of flies, and brown feathers on a screen. **CD3:930-932; CD3:981-987**. The County cannot weigh evidence in favor of the applicants when there is no evidence to contradict what the Plaintiffs have proven.

Defendants argue compatibility but present no competent testimony to dispute that the hen-laying operation generates a considerable plume of particulates and biological components which blow onto the neighbors. **CD2:122**. Defendants admit the neighbors are sick, but challenge the causation of their illnesses. The Health Map provided by Dr. Raymond shows that the health concerns are all from people predominantly downwind from the Hostetler operation. **CD3:933**. The Health Map should be viewed in conjunction with the wind graph and description,

which shows the direction of the prevailing winds throughout the day and night to prove that those downwind from the facility are the ones with health concerns. Downwind in this mountainous region changes throughout the day and night because of the diurnal valley wind flow. Therefore, upwind people become downwind people dependent on the wind flow. **CD2:624; CD2:729-731**.

Defendants assert that the Plaintiffs' illnesses were not caused by operation of the chicken barn, but rather dust, pollen, wildfire smoke, and hot summer temperatures. **CD2:142.** But Defendants failed to show why there were no other health complaints in the county, other than those downwind from the chicken barn.

The County now argues that it was free to ignore Plaintiffs' expert opinions because they were "junk science." But the record contains no assertion by the Defendants of "junk science." The County's citation to the EPA experience in enforcing air quality standards on page 26 is an improper effort to put evidence in the record after the public hearing was closed and should be disregarded by this Court. Further, the Plaintiffs' expert opinions were supported by other evidence other than their own opinions. The County cannot be free to ignore credible expert testimony, when no contrary evidence exists in the record.

Edwin Hostetler never testified about his health or the health of his family. Nor is there any competent evidence in the public hearings about the health of Hostetlers' families. Neither the County nor the Hostetlers presented any evidence at the May 1, 2013, hearing when the Plaintiffs' technical reports were made part of the record. **CD4:951-972.** None of Hostetlers' citations are competent evidence to rebut the detailed medical evidence the neighbors presented that they are being made sick from the operation of the hen-laying facility.

The new condition, which does not protect the neighbors from air pollution nor does it protect the neighbors' existing agricultural operations, is a misapplication of the RSD. The new condition requires only that the applicant study how to "reduce" air pollution. This is not much different from the original condition which referenced air quality, but did nothing to stop the air pollution. **CD3:936; CD3:944**. The Master Plan and the RSD prohibits a new use from injuring neighboring properties so a mere study of ways to reduce pollution is per se insufficient. **CD2:769**. This last condition was not adopted when it was first proposed by the County Health Director in October, 2012. **CD1:142-143**. Only after the May, 2013 public hearing did the County think such a condition would be helpful for legal review purposes. But a condition is meaningless "if the

application need only address how (air pollution) might be addressed in the future." *Wolf Creek Ski Corp. v. Bd. of County Comm'rs*, 170 P.3d 821 (Colo. App. 2007). The new condition does not provide any quantitative standards for air quality or how often tests should be conducted. There is no way for the neighbors to obtain meaningful review of future studies.

Further the Master Plan provides that new development should be built in areas with adequate infrastructure. **CD2:766**. The neighbors presented undisputed evidence that the county road infrastructure could not support an industrial, agricultural operation of this magnitude. Neighbors on Redlands Mesa complained that the access route to the landlocked parcel was a ¼ mile long driveway, passing extremely close to other houses, which was only wide enough for one passenger vehicle and cannot be widened. **Cd2:349-0350; CD2:353-0354**. On Powell Mesa the access road is so narrow and steep that semi-trucks have to back up a hill, and go into a neighbor's driveway before proceeding up hill. **CD2:524; CD3:909; CD3:919**. Neighbors complained of safety issues from semi-trucks on rural roads. **CD2:366; CD2:378-379; CD2:524; CD3:925**. Despite this evidence the County did not deny the application.

Defendants assert that Plaintiffs must prove the causal link. Dr. Lazear states that the timing of the illness cluster should be a red flag and the operation should be shut down to see if illnesses abate over time. **CD4:1009**. Under applicable regulations, the Plaintiffs' evidence was more than sufficient to require a reasonable inquiry as to why these people were getting sick.

The County argues that it cannot bear the burden of air quality testing since this a matter of some complexity. But it is the applicant's burden to prove its use will not harm the neighbors – not the County's. The County is supposed to be a neutral arbiter – a quasi-judicial body. If the applicant's proposed use will harm the neighbor's health, harm their existing agricultural operations or property values, then the application should be denied. Judge Patrick below did not suggest that Delta County become a "mini-EPA;" he simply observed that a poorly conceived "condition" that expressly permits continued pollution does not comply with the County's RSD or Master Plan provisions that require priority protection of neighbors, and existing agricultural uses.

The County's decision to promote confined animal operation in spite of proven injuries to the neighbors ignores the County's own regulations. In the RSD, "compatible" includes "air quality." **CD2:793**. Further, the County paid for

an air quality snapshot, when this should have been the applicant's responsibility. The County regulations make preeminent the preservation of the adjoining uses, and the County decision which makes these concerns secondary is a misapplication of these regulations.

There is much discussion in the Defendants' briefs about the distinction between AFOS and CAFOS, trying to argue that size is determinative of the air pollution issue. The RSD regulates all confined animal operations and does not refer to AFOS and CAFOS. **CD2:779**. As Dr. Lazear points out even small facilities can be just as dangerous as a larger operation, especially if the setback is not adequate. **CD4:1008**. Simply put, as to the RSD and the Master Plan, confined animal operations – whether they are the chicken barns in the instant case, or whether they are CAFOS, AFOS or anything else – may not "physically damage or adversely impact the property or property values or neighboring landowners" or "interfere with the normal operation of existing agricultural operations." **CD2:769; CD2:791**.

Defendants' evidence is not competent to support the approval of the applications. Any reliance on Mr. Nordstrom is misplaced. He has no training in public health; it has been 40 years since he took a college class. **CD2:45**. In 30

years with the County, he has not attended any seminars on chicken barn issues. ***Id.*** He warned Hostetlers of the upcoming air snapshot. Even though he testified in court that he would investigate any health complaints, he chose not to contact the health complainants and made no effort to obtain medical records to further investigate the health issues. Neither Mr. Nordstrom nor Mr. Lakin are qualified to give opinions about the health impacts of air pollution.

Mr. Lakin's air snapshot is not competent evidence to support the County decision. First, Mr. Lakin warned the County to have his report reviewed by an appropriate medical expert. **CD2:118-140; CD2:114-117**. This was never done. Second, he told the County that his findings were only a snapshot, and the conditions of the chicken barn were dynamic. ***Id.*** He did not test for air pollution in the tunnel mode, which the facility often used, and when used would spew greater amounts of pollution on the neighbors. The critique of Mr. Lakin's work is not rebutted, and the only reasonable inference from the evidence is that it should have been disregarded by the County in its decisions. Even at that, Mr. Lakin verified the huge plume of particulates.

Defendants' reliance on Mr. Blean is misplaced. The Court, in its Order of July 5, 2012, disregarded Mr. Blean because the conditions in Illinois are not the

same as Delta County in terms of climate, proximity to neighboring farms and character of the neighborhood. **Trial Court Order of July 5, 2012, at p. 10; (2011CV282) CD12:723**. Dr. Koelkebeck, another witness of Defendants, is based in Illinois. He admits that in Illinois a confined animal operation requires a greater setback than is present here. He also admits that the climate is much drier in western Colorado. Dr. Koelkebeck does not address the question of how the conditions of approval can be effective when they do not contain any objective standards as to the emission of the hen-laying operation, nor require monitoring the testing of air and water pollution. **CD2:601-602**.

Nor is the testimony of Dr. Bundy competent, substantial evidence. His comments are not site specific. First, he states, "Poultry odors by most people are not considered to be obnoxious in smell." **CD2:598**. Second, "air quality from a facility are not high enough to present health issues." Third, "disease transmissions from layer hen to humans is not considered to be an issue." **CD2:599**. Of course a chicken barn smells bad. The record contains undisputed evidence of airborne illness. And both people and animals are sick from the pollution of the chicken barn.

Mr. Hammon did a fly inspection of the facility and found undated fly cards. **CD2:606**. But, it is admitted that Mr. Nordstrom found that the sticky paper fly traps and the jar with attractive traps in the facility were filled with flies. **CD2:54**. This comports with Dr. Raymonds' photos of full fly sticky tapes on her property and her own jars of flies. **CD3:930-931**.

Defendants' reliance on Ms. Schmidt to show compatibility is misplaced. **CD2:549-550**. Ms. Schmidt observed that the Hostetler barn was pleasing to look at. **CD2:549-550**. She does not discuss the hen-laying operation that went on inside it or the plume of pollutants that were discharged outside.

Both Defendants argue that the conditions of approval make the hen-laying operations compatible with the neighborhood and consistent with the objectives of the Master Plan. But the original conditions were in effect for a year and half and the stream of pollution from the hen-laying operation did not cease, and people were still getting sick. The latest condition adds nothing of substance and does not protect the neighbors. There is no quantification or standards as to acceptable levels of emissions and there is no provision for periodic testing. This condition is simply pretext for the County's predisposition to approve the chicken barns, and by its express terms, violates both the RSD and the Master Plan.

All Defendants argue that the confined animal operation should be approved since it is agricultural in nature. The County cites *Bd. of County Comm'rs v. Vandemoer*, 205 P.3d 423 (Colo. App. 2008), for the proposition that agriculture is a favored use in the state. **County Opening Brief, at p. 45**. This is not in conflict with the Master Plan, which sets forth five goals, one of which is promotion of agriculture. But the Master Plan also promotes preservation of existing neighborhoods and protection of property values. The RSD prohibits interference with existing agricultural operations. **CD2:791**. Dr. Raymond's veterinarian practice, horse ranch and hay operation have been harmed by the chicken barn. Dr. Raymond has been made sick, her horses have been made sick, here veterinary practice has been disrupted, and she has had to throw away tons of hay. **CD4:979**.

**b. The County's Decision Violated the Constitutional Rights of the Plaintiffs.**

Under Colorado law, the right to use property is fully protected by the Due Process Clauses of the federal and state constitutions. *Eason v. Bd. of County Comm'rs*, 70 P.3d 600, 605 (Colo. App. 2003). In the case of *Hillside Community Church, S.B.C. v. Olson*, 58 P.3d 1021 (Colo. 2002), the Supreme Court identified the necessary prerequisite for a party to have a legitimate claim of entitlement to

support a 42 U.S.C. § 1983 claim. In *Hillside Community Church*, the Supreme Court said that a legitimate claim of entitlement which is based on the United States Constitution is created by state law. *Hillside Community Church*, at p. 1025. "In short, legislators create property and courts protect it." ***Id.***

The Master Plan provides that "the 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." **IV.B.** The RSD provides that developments shall not interfere with the normal operation of existing agricultural operations. These provisions are a guarantee to adjoining land owners that their property will not be harmed by new land uses. The record shows that the neighbors' use and quiet enjoyment of their property has been affected by a harmful neighboring land use. **CD2:440; CD2:500**. Neighbors Raymond and Cool cannot sit on their porches at night. Their air has been fouled. Dr. Raymond did not plant a garden because of the pollution. When the wind is blowing in her direction, Dr. Raymond cannot go outside of her house without a mask on, and she now needs to use a steroid inhaler. **CD2:439-440; CD2:732-734**.

As to property values, the neighbors introduced the report of Dr. John Kilpatrick who is a national expert as to the adverse economic consequences of confined animal

operations. **CD2:559-576.** Dr. Kilpatrick concludes that, "the property value impacts from this hen-laying operation range as high as 88% for homes located immediately adjacent to the animal operation, rendering the property useless and unmarketable for any residential purpose." **CD2:575**. "This type of facility constitutes an incurable, external obsolescence on the surrounding and nearby residences." ***Id.*** While there are proposals for potential mitigation, these have not proven to be effective and may not even be feasible. ***Id.***

Plaintiffs also introduced into the record a letter from Pamela M. Sant who has 30 years of appraisal experience in Western Colorado, including Delta County, Colorado. **CD2:557**. Based upon the information she received, which is the same as the information in the record, she states, "[w]ithout a doubt, this will have a negative effect on surrounding properties. This is a form of external obsolescence that cannot be cured by the surrounding properties." **CD2:557**.

None of Defendants' evidence is competent to rebut Plaintiffs' evidence about loss of value of their property. Defendants' reliance on Ms. Christie Schmidt is misplaced. First, Ms. Schmidt is not an appraiser and cannot give opinions as to value. C.R.S. §12-61-702 (5)(b). Ms. Schmidt does not even provide an opinion of value on either the Hostetler property, or any of the surrounding properties. She offered no comparable

sales or valuations in the proximity or region. **CD2:549-550**. She did not cite a single, similar situation on which to base her comments. **CD2:549-550**.

Nor can Defendants rely upon Ms. Smith as competent evidence that the hen-laying operation is not harmful to the neighbors' property values. **CD2:439**. She, like Ms. Schmidt, is not an appraiser. **CD2:267**. Ms. Smith's statement as to the value of the Peet property is not based on sales, but rather offers. **CD2:439; CD2:347-348.**

The County Brief at p. 19, talks about a "dead animal pit" in an effort to discredit Dr. Raymond. There is no dead pit, just a few neighbors with an ax to grind.

**c. The County was Biased in Its Decision-Making, and Its Decision Cannot Stand**.

The following facts constitute an appearance of impropriety, and under *Churchill*, the County decision cannot stand. A quasi judicial proceeding must be conducted in accordance with procedural due process. *Soon Yee Scott v. City of Englewood*, 672 P.2d 225, 227 (Colo. App. 1983).

(1) Commissioners Hovde, Atchley and Lund visited the Hostetler properties. Commissioner Hovde discussed the application with Kelly Yeager the

applicant's representative, and with Edwin Hostetler, *ex parte*, all actions taken outside the public hearing.

(2) Commissioner Lund failed to disclose his conflict of interest that he was president of the Delta County Farm and Livestock Bureau, also known as the Delta County Farm Bureau, and failed to recuse himself from the deliberations and decision-making. **CD2:251-252.** Both the county chapter and the state Colorado Farm Bureau submitted written comments and two County board members testified on behalf of the applicants. **CD2:701**.

(3) The conditions of approval required the Applicants to fulfill all conditions before operations could begin, but the County allowed the Applicants to populate and begin operations before these conditions were met. **CD3:935; CD3:943; CD2:100-104**. On July 5, 2012, this Court invalidated the Development Permits for the subject applications. Despite a demand by the Plaintiffs and a Supplemental Order from this Court, the County refused to enforce its own regulations and allowed the hen-laying operations to continue until October 22, 2012 without a valid Development Agreement. **CD2:620**.

(4) The record highlights the improper conduct of Mr. Nordstrom seeking out Mr. Hostetler, after-hours, to discuss the upcoming air quality monitoring. **CD3:818;**

**CD4:977-978; CD2:435**. Even though it is obvious that emissions were drastically reduced by the presence of sawdust in the facility and it was not being run in the tunnel ventilation discharge mode, the County has affirmed this conduct and refused to separate itself from the Applicants even though it is obvious that the results were skewed by the presence of sawdust in the facility. **CD4:1088**.

(5) The County Attorney withheld the Plateau Report until the hearing of September 4, 2012. Even after Plaintiffs raised this issue, the County did not correct the County Attorney's misrepresentation.

(6) After the September 4, 2012 public hearing, the County put evidence in the record after the record was closed in order to promote a legal basis for its conduct.

(7) The County insists on relying on the Plateau Report even though its conclusions are based upon the masking effects of the sawdust and its author recommended that the report be reviewed by a medical specialist, which was not done. **CD4:1087-1088; CD2:116; CD2:122**.

(8) The County Health Director never spoke to any of the twenty-two health complainants. **CD4:978**.

(9) In the May 28, 2013 Commissioner Meeting transcript, both Commissioners Hovde and Roeber stated that they drove by the chicken barn and

did not see the air pollution. **CD4:1086-1087.** Their comments demonstrate that they still do not understand their role as impartial judges of the evidence.

(10) Despite direction from this Court regarding the controlling nature of the RSD and the Master Plan, all commissioners have refused to make these decisions based on the merits. Commissioner Roeber stated that there was a question of whether the neighborhoods surrounding the facilities were agricultural or residential and he did not know the answer to that. **CD4:1087**. However, it is the County's job to make that determination, as the Trial Court has instructed the County to make its decision on compatibility of the facilities with the surrounding area.

## II. Hostetlers Did Not Preserve Any Objection to the Master Plan in the Administrative Hearing.

Hostetlers assert that the Master Plan is an improper regulatory device and the Court should disregard its requirements. The Trial Court, in its July 5, 2012 Order, found that the Master Plan was regulatory because it was incorporated in the RSD. Hostetlers did not appeal this ruling, and therefore it became the law of the case. *Rantz v. Kaufman*, 109 P.3d 132 (Colo. 2005). At no time in these proceedings, in over a year and a half in length, did Hostetlers make a record on

the administrative level that the Master Plan was not regulatory. Hostetlers provided no citation to the record when such an objection was made. Therefore, Hostetlers' argument should not be considered by this Court.

## III. The Nuisance Liability of Agricultural Operations Statute is Not Applicable in This Case.

Both the Colorado Farm Bureau ("CFB") and the State of Colorado (the "State") assert that if the Trial Court's decision is affirmed, ongoing agricultural operations will be harmed. As to its interest in this matter, CFB states in its Motion that if the Trial Court decision is affirmed, "the District Court's decision might set a precedent that will allow complaining persons to shut down agricultural operations without proving that the operation is negligently run or causing damage to neighboring property." **CFB Brief, at p. 3**. These statements are incorrect for several reasons. First, this case involves a Rule 106(a)(4) challenge to the issuance of a land use permit and has no applicability to ongoing agricultural operations. Second, the issue before this Court is whether the County's approval of the subject land use applications was an arbitrary and capricious exercise of authority. Admittedly, a ruling adverse to Hostetlers would have an immediate impact on them. But the Trial Court ruling does not otherwise negatively affect the

operations of other agricultural operations. Indeed, the Trial Court's Order preserves and protects neighboring agricultural operations on both Powell Mesa and Redlands Mesa from chicken barn pollution. As the Trial Court recognized, the precedential value of this case is limited to very unique circumstances. The Court defined the narrowness of its ruling on September 27, 2013:

> To the extent the County makes a similar argument, this Order has no application to existing agricultural uses and further that other pending applications requiring approval of the Board in a *quasi* judicial setting would only be analogous to this situation where the development was operating prior to final approval and there is medical testimony that health impacts had occurred after commencement of the operation.

**September 27, 2013 Trial Court Order, p. 4 (2012CV314)CD12:493**.

CFB and the State attempt by their *Amicus* Briefs to interject into this case the Nuisance Liability of Agricultural Operations Statute, C.R.S. §35-3.5-101, *et seq*. CFB asserts that C.R.S. §35-3.5-101 controls the burden of proof in this case and what conditions, if any, the County can impose upon an applicant. ***Amicus* Brief, at p. 18-22**. In violation of C.A.R. 28(a), CFB fails to identify where in the record an objection is made to these proceedings based on the argument presented in its *Amicus* Brief. The burden of proof issue was not raised by either of the Defendants in this proceeding. C.R.S. §35-3.5-101 is not listed by either of the

Defendants in their Notice of Appeal. Hostetlers make no reference to C.R.S. §35-3.5-101 in their Opening Brief. The County only makes reference to the general intent of C.R.S. §35-3.5-101 in its Opening Brief at page 43.

In prior proceedings below, the Trial Court disposed of these arguments, and found that C.R.S. §35-3.5-101 was not controlling. On page 11 of its Order of July 5, 2012, the Court addressed C.R.S. §35-3.5-101. The Court said:

> Counsel appeared to agree that the statutory right to farm does not directly apply to this matter. The Court agrees. C.R.S. §35-3.5-101, *et seq*., limits circumstances where preexisting agricultural uses may be deemed to be a nuisance to surrounding properties. The Court also agrees that the Delta County Resolution 96-R-033, R-823-24, on the issue of right to farm similarly does not directly apply.

**(2011CV282)CD12:724**.

Neither Hostetlers nor the County appealed the July 5, 2012 Trial Court Order.

After the remands by the District Court, in the hearings of September 4, 2012 and May 1, 2013, no evidence was presented to the County as to the applicability of C.R.S. §35-3.5-101. The Court issued a second Order on September 5, 2013, which Order is the basis of the appeal in this case. There was only a reference to C.R.S. §35-3.5-101 by way of summary of the prior Order.

**(2012CV314)CD12:379**. C.R.S. §35-3.5-101 was not the basis of the Court's ruling.

The State has not otherwise demonstrated that it has an interest in this matter. The State references its jurisdiction over animal feeding operations for the purpose of protecting waters of the State, and alleges that the Hostetlers are following Best Management Practices. **State's Opening Brief, p. 3**. The State fails to note that in the record the Hostetlers received a citation from CDPHE as to non-compliance with its state water quality permit. **CDPHE letter of May 23, 2013, by Nicole Rolfe**. **CD2:174**. The State's *Amicus* Brief also fails to mention that as to poultry operations, there are no state air quality regulations. Finally, because local land use authority is delegated to counties by law, the State does not assert that it has any jurisdiction over land use issues such as compatibility with the neighborhood, damage to property values or protection of the health of adjoining property owners. C.R.S. §30-28-101, *et seq*.

The State's *Amicus* Brief is in violation of C.A.R. 28(a). There are no citations to the record before the County, where C.R.S. §35-3.5-101, *et seq.*, was raised as a limitation on the County's authority. Nor does the State's Brief contain any case law citations for the unique propositions it advances.

The State argues at pages 5-7 of its *Amicus* Brief that this Court does not have jurisdiction to hear a Rule 106(a)(4) matter because the Rule 106(a)(4) proceeding is barred by the Colorado Nuisance Liability of Agricultural Operations Statute, C.R.S. §35-3.5-102(1)(a). ("While plaintiffs' lawsuit is brought under C.R.C.P. 106(a)(4), it is akin to a nuisance lawsuit that should have been barred under §35-3.5-102(1)(a), C.R.S." **State's Opening Brief, at p. 6-7**. There is no legal support that the Nuisance Liability of Agricultural Operations Statute was intended to limit the power of this Court to provide a *certiorari* remedy for arbitrary and capricious decision making.

In summary, both *amicus* parties raised issues that were not properly preserved for appeal and not raised by the actual parties to the case. Neither *amici* has any interest in this matter and the outcome of this case will not affect state interests they purport to assert. The State's arguments have no basis in the evidence of the case nor are they supported by the arguments of the Defendants.

## CONCLUSION

For the above stated reasons, the Trial Court's Order should be affirmed.

Respectfully submitted this 25th day of April, 2014.

*/s/ Earl G. Rhodes-original signature on file*
Earl G. Rhodes, #6723
*Attorney for Plaintiffs-Appellees*

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **PLAINTIFFS-APPELLEES' ANSWER BRIEF** was served this 25th day of April, 2014, via the Integrated Colorado Courts E-Filing System to the following:

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