COLORADO COURT OF APPEALS 2 East 14th Avenue Denver, Colorado 80203 Phone: 720-325-5150	
7th Judicial District Court The Honorable J. Steven Patrick Case No. 2012 CV 314	
Plaintiffs-Appellees: **TRAVIS JARDON, CORRINE HOLDER, SUSAN RAYMOND, MARK COOL, AND ANDREA ROBINSONG** v. **Defendants-Appellants:** **EDWIN HOSTETLER, EILEEN HOSTETLER, GREG HOSTETLER, CARMEN HOSTETLER, and DELTA COUNTY BOARD OF COUNTY COMMISSIONERS.**	COURT USE ONLY
Attorneys for Plaintiffs-Appellees: Earl G. Rhodes, LLC Earl G. Rhodes, Reg. #6723 P. O. Box 4387, Grand Junction, Colorado 81502 rhodesgjlaw@gmail.com Phone: (970) 250-2256	Court of Appeals Case Number: 13CA1806
PLAINTIFFS-APPELLEES' PETITION FOR REHEARING	

Plaintiffs-Appellees, by and through counsel of record, hereby file their Petition for Rehearing in accordance with C.A.R. 40 as follows:

On October 16, 2014, this Court reversed the judgment of the Trial Court of September 5, 2013, and directed the Trial Court to vacate the injunction against the Defendants and reinstate the Defendants' land use permit with Delta County, Colorado. For the following reasons Plaintiffs-Appellees assert that this Order is inconsistent with Colorado law in *Bd. of Cnty. Comm'rs v. Conder,* 927 P.2d 1339 (Colo. 1996), and *Churchill v. University of Colorado,* 285 P. 3d 986 (Colo. 2012), and the Trial Court's order should have been affirmed.

In this case, the Trial Court found that the Defendants' chicken farm was actually making its neighbors sick, and thus could not be a compatible use in the neighborhood. The Trial Court also found that neither the County nor the Defendants has submitted any evidence in the record to rebut this evidence. The Trial Court understood the difference between substantial evidence, which arose after the chicken farm went into operation, and generalized, speculative evidence which was neither case specific nor relevant, and which did not address the real issues of the case.

ARGUMENT

1. The Court of Appeals Erred By Ruling that the Delta County Commissioners Could Decide that the Delta County Master Plan is Advisory in Its Entirety and Not Regulatory in Violation of the Dictates of *Bd. of Cnty. Comm'rs v. Conder*, 927 P.2d 1339 (Colo. 1996).

The Court of Appeals erred by ruling that the Delta County Commissioners could have decided that their entire Master Plan is advisory. See *Jardon v. Hostetler*, 13CA1806, at 9-12. The Colorado Supreme Court has provided clear direction that county commissioners may not do so. *Bd. of Cnty. Comm'rs v. Conder*, 927 P.2d 1339 (Colo. 1996); and *Beaver Meadows v. Bd. of Cnty. Comm'rs,* 709 P.2d 928, 936 (Colo. 1985). If the Court of Appeals' decision in this regard is allowed to stand, future Delta County specific developments will no longer be reviewed under the terms of the Delta County Master Plan. Even if the Delta County Commissioners approve a specific development over the objections of the neighbors (which they did in this case), because of the Master Plan compliance provisions contained in Delta County's Regulations, the Delta County Commissioners are required to fashion effective conditions controlling the development to protect neighboring landowners from the development's impacts. The Court of Appeals' decision removes these Master Plan protections in violation of the dictates of *Conder* and its progeny.

If a county land use regulation or state statute contains a Master Plan compliance requirement, provisions contained in such a Master Plan become regulatory, subject only to a specificity analysis required for due process considerations. *Conder* and *Beaver Meadows*, *supra*. In *Conder* and *Beaver Meadows*, the Larimer County Commissioners denied proposed subdivisions based in part upon County Master Plan provisions that had been adopted per the Larimer County Subdivision Regulations. Similarly, in the instant case, the Delta County Regulation for Specific Developments requires compliance with the Delta County Master Plan. Following *Conder*, the District Court below correctly ruled that the Delta County Master Plan provisions were regulatory. The Court of Appeals erred in reversing that ruling.

In *Conder* and in *Beaver Meadows*, the specificity analysis required by the Colorado Supreme Court was focused upon the due process rights of developers. If their proposals are denied based upon Master Plan provisions, the regulation referencing such provisions must have been adopted at public hearings with adequate notice and the Master Plan provisions relied upon must be drafted with sufficient exactitude "to ensure that any action taken by a county in response to a land use proposal will be rational and consistent and that judicial review of that

action will be available and effective." *Conder*, at 1350. The *Conder* court proceeded to define sufficient exactitude:

> The comprehensive land use plan uses terms such as harmony, compatibility, need, and so forth, which are within the ordinary understanding of reasonable people, and which have been approved on appellate review, in the context of a constitutional challenge, in similar circumstances. A person of ordinary intelligence is not required to guess or speculate as to the meaning of these terms.

Conder, at 1350.

In the instant case, the opponents of the development assert that their Master Plan protects them. Opponents of proposed land uses are similarly protected by Master Plan provisions deemed regulatory. *See, e.g.*, *Canyon Area Residents For The Environment v. Bd. of Cnty. Comm'rs of Jefferson County*, 172 P.3d 905 (Colo. App. Div. 2, 2006), a case cited by the Trial Court in its September 5, 2013 Order, at 9, along with *Conder, supra*. In *Canyon Area Residents*, the Jefferson County Commissioners approved a cell tower over the objections of neighboring residents. A different division of the Court of Appeals reversed and remanded to the District Court with directions to remand to the Board of County Commissioners to, *inter alia*, make specific findings required by C.R.S. § 24-67-

104, a P.U.D. statute that requires Master Plan compliance in review of proposed P.U.D. developments.

In the instant case, the neighboring landowners cited Master Plan provisions designed to protect their property interests, *e.g.*:

> **"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.**
>
> **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."**

Delta County Master Plan, at 11, cited by the Trial Court in its September 5, 2013, Order, at 9.[1] These provisions meet the specificity requirement in the above cases. Persons of ordinary intelligence are not required to speculate as to the meaning of the above-quoted terms.

Especially in the unique circumstances of the instant case, where the chicken barn was built prior to final Rule 106(a)(4) review, and the neighbors submitted unrebutted evidence to the Delta County Commissioners of actual adverse health

[1] Other provisions of the Master Plan protect the neighbors' property interests such as: "[R]esidential subdivisions and other types of development adjacent to agricultural operations may have to be denied or required to mitigate adverse impacts on existing agricultural land use." Delta County Master Plan at 5.

impacts from the operating barn, the Delta County Commissioners must be required to specifically address the Master Plan provisions designed to protect the neighbors, to ensure that their actions are rational and consistent, and that judicial review of that action will be available and effective.

That the Delta County's RSD does not require compliance with any specific Master Plan provisions proves nothing. *See Jardon, supra*, at 10. The Larimer County Subdivision regulations and the state PUD statute (C.R.S § 24-67-104(1)(f)) involved in *Conder* and *Beaver Meadows* required only "general conformity with the County's Comprehensive Plan." *Conder, supra*, at 1346.

That the County Master Plan provisions are broadly worded and aspirational proves nothing. *See Jardon, supra*, at 11. In *Conder*, broadly worded and aspirational provisions such as "[c]ompatability with the surrounding area" and "[h]armony with the character of the neighborhood," were approved by the Colorado Supreme Court.

While one can speculate that some provisions of the Delta County Master Plan might conflict, *see Jardon, supra*, at 11, no such conflict was present in the instant case, and such speculation does not permit the Delta County Commissioners to ignore the specific Plan provisions cited to them by the

neighbors. The Delta County Commissioners are required by *Conder* and *Canyon Area Residents* to make specific findings of their analysis of the Master Plan provisions brought to their attention by the neighbors. They are not allowed to avoid this responsibility by conjuring conflicts and concluding the Master Plan is advisory only.

The Court of Appeals erred in concluding that the Delta County Commissioners could reasonably conclude that their Master Plan in its entirety was advisory only. There can be no reasonable basis for the Delta County Commissioners to interpret *Conder* to allow them to sidestep their obligation to address the neighbors' references to specific Master Plan provisions designed to protect them, thus eliminating the neighbors' rights to meaningful Rule 106(a)(4) review of the Delta County Commissioners' actions.

2. The Court of Appeals Erred in not Ruling on This Matter in Conformity With *Churchill V. The University of Colorado*.

In *Churchill v. University of Colorado*, 285 P. 3d 986 (Colo. 2012), the Colorado Supreme Court upheld absolute judicial immunity for the Board of Regents of the University of Colorado, and in so doing, held that review under Rule 106(a)(4) was Churchill's adequate state remedy to correct alleged abuses of

the Board of Regents, including alleged violation of his constitutional rights and bias of the Board. Churchill argued, as did the Court of Appeals in *Jardon*, that almost any evidence was sufficient to support the administrative agency's decision under the deferential standard set forth in *Bd. of Cnty. Comm'rs v. Odell*, 920 P. 2d 48 (Colo. 1996). Thus, Churchill argued that Rule 106(a)(4) review was not an adequate state remedy under the U.S. Supreme Court standard in *Cleavinger v. Saxner*, 474 U.S. 193, 202, 106 S. Ct. 496, 88 L.Ed.2d 507 (1985). The Court said: "Churchill contends that this standard strongly shifts a presumption of legality in the Regent's favor because all they would need to prove at a C.R.C.P. 106(a)(4) review hearing is that their decision was based on some credible evidence." *Churchill*, at 1006.

The Colorado Supreme Court expressly rejected this argument and said: "Although it is true that a lack of evidence is one basis for a court reviewing an administrative decision under C.R.C.P. 106(a)(4) to find that a decision was arbitrary and capricious, it is not the only basis." *Churchill*, at 1006. In order for Rule 106(a)(4) to be an adequate state remedy, a court must review a case *de novo* for illegality and not just rely on a deferential standard as to the evidence.

Here, Plaintiffs demonstrated by competent, unrebutted evidence that the operation of the chicken barn was making them sick. Twenty-two health complaints were filed with the County, which it refused to investigate. Drs. John and Heidi Marlin, neighbors downwind to the east of the chicken farm, complained of respiratory problems. Neighbors Raymond, Cool, Stacy and Robinsong submitted medical records to support their claims of injury. Ms. Raymond's doctors submitted a letter regarding her health condition.

The evidence cited by the Court of Appeals, including air quality testing, Georgia industry pamphlets, and Midwestern experts, was insubstantial evidence that the Trial Court rejected because they did not address the problems created by operation of this chicken farm. *See Jardon v. Hostetler*, 13CA1806, at 14-15. Reliance on this evidence did not make Rule 106(a)(4) review an adequate state remedy as required by *Churchill*. Where, as here, there was no substantial evidence in the record to meet the real issues of the case, then the Court must determine, as did the Trial Court, that the land use permits were issued arbitrarily and capriciously.

RESPECTFULLY SUBMITTED this 30th day of October, 2014.

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

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 40, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

Plaintiffs-Appellees' Petition for Rehearing complies with C.A.R. 40: it contains 1792 words.

/s/ Earl G. Rhodes (original signature on file)
Earl G. Rhodes, #6723
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Plaintiffs-Appellees' Petition for Rehearing was served this 30th day of October, 2014, via the Integrated Colorado Courts E-Filing System to the following:

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