DISTRICT COURT, DELTA COUNTY, COLORADO Court Address: 501 Palmer Street, Suite 338, Delta, CO 81416 Phone Number: (970) 874-6280 Plaintiffs: Travis Jardon; Corrine Holder; Susan Raymond; Mark Cool; and Andrea Robinsong; v. Defendants: Delta County Board of County Commissioners; Edwin Hostetler; Eileen Hostetler; Greg Hostetler; Carmen Hostetler; Anna Hostetler; and Roland Hostetler Attorney for the Plaintiffs: Earl G. Rhodes, No. 6723 743 Horizon Court, Suite 200 Grand Junction, CO 81506 Phone Number: (970) 242-2645 Fax Number: (970) 241-5719 earl@youngelaw.com	DRAFT: 8/26/ 2013 AM ▲ COURT USE ONLY ▲ Case Number: 2012 CV 314 Division: Courtroom: Hon. J. Steven Patrick
PLAINTIFFS' REPLY BRIEF	

Plaintiffs, by and through counsel of record, hereby file their Reply Brief in support of their Rule 106(a)(4) claim as follows:

INTRODUCTION

In its July 5, 2012 order, the Court found there was no competent evidence in the record as to four key issues and invalidated the Board of County Commissioner's (hereinafter "the Board," "BOCC," or "the County") approval of the subject land use permits. Since then, neither the County nor the Applicants have put competent evidence in the record to address these four issues. The County's Brief is just more proof that the "fair and impartial decision-maker" is allied with the Applicants. Defendants Hostetlers attack Dr. Raymond's character and tout their alleged expert opinions. This Reply Brief responds to the Defendants' Answer Briefs and proves

that there is no competent evidence in the record to support the County's approval of the subject land use decisions.

The record has been certified in this matter. Plaintiffs filed their Opening Brief in this matter on March 12, 2013. Plaintiffs filed a Supplemental Opening Brief in this matter on July 1, 2013. The Defendants filed their Answer Briefs on August 5, 2013, and this argument is Plaintiffs' Reply Brief. Upon the filing of this Brief, this matter will be fully briefed. Plaintiffs are not requesting oral argument in this matter.

LEGAL STANDARD OF REVIEW

A Court review must set aside decisions based on a record which contains "no competent evidence" supporting the decision. *Board of County Commissioners v. Odell*, 920 P.2d 48, 50 (Colo. 1996). Courts have determined that competent evidence must be "substantial." *Colorado Municipal League vs. Mountain States Telephone and Telegraph Company*, 759 P. 2d 40, 44 (Colo. 1988). Defendants focus their argument on "conflicting evidence." But before evidence can be conflicting, Defendants must present competent and substantial evidence. The substantial evidence standards requires that there be more than merely "some evidence and some particulars to support the administrative body's decision." *Burns v. Board of Assessment Appeals of State of Colorado*, 820 P. 2d 1175, 1176 (Colo. App. 1991); *See also* 117^{TH} *Associates v. Jefferson County*, 811 P. 2d 461, 463 (Colo. App. 1991).

Hostetlers admit that under the Regulation for Specific Developments ("RSD") they have the burden of proof of "demonstrating compliance with these regulations". **RSD Sec.8, R0775** ("The burden of demonstrating compliance with these regulations, ..., rests with the applicant"). **Hostetler Brief pg. 9**. Yet Hostetlers assert that the neighbors have the "burden of proof" to

show that the hen-laying operation is not compatible with the neighborhood. **Hostetler Brief pg. 9**. In support of this, they reference the burden of proof section in the Master Plan. Hostetler's assertion is based on the language of the Master Plan which assumes that a use is compatible, "unless the use would adversely impact neighboring property owners or residents, or contradict the goals and objectives of the Master Plan. " **Delta County Master Plan, Policies A. 1. Burden of Proof. R0768**. Plaintiffs assert that the evidence in the record is overwhelming that the hen-laying operation is adversely impacting the neighbors. Plaintiffs further assert that the evidence in the record shows that the hen-laying operation has had a substantial impact on neighbor's property values. Therefore, under the "unless" standard from the Master Plan, the Applicants had the burden of proof in the administrative proceeding.

As a legal matter, and regardless of the evidence in the record, the statement of the burden of proof in the RSD controls over any language in the Master Plan. **Section8. R0775**. The RSD was adopted by the County and has the force of law. The RSD, which was adopted after the Master Plan, incorporates the Master Plan as a standard for compatibility. **R0789.** There is no reference in the RSD for the Master Plan provision as to burden of proof controlling over the express provisions of the RSD. Even so, where different sections of regulations are in apparent conflict, the Court gives preference to later adopted regulations to decide what is paramount. *Jenkins v. Panama Canal Ry. Co.*, 208 P. 3d 238 (Colo. 2009). Clearly, the burden is on the Applicants, as it should be, to show compatibility with the neighborhood.

ARGUMENT

1. Defendants' reliance on collateral issues are a smoke screen to divert the Court from the merits of the case.

A. AFOs/CAFOs

There is much discussion in the Defendants' Briefs about distinction between AFO's and CAFO's and how this affects the merits of the case. The RSD regulates all confined animal operations and does not refer to AFO's or CAFO's. R-779. An "AFO", according to the Colorado State Department of Public Health and Environment ("CDPHE"), Water Quality Control Division, for water quality regulation purposes, is an Animal Feeding Operation where animals are kept and raised in confined situations for 45 days or more in any 12 month period. 5 CCR 1002-81. A CAFO is an AFO that meets the definition of a confined animal operation that has a significant impact on water quality. **R0170**. CDPHE, which uses the CAFO definition, only regulates water pollution as to animal feeding operations. **R0170**. CDPHE does not regulate any other public health nuisance conditions. **R0170**. As Dr. Francis Lazear points out in her letter of April 30, 2013, even smaller facilities can be just as dangerous as a larger operation, especially if the setback is not adequate. **R1008**. Thus, the AFO/CAFO distinction is not helpful in determining the impact of the hen-laying operation on its neighbors.

B. Dr. Raymond's Testimony is Competent and Overwhelming

Dr. Raymond is a key witness in these proceedings, and her testimony and exhibits demonstrate that the subject land use applications should be denied for the four reasons set forth by the Court in its order of July 5, 2012. Defendants attack Dr. Raymond because she is so credible, and her personal and scientific evidence refutes any argument that the hen-laying operation is not a health hazard to its neighbors. Dr. Raymond is sick because of the hen-laying operations, and her property, once very valuable, has suffered a dramatic decline in value. **R0526-0527, R0559-0576, R0526-0527, R0557-0558, R0336-0339, R0773**. Defendants apparently wish

that Dr. Raymond's voice be silenced so that the hen-laying operations can continue to make her, her employees, and her neighbors sick.

Dr. Raymond's testimony can be substantiated in various ways. Most important is the objective evidence that supports her testimony. Defendants fail to address photographs of jars of flies and a jar of down feathers in the record that were blown onto her property and from the hen-laying operation. **R0916, R0927-0932, R0507, R0541, R0542, R0732, R0733**. Mr. Lakin stated downstream tests revealed feathers. **R0121**. Dr. Raymond's employees and clients are getting sick. **R0496, R0513, R0517, R0543**. Animals on her property are sick from the particulates sent out by the hen-laying operation. **R0502, R0504, R0505, R0440**. Her neighbor, Mr. Cool, also has feathers and white dust on his property from the hen-laying operation. **R0366, R0499-0500**. Dr. Raymond's testimony is supported by and consistent with expert opinions submitted in this case. **R0988-0994, R0998-1001, R1004-1007, R1008-1010, R1014-1017**. This Court considered Dr. Raymond's extensive testimony when it ruled against the County in the first case. Even the BOCC conceded that her testimony was credible when it approved of the new condition as to air pollution in its May 28, 2013 ruling. **R1089**.

The Defendants' attacks appear borne of desperation. For example, in the County's Answer Brief, County Attorney Knight improperly interjects her own comments about the effects of the weather, and other person's health problems to show that Dr. Raymond's health problems are not related to the hen-laying operations. **County Brief pg. 9**. Ms. Knight's personal observations are not in the record and should be stricken as outside the record. C.R.C.P. 106 (a)(4)(I). *Lieb v. Trimble*, 183 P. 3d 702 (Colo. App. 2008). The County then asserts that the operations on the Raymond ranch generate these same sort of pathogens. **County Brief pg. 17.**

The County does not cite to, nor is there anything in the record, to support the spurious allegations that Dr. Raymond's ranch is a source of pollution, including any complaints about health, noise, odor or pollution in her 29 years of operation. Again, the County's assertions should be stricken. C.R.C.P. 106(a)(4)(I).

Hostetlers, in their Answer Brief, state that "Raymond has even let religious discrimination slip into her written comments opposing the Applicants." **Hostetler Brief pg. 19**. Dr. Raymond references "Mennonite vehicles" in two of her comments. **R0438, R0979**. This is a descriptive and not a pejorative term. Hostetlers further imply that she said that the County should be concerned about Mennonites. In fact she said " With the Hotchkiss Middle School on the pathway of the transportation of the manure to Thomas Kay's (key player in the soil health initiative and whose partner is Richard Blosser, a Mennonite) via the middle of the town of Hotchkiss, should you not be concerned?" **R0979**. It is clear that Dr. Raymond is concerned about public health and not about the Applicants. Hostetlers' assertions are a clear distortion on their part of what Dr. Raymond said. Hostetlers emphasis on this is an attempt to unfairly demean Dr. Raymond and change the focus of the proceeding.

Hostetlers assert that Dr. Raymond suffers from conflict of interest in her participation in the Leroux Creek Advisory Planning Committee. **Hostetler Brief pg. 19**. She was a volunteer and the committee's activities were purely advisory. Under the County regulations her participation was not a conflict of interest. She has a right to participate in public proceedings just like anyone else.

C. The Delta County Master Plan, as Referenced by the RSD, Governs These Proceedings and Requires Absolute Protection of the Neighbors.

On page 7 of the Hostetler Brief, the Hostetlers object to this Court's ruling of July 5, 2012, that a specific development application must be in compliance with the County Master Plan. Hostetlers assert that they have no obligation to meet the specific requirements of the Master Plan as to their Land Use Applications.

First, Plaintiffs assert that this objection is not timely and was not presented to the County in any of the public hearings. The Hostetlers were parties to this proceeding before the July 5, 2012 Order. The Plaintiffs in their Opening and Reply Briefs clearly argued that the Master Plan was regulatory and not advisory. **2011 CV 282, Opening and Reply Briefs.** The County, in its Answer Brief, admitted the same. **2011 CV 282, County Answer Brief**. The Hostetlers were silent through this whole process and made no objection as to these arguments. The Hostetlers are precluded by the doctrine of claim preclusion from litigating again issues which were or could have been raised in the prior suit which involved the same parties. *Rantz v. Kaufman*, 109 P. 3d 132 (Colo. 2005). Therefore, their objection is untimely and cannot be considered.

Secondly, the Hostetlers made no record in any of the public hearings asserting that the Master Plan was advisory only. As a matter of administrative law, legal issues cannot be raised for a first time on appeal. *CTS Investments, LLC v. Garfield County Board of Equalization*, ___ P. 3d ____, 2013 WL 979357, para. 14 (Colo. App. 2013); *see also Robinson v. Colo. State Lott. Div.*, 179 P. 3d 998, 1008 (Colo. 2008). Defendants had an obligation to first present their arguments to the administrative agency before these issues can be raised on appeal. For the above reasons, the Hostetlers' objection at page 7 of their Answer Brief is not proper and must be disregarded.

For its part, the County also attempts to distance itself from its own Master Plan and persuade the Court that the Delta County Master Plan is not regulatory. **County Brief pgs. 23-26.**

This argument must fail for several reasons. The County adopted the RSD with knowledge of its contents. **R0773.** The RSD clearly requires that specific developments be consistent with the Master Plan. **R0773, R0789.** The County is estopped from asserting that its own regulations are invalid because they are too vague to enforce. The County never asserted that the Master Plan was too vague to enforce, and the Plaintiffs have relied on this representation. *V Bar Ranch LLC v. Cotten*, 233 P. 3d 1200 (Colo. 2010); *see also Bentley v. Valco*, 741 P. 2d 1266, 1269 (Colo. App. 1987). If the County had concerns about the Master Plan as regulatory, it should not have adopted them as part of the RSD. Secondly, the County was a party to this case in Civil Action No. 2011 CV 282. It never raised this issue before the Court. The County is barred by the doctrine of claim preclusion from arguing the invalidity of the Court's July 5, 2012 Order. *Rantz v. Kaufman*, 109 P. 3d 132 (Colo. 2005). Nor did it raise this issue in its own administrative hearings. Further, the County should have raised this issue in the public hearings so that the Plaintiffs would have the opportunity to respond. Colorado Law is clear that legal issues need to be first raised before the administrative body before they can be addressed on appeal. *CTS Investments, LLC*, ____P. 3d ___, 2013 WL 979357, para. 14; *see also Robinson v. Colo. State Lott. Div.*, 179 P. 3d 998, 1008 (Colo. 2008). The County cannot now argue that its regulations are invalid and therefore, by this means, uphold the Land Use Permit to the Applicants.

It is correct that the *Condor* case requires that the "the [Master Plan] provisions that the County seeks to enforce must be sufficiently specific 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. " 927 P. 2d at 1348. The court in *Condor* continues:

> "Still, the specificity requirement, "properly applied, does not undercut a desirable degree of flexibility." Tri-State, 647 P.2d at 678. In this vein, we have approved broad criteria such as "[c]ompatability with the surrounding area" and "[h]armony with the character of the neighborhood" when applied in conjunction with more specific criteria relating to utilities and traffic."

Id.

The County is not arguing that the provisions of the Delta County Master Plan are not specific enough that an Applicant is denied due process if his or her application is denied, but the County is now arguing that the provisions are contradictory and therefore incapable of compliance. This is a novel yet specious argument and requires a response.

The significant Master Plan provision that the Plaintiffs believe the Applicants and the County have violated is found on page 11 of the Delta County Master Plan:

> "B. 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."

The above specific statement is a Master Plan policy under the general goal of Protection of Private Property Rights. The above statement is specific enough that the language is within the ordinary understanding of reasonable people. It certainly is as specific as "harmony with the character of the neighborhood," that the Colorado Supreme Court finds specific enough. There is nothing esoteric about the statement. The evidence of adverse impact is voluminous and much of it uncontroverted. The record is replete with evidence that the County's approvals of the hen-laying operations violate this specific regulatory statement.

In a low blow, the County is now arguing that the goals of the Master Plan may be contradictory and therefore should not be regulatory. **County Brief pg. 23-26.** Even if one could conjure such a conflict, it is not so in the instant action. Just because the land use proposed is an agricultural use that the Master Plan promotes, the RSD, adopted after the Master Plan and

explicitly in furtherance of it, supports the goal of encouraging agriculture by exempting all forms of agriculture except slaughter houses and confined animal operations. These two uses require review and regulation in order to protect neighboring landowners. The RSD provisions that address confined animal operations are a perfect fit with these two Master Plan policies: it encourages agriculture (by exempting all but the two most noxious agriculture uses), yet protects neighbors from being damaged by requiring that the neighbors, their properties and property values not be harmed. **R0774.**

All of the arguments about the chicken barns being just another form of agriculture (the "Ag is Ag" argument) which the Master Plan promotes, the arguments that attempt to cast the barns as "compatible" because they are a form of agriculture, and all the arguments about the barns being or not being CAFO's, AFO's, industrial agriculture, etc., are all diversions. The RSD does not use any of these terms; it does use the term "confined animal operation" which not even the Applicants argue with.

Simply put, confined animal operations, whether they are the chicken barns in the instant action, or whether they are CAFO's, AFO's, or industrial agriculture or not, may not "physically damage or adversely impact the property or property value of neighboring landowners." It is that simple. The Commissioners' actions in approving the chicken barns in this case, even with the ineffective mitigation measures, still do not comply with the Master Plan provision requiring protection of the neighbors, meaning that they have acted arbitrarily by not enforcing their own regulations and have violated the neighbors' property rights in the process. The most recent condition adopted on May 28, 2013, while demonstrating the County's delayed acceptance of at least the fact of air pollution injury to the neighbors from its past approvals of the "barns," still

violates the Master Plan provision which is absolute: confined animal operations may not injure the neighbors. **R1089**. The "no adverse impact" Master Plan provision does not imply: "confined animal operations may operate as long as they reduce their air pollution to unspecified levels." No, the Master Plan and the RSD require that either the conditions absolutely protect the neighbors from adverse impacts or the use not be permitted to exist.

2. There is No Record Support that the Hen-laying Operations are Compatible with the Character of the Neighborhood as Required by to the Delta County Master Plan.

Article VI Section 2(A) of the RSD requires compatibility with adjacent land uses and states "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." **Id. (*Emphasis added*). R0789, Article VI, Section 1.** The Trial Court has held that the Delta County Master Plan is regulatory, and not advisory. **Trial Court Order of July 5, 2012 at page 9**. The only agricultural operations which require a special use permit under the RSD are confined animal operations or slaughterhouses. **R0774, R0779.** This is the first confined animal operation to be subject to County review under the RSD regulations.

All parties agree that the neighborhoods are rural residential. **R0246, R0248, R0250, R0261, R0370, R0377, R0409, R0840**. Therefore, one of the questions for the BOCC and the Court is whether the hen-laying operations are compatible with these existing neighborhoods. In regard to this, the County, through its regulations, has already pre-determined that these confined animal operations need more scrutiny as to compatibility than the other uses in the neighborhood.

R0779. The other uses do not require a special use permit. The Defendants' argument that the other uses in the neighborhood are agricultural means nothing, because confined animal operations require a special use permit, and the other agricultural operations do not. Under the County regulations the other uses in the neighborhood are a less intense type of agriculture, which do not require a special use permit. There are no other hen-laying operations in the neighborhoods. No other activities on Powell Mesa or Redlands Mesa require RSD permits. The RSD states that its goal is to preserve the character of existing neighborhoods, and the County has to follow this guideline in its decision-making. **R0773.**

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, since it requires special review. **R0779**. Each of the Applicants proposed using a 400 foot x 50 foot building which contains access to a 335 foot x 90 foot fenced area outside the area to house 15,000 hen-laying operation. **Trial Court Order pg.2.** This confined animal operation equals 183 animal units ("AU") on less than ½ acre. 5 CCR 1002-8. In comparison, on the Raymond property across the road, there are 22 horses (44 animal units) on 60 acres. **R0440, R0732**. As to intensity of use this is 366 AU's per acre on the Hostetler property to .73 AU's per acre on the Raymond property. This ratio is 500 to 1.

Defendants argue compatibility but present no competent testimony to dispute that the hen-laying operation generates a "considerable plume of particulates and biological components." **R0122**. Nordstrom states in his August 8, 2012 memo that dust was billowing from the hen-laying operation. **R0818**. The Raymond videos prove this. **See CD #1, CD #2, and CD #4**. In its latest

approval resolution, The County has now required the Applicants "to evaluate the air pollution emissions" coming from the facility. **R1089**.

Defendants presented no competent evidence to dispute that large amounts of harmful particulate matter were present in the air tested by Plateau, Inc. **R0114-0140, R0992-0993, R1000-1002, R1010, R0120-0122**. These included ammonia, a tremendous amount of spores, and many bacteria. **R1000-1002, R1072-1074**. In addition, the testing results showed the huge quantity of bacteria, mold, fungi and other toxins identified in the reports. **R0992, R1001-1002, R1010, R0114, R0115**. Mr. Lakin admits that some components found in the air test are potentially hazardous to people and the exposure to the neighbors is undefined. **R0122**. Mr. Lakin, in his second report, points out a comparison with a rural residence where harm occurred in the Upper Gunnison River Valley where there was an elevated fungal spore level (over 5,000 spores per cubic meter), which were found with a winter time cattle feeding operation several miles upwind. **R0115**. In this case, the adjoining neighbors are substantially closer than 1000 feet to a 24 hour a day operation, and the spore count found by Mr. Lakin from the Hostetler operation is well in excess of 15,000 per cubic meter." Due to the high level of spores, an estimation procedure was used." **R0132**.

Defendants' only response to this is that the barn is good looking and the use is agricultural, and therefore the same as its neighbors. **County Brief pg. 13, Hostetler Brief pg. 12, 16-17.** Defendants have failed to present competent evidence that the Plateau Report is accurate, that the scientific evidence submitted by the Plaintiffs as to health risks to the neighbors is wrong, or that there are other uses in the neighborhood which are similarly intense and give off the pollution of this hen-laying operation.

The Defendants reliance on the comments from other government agencies is misplaced. CDPHE jurisdiction is limited to water, and it has no jurisdiction over air pollution. **R0170**. Also, it is inaccurate to say that CDPHE staff did not have concerns about the Hostetler operations. Ms. Rolfe in her letter of May 23, 2011 issued a 3 page Stormwater Inspection Report detailing numerous discrepancies found during a site visit. **R0174-0178**. Discrepancies included a Stormwater Management Plan not containing all the required components, ground surface disturbances not identified, and multiple run-off and drainage BMP (best management practices) not implemented or being used. **R0174-0178**.

A use cannot be compatible with its neighbors if it is adversely impacting their health. Defendants admit the neighbors are sick, but challenge the causation of their illnesses. **County Brief pg. 8, Hostetler Brief pg. 18**. The health map provided by Dr. Raymond shows that the health concerns are all from people predominantly downwind from the Hostetler operation. **R0933**. View the health map in conjunction with the wind graph and description, which shows direction of the prevailing winds throughout the day and night to prove that those downwind from the facility are the ones with health concerns. **R0624, R0729-0731**. Defendants assert that Plaintiffs must prove the causal link. **County Brief pg. 9, Hostetler Brief pg. 18**. In fact, the RSD puts the burden of proof on the Applicants to show compatibility. The Applicants have made no showing that the Health Map is incorrect, or that the Wind graph is inaccurate. Plaintiffs demanded that the County shut down the hen-laying operations because of the overwhelming proof of injury to the neighbors. The County has declined to do so. Dr. Fran Lazear says timing of the illness cluster should be a red flag and the operation should be shut down to see if illnesses abate over

time. **R1009**. The County cannot now argue lack of proof based on the scientific method, when it is the County that has prevented the neighbors from proving their case.

Defendants assert the hen-laying operation is compatible, but fail to present competent evidence that the county roads to the site are adequate for this industrial, agricultural use. The Master Plan states that the quality of the infrastructure is an important consideration as to the finding of compatibility. **R0766, R0767**. The record shows that before the start of the hen-laying operation, semi-trailer truck traffic in the neighborhood was almost nonexistent. **R0366, R0468**. Now there is semi-trailer truck traffic to and from the hen-laying operations at all hours. **R0522, R0524, R0909, R0925, R0366, R0438**. No semi-truck traffic has ever shared the private drive on Redlands Mesa. **R0349-0353.** Whereas the neighbors use their land to generate food for humans and animals, all of the food for the chickens must be brought in by truck, the eggs must go out by truck, and manure must be trucked out. **R0744.**

Powell Mesa Road, which leads to Powell Mesa, is inadequate to handle truck traffic of the Applicants. **R0909**. The trucks cannot even drive up the road to the Hostetler location, but must back up a steep section because the turns are too tight. **R0524**. When the chickens were delivered, a delivery truck took out part of a fence because the road was too narrow. **R0366**. As to Redlands Mesa, the private access road is too narrow for the truck traffic associated with the hen-laying operation. **R0349**. Hostetler asserts they are working now to meet these requirements. **Hostetler Brief pg. 20**. This is an admission that there is no evidence in the record of the adequacy of the roads to meet the needs of their confined animal operation. Nor that these requirements will ever be met.

Defendants' reliance on Ms. Schmidt to show compatibility is misplaced. **R0549-0550.** Ms. Schmidt observed that the Hostetler barn was pleasing to look at. **R0549-0550.** She does not discuss the hen-laying operation that goes on inside it or the plume of pollutants that are discharged outside. If this building did not house a hen-laying operation, and if the land use issue was the aesthetics of the barn exterior, then the observation that the barn is pleasing to look at might be relevant. But it is the adverse effects of the use of the barn that are at issue here.

3. There is No Competent Evidence to Show that the Chicken Barns Have not Adversely Impacted the Neighbor's Property Values

Defendants assert that there is substantial evidence in the record that the real estate values of the adjoining properties will not substantially decline because of the hen-laying operations. **Hostetler Brief pgs 20-24, County Brief pgs 11-14.** The Defendants are critical of the testimony presented by two of the Plaintiffs' experts, Dr. John Kilpatrick and Pam Sant, and assert that the evidence Defendants have presented is competent. Plaintiffs deny this assertion and by the following show that the Plaintiffs' testimony is very substantial and that the Defendants' testimony is not competent.

(a) Plaintiffs' Evidence of Market Diminution is Neighboring Properties is Competent and Substantial.

Dr. John Kilpatrick is a national expert as to the adverse economic consequences of confined animal operations. **R0559.** He has a Ph.D. in economics and is licensed in Colorado as a Certified General Appraiser. **R0559.** The report is site specific to this case. **R0559.** He cites at least three (3) Colorado studies in his report. **R0564, R0570, R0572.** 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. " **R0575**. "This type of facility constitutes an incurable, external obsolescence on the surrounding and nearby residences." **R0575**. While there are proposals for potential mitigation, these have not proven to be effective and may not even be feasible." **R0575**.

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. **R0557**. She has appraised 100 hundred rural properties in Delta County alone. **R0557**. 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." **R0557**. She then states: "The degree of negative impact cannot be determined without more specific research into similar properties within similar situations. I would anticipate the negative loss could be significant based on the videos and pictures provided." **R0558** (*Emphasis added*). The Defendants have misquoted Ms. Sant and deleted the words "the degree of" from their citations in their briefs. **County Brief pg 13**. There is no question that she is expressing an opinion that there will be a substantial impact on property values from the hen-laying operations. Her only hesitation, which is based upon more inquiry, is the extent of that negative impact. **R0558**.

(b) Defendants do Not Point to any Competent Evidence in the Record to Support the Position of No Market Diminution

Defendants rely upon the letter from Ms. Christie Schmidt as substantial evidence that the property values on the adjoining properties to the hen-laying operations will not decline. **Hostetler Brief pg. 20,21; County Brief pg. 13**. First, Ms. Schmidt is not an appraiser. Colorado law

makes clear that a real estate agent opinion of value cannot be represented as an appraisal and cannot be used for purposes of obtaining financing. **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.**R0549-0550.** She did not cite a single, similar situation on which to base her comments. **R0549-0550**.

Ms. Schmidt based her opinion solely on the appearance of the Hostetler property and surrounding properties. Ms. Schmidt only once mentions "chicken facility" in her letter, and neglects to explain that the facility houses 15,000 chickens. **R0549**. She also fails to address the nuisance issues typically associated with confined animal operations that were the subject of the numerous complaints by surrounding neighbors. She simply stated that she observed "no smell or dust at the time I viewed the facility." **R0550**. Thus, she admits to not having seen the facility when "dust was observed billowing from the henhouse facility backlit by the setting sun," Mr. Nordstrom, or as stated by Mr. Lakin in the Air Monitoring report, "In general, it can be stated that the facility generates a considerable plume of particulates and biological components. Potentially, some of these components may be hazardous to certain persons." **R0818, R0122**. This demonstrates how vacuous Ms. Schmidt's opinion is. Her opinion clearly cannot be considered competent and any credence attributed to it as either competent, or conflicting, by the Commissioners is, in and of itself, arbitrary and capricious. Lastly, Ms. Schmidt has a financial interest in this matter. Ms. Schmidt's former business partner is married to Rod Hall, who is a business partner of the Applicants. **R0433**.

The Defendants attempt to focus the Court on the statements of Ms. Cathy Smith as credible evidence that the hen-laying operation is not harmful to the neighbors' property values.

County Brief pg. 13-14; Hostetler Brief pg. 22. Ms. Smith is a real estate agent with Coldwell Banker Realty in Hotchkiss, Colorado, which is the same agency that represented the owner of the Redlands Mesa property purchased by Defendants Rocky Mountain Layers. She, like Ms. Schmidt, is not an appraiser. **R0267.** Ms. Smith's statement as to the value of the Peet property is not based on sales, but rather offers. The record directly contradicts her statements in regard to this property. Dan Bolton said he had not proceeded an offer to purchase the Peet property because of a decrease of property values connected to the hen-laying operation. **R0347.** Mr. Knapp, husband of Ms. Peet, called Dr. Raymond and told her to take her Powell Mesa chicken farm videos off of YouTube, because it was ruining the sale of his property. **R0439.** Ms. Smith makes no showing that information about failed offers is accepted by real estate agents or any group as helpful information about market values of real estate.

Moreover, Ms. Smith has an obvious bias against Dr. Raymond. Her characterization of Dr. Raymond is grossly inaccurate. Ms. Smith suggests Dr. Raymond sues her neighbors. **R0267.** Before the 2011 action, she had not been a plaintiff or defendant in a district court, civil action for many years.

Defendant Hostetler asserts that Steve Harper misunderstands the concept of "incurable external obsolescence." **Hostetler Brief pg. 22.** Mr. Harper's understanding of the concept is not at issue here. What is important is that Dr. Kilpatrick, the Colorado appraiser and national expert, understands this concept which is addressed in his letter. Dr. Kilpatrick describes "incurable external obsolescence" as an external factor which the affected landowners cannot control. **R0575.** Dr. Kilpatrick notes that mitigation efforts have not proven effective and may not be feasible, and thus the damage to the neighbors is on-going and highly detrimental. **R0575.**

As one of Defendants' witnesses, Mr. Bittel's own statements about the concept of incurable external obsolescence quoted on page 23 of the Hostetlers' Answer Brief supports Plaintiffs' assertions. **R0555.** Mr. Bittel's understanding implies injury and incompatibility because he refers to possible "cures" to the obsolescence. If there weren't an obsolescence, you wouldn't need a cure. Defendants tout Mr. Bittel's understanding to argue that it is not impossible to cure the external obsolescence, that it still could be "beneficial" for Susan Raymond to somehow "cure" the fact that a polluting chicken barn now lies 900 feet from her home, diminishing her property value -- only that the costs of her "cure" may outweigh the benefit received. As Mr. Harper pointed out at the September, 2012 hearing, Dr. Raymond could build a dome over her acreage to prevent the pollution from entering, but the cost of the dome would surely outweigh the economic benefit she would realize in an effort to protect her property value. **R0749**. Her "cure" is not impossible, just so impractical as to be ludicrous, and perhaps more importantly, the polluting neighbor has now required her to bear this cost. This is precisely why Delta County enacted the RSD: regulations that give priority to protecting existing landowners -- protecting them from having such costs thrust upon them by a neighbor who decides to install an obnoxious, polluting use.

Defendants' reliance on Mr. Blean is misplaced. This 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 area. **Trial court Order of July 5, 2012 pg. 10**. Mr. Blean has not made any showing that the concerns of the Court have been addressed. **R0544**.

4. There is No Competent Evidence in the Record Support that the Conditions of Approval and the Undertakings of the Applicants are Sufficient to Address the Concerns Identified in the Record.

(a) Defendants Proffer Evidence Regarding Conditions is Not Competent

Defendant Hostetler puts forth the statements of Dr. Koelkebeck as proof that the conditions of the land use approval adequately address the neighbors' concerns. **Hostetler Brief pg. 24**. Just like Mr. Blean, Dr. Koelkebeck's experience is in Illinois, where climate conditions are dramatically different from Western Colorado. He admits that in Illinois a confined animal operation requires a greater setback, which is not present here. **R0602**. He also admits that the climate is much drier in Western Colorado. Dr. Koelkebeck does not represent that he has reviewed the evidence of the case, or considered the lay and expert opinions which are in the record that the hen-laying operation is making the neighbors sick. 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 emissions of the hen-laying operation, nor require monitoring and testing of air and water pollution. **R0601-0602**. Given the lack of foundation and the quality of the comments, Dr. Koelkebeck's comments are not competent and should not be considered.

The Defendants also point to comments made by Dr. Dwaine Bundy that the conditions added in response to Plaintiffs' concerns "go above and beyond operations of this size of operation in other locations in state and in other states." **R0599 (Hostetlers cited R0509, but it should have been R0599**). Like Mr. Blean, Dr. Bundy works in the Midwest. **R0600**. Dr. Bundy is an Agricultural Engineer in Iowa presently consulting in the area of light frame building structures, odors, and ventilation systems. **R0600**. He offers only generalizations, repeatedly referring to "other locations" and "other states" throughout his letter with no substantiating references or

examples. **R0597-0599**. There is no indication that he has seen this hen-laying operation, or that he has considered the evidence in the record that this hen-laying operation is letting loose a stream of pollution. **R0818**. Dr. Bundy makes three assertions that must disqualify him as credible. First, he states "Poultry odors by most people are not considered to be obnoxious in smell." **R0598.** Second, "Air Quality - ambient air quality in the community from a facility are not high enough to present health issues." And third, "Disease Transmission – disease transmission from layer hen to humans is not considered to be an issue." **R0599**. These statements simply fly in the face of universally accepted studies and the reports of Plaintiffs' experts, and what is actually occurring at the Hostetler facility. **R0989-0994, R0998-1002, R1008-1010, R1011-1017, R1021-1023**. Dr. Bundy's comments display his lack of currency with poultry operations in general, and total lack of familiarity with the Hostetler hen-laying operation.

Mr. Hammon is another witness that the Defendants cite as proof that the conditions of approval by the county are sufficient to protect the neighbors. **County Brief pg. 17; Hostetler Brief pg. 26**. The fly inspection was done at the invitation of Mr. Hostetler. **R0605**. After his inspection, Mr. Hammon stated: I suggested that these tapes be dated and kept as reference." **R0606**. No conclusions can be made about the amount of flies without knowing how long the fly traps have been in place. Mr. Nordstrom contradicts Mr. Hammon's conclusion about a lack of flies. Mr. Nordstrom noted that "the sticky paper fly traps and the jar with attractant traps were filled with flies." **R0054**. This observation agrees with Dr. Raymond who has photos of full fly sticky tapes on her property and her own jar of flies. **R0930-0931.**

Defendant Hostetler asserts that the comments of Joseph Kropf is credible evidence that the conditions on the land use approval protect the neighbors' interests. **Hostetler Brief pg. 27**. Mr.

Kropf's has a vested interest in these hen-laying operations because he purchases their eggs. **R0610**. His conclusions are not supported by any studies, report, or objective data. No statement of his can be the basis of an informed decision by the County.

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. **County Brief pg. 3; Hostetler Brief pgs. 35-36.** Both Defendants hasten to point out that an additional condition as to air pollution was added on May 28, 2013, and this condition, they assert, will prevent harm to the neighbors. **County Brief pg. 3; Hostetler Brief pg. 35**. Plaintiffs argue that the other conditions have been in effect for a year and half and the stream of pollution from the hen-laying operation has not ceased, people are still getting sick, and everything indicates that property values are going down. The latest condition adds nothing of substance and does not protect the neighbors.

(b) Plaintiffs' Evidence that the Conditions are Ineffective is Competent.

The record contains overwhelming evidence of pollution being blown out of the hen-laying operation by large fans and causing health issues for the neighbors. **R0114-0117, R0118-1040, R0495-0543, R0833, R0999-1001, 1008, see videos: CD #1, CD #2, and CD #4**. The Defendants have not submitted any evidence to contradict this. This evidence of health issues refutes any argument that the conditions imposed by the County are effective, to the extent required by the Master Plan, to prevent harm to the neighbors.

Plaintiffs' experts state and Defendants do not refute that meaningful conditions must contain objective standards as to discharge of pollutants and a clear methodology for collecting information over time as to whether these standards have been met. **R0991, R0999-1001, 1012-**

1015. Neither of these are present in this case. Original Conditions 9(e) and 10(e) provide that Applicants must prepare a management plan " to control the amount of dust and odors produced from the facilities." **R0936, R0944**. This Management Plan contains no standards, nor does it reference any testing to be done at the Applicants expense to find out the amount of emissions from the hen-laying operations. **R0661-0662**.

Both Defendants point to the new condition added on May 28, 2013, when the County again approved these land use permits. **County Brief pg. 3, Hostetler Brief pg. 35**. It reads: (the Applicant) obtain the services of a professional air pollution engineer to evaluate the air pollution emissions and provide a plan for deducing the air emissions from the Facility for (review by the County.)." **R1093**. This is really no different than the original conditions 9 (e) and 10 (e). **R0936, R0944.** Again, there are no objective standards as to the amount of pollution the hen-laying operation can send out to its neighbors and no requirement for periodic testing to see if those standards have been met. How can the county evaluate such a plan when the County has not adopted any standards as to what level of protection the neighbors have from the hen-laying operations, and what the data is that the Applicants, the public, and the County can discuss as to whether those standards have been met? These vague conditions, by their very nature, do not protect the neighbors. Again, the RSD and the Master Plan require no adverse impacts on neighbors. The County's regulations do not permit vague, unenforceable plans to reducer pollution to unspecified levels.

Likewise, the County conditions as to water pollution contain no objective standards and no mechanism as to whether those standards have been met. Plaintiffs' experts pointed this out to the County, and the County has done nothing to strengthen the original conditions. Original

Conditions 9(a) and 10(a) require the Applicants to have "a management plan ....divert clean surface water away from the poultry operation,... decrease the potential for poultry water runoff to enter waters of the state." **R0936, R0944.** Contrary to the statements of Mr. Hendricks, testing has shown that ground water pollution has already occurred at site #3, just southwest of the facility location. **R0182, R0381, R0108, R0141.** The County condition does not contain objective standards as to groundwater pollution and no requirement that periodic testing be done to see if any standards have been exceeded. **R0187-0194, R0936.**

That the Applicants are required to submit a plan to the County means nothing. There is no requirement that the Applicants abide by the plans. The County asserts that so long as the plan is "typed" it is considered professionally prepared. **R0937, R0945.** Although the most recent condition requires professional engineers to submit plans to reduce air pollution emissions, there are no standards stated, while the County's regulations require no adverse impacts.

5. There is No Record Support that the County Staff is Capable of Monitoring the Compliance of the Applicants with the Conditions and Undertakings of the Land Use Permit.

(a) Defendants' Proffered Evidence of Staff Capability is Not Competent

Defendants argue that the County Staff is competent to monitor the hen-laying operations and protect the neighbors from its admitted ill effects. All parties agree that it is the County's responsibility to protect the public health, safety, and welfare. **R0768, R0773, R1093, R1094.** Yet the County has harmed the neighbors by failing to enforce the setback representations of the Applicants. Setbacks are a key issue in this case. If this use were substantially farther back from its neighbors, then it might have been compatible. The Applicants represented that the hen-laying operation would be 1000 feet from the nearest dwelling. **2011 CV 282, R0979-0980.** In fact the

hen-laying operation is 817 feet from the Cool house and 932 feet from the Raymond house. Commissioner Atchley in his comments on May 28, 2013, makes light of this. **R1088.**

(b) Plaintiffs' Evidence of Lack of Staff Capability is Competent and Overwhelming

(1)The County has changed the source of water condition to help the Applicants. **R0935.** The Applicants represented they would build a retention berm and two retention ponds around their facility. **R0189.** The southwest pond was changed with County approval. The County is aware that the east retention pond was also not built, but the County has done nothing about this. **R0071.**

(2) Also, it has changed the obligations of the Applicants by not requiring that technical work be prepared by professionals, but rather only that it be professionally prepared, i.e. typed. **R0937, R0945.**

(3) After the July 5, 2012 decision, Plaintiffs made demand on the County to enforce its land use regulations and suspend the operation of the hen-laying operation until such time that the County had approved the same, but the County refused to enforce its own regulations. **R0619-0623.** This court, in its Supplemental Order of August 7, 2012, said that there was no valid land use permit, but left it up to the County to enforce its own regulations, which it did not do. From July 5, 2012 through October 22, 2012, the Applicants were allowed to continue their use even though they did not have a valid Development Agreement. **R0620.**

(4) The County based its decision of October 22, 2012 on the Plateau Report. **R0755-0756.** The Plateau Report expressly stated that its information and conclusions should not be used without being reviewed by a medical specialist. **R0116-0122.** No medical specialist was hired and the County used the report as the basis for its approval of the subject applications. Even though the methodology was questioned and every attempt to dampen emissions was utilized by the applicant,

for example, only side exhausters (3 fans) were running in general ventilation mode vs. all eleven fans running in tunnel ventilation mode, curtains up not down, misting inside the building, and sawdust applied to the floor prior to the sampling, the results that were obtained by Plateau Engineering from this brief 2 hour snapshot survey were decidedly alarming. Footnote 1. **R1011-1020, R0991-0994, R0979, R0999-1000, R0119, R992, R1003.** But in the continuation of the County's behavior of turning a "blind eye," they chose to ignore the data that their own procured report elucidates and they extracted only favorable comments and generalities to support their decision, such as stating this type of pollution is expected from an operation of this sort. **R0115, R1087, R1088, R0755-0756.**

(5) Although the county has a legal duty to protect the health of its citizens, it has refused conduct a thorough investigation as to the neighbor's health complaints from the Hostetlers' operations. **County Brief pgs. 10, 21, R0978, R1009.** The County has never inspected any of the

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Footnote 1:
1. Spores- The facility is generating 26Xs more spores downwind (13,000 spores per cubic meter) vs. upwind (500 spores per cubic meter) R0121
2. Bacteria- The facility easily exceeds 100,000 colony forming units (CFU) per meter downwind to less than 1000 CFU upwind. R0121
3. Particulates- According to the particulate chart (R0138), 289.5 million particles per cubic meter in the 1 micron or less range (add up the .3, .5 and 1 micron columns) were being registered downwind. Mr. Lakin even states "the facility is responsible for generating a significant (in comparison to ambient) number of particles" R120 These smaller particulates can reach the deeper portions of the lungs and cause lung problems R1010, R1004, R1001. "The concentration of fungal and bacterial particles generated from the facility is in the tens of millions per second" R122.

complainant's properties. **R0978**. The County has not even interviewed any of the 27 people who have filed health complaints. **R0978**. Dr. Lazear correctly writes that the County's failure to investigate is unconscionable. **R1009**.

(6) The comments of the County Commissioners indicate they have a lack of understanding of the evidence in the record. In his comments of May 1, 2013, Commissioner Atchley interrupted Dr. Raymond numerous times and told her to only reference the four items identified by the Court Order. **R0960**. Dr. Raymond was discussing the impact of "Yersinia," one of the most potentially pathogenic gram negative lactose-fermenting bacteria, and a key component to the findings of the Plateau Report. **R0121, R0129**. Commissioner Atchley appeared unfamiliar with the Plateau Reports which were the focus of the hearing or otherwise he would not have interrupted Dr. Raymond numerous times. **R0960**. Commissioner Roeber identified the right to farm statute as the number one issue in this case. **R1087**. Clearly, he had not read the July 5, 2012 Court Order, which said that Right to Farm was not an issue in this case.

(7) Mr. Kenneth Nordstrom is the Director of the County's Environmental Health Division. **R0031**. He has been involved in this matter since the filing of the Applications. He has admitted very limited knowledge of hen-laying operations and confined animal operations. **R0040-0048**. For example, he stated that he has no knowledge of comparable air standards. **R0142**. In fact, the State of Colorado has adopted air standards for swine confinement operations. **R1015**. When Mr. Nordstrom needed to find something out about the salmonella standards, he emailed the Applicants' sponsor, an industry member, instead of doing his own research. **R0155**.

(8) The County asserts there was nothing wrong with Mr. Nordstrom going to the Hostetler property on August 8, 2012. **County Brief pg. 18**. The County insists this was a regular inspection

of the property. But Nordstrom visit occurred at 7:30 pm, outside normal business hours. **R0818.** Mr. Nordstrom did not give the Applicants 24-hour notice as is required under the County Regulations for an inspection. **R0818.** Mr. Nordstrom has not listed this encounter with Mr. Hostetler on the County inspection report list. **R0819.** The obvious purpose was "to game" the situation so that Hostetlers would have notice of the testing and could modify the conditions of the hen-laying operation to make the results more favorable. Hostetler brought in sawdust on August 10, 2012, placed it in the facility on August 13, 2013 to dampen the emissions in the hen-laying operation. **R0926, R0977, R0119.** The County proceeded with its testing on August 16, 2013. **R0118.** The sawdust would have been most effective at the time of the testing. **R0992.** The County has never protested the Hostetler conduct. In fact, Commissioner Hovde thinks this prior notification was acceptable. **R1088.**

(9) Even though Mr. Nordstrom acknowledges there is an air pollution problem from the facility, he refused to investigate the health complaints of the 27 complainants. **R0142-0143, R0818, R0978, R1009.** He has never visited Dr. Raymond on her property or made contact with any of the other complainants. **R0978.** Mr. Nordstrom tried to shift the responsibility to the neighbors to prove their medical problems and has taken the position that they have no medical problems related to the hen-laying operation unless they prove their conditions with scientific exactness. **R0142.**

Appearance of the County's Impropriety

Hostetler asserts that the Plaintiffs have not correctly quoted from *Churchill v. University of Colorado*, 285 P. 3d 986 (Colo. 2012). The operative language from the Court is that "[a]ny appearance of impropriety sufficient to cast doubt on the impartiality of the regents and

investigating faculty members would be grounds for a reversal of the underlying administrative decision to terminate Churchill's employment." *Churchill v. University of Colorado*, 285 P.3d 986, 1006 (Colo. 2012). Thus, any evidence which a reasonable person would consider as to the appearance of impropriety is sufficient to invalidate the County land use approval. C.J.C. 2.11(A); *People of the State of Colorado in the Interest of A.G.*, 262 P. 3d 646 (Colo. 2011). In *Churchill*, the court said any appearance of impropriety "by the Board or the faculty" could be a basis for reversal of the administrative decision. Thus, in the instant case there is no distinction between the BOCC and the County Staff. Of course, actual improprieties would be a basis for recusal of a judge, and in this case sufficient to invalidate the county land use approval. An actual bias is something "that is all probability will prevent (a judge) from dealing fairly with a party." *Id* at 650.

The following constitute evidence that a reasonable observer would conclude constitute an appearance of impropriety:

(1) 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. **R0935, R0943, R0100-0104**. 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. **R0620**.

(2) 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.

(3) 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. **R1087-1088, R0116, R0122.**

(4) The record suggests the improper conduct of Mr. Nordstrom seeking out Mr. Hostetler, after hours, to discuss the upcoming air quality monitoring. **R0818, R0977-0978, R0435.** The County has affirmed this conduct and refuses to separate itself from the Applicants even though it is obvious that the results were skewed by the presence of sawdust in the facility. **County Brief pg. 18, R1088.**

(5) The County has refused to investigate the 27 health complaints from neighbors. **R0978.**

(6) The County is now attempting to abandon the Master Plan to help justify its approvals. **County Brief pg. 23-26.**

(7) The conduct of Ms. Knight, the County Attorney, constitutes an actual impropriety, which invalidates the county land use approvals. The County admits that Dr. Raymond had made a demand to see the report as soon as it came in and the County did not provide it to her. **Def. Response to Motion to Strike, 2012 CV 314 at pg. 2, Exhibit 1 to Plaintiff's Opening Brief.** The County Attorney represented to this Court that the Plateau Report was not received by the County until September 4, 2012. **Def. Response to Motion to Strike, 2012 CV 314 at pg. 2.** In fact, the Plateau Report was in the County's possession the previous week. **R1082.** The County Attorney has misrepresented facts in order to get this application approved. Even after Plaintiffs raised this issue, the County did not correct the County Attorney's misrepresentation. **Plaintiffs' Supplemental Opening Brief at pg. 18-19.**

(8) Commissioner Atchley commented on May 28, 2013 and added his own testimony

about setbacks (now approximately 900 feet) and stated that "this operation is very similar to Foster Farms." **R1088.** However, in actuality, there is substantial testimony to the contrary. **R0370, R0372, R0398**. Add the fact that in the May 28, 2013 Commissioner Meeting transcript, both Commissioners Hovde and Roeber mention that they have not seen the air pollution when they've driven by, it is blatantly evident that they don't understand their quasi-judicial role. **R1086-1087.** Whether they personally drove by and did or did not see anything, it would be extra-judicial evidence. The Commissioners, as judges, are not permitted to testify. This far into these proceedings, their comments demonstrate that they still do not understand their role.

CONCLUSION

For the reasons stated above, this court should enter its order invalidating the subject land use permits and Development Agreements, and ordering Edwin Hostetler to immediately cease and desist his hen-laying operation.

Submitted this 26th day of August, 2013.

#44015 for

s/ Earl G. Rhodes - Original Signature on File
Earl G. Rhodes, No. 6723
Attorney for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the _____ day of August, 2013, a true and correct copy of the foregoing PLAINTIFFS' REPLY BRIEF was served on the following by:

- ☒ ICCES filing (where indicated)
- ☐ U.S.Mail, first class postage prepaid (where indicated)
- ☐ Email (where indicated)
- ☐ Telefax
- ☐ Hand delivery

Christine L. Knight, County Attorney
320 W. 5th Street
Delta, CO 81416
Attorney for Delta County Board of County Commissioners

Joshua A. Tolin
Budd-Falen Law Offices, LLC
300 E. 18th Street, PO Box 346
Cheyenne WY 82003-0346
Attorneys for Defendants Edwin and Eileen Hostetler

s/ Charlotte Waterhouse - Original Signature on File

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