Larimer County, Colorado, District Court Larimer County Justice Center 201 La Porte Avenue, Suite 100 Fort Collins, Colorado 80521-2761 (970) 494-3500	
CITY OF THORNTON, a home rule municipality of the State of Colorado, Plaintiff, v. BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF LARIMER, State of Colorado; JOHN KEFALAS, in his official capacity; STEVE JOHNSON, in his official capacity, and TOM DONNELLY, in his official capacity, Defendants, and NO PIPE DREAM CORPORATION and SAVE THE POUDRE, Intervenors.	Court Use Only
Jeannine S. Haag, Reg. No. 11995 William G. Ressue, Reg. No. 34110 Larimer County Attorney's Office 224 Canyon Ave., Suite 200 Post Office Box 1606 Fort Collins, Colorado 80522 Telephone: (970) 498-7450 Fax: (970) 498-7430 jeanninehaag@larimer.org wressue@larimer.org	Case No. 19 CV 30339 Courtroom 3B
DEFENDANTS' COMBINED ANSWER BRIEF AND RESPONSE TO MOTION FOR DECLARATORY JUDGMENT	

Defendants by their undersigned attorneys respectfully submit this Combined Answer Brief and Response to Motion for Declaratory Judgment:

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

INTRODUCTION

This case is about whether there is any competent evidence to support the Board of Larimer County Commissioners' (Board) decision that a water pipeline proposed by the City of Thornton (Thornton) does not satisfy all of Larimer County's 1041 permit review criteria. Thornton's Opening Brief argues a multitude of other issues such as whether its water decree, and its innate authority to construct water projects and to condemn property eclipses Larimer County's 1041 permitting authority. The Court need not reach these collateral arguments because they are based on incorrect premises. The Board's only decision was that Thornton's 1041 permit application failed to satisfy Larimer County's 1041 review criteria. The Board has not mandated or forbid any diversion point for Thornton's water. The Board has not prohibited Thornton from exercising eminent domain power. The Board has not prohibited Thornton from constructing a water project in Larimer County.

While this Answer Brief touches on all arguments presented by Thornton, the true scope of this action is much narrower than the Opening Brief portrays. This Answer Brief first addresses Thornton's claim for judicial review pursuant to C.R.C.P. 106(a)(4). The Board next addresses Thornton's purported declaratory judgment claim, however, as argued herein, such claim is essentially a re-packaged Rule 106 claim.

ANSWER BRIEF

I. ISSUES ON REVIEW

a. Whether the Board's decision infringes on Thornton's water rights and authority to construct water projects and to condemn property.

b. Whether there is any competent evidence to support the Board's decision that Thornton did not satisfy all 1041 permit criteria.

c. Whether the Board exceeded its jurisdiction by misapplying criterion 11 of the 1041 permit criteria.

d. Whether the Court's review includes the Board's written Findings and Resolution or is limited to the Board's verbal deliberation.

e. Whether Thornton can proceed under Location and Extent Review and disregard the Board's decision made pursuant to Larimer County's 1041 regulations.

II. STANDARD OF REVIEW AND 1041 AUTHORITY

a. C.R.C.P. 106 Review Standard. A court's review of a quasi-judicial action under C.R.C.P. 106(a)(4) "shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer." As with any quasi-judicial action, the Board has broad discretion in evaluating the information presented at the public hearing and determining what weight to afford that information. The object of a C.R.C.P. 106 proceeding is not to settle or determine disputed facts, but to investigate and correct errors of law of a jurisdictional nature and abuses of discretion. *Doran v. State Bd. of Medical Exmrs.,* 78 Colo.153, 240 P. 335, 337 (1925). The merits of the case are not involved. *State Bd. Of Medical Exmrs. v. Noble*, 65 Colo. 410, 177 P. 141 (1918). Actions under C.R.C.P. 106(a)(4) provide for a deferential review that gives credence to an agency's own interpretations and application of its policies and regulations. *Langer v. Board of County Commissioners of Larimer County,* 2020 CO 31, ___ P.3d ___; citing *Stor-N-Lock Partners #15, LLC v. City of Thornton,* 2018 COA 65, Para. 22, ___ P.3d ___ ("In conducting our review under C.R.C.P. 106(a)(4), we apply a deferential standard, and we may not disturb the governmental body's decision absent a clear abuse of discretion.").

An abuse of discretion occurs only when there is **no** competent evidence to support the decision. *Ross v. Fire & Police Pension Ass'n.,* 713 P.2d 1304, 1305 (Colo. 1986). "No competent evidence" means that the ultimate decision of the lower tribunal is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority. *Bentley v. Valco, Inc.,* 741 P.2d 1266, 1267 (Colo. App. 1987). A Board's "findings may not be set aside merely because the evidence was conflicting or susceptible of more than one inference." *Arndt v. City of Boulder*, 895 P.2d 1092, 1095 (Colo. App. 1994), *cert. denied* (1995); *see also Bristol v. County Court*, 352 P.2d 785, 786 (Colo. 1960) (finding that mere disagreement with a ruling is not a sufficient showing of abuse of discretion). The proper function of a district court under Rule 106 is to affirm a lower tribunal where there is **any** competent evidence to support the tribunal's decision. *Bauer v. City of Wheat Ridge*, 182 Colo. 324, 513 P.2d 203, 204 (1973). The reviewing court cannot consider whether the lower agency's findings are right or wrong, substitute its judgment for that of the agency, or interfere in any manner with the agency's judgment if there is any competent evidence to support those findings. *State Civil Serv. Comm'n v. Hazlett*, 119 Colo. 173, 201 P.2d 616 (1948). A court cannot weigh anew the credibility of witnesses. A mere disagreement with a ruling is not a sufficient showing of abuse of discretion. *Bristol v. County Court,* 143 Colo. 306, 352 P.2d 785, 786 (1960).

"In determining whether the administrative agency abused its discretion, the reviewing court may consider whether the agency misconstrued or misapplied the law. If there is a reasonable basis for the agency's application of the law, the decision may not be set aside on review." *Platte River Envtl. Conservation Organiz. v. Nat'l Hog Farms*, 804 P.2d 290, 292 (Colo. App. 1990) (citations omitted). Furthermore, the construction of ordinances by administrative officials charged with their enforcement "should be given deference by the courts." *Abbott v. Bd. of County Comm'rs,* 895 P.2d at 1167. When a regulation is clear and unambiguous, it should be construed as written so as to carry

out the intent of the legislative body; however, "[i]f the language of an administrative rule is ambiguous or unclear, [the court] give[s] great deference to an agency's interpretation of a rule it is charged with enforcing, and its interpretation will be accepted if it has a reasonable basis in law and is warranted by the record." *Sierra Club v. Billingsley,* 166 P.3d 309, 312 (Colo. App. 2007). "Administrative interpretations are most helpful when the subject involved calls for the exercise of technical expertise or when the statutory language is susceptible of more than one reasonable interpretation." *Id.* "Generally, a reviewing court should defer to the construction of a statute by the administrative officials charged with its enforcement. If there is a reasonable basis for an administrative board's interpretation of the law, [the reviewing court] may not set aside the board's decision." *Lieb v. Trimble,* 183 P.3d 702, 704 (Colo. App. 2008); *see also Langer v. Board of County Commissioners of Larimer County,* 2020 CO 31, ___ P.3d ___ (…[I]ndeed we might have reached a different conclusion than the BOCC were we deciding this case in the first instance, under our applicable standard of review, we do not do so.").

b. Remedy. Thornton requests the court, in lieu of remanding to the Board, reweigh the evidence, substitute its judgment for that of the Board, and order the Board to issue a 1041 permit. Such relief is not available. As explained above, the purpose of a C.R.C.P. 106 action is to review the record and determine if the lower body abused its discretion or exceeded its jurisdiction. The sole remedy for an abuse of discretion or act in excess of jurisdiction is a remand for further proceedings: "Once a court finds that an administrative body has abused its discretion, how to address the deficiency on remand is within the discretion of the administrative body." *Wolf Creek Ski Corp. v. Bd. Of County Com'rs of Mineral County*, 170 P.3d 821, 831 (Colo. App. 2007).

c. 1041 Overview. The intent of Colorado's Land Use Act is the protection, utility, value and future of all private and public lands. §24-65.1-101(1), Colo. Rev. Stat. The Act identifies

land use, planning, and the quality of development as matters of state responsibility for the health, welfare, safety and protection of Colorado's environment. *Id.* To accomplish these objectives the Act designates specific development activities as matters of state responsibility and authorizes local governments to supervise such activities through local regulations. *Denver v. Grand County*; at 755; §24-65.1-101(2), Colo. Rev. Stat. This dual regulation by the state and local government is deemed necessary because the designated development activities may impact the people of Colorado beyond the immediate scope of the project. *Denver v. Grand County*; at 755.

The siting and construction of a Domestic Water System, which includes water pipelines[1], is identified as an activity of state interest for which local governments may designate for local regulation. §24-65.1-203(1)(a), Colo. Rev. Stat. The criteria for administering the siting and construction of a Domestic Water System is provided in §24-65.1-204(1), C.R.S., which requires such systems properly utilize existing treatment plants and orderly develop with water systems of adjacent communities. The Board has designated site selection and construction of new domestic water pipelines that are within new permanent easements greater than 30 feet[2] as an activity of state interest and adopted regulations therefore (1041 Regulations). Larimer County Land Use Code, §§ 14.0; 14.4(J). The 1041 Regulations require those who want to construct new domestic water pipelines in Larimer County to apply for and obtain a 1041 permit (1041 Permit). Larimer County Land Use Code, § 14.9(A). To be issued a 1041 Permit the applicant must complete certain procedural steps and demonstrate at a public hearing before the Board that the project satisfies the permit review criteria. Larimer County Land Use Code, §§ 14.9(B), 14.10. The review criteria for

[1] Per § 24-65.1-104(5), Colo. Rev. Stat., Domestic Water System includes a Water Distribution System as defined in § 25-9-102(6), Colo. Rev. Stat., which includes any combination of pipes, tanks, pumps or other facilities that deliver water from a source or treatment to the consumer.

[2] It is undisputed that Thornton's water pipeline proposes new permanent easements greater than 30 feet. Opening Brief, pp 4, 18.

approval of a 1041 permit are as follows:

1. The proposal is consistent with the master plan and applicable intergovernmental agreements affecting land use and development.

2. The applicant has presented reasonable siting and design alternatives or explained why no reasonable alternatives are available.

3. The proposal conforms with adopted county standards, review criteria and mitigation requirements concerning environmental impacts, including but not limited to those contained in this Code.

4. The proposal will not have a significant adverse affect [sic] on or will adequately mitigate significant adverse affects [sic] on the land or its natural resources, on which the proposal is situated and on lands adjacent to the proposal.

5. The proposal will not adversely affect any sites and structures listed on the State or National Registers of Historic Places.

6. The proposal will not negatively impact public health and safety.

7. The proposal will not be subject to significant risk from natural hazards including floods, wildfire or geologic hazards.

8. Adequate public facilities and services are available for the proposal or will be provided by the applicant, and the proposal will not have a significant adverse effect on the capability of local government to provide services or exceed the capacity of service delivery systems.

9. The applicant will mitigate any construction impacts to county roads, bridges and related facilities. Construction access will be re-graded and re-vegetated to minimize environmental impacts.

10. The benefits of the proposed development outweigh the losses of any natural resources or reduction of productivity of agricultural lands as a result of the proposed development.

11. The proposal demonstrates a reasonable balance between the costs to the applicant to mitigate significant adverse affects [sic] and the benefits achieved by such mitigation.

12. The recommendations of staff and referral agencies have been addressed to the satisfaction of the county commissioners.

Larimer County Land Use Code, §§ 14.10(D).

Following a hearing on a 1041 permit application, "[t]he local government may approve an application for a permit to conduct an activity of state interest if the proposed activity complies with the local government's regulations and guidelines for conduct of such activity. If the proposed activity does not comply with the guidelines and regulations, the permit shall be denied." §24-65.1-501(4), Colo. Rev. Stat. The denial of a 1041 permit by a local government is subject to judicial review in the district court for the judicial district in which the activity is to occur. §24-65.1-502, Colo. Rev. Stat.

III. STATEMENT OF FACTS

Thornton's description of the course of proceedings is largely undisputed and follows the Procedural History laid out by the Board in its Findings and Resolution. In places Thornton sets out some facts and characterizes others in ways with which the Board disagrees. For example, in describing the alternative pipeline routes it considered, Thornton frequently references four "reasonable" routes. Use of the word "reasonable" is a qualitative description, not a statement of fact. The Board appreciates the clear distinction between fact and argument, and therefore generally disputes all argumentative/qualitative descriptors within Thornton's recitation of facts. Otherwise, the Board provides the following limited factual disputes and supplemental facts:

a. The Board disputes Thornton's statements that the Board considered and rejected four pipeline routes. Thornton's initial application presented to the Board for decision a single "preferred route" for which it sought a 1041 permit (the Douglas Road Route). R0007-0008, 7234:4-6.[3] During the course of proceedings Thornton submitted a third supplement to its application identifying a different—but singular—preferred pipeline

[3] References to the quasi-judicial record are to the Third Amended Certified Record filed on January 10, 2020. Citations to the record are "R" followed by the page number (i.e. R8067). When citing to a transcript, the specific line will be referenced after the page number (i.e. R8015:20).

route that uses County Road 56 (the CR 56 Route). R2032-2035, 4967, 7537:23-7539:3. The other routes referenced in Thornton's application materials were alternatives it considered but did not advance to the Board. R2032-2035. The Board's Findings and Resolution addresses the two preferred routes presented by Thornton—the Douglas Road and CR 56 Routes—and measured them against the applicable 1041 permit criteria. R6827-6869.

b. The Board disputes Thornton's assertion that the proceedings were continued on August 1, 2018 "without any specific guidance." Opening Brief, p 5. The transcript shows a lengthy discussion by the Board about the need and purpose for continuing the hearing. Specifically, Commissioner Donnelly commented that additional information was needed about mitigating traffic impacts on the roads under construction and alternative routes that will see increased traffic. R7499:5-7500:21. Commissioner Gaiter stated he was not convinced Thornton had presented reasonable siting and design alternatives as required by the 1041 review criteria, and more information about alternative routes needed to be discussed with people living along those routes. R7503:22-7504:3, 7508:8-7509:12-21. Commissioner Johnson echoed the comments of the other Commissioners and highlighted the need for more information about the alternative routes that were considered by Thornton. R7518:5-24. Commissioner Johnson also reviewed the Land Use Code's reference to continuation of 1041 permit proceedings if additional information is needed to determine if the approval criteria are met. R7519:14, 7521:13-20. When the hearing resumed on December 17, 2018, Thornton confirmed its understanding of the purpose for the continuance with the following statement:

> You provided direction that Thornton needed to provide the specific additional information as discussed by the Board of County Commissioners, and then you directed Larimer County staff to

> involve the public in the information gathering process through public meetings or public open houses. We heard loud and clear that communication was a concern for you, and that further opportunities for your residents to communicate their interests was needed. We understand that communication is about listening as much or more than it is about talking or providing information. Thornton took your direction to heart and we dedicated additional resources to the public outreach effort you asked for. We had a team of Communication Professionals at all of the working group meetings and at all of the public meetings. And we listened and gathered information from those speaking at the events and those that chose to speak with us directly at those events. Thornton believes firmly that this process was beneficial and included a great deal of wisdom to undertake. The information we gathered and evaluated from the outreach efforts you directed indeed led us to what we believe is a better preferred route for our project and for Larimer County. R7573:4-7574:3.

c. Within its recitation of facts Thornton frames the Board's decision as consisting of only a few oral statements by individual Commissioners during deliberation and argues the Board's decision is limited to what was said during deliberation rather what is in the Findings and Resolution. Opening Brief, p 16-17. The Board's deliberation should be considered in its entirety rather than only select soundbites. The transcript reflects the entire deliberation and is in the record at Vol. 7(e), pp 8067:7-8082:20. Further, with respect to Thornton's argument that the written Findings and Resolution does not count, the Board's responsive argument is in Section V(d) below.

IV. ARGUMENT

a. Whether the Board's decision infringes on Thornton's water rights and authority to construct water projects and to condemn property.

Thornton asserts Larimer County's 1041 authority impermissibly infringes on the terms of its water decree and authority to construct water projects and condemn property. Specifically, Thornton argues its water decree "requires and entitles Thornton, as a matter of law, to install a

water pipeline to deliver its water to Thornton" and the Board "must choose one of the four reasonable routes Thornton presented and saying 'no' to all four amounted to unlawful interference with Thornton's powers to construct a water pipeline across Larimer County." Opening Brief, pp. 13, 25.

Similar arguments were rejected by the Colorado Supreme Court in *City and County of Denver By and Through Board of Water Com'rs v. Board of County Com'rs of Grand County*, 782 P.2 753, 761-765 (Colo. 1989). In that case, Denver argued 1041 regulations infringe on its governmental powers to, *inter alia*, construct, operate and condemn for water projects. *Id.* at 762. The Court rejected this argument after finding 1041 statutes confer the power to regulate not prohibit, and Denver's condemnation and utility powers "do not prevent other local governments from regulating the activities…" *Id.*

In *Denver v. Grand County*, Denver also argued it should not be subject to 1041 regulations because its water project was necessary to implement its established water rights. *Id.* at 756, 764. In rejecting this argument, the Court noted that Denver's established water rights did not give it a blanket exemption from 1041 regulation, and such a reading would ignore the plain language in the 1041 statutes that subject water projects to regulation. *Id.* at 764-765. The Court recognized that local government regulation is valid even when it impacts established water rights, so long as such rights are not undermined. *Id.* at 765.

The Board has not required Thornton forgo any water rights or its authority to construct water projects and to condemn property. Further, the Board has not mandated or excluded any specific diversion point for Thornton's water and has not required any particular route of conveyance. Nothing prohibits Thornton from returning to the Board with a revised proposal for the pipeline that better addresses the unmet criteria.

Thornton speculates that the Board's decision disapproving the Douglas Road and CR 56 Route proposals was an attempt to force Thornton to convey its water via the Poudre River. The record shows that the Board was fully aware that the project was a proposed pipeline. "The Board is cognizant that it may not deny Thornton the use and benefit of its water right and that the Board's authority is limited to approving the siting and development of pipelines." R6839. Further, the Planning Staff informed all that the Board's authority was to decide the siting and development of a water pipeline, not tamper with water rights. R4971, 7169:18-19 ("Its about a pipeline. It's not about where the water comes from or where the water is going to."). The Board's decision did not require or otherwise condition the conveyance of water using the Poudre River. True, Commissioner Johnson inquired about the so-called Shields Street alternative by referencing how Thornton staff had initially presented it to Thornton City Council as an option to consider and questioned if it was a reasonable alternative. R7514:5-20, 7784:18-25. That inquiry was the result, however, of Thornton initially proposing this alternative to its council. R7611:11-7612:11.

After reciting the basis for its eminent domain authority, Thornton asserts the Board was required to approve one of the proposed pipeline routes, and its failure to do so, impermissibly interfered with Thornton's condemnation power. Opening Brief, pp 12-13. Thornton argues its condemnation of private property is immaterial, should not have been a topic of discussion, and any findings by the Board that mention eminent domain are invalid. Opening Brief, pp. 59, 75. Public testimony included opposition to Thornton's possible taking of certain landowner's private property. R7022:4-6, 7420:6-9, 7856:20-7857:6, 7906:10-14, 7973:10-12, 7997:17-21. The Board appreciates that its citizens have private property rights and seeks to balance governmental power against those rights. The Board did not state, however, that it would approve no route that required Thornton to condemn private property. Thornton cannot be and was not precluded from using eminent domain.

It was not arbitrary or improper for the Board to express a preference for Thornton to use a route that prefers (not requires) pipes be installed in public right of way or other public property when feasible, rather than taking private property.

b. Whether there is any competent evidence to support the Board's decision that Thornton did not satisfy all 1041 permit criteria.

Thornton invites the Court to reweigh the evidence in the record and reach a different decision than the Board. In doing so, Thornton ignores the role of a reviewing court in a C.R.C.P. 106 proceeding, which is to search the record for any competent evidence in support of the Board's decision. *Ross v. Denver Dep't of Health and Hosp.*, 883 P.2d 775, 778 (Colo. App. 1994) (citing *Sundance Hills Homeowners Assoc. v. Bd. of County Comm'rs*, 534 P.2d 1212, 1216 (Colo. 1975)). The number of revisions to Thornton's plan, the number of public hearings, and the evidence in favor of granting Thornton's permit are not relevant.

The Board found Thornton's application failed to satisfy seven of the twelve review criteria. R6831-6839. Pursuant to §14.10(B) of the Larimer County Land Use Code, a 1041 permit application must satisfy all review criteria to be approved. R6892. If the Court finds record support for any single criterion not being satisfied, it need not review any remaining criteria because denial is required even if only one criterion is unmet.

The record in this proceeding is vast, consisting of over 8,000 pages. With respect to the Board's decision that seven criteria were not satisfied, the record includes the following examples of competent supportive evidence:

i. Criterion 14.10(D)(1)[4] *The proposal is consistent with the master plan and applicable*

[4] The 1041 review criteria are in Section 14.10(D) of the Larimer County Land Use Code which can be found in the Record at R6892.

intergovernmental agreements affecting land use and development.

In finding this criterion was not met the Board summarized relevant principles from Larimer County's Master Plan such as settlement patterns that protect existing neighborhoods; a fair, open and predictable land planning and development process that does not infringe on the rights of individuals; and preservation of agricultural as a viable and valued economic, cultural and social resource. R6831-6832; 8103-8105. Thornton's pipeline is proposed to be constructed in a yet-to-be-determined spot within a corridor of 500' to ¼ mile wide in places. R0006, 6934:11-14; 7070:23-7071:13; 1223-1224. This vast corridor, the Board found, unreasonably limited the ability to assess specific impacts to existing neighborhoods and on the property rights of those living along the corridor. R6829-6836. This uncertainty interferes with the Master Plan's goal of a fair and predictable development process because property owners must speculate about the impacts on their property. The record has the following competent evidence in support of the Board's finding that the proposed 500' + corridor fails to meet the Master Plan principles of protecting existing neighborhoods, and fair and predictable development that does not infringe on individual rights:

1. Testimony from a farmer who explained the 500' corridor covers essentially his entire 40-acre farm and Thornton's proposal "is not a specific plan, and this map [of the pipeline] doesn't show the route." R7908:3-11.

2. Testimony from a representative of 12 property owners along the corridor who explained their confusion about where the pipe would actually go; changes in the preferred route with the most current depiction running the pipe potentially between a home and barn; an undetermined route through a 100-acre area

with three separate owners; and a 35-acre parcel within the corridor that the pipeline will cut across, which may limit buildable area beyond current limitations due to existing wetlands. R7853:12-7856:8.

3. Testimony about uncertainties for the redundant power source for the pumphouse, such as whether it will require additional power lines or new substations. R7960:21-7961:1.

4. Testimony questioning the reasonableness of Thornton's proposal because it is "replete with qualifiers like 'may,' 'could,' and 'up to,'…" rather than concrete terms. R7973:18-20.

5. Testimony that "[t]he description of the pipeline route is currently very vague. If [the Board] approves it as it is currently written, Thornton will assume that they can place the pipeline wherever they want in that corridor, irrespective of how it harms the landowner, and [the Board would] have stripped the landowner of any negotiating ability." R7981:18-24.

6. Testimony from a citizen who explained: "[m]y concerns for the Thornton water pipeline lie in the fact that so much of Thornton's water project is undefined, unknown, unavailable. According to Thornton's water project website, detailed designs for the water pipeline have not been completed. The details of the construction of the pipeline are not yet known. The design of the source water pump station is not finalized…everything involved in this project should be much more clearly and specifically defined before approval of the 1041 application is granted…." R7345:8-7346:1.

7. A representative of a home owners association for a neighborhood

on the east side of I-25 along Thornton's proposed CR 56 Route testified that approval of the ¼ mile wide corridor leads to speculation about whether trees, structures or other improvements on their private property would be injured by the chosen location of the pipeline. R7864:13-16.

8. Findings of different Planning Commission members concerned about the lack of a specific pipeline location: "I don't understand how people that are along this pipeline corridor are going to understand their [sic] impact to them without having much more specificity…" (R7105:8-20); "we're trying to talk about affecting private properties and property rights and citizens and to not have that information doesn't —I mean, that makes it really hard for me to see how they're going to be affected" (R7072:11-15); and "The lack of specificity in some of this, which I think could have been addressed to allay some of the concerns of the neighbors and of Larimer County as a whole were not done and so I really don't think that this is complete as it should have been and I would not support passing this at this time." (R7103:19-24).

9. Testimony about the Master Plan purposes of maintaining quality of life and fundamental fairness, and compatibility of new development with existing uses. R7262:5-8; 7272:13-20.

The above competent evidence supports the Board's decision that Thornton's proposal does not satisfy the Master Plan principles of protecting existing neighborhoods and fair and predictable land development that respects individual rights.

With respect to the Master Plan principle to preserve viable agricultural in Larimer County, the Board found "it [is] important to have information about and consider the

cumulative impacts of irrigated farmland turning to dryland. A significant reduction in the amount of irrigated farmland is concerning to the Board and conflicts with the goals of the Master Plan. The long-term viability of Larimer County's agricultural communities, and the economic, cultural and environmental impacts of drying up irrigated farmland are valid considerations under the Master Plan. As these impacts are not adequately described or analyzed by Thornton, the Board cannot conclude that Thornton's proposal is consistent with the Master Plan." R6833. In support of these findings, the record show that over time Thornton has purchased about 20,000 acres of irrigated farmland in northern Colorado, of which eight farms totaling 1,509 irrigated acres are in Larimer County. R7640:23-7641:8; 7759:11-14. Thornton has already dried up three of these eight farms, turning the irrigated acreage into native grasses. R7759:19-21. Thornton does not provide any supplemental irrigation on farms that it has dried up. R7764:1-2. Thornton's other five farms continue to be used for irrigated agriculture and are described by Thornton as "very good producing farms, and they're important parts of—that farmers that farm these properties of their overall business." R7759:24-25, 7768:1-4.

The water for Thornton's irrigated agricultural acreage flows through the Water Supply and Storage Company (WSSC) canal system in which Thornton owns 289 of the 401 municipal use water shares. R7924:4-12. The 401 municipal water shares represent 2/3 of all water shares in WSSC, and all but 21 of the 401 municipal shares remain currently used for agricultural irrigation. R7924:4-8. But, as WSSC testified, the agricultural use of municipal shares is changing, presumably as they are pulled from agricultural use for municipal use. R7924:7-8. Thornton's plan is to begin drying up its irrigated acreage in 2030, starting with two farms it refers to as the "I-25 farms.". R7767:24-7768:6. WSSC

testified that as Thornton and other municipalities divert their water shares for municipal use "it's going to be a struggle for us to be able to take care of all of rest of those farms for…as long as they want to keep farming, because the total amount of water in the [WSSC] system, obviously is going to be dropping." R7934:13-24.

This sample of competent evidence in the record supports the Board's finding that Thornton's proposal, in its current form, is inconsistent with the Master Plan principle of preserving agriculture as a viable long-term segment of Larimer County's economic, cultural and social fabric. The irrigated farms described by Thornton as "very good producing farms" that are important to the overall business of the farmers who farm them, are going to be dried up in the coming years. R7759:24-25, 7768:1-4. That impact has not been evaluated by Thornton. And, as WSSC testified, Thornton is one of many municipalities who have converted water shares in Larimer County from agricultural to municipal use. Currently, the vast majority of those converted shares—380 of 401 shares—are still used for agriculture, but that is changing. R7924:5-8. The Board is justified in questioning the significance of this change within the scope of Thornton's pipeline project—the pipeline is the conduit that will enable Thornton to implement this change. The Board understands that it cannot prohibit Thornton from using its water for municipal purposes, but without an analysis of impact on the agricultural fabric of Larimer County, the Board found Thornton's project was not consistent with the applicable Master Plan principles.

After arguing the weight of the evidence, Thornton turns to the validity of the Board's reliance on provisions in the Master Plan. In *Board of County Commissioners of Larimer County v. Condor,* the Colorado Supreme Court confirmed that master plan provisions are regulatory (rather than advisory only) when the master plan is adopted within land use

regulations and its provisions are sufficiently clear. *Bd. of Cty. Comm'rs v. Conder*, 927 P.2d 1339, 1350-1351 (Colo. 1996). While not expressly stated, it appears Thornton concedes that the Master Plan is regulatory rather than merely advisory. To be clear on this point, in *Condor* the Court concluded that Larimer County's Master Plan was regulatory rather than advisory because subdivision regulations incorporated the Master Plan through statements such as "[t]he Board of County Commissioners shall use the Master Plan as a guideline in the evaluation of each development proposal." *Id.* at 1346. Here, Larimer County's 1041 regulations similarly mandate compliance with the Master Plan in Section 14.10(D)(1) by requiring the applicant show "[t]he proposal is consistent with the master plan…" R6892.

As mentioned above, the Court in *Condor* explained that regulatory master plan provisions must be sufficiently clear to ensure application will be rational and consistent and allow for judicial review. *Id.* at 1348. In evaluating for such clarity, the *Condor* Court explained that flexibility should not be undercut, and broad master plan provisions requiring "[c]ompatibility with the surrounding area" and "[h]armony with the character of the neighborhood" are sufficient when applied in conjunction with more specific criteria. *Id.* Using this measure, the record shows the Board relied on specific Master Plan principals as outlined in its Findings and Resolution such as development patterns that protect existing neighborhoods, a fair, open and predictable land planning and development process that does not infringe on the rights of individuals, and preservation of agriculture as a viable and valued economic, cultural, and social resource in Larimer County. R6831-6832. The provisions are clearly spelled out in the Master Plan as follows:

1. Master Plan §1.5, TH-3 "**Agriculture will remain a viable long-term segment of Larimer County's economic, cultural and social fabric.**"

R8103.

2. Master Plan §2,7, GM-8 "**Agriculture shall be recognized as an important economic, cultural and environmental resource value-provider for the County."**

3. Master Plan §1.5, TH-4 "**The Master Plan shall support logical settlement patterns that reflect the character of the Open West, i.e. the existing character of Larimer County, and protect existing neighborhoods.** Proposed uses shall be compatible with adjacent uses and help create sustainable communities. Performance standards shall be used to protect existing uses from adverse impacts to ensure that new uses are 'good neighbors.'…" R8103.

4. Master Plan §1.5, TH-13 "**The planning and development review process shall be fair, open and predictable, and meet the needs and interest of the community without infringing on the rights of individuals.**" R8105.

5. Master Plan §4.3, PF-8 "**The location and design of new public facilities shall be consistent with the Master Plan.**" R8145.

6. Master Plan §6.1.3 "**Cumulative Impacts**" explains the need to consider cumulative impacts from development, including temporal and spatial. R8155.

The Master Plan principals relied on by the Board are sufficiently clear to allow for rational and consistent application, as was done by the Board here. As explained above, these Master Plan principals were evaluated against specific attributes of Thornton's proposal such as its 500' to ¼ mile wide corridor, and the conversion of irrigated agricultural acreage into dryland that will result from the project.

ii. Criterion 14.10(D)(2) *The applicant has presented reasonable siting and design alternatives or explained why no reasonable alternatives are available.*

The Board found this criterion was not met because the two routes proposed by Thornton identified large corridors of 500' or more which made evaluation of the pipeline siting unreasonably imprecise. R6833-6834. The Board also found the impacts of the pipeline could vary significantly depending on where within the corridor the pipeline is physically located. R6833-6834. The lack of a specific location for the pipeline and the inability to assess specific impacts led the Board to conclude that reasonable alternative routes were not presented. R6834. Further, the Board found that Thornton had internally considered and rejected many siting alternatives, but only presented two options to the Board. R6834.

The record shows the two routes proposed by Thornton had 500' to ¼ mile wide corridors within which the pipeline would be located. R6934:11-14; 7070:23-7071:13; 1223-1224. The physical location of the pipeline was not identified, which elicited substantial testimony from property owners who were frustrated that they could not determine the specific impacts on their properties. Without knowing the physical location of the pipeline, the Board found Thornton's two proposed routes did not present reasonable alternatives. Testimony in support of this finding is referenced in this Answer Brief in Sections V(b)(1)-(9) above, which is incorporated by reference rather than repeated here. In addition, the following testimony supports the Board's decision:

1. Planning Commission member found that Thornton did not present reasonable alternative routes because the project "was really looked [at] purely from Thornton's position." This member also commented about her experience with a

pipeline project where the location of the pipe "was very clear all along the pipeline…" R7104:24-7105:17.

2. Testimony summarizing Thornton's presentation of routes that were not really reasonable alternatives because Thornton had already ruled them out: "Thornton would like to say, well, we've presented reasonable alternatives. But in the next breath they say, but they're unreasonable." R7822:14-16.

3. Testimony from Thornton that it narrowed down 10 possible routes for the pipeline to a single route, and then started public outreach for that singular route. R7233:8-7234:8. Thornton further testified it created its own criteria for evaluating route alternatives and different location options for the pumphouse. R7205:3-14.

4. Testimony that during the community open house/working group meetings to evaluate routing options "Thornton at no time took any interest whatsoever in considering any route by the pipeline off of Douglas or County Road 56. In fact, throughout the working group, Thornton never showed themselves to be open to any viable alternatives." R7891:1-16.

While Thornton internally vetted many potential routes, it unilaterally deemed most were impractical and only presented two routes to the Board. The Board found Thornton's self-evaluation of alternative routes was insufficient to satisfy Thornton's obligation to present reasonable alternatives to the Board. R6834. That finding is supported by competent evidence and should be affirmed.

With respect to reasonable design alternatives, the Board found that Thornton identified tunneling and boring as the methods for constructing the pipeline as it goes north

by WSSC reservoirs No.3 and No.4. R6834. Robin Dornfest, an engineer with over 18 years of experience in geologic and geotechnical engineering with a main focus on pipeline infrastructure, was hired by the County to evaluate the use of a lake tap as a possible alternative to installing the pipe around the perimeter of the reservoirs. R1476-1479, 4757. Mr. Dornfest noted that lake taps are more expensive and have inherent risks but are becoming more common in water storage and conveyance projects. R1479, 4759-4760. Reasons to consider a tunnel/lake tap rather than digging a trench, per Mr. Dornfest, are to minimize impacts to third parties and avoid impacts to infrastructure and environmentally sensitive areas. R4759. Mr. Dornfest found nothing about Thornton's project that would preclude the use of lake taps as Thornton itself had initially contemplated. R4760. Mr. Dornfest also concluded there "is room for optimization for each lake tap option. Further development of the lake tap options could include shortening tunnel lengths, conducting geotechnical investigations, refining tunnel and shaft designs, and refining the intake riser design." R4760.

The Board found the potential use of lake taps may mitigate significant impacts on established neighborhoods around reservoirs, such as the Braidwood and Eagle Lake neighborhoods. R6836. The Board does not dispute that lake taps cost more and have some inherent risks, but Thornton dismisses them as even an option to evaluate because they do not believe they are warranted. Thornton's Opening Brief criticizes Mr. Dornfest's comments as a "superficial opinion of an engineer…who admitted that more information was needed…" Opening Brief, p. 53. The Board agrees that more information about the reasonableness and viability of lake taps is needed. Commissioner Gaiter asked County staff during the August 1, 2018 hearing whether a lake tap is feasible without resorting to the

"draconian measure" mentioned by Thornton. R7495:6-9. County staff responded that technical experts would need to get involved to evaluate the options because "we don't have that information available to us at this time." R7495:10-13. It could be that a lake tap is not a reasonable alternative design, but the Board is not required to take Thornton's word on that point.

iii. Criterion 14.10(D)(3) *The proposal conforms with adopted county standards, review criteria and mitigation requirements concerning environmental impacts, including but not limited to those contained in Section 8 of this Code.*

This criterion requires the proposal conform with development criteria in Section 8 of the Larimer County Land Use Code. The Board found Thornton's proposal did not meet two of the applicable Section 8 criteria: Section 8.4 Wildlife and Section 8.8 Irrigation Facilities.[5] R6834-6835.

With respect to Section 8.4 Wildlife, County staff noted the environmental analysis identified possible conflicts with wildlife. R7180. The Board heard testimony with general concern about the potential removal of established trees in the area that are used for nesting and perching by raptors (R7444:13-17); disruption of rattlesnake dens and osprey nesting sites that could occur given the ¼ mile wide corridor identified as Thornton's proposed route (R7865:15-25); disruption of hawks, ospreys and other federally protected raptors that live along the reservoirs in Thornton's pipeline corridor (R7958:4-7); and displacement of wildlife that use the property proposed for Thornton's pumphouse (R7887:15-25).

With respect to Section 8.8 Irrigation Facilities, County staff testified many irrigation ditches will need to be crossed, some more than once. R7180. With respect to the Douglas

[5] The Board's argument addresses only the Section 8 criterion that it found were not met.

Road Route, the already lengthy construction period could be extended for yet unknown delays related to, among other things, permits to cut across ditches. R4758. The Board found it prudent to consider alternatives that reduce these impacts involving ditch crossings. R6835.

iv. Criterion 14.10(D)(4) *The proposal will not have a significant adverse affect (sic) on or will adequately mitigate significant adverse affects (sic) on the land on which the proposal is situated and on lands adjacent to the proposal.*

As a preliminary matter, Thornton's argument with respect to this criterion is founded on its belief that only "permanent" effects from its project count. Opening Brief, p 47-48. In evaluating this criterion, the Board applied it as written. A significant amount of testimony addressed long and short-term adverse impacts from Thornton's project, and Thornton's application and presentation similarly addressed temporary and permanent impacts. There is simply no basis on which to now, on judicial review, stray from the express language in the criterion by looking only at "permanent" impacts. When a regulation is clear and unambiguous, it should be construed as written so as to carry out the intent of the legislative body; however, "[i]f the language of an administrative rule is ambiguous or unclear, [the court] give[s] great deference to an agency's interpretation of a rule it is charged with enforcing, and its interpretation will be accepted if it has a reasonable basis in law and is warranted by the record." *Sierra Club v. Billingsley,* 166 P.3d 309, 312 (Colo. App. 2007).

The Board found Thornton's proposal will have a significant adverse effect on the land on which the pipeline will be constructed and on adjacent lands. R6835-6836. The Board specifically highlighted an unreasonably long construction cycle that will cause significant impacts on those along the route; traffic intersections that will perform at

unacceptable levels with the addition of traffic from those avoiding construction areas; impacts on private property where the pipeline will go through neighborhoods and areas with limited public right of way; and impacts caused by the uncertainty of the physical location of the pipeline and future pipelines contemplated by Thornton's long-range water plans. R6835-6836. In support of these findings the record has the following:

1. Testimony about the negative visual, noise and quality of life impacts of the pumphouse being located within a residential area where sound travels, and replacing what is currently open fields, trees, wildlife, peace and quiet. R7887:15-25, 7883:20-15, 7301:18-25, 7953:13-7954:4, 8013:1-8014:14.

2. Testimony about a narrow and dead-end residential dirt road only 10-15 feet wide that is a possible location for the pipeline; and concerns about existing foundation and structural problems being exacerbated by installation of the pipeline. R7885:18-15. This person also testified that the use of his residential street as a possible location for the pipeline had not been discussed with him and was mentioned for the first time during the hearings on the application. R7885:18-21.

3. Testimony about how the pipeline will introduce commercial features like large breather tubes, inspection ports, manhole covers, and a 48" pipe into his residential neighborhood and injure quality of life and property values. R7956:1-17.

4. Testimony from a resident who currently has two pipelines on his property that have ongoing impacts. R7972:8-10.

5. Testimony about the proposed pipeline bifurcating a home and barn. R7854:24-7855:5.

6. Testimony about a vacant investment parcel within Thornton's

corridor that has wetlands and limited building area that will be negatively impacted by installation of a pipe. R7859:1-12.

7. Testimony about disruption of rattlesnake dens within Thornton's corridor that may drive the snakes into the neighboring residential area. R7865:21-25.

8. Testimony that pipeline projects in addition to Thornton's are in the works and there is no evaluation on the cumulative impacts of multiple pipelines traversing Larimer County from west to east, which could subject the area to repeat impacts over many years. R7948:9-16, 7832:8-13, 7314:11-7315:18, 7337:7-11, 7441:14-7442:15.

9. Testimony that the pipeline, even in concept, has negatively affected the marketability and value of property in the area. R7852:7-13; 7909:14-19; 803:11-17.

10. Testimony that road construction for the project may last two years, and the traffic impacts will be significant and unacceptable. R7195:5-24, 7344:11-16, 7405:8-25, 7420:24-7421:11, 7439:17-7440:2.

11. Testimony from the owner of an assisted living facility located along the Douglas Road Route with residents an average age of 90 years old who will be significantly impacted by a lengthy construction period. R7354:24-7356:8.

12. Testimony from Thornton that less than 50% of the pipe to be installed for the CR 56 Route will be within road rights of way. R7807:8-22.

13. Testimony, as cited in Section IV(b)(i)(1)-(9) above, about the impacts of uncertainty about the actual physical location of the pipeline given the

imprecise corridors proposed by Thornton.

14. Testimony about the uncertainty of Thornton's proposed pipeline route, specifically that the initial part of the CR 56 Route would travel north from a pumphouse located "somewhere" below Reservoir No. 4, and "either" go through residential lots in the Braidwood neighborhood or along the residential subdivision road Lake Vista Drive. R7724:21-7725:3.

The above evidence in the record supports the Board's finding that the Douglas Road and CR 56 Routes, as proposed, would have significant adverse impacts to the property in the area.

Thornton next argues the Board "never stated that the corridor approach was unacceptable, and thereby waived this objection." Opening Brief, p 54. In support, Thornton cites *Crawford v. Mcaughlin*, 473 P.2d 725 (Colo. 1970), however that case addresses facts that are not present here. In *Crawford*, the Court outlined the doctrine of equitable estoppel and explained where a building permit is issued and relied on by a property owner, a property right vests and the local government may be estopped from contesting the validity of the permit after the fact. *Id.* at 731. Here, no aspect of Thornton's project has been approved and it has no vested right to construct its pipeline project. Further, the Board's concern with the uncertainty of Thornton's 500' to ¼ mile wide corridor arose during the hearing on the application based on testimony from concerned property owners. Shortly thereafter the Board's concern with the breadth of the corridor was communicated to Thornton and the public in the Findings and Resolution.

v. Criterion 14.10(D)(6) *The proposal will not negatively impact public health and safety.*

The Board found this criterion was not met because Thornton's proposal includes a lengthy construction cycle that may delay (not prevent) emergency services. R6837. In support of these findings the record shows testimony that there are a significant number of single-entrance residences where delayed emergency services could be problematic. R7006:23-7007:4, R7023:11-14.

vi. Criterion 14.10(D)(10) *The benefits of the proposed development outweigh the losses of any natural resources or reduction of productivity of agricultural lands as a result of the proposed development.*

The Board found Thornton's proposal will cause a significant reduction in the productivity of agricultural lands in Larimer County that outweighs the benefits of the development. R6838. More specifically, without further mitigation, the Board found the project will divert water from irrigated agricultural land and injure the agricultural segment in Larimer County. R6838. The record has the following competent support for these findings:

1. Since the 1980s, Thornton has purchased about 20,000 acres of irrigated farmland in northern Colorado, of which eight farms totaling 1,509 irrigated acres are in Larimer County. R7640:23-7641:8; 7759:11-14.

2. Thornton has already dried up three of these eight farms, turning the irrigated acreage into native grasses. R7759:19-21. Thornton does not provide any supplemental irrigation on farms that it has dried up. R7764:1-2.

3. Thornton's other five Larimer County farms continue to be used for irrigated agriculture and are described by Thornton as "very good producing farms, and they're important parts of – that farmers that farm these properties of their overall business." R7759:24-25, 7768:1-4.

4. The water for Thornton's irrigated agricultural acreage flows through the Water Supply and Storage Company (WSSC) canal system in which Thornton owns 289 of the 401 municipal use water shares. R7924:4-12.

5. The 401 municipal water shares represent 2/3 of all water shares in WSSC. R7924:4-8. Despite having been converted for municipal use, these water shares have continued to be used mostly for agricultural irrigation (all but 21 of the 401 municipal shares remain currently used for agricultural irrigation). R7924:4-8.

6. The historical agricultural use of the majority of WSSC water shares is changing as municipalities need the water for municipal purposes. R7924:7-8.

7. Thornton's plan is to begin drying up its irrigated agricultural acreage in 2030, starting with two farms it refers to as the "I-25 farms." R7767:24-7768:6.

8. WSSC testified that as Thornton and other municipalities divert their water shares for municipal use "it's going to be a struggle for us to be able to take care of all of rest of those farms for…as long as they want to keep farming, because the total amount of water in the [WSSC] system, obviously is going to be dropping." R7934:13-24.

Thornton's pipeline project will enable it to commence further removal of water from irrigated farmland in Larimer County. While Thornton's focus has been that its water decree authorizes such use, that was not the focus of the Board. It is the *impacts* of Thornton's removal of significant water from agricultural use in Larimer County that is relevant to the Board, not whether Thornton has secured the right to use its water for municipal purposes. The Board, relying on the above competent evidence, decided the conversion of significant irrigated farmland to non-irrigated dryland grass will reduce the

productivity of such agricultural lands that, without further mitigation, outweighs the benefits of Thornton's proposal.

In addition to re-weighing the evidence, Thornton argues the Board could only consider the physical impacts of installing the pipeline and therefore impacts on irrigated agriculture was outside the Board's authority. Opening Brief, p 63. First, Thornton's argument is based on an unreasonably narrow reading of the criterion. The criterion looks at the balance of benefits of the proposed development with its impacts on natural resources and the productivity of agricultural lands. There is no express or implied limitation that only physical impacts from digging a hole in the dirt can be considered. Further, Thornton's narrow interpretation conflicts with the purposes of 1041 regulations which are to manage land development impacts on the health, welfare, safety and protection of Colorado's environment and "to supervise land use which may have an impact on the people of Colorado beyond the immediate scope of the land use project." §24-65.1-101(1), Colo. Rev. Stat.; *City and County of Denver By and Through Board of Water Com'rs v. Board of County Com'rs of Grand County*, 782 P.2d 753, 755 (Colo. 1989).

vii. Criterion 14.10(D)(11) *The proposal demonstrates a reasonable balance between the costs to the applicant to mitigate significant adverse affects (sic) and the benefits achieved by such mitigation.*

The Board inquired about options that Thornton initially considered that involved a combination of pipes and use of the Poudre River to convey water to Thornton. Thornton testified it believes conveyance options that include the Poudre River would degrade the quality of water and cause loss through evaporation, and therefore these options did not advance past initial consideration. R7606:14-7613:7. Thornton also testified its water court decree requires diversion of its water from a specific point, WSSC Reservoir No. 4, and

therefore any conveyance option must abide by the water decree. R7597:21-25.

The record has contrary testimony from a water lawyer, Ryan Donovan, who opined Thornton's water decree allows for a change in the diversion point with certain agreements and notice to the Division Engineer, and providing such notice is relatively routine. R7379:1-7380:15. Thornton acknowledged a change to the water decree would be an option, albeit an unattractive one in its estimation. R7079:6-8. And further, Mr. Donovan testified there is no legal barrier to Thornton seeking changes to its water decree that would allow it to store its water in "new buckets" closer to Thornton that would significantly reduce the length of pipeline. R7017:14-7018:23.

The Board also heard testimony from attorney John Barth who referred to an expert report from Lisa Buchanan, LRB Hydrology & Analytics, which refutes Thornton's claim that water quality would be degraded if taken out downstream on the Poudre River. R7269:23-7270:4. The report from Ms. Buchanan is in the record at R8396-8432, and concludes that water taken from the Poudre River downstream and above the Mulberry Water Reclamation Plant would be at least as clean as the water taken from WSSC Reservoir No. 4. R8422. Further, Ms. Buchanan opined that even water taken below the reclamation plant would satisfy safe drinking water standards and recommendations more than 50% of the time without treatment, and otherwise would satisfy the standards with some treatment. R8422.

Thornton acknowledged that it currently treats its water at a treatment plan, and such water is similar in quality to what would be found in water that has traveled via the Poudre River through the City of Fort Collins. R7589:13-17. Thornton did not evaluate the cost of treating water withdrawn from downstream on the Poudre River, and could only venture a

guess of $10 million per year when asked by the Board to "spitball it" and "just guess." R75911-17.

To be clear, the Board did not find Thornton must withdraw its water from a location other than WSSC Reservoir No.4 or use the Poudre River as a means of conveyance. However, Thornton's project will have significant impacts as outlined in other sections of this Answer Brief, and the Board must evaluate the balance of costs to mitigate those impacts with the benefits of the mitigation. A cost/benefit analysis of mitigation steps proposed by citizens—namely involvement of the Poudre River—could not be performed because Thornton rejected such mitigation steps are even possible. There was conflicting evidence about the feasibility of Thornton's use of the Poudre River in any respect, and regardless of whether its diversion point remains at WSSC No. 4 as provided in Thornton's water decree. After considering the conflicting evidence, the Board concluded Thornton failed to satisfy the criteria requiring a balance of the costs to mitigate impacts with the benefits of achieved by such mitigation. R6839.

c. Whether the Board exceeded its jurisdiction by misapplying criterion 11 of the 1041 permit criteria.

Thornton argues that its pipeline project will have no adverse effects, only short-term temporary impacts. Opening Brief, p 66-67. This argument is premised on a faulty assumption that Thornton's proposal will not have any long term or permanent adverse impacts. As outlined elsewhere in this Answer Brief[6], there is competent evidence that Thornton's proposal will have substantial and permanent impacts in Larimer County. The Board's evaluation of the costs to mitigate those impacts with the benefit of the mitigation is not an exceedance of jurisdiction but

[6] Sections IV(b)(i); IV(b)(iv).

required by the 1041 permit review criteria.

d. Whether the Court's review includes the Board's written Findings and Resolution or is limited to the Board's verbal deliberation.

Thornton states (i) the Board's decision is limited to the verbal statements each Commissioner made at the close of the hearing on February 11, 2019; (ii) only those statements or reasons shared by two or more of the Commissioners (i.e. a majority) constitute the "decision" to be considered by the Court; and (iii) any facts, analyses, rationales, etc. verbally articulated by the Board must be set out in the written decision (Findings and Resolution), meaning the Court cannot consider anything in the Findings and Resolution that was not verbally stated when the Board announced its decision on February 11, 2019.

This position hoists Thornton on its own petard. To adopt Thornton's argument means the Board's decision was full and final at the conclusion of the hearing on February 11, 2019. Under this premise, the jurisdictional deadline for Thornton's Rule 106(a)(4) complaint was March 11, 2019 (28 days from the final decision pursuant to C.R.C.P. 106(b)). Thornton filed its complaint on April 16, 2019, far past this deadline, meaning the Court would have no jurisdiction over Thornton's Rule 106 claim. *3 Bar J. Homeowners Ass'n v. McMurry,* 967 P.2d 633, 634 (Colo. App. 1998) (the mandatory time period under C.R.C.P. 106(b) begin to run at the point of "administrative finality," which occurs when the "action complained of is complete, leaving nothing further for the agency to decide. The date of the public vote by the Board of County Commissioners, and not the date final plats were approved and recorded, was the point of administrative finality that triggered the 30-day time limitation."); *Park County v. Board of County Commissioners,* 969 P.2d 711 (Colo. App. 1998)(when a tribunal announces its decision in a quasi-judicial proceeding, a party seeking judicial review under Rule 106 must file the complaint within 30 days after the ruling is announced).

Contrary to its own arguments, Thornton recognized the Findings and Resolution as the final decision of the Board when it filed its Rule 106 complaint exactly 28 days from the date the Board signed its Findings and Resolution (March 19, 2019). R6840. Thornton takes no exception to the parts of the Findings and Resolution describing the course of events or that it met five of the twelve criteria, even though a majority of the board did not comment on any of those criteria at the conclusion of the hearing. Thornton cites to and otherwise relies on many parts of the Findings and Resolution that were not verbally discussed by the Board. Thornton cannot have it both ways.

Further, Section 12.4.3 of the Land Use Code sets out the order of proceedings for a public hearing. Step "G" states: "*Decision of board of or commissioners.* The board or commission makes its decision or recommendation to approve, approve with conditions or deny the application. The decision must be in writing." This makes clear that the commissioners will issue a written decision. The Board announces a decision verbally at the conclusion of the hearing in the interests of transparency and out of respect to the public who often have attended and listened to hours of testimony. The public deserves to know the outcome sooner than later. Moreover, this custom and practice is observed by other county commissioners in Colorado.

In *Wilson v. Bard of County Commissioners of Weld County,* 992 P.2d 668 (1999), the Board adopted a verbal resolution denying plaintiffs' requested permit at the conclusion of a public hearing. The decision was subsequently reflected in a written resolution that detailed its findings and conclusions. The Board's actions in entering the written resolution and later revising it demonstrates that the Board's verbal decision was not the final decision.[7]

[7] This Court addressed the issue of verbal pronouncements at the conclusion followed by a written decision in *Estes Valley Recreation and Park District v. Joshua Tobey, et.al,* Larimer county District Court Case No. 1955CV11918, Order Denying Motion to Dismiss (December 12, 2019) appended to this Brief as Exhibit "A".

Colorado courts have also variously addressed this practice within the judicial context. In *Koontz v. Rosener,* 787 P.2d 192 (1989), the court, at the conclusion of the trial, made remarks and opinions. The court then directed defendant's counsel to prepare written findings, conclusions, and judgment. Plaintiffs argued that because the court's written findings varied from those it announced earlier on the record in open court, the inconsistent written findings must be set aside. The Court rejected this argument: "A court's remarks or expressions of opinion made during or at the end of a trial are not necessarily formal findings of fact prepared as the basis for a judgment . . . . [T] findings that serve as the basis for the court's judgment are those it formally approved and adopted contemporaneously with the entry of judgment." Id. at 195

In *Jones v. Boyer,* 193 P. 568, 569 (Colo. 1920) the Court noted, "the judge, as judges often do, after the argument had been made, discussed the case at length but his remarks, as is usual in such cases, were informal and desultory, consisting mostly of comments on the evidence and the witnesses, and we cannot regard them as of the force of formal findings, prepared as a basis for a judgment; there is nothing to indicate that they were so regarded by the judge." *See also, In re Marriage of West,* 94 P.3d 1248, 1250 (Colo.App. 2004); *Rock Mountain Health Maintenance Organization, Inc. v. Colo. Dept. of Health Care Policy and Financing,* 54 P.3d 913, 918.

In addition, Thornton's assertion that the Board acted covertly in violation of the Colorado Open Meetings Act when it voted on and approved the written Findings and Resolution is wrong. The Findings and Resolution approval occurred at a duly advertised meeting open to the public on March 19, 2019. R008681. This meeting fully complied with the Open Meetings Act. Thornton confuses a public **hearing** where the Board takes testimony with an open **meeting** where the Board typically does not take testimony. Thornton had constructive, if not actual, notice of this open meeting and could have attended. Because the taking of testimony had closed just prior to the

Board's vote on February 11, 2019, it was not error for the Board to sign the written decision as part of the consent agenda at the open meeting on March 19, 2019. This action did not deny Thornton due process any more than a judge who issues his or her written decision after a trial has concluded.

Moreover, quasi-judicial decision makers are not required to express every fact and reason for their decision, and even the findings themselves can be implied. *Hudspeth v. Bd. of County Comm'rs*, 667 P.2d 775, 778 (Colo. App. 1983) ("The absence of express findings by a lay board does not affect the validity of the decision where the necessary findings are implicit in the action taken.") (citing *Sundance Hills Homeowners Assoc. v. Bd. of County Comm'rs*, 534 P.2d 1212, 1216 (Colo. 1975)). Since an administrative board's findings may be express or implied, its decision should be upheld if there is support in the record for the decision. *Ross v. Denver Dep't of Health and Hosp.*, 883 P.2d 516, 518 (Colo. Ct. App. 1994), *cert. denied* (1994). Where necessary, the reviewing court should search the record to uphold the board's decision, and should "hold, in the absence of an express finding . . ., that there is an implicit finding in the decision of these prerequisite facts when the state of the evidence is such as would warrant the making of such finding by the board." *Sundance*, 534 P.2d at 1216 (quotation marks omitted); *Colo. Office of Consumer Counsel v. Public Util. Comm.*, 786 P.2d 1086, 1091 (Colo. 1990). Thornton's argument that the Board's written Findings and Resolution should be ignored or discounted is inconsistent with the court's function of reviewing the entire record in search of credible evidence to support the Board's decision.

e. Whether Thornton can proceed under Location and Extent Review and disregard the Board's decision made pursuant to Larimer County's 1041 regulations.

At page 71 of the Opening Brief, Thornton states:

> Given the unique facts of this case, the Court should also revisit the ability of municipalities to rely on C.R.S. § 30-28-110(1)(c) and find that Thornton can overrule the BOCC's denial of its 1041 permit in

> this case. Under this provision, a municipality constructing a utility in another jurisdiction can override the planning commission's decision in the extraterritorial jurisdiction by a majority vote of the municipality's council.

The statute to which Thornton refers provides for what is commonly known as a "location and extent" review. It is a mechanism by which one governmental entity project is reviewed by another governmental entity in whose jurisdiction the project is to be constructed. The advisory review is performed by the local planning commission to determine if the project is in sync with the master plan of the hosting jurisdiction. The planning commission's decision may be overruled by the project entity's governing body. This perfunctory review does not apply, however, where a county has elected to adopt 1041 regulations which allow for a detailed review of the project and possibly denial. The allowance of a 1041 process by the General Assembly was a means to allow local governments more authority over large projects that could significantly impact them.

Thornton's attempt to distinguish *City of Colorado Springs v. Board of County Commissioners of Eagle*, 895 P.2d 1105 (Colo. App. 1994) is unavailing. The Court's decision did not turn on the voluntariness or involuntariness of the cities' agreement to follow Eagle County's 1041 regulation. That was dicta. The decision turned on the conclusion that the 1041 statute, though adopted before the location and extent statute (later statute controls principle), was more specific (specific controls over general principle). The Court's decision also recognized that the Colorado Supreme Court had decided years earlier that the location and extent statute did not exempt a municipality from complying with a county's 1041 regulations. *City & County of Denver v. Bd. of County Com'rs of Grand County,* 782 P.2d 753, 763-764 (Colo. 1989).

By its own admission, Thornton spent years, hundreds of man-hours and significant expense pursuing a 1041 permit. Those actions belie its new argument that the truly applicable process is a location and extent review. As such the argument rings hollow.

RESPONSE TO MOTION FOR DECLARATORY JUDGMENT

Thornton's Complaint includes twelve claims for relief, the first eleven of which seek judicial review under C.R.C.P. 106(a)(4) and are addressed by the Board in the Answer Brief above. The twelfth claim is brought for a declaratory judgment pursuant to §13-51-101 C.R.S. *et seq*., C.R.C.P. 57, and Colo. Const. Art. III. ("Rule 57 Claim"). This claim sets out four allegations:

> 182. Thornton incorporates into this claim for relief all of the allegations in the preceding paragraphs.
>
> 183. The Board misconstrued its criteria and the scope of its powers under the 1041 Act in denying Thornton's 1041 application.
>
> 184. Thornton is entitled to the Court's determinations and declarations that Thornton complied with the 1041 criteria. A ruling from the court will resolve a current dispute.
>
> 185. Thornton has no other plain, speedy and adequate remedy otherwise provided by law; therefore, Thornton is entitled to declaratory relief.
>
> Complaint, p 30.

As presented in its Complaint, Thornton's Rule 57 Claim is a reiteration of its Rule 106 Claim and seeks the same relief: declare the County's decision was wrong, set it aside, and order the County to issue the 1041 permit. Without more, this duplicative claim should be dismissed as a matter of law. *Fairall v. Frisbee,* 104 Colo. 553, 92 P.2d 748 (1939) (Where in the pleadings in an action for a declaratory judgment, no question is presented which is properly cognizable under the uniform declaratory judgment act, the suit should be dismissed).

But now there is more. On February 24, 2020, Thornton filed a Motion for Declaratory Relief and Determination of Questions of Law pursuant to C.R.C.P. 57 (declaratory judgment) and 56(h) (summary judgment on a question of law). This Motion requests the Court:

> 1. Rule that the County cannot consider, condition or deny Thornton's 1041 permit application for a pipeline based on any alternative that would change, impair, infringe, take or condition:
>
> (a) Thornton's constitutional right to build a pipeline and its property rights;
>
> (b) Water matters already determined under the exclusive jurisdiction of the Water Court, such as Thornton's water diversion point, delivery point, water quality, water quantity, and use, or alter Thornton's requirement to cease irrigation on Thornton-owned farms; and
>
> (c) Thornton's delivery point in violation of the WSSC Contract.
>
> 2. Rule that the County cannot diminish the quantity and degrade the quality of Thornton's water rights in violation of the 1041 Statute.
>
> 3. Rule that the County cannot fall outside of its authority under the LUC.

Motion, p 36.

Thornton's Motion then goes on to provide a detailed history of the acquisition of its water rights, the nature of its water rights, the holdings of the Water Court, and a synopsis of applicable water law.

Section 13-51-106, C.R.S., states:

> Any person interested under a deed, will, written contract, or other writing constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question or construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration or rights, status, or other legal relations thereunder.

See also, Rule 57 (b) C.R.C.P. (same language).

By its explicit terms, the declaratory judgment statute and rule require the Court to determine parties' rights, status and legal relationship with respect to a document. In this case, the document is the decree entered by the Water Court. Thornton's Motion is premised entirely on its speculative supposition that the County denied Thornton's pipeline in an effort to alter Thornton's water decree and cause Thornton to use the Poudre River as a means of conveyance of its water.[8] Thornton's supposition is wrong.

In Section II(c) of its Rule 106 Answer Brief above, the County sets out its authority to regulate matters of state interest under 1041, including installation of pipelines, notwithstanding there is a collateral effect on Thornton's water. This collateral effect does not translate to surreptitious motive to deny Thornton's use of its water. The County expressly acknowledged Thornton's right in its Findings and Resolution. The County's decision does not interpret, apply, or change Thornton's water rights or its point of diversion. Most importantly, the County has not taken any position with respect to Thornton's water decree.

A "court may refuse to render or enter a declaratory judgment or decree where such judgment or decree if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding. §13-51-110 Colo. Rev. Stat.; C.R.C.P. 57(b). The hallmark of a declaratory judgment action is an actual case or controversy. In *Beacom v. Board of County Com'rs of Adams County,* 657 P.2d 440 (Colo. 1983), the board of county commissioners denied certain of the district attorney's budget requests. The district attorney filed a petition for writ of mandamus to require the board fund the full amount of his budget and for a declaratory judgment that the employees of his office were employees of the

[8] Thornton's Rule 57 Motion includes many of the same facts and arguments set out in its Rule 106 Opening Brief. The County has addressed these in the Rule 106 part of its Answer Brief and incorporates those arguments rather than repeat them here.

judicial district and not county employees subject to county administrative requirements. The court passed on the budget question and then turned to the question of the status of the district attorney's employees. As to that question, the court held:

> The only actual controversy before the district court was the board's denial of certain budgetary items. We view the remaining requests for declaratory judgment—that of the district attorney for a declaration that the employees of his office are employees of the 17th Judicial District, and that of the county for a declaration that the employees of the district attorney's office are county employees for purposes of a variety of insurance and retirement programs and the county pay, classification and benefit plan—as requests for advisory opinions.
>
> The Uniform Declaratory Judgments Law, section 13–51–101 *et seq.,* C.R.S.1973 and C.R.C.P. 57 give the district court the power to declare rights, status, and other legal relations affected by a statute when the court is presented with a question of construction or validity arising under the statute, but the court may refuse to render or enter a declaratory judgment or decree where such judgment or decree would not terminate the uncertainty or controversy. **A proceeding for declaratory judgment must be based upon an actual controversy and not be merely a request for an advisory opinion.** *Farmers Elevator Company v. First National Bank,* 176 Colo. 168, 489 P.2d 318 (1971); *Heron v. City and County of Denver,* 159 Colo. 314, 411 P.2d 314 (1966); *Ahern v. Baker,* 148 Colo. 408, 366 P.2d 366 (1961); *Taylor v. Tinsley,* 138 Colo. 182, 330 P.2d 954 (1958). In addition, for a declaratory judgment to be binding, the necessary parties must be before the court. *City and County of Denver v. Denver Land Co.,* 85 Colo. 198, 274 P. 743 (1929). Here, neither party adduced evidence as to a number of the purposes for which the county requested a declaration of employee status nor were the individual employees joined in order that they might be bound by the court's determination. Consequently, it was inappropriate for the district court to rule that the employees of the district attorney's office were employees of the 17th judicial district or to imply that they were employees of the county for a variety of purposes.

Id. 446-447. (Emphasis added).

Beacom is only one of a plethora of cases where the court has asserted the need for a case or controversy in order to act. *See e.g., Associated Master Barbers, Local 115 v. Journeyman Barbers, Local 205*,

132 Colo. 52, 285 P.2d 599 (1955) (The supreme court will not render an advisory opinion in declaratory judgment actions.); *Gabriel v. Board of Regents*, 83 Colo. 582, 267 P. 407, 408 (The real question is, "have such questions 'arisen' "? This act was not intended to repeal the statute prohibiting judges from giving legal advice, nor to impose the duties of the profession upon the courts, nor to provide advance judgments nor to settle mere academical questions. . . . Court is not required to reply to mere speculative inquiries.); and *Mulcahy v. Johnson,* 80 Colo. 499, 512, 252 P. 816 (1927) (We decline to determine those questions which have not yet arisen, and which may never arise. Courts are not required to give general advice and instructions upon matters which have not arisen at the time their jurisdiction is invoked. The court should refuse to answer speculative inquiries.).

Here there is no controversy. Thornton says: ". . . [T]he [County] by its own admission has only the limited authority granted to it by the 1041 Statute 'to approv[e] the siting and development of pipelines.' R6839. This limited authority does not allow the [County] to deny Thornton's chosen means of its water delivery – a pipeline – as that right is granted by the Constitution. Nor does the [County's] limited authority allow it to determine where the pipeline starts or what water Thornton can take through the pipeline." *Motion*, p 4. The Board agrees! The Board's decision was that Thornton's proposal does not satisfy certain of Larimer County's 1041 permit review criteria— it did not deny Thornton the use of a pipeline nor dictate a starting point for it.[9] Thornton, with speculation and argument cannot turn the Board's decision into a water controversy requiring intervention by this Court.

[9]Thornton admits in its Rule 57 Motion, Footnote 7, Page 5 that the ideas of conveying the water by the river or canal were "proposed by the **public.**" Thornton notes that the County Staff advised the County that the 1041 regulations only covered the siting and design of pipelines and did not allow Larimer County to regulate Thornton's water rights, source water, or amend Thornton's Water Decree and that the County acknowledged this. Rule 57 Motion, p 7-8. Thornton's assertion that the County acted contrarily is fiction.

Thornton also strenuously argues the Water Court is the only entity with jurisdiction as to its water rights. Thornton then contrarily asks this Court to intervene and interpret and apply the water decree. This Court cannot do so. The Water Court entered the decree after a decade of litigation that involved numerous parties in interest. The Water Court retains exclusive jurisdiction over the case and its decree. This Court cannot alter, amend, interpret, or supplement that decree without notice and involvement of all parties to the Water Court litigation. §13-51-115, Colo. Rev. Stat. (When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration); *City & County of Denver v. Denver Land Co.,* 85 Colo. 198, 274 P. 743, (1929) (As desirable as it might be to have an announcement of the court upon a question, it would be improper for it to decide in the absence of the necessary parties).

Thornton seeks an advisory ruling to direct the County to act in a particular manner should this case be remanded. Equally, Thornton seeks to limit the nature of the evidence that may be presented to the County should a further hearing on remand occur. "The Court's declarations or rulings protecting Thornton's constitutional and property rights are also critical to providing the appropriate guidance and side-boards to the [County] in the event that the Rule 106 appeal is remanded, or if Thornton has to re-apply. Otherwise, the [County] will again improperly consider, condition or deny Thornton's 1041 permit application based on matters that are outside its authority." Motion, p 6. Thornton directs this Court to control the County's future actions should they arise. On this point, precedent is clear: declaratory judgment proceedings may not be invoked to resolve a question which is nonexistent, even though it can be assumed that at some future time such question may arise. *Heron v. City & County of Denver,* 159 Colo. 314, 411 P.2d 314 (1966); *Taylor v. Tinsley,* 138 Colo. 182, 330 P.2d 954 (1958).

There simply is no judicial Rule 57 claim here. Thornton does not seek this Court's interpretation of the Water Decree. Thornton asks this Court to read the decree, obey it according to Thornton's terms, and enforce it.

CONCLUSION

For the reasons herein the Board respectfully requests the Court affirm its decision denying Thornton's 1041 permit application.

DATED: June 1, 2020.

LARIMER COUNTY ATTORNEY'S OFFICE

By: s/William G. Ressue
Jeannine S. Haag, Reg. No. 11995
William G. Ressue, Reg. No. 34110
Attorneys for Defendants

CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of the foregoing DEFENDANTS' COMBINED ANSWER BRIEF AND RESPONSE TO MOTION FOR DECLARATORY JUDGMENT was served using the Colorado Courts E-Filing system this 1st day of June, 2020, which will send notification to the following:

Luis A. Corchado
Joanne Herlihy
City of Thornton
9500 Civic Center Drive
Thornton, CO 80229
luis.corchado@cityofthornton.net
joanne.herlihy@cityofthornton.net

Mike Chiropolos
Chiropolos Law
3325 Martin Drive
Boulder, CO 80305
mike@chiropoloslaw.com

John M. Barth
P.O. Box 409
Hygiene, CO 80533
barthlawoffice@gmail.com

s/Jennifer D. Infeld