

21CA0467 Thornton v Bd of Comm 09-01-2022

COLORADO COURT OF APPEALS

DATE FILED: September 1, 2022
CASE NUMBER: 2021CA467

Court of Appeals No. 21CA0467
Larimer County District Court No. 19CV30339
Honorable Stephen J. Jouard, Judge

City of Thornton, a home rule municipality of the State of Colorado,

Plaintiff-Appellant,

v.

Board of County Commissioners of Larimer County, State of Colorado; John Kafalas, in his official capacity; Steve Johnson, in his official capacity,

Defendants-Appellees,

and

No Pipe Dream Corporation and Save the Poudre,

Intervenors-Appellees.

JUDGMENT AFFIRMED

Division V
Opinion by JUDGE FOX
Gomez and Taubman*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced September 1, 2022

Tami Yellico, City Attorney, Kara N. Godbehere, Senior Assistant City Attorney, Shaun McCullough, Assistant City Attorney, Thornton, Colorado; Hamre Rodriguez Ostrander Dingess, PC, Richard Rodriguez, Steven Louis-Prescott, Denver, Colorado, for Plaintiff-Appellant

William G. Ressue, County Attorney, David P. Ayraud, Deputy County Attorney, Frank Haug, Assistant County Attorney, Fort Collins, Colorado, for Defendants-Appellees

John M. Barth, Esq., Hygiene, Colorado; Chiropolos Law, LLC, Michael Chiropolos, Boulder, Colorado, for Intervenors-Appellees

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2021.

¶ 1 In this C.R.C.P. 106(a)(4) proceeding, the City of Thornton appeals the district court’s judgment affirming the Board of County Commissioners of Larimer County’s denial of its permit application for a major domestic water pipeline. Although we agree with Thornton that the Board exceeded its regulatory powers in several respects, we ultimately affirm its decision to deny the permit application.

I. Factual, Legal, and Procedural Background

¶ 2 Thornton is a Colorado municipal corporation. It owns and operates a municipal water and sewer system benefiting its citizens and other consumers outside its municipal boundaries. Thornton is a largely suburban community situated north of Denver with a population of approximately 140,000.

¶ 3 It was not always this big, of course; indeed, in the mid-1980s, Thornton’s population was approximately 78,000. *See City of Thornton v. Bijou Irrigation Co.*, 926 P.2d 1, 19 (Colo. 1996).

Anticipating such growth in the mid-1980s, Thornton sought to enhance its water security by acquiring water rights in the Cache La Poudre River, which is located roughly eighty miles north. To that end, Thornton purchased 289 shares in the Water Supply and

Storage and Jackson Ditch Companies (collectively, the WSSC System).

¶ 4 After years of litigation, Thornton obtained a water decree that changed its shares from agricultural to municipal. *See id.* The water decree also mandated, as relevant here, that Thornton (1) divert its water at two points, both of which are north of Fort Collins; (2) transport the water through the Larimer County Canal; and (3) withdraw the water at WSSC Reservoir No. 4.

¶ 5 In section 24-65.1-101(1), C.R.S. 2021, the General Assembly declared that “[t]he protection of the utility, value, and future of all lands within the state . . . is a matter of public interest.” Local governments are thereby empowered to “designate [certain] areas and activities of state interest” and, after such designation, regulate such areas and activities. § 24-65.1-101(2)(b). One such activity is the “[s]ite selection and construction of major new domestic water . . . systems.” § 24-65.1-203(1)(a), C.R.S. 2021.

¶ 6 Larimer County is situated north of Thornton. Consistent with section 24-65.1-404, C.R.S. 2021, the County designated as a matter of state interest the “[s]iting and development of new or extended domestic water or sewer transmission lines which are

contained within new permanent easements greater than 30 feet.” Larimer County Land Use Code § 14.4.J (effective Sept. 3, 2017) (hereinafter, Land Use Code). Before the Board approves such a project, the applicant must show that the project satisfies twelve review criteria delineated under Land Use Code section 14.10(D). Such applications are known as “1041 permits.”¹

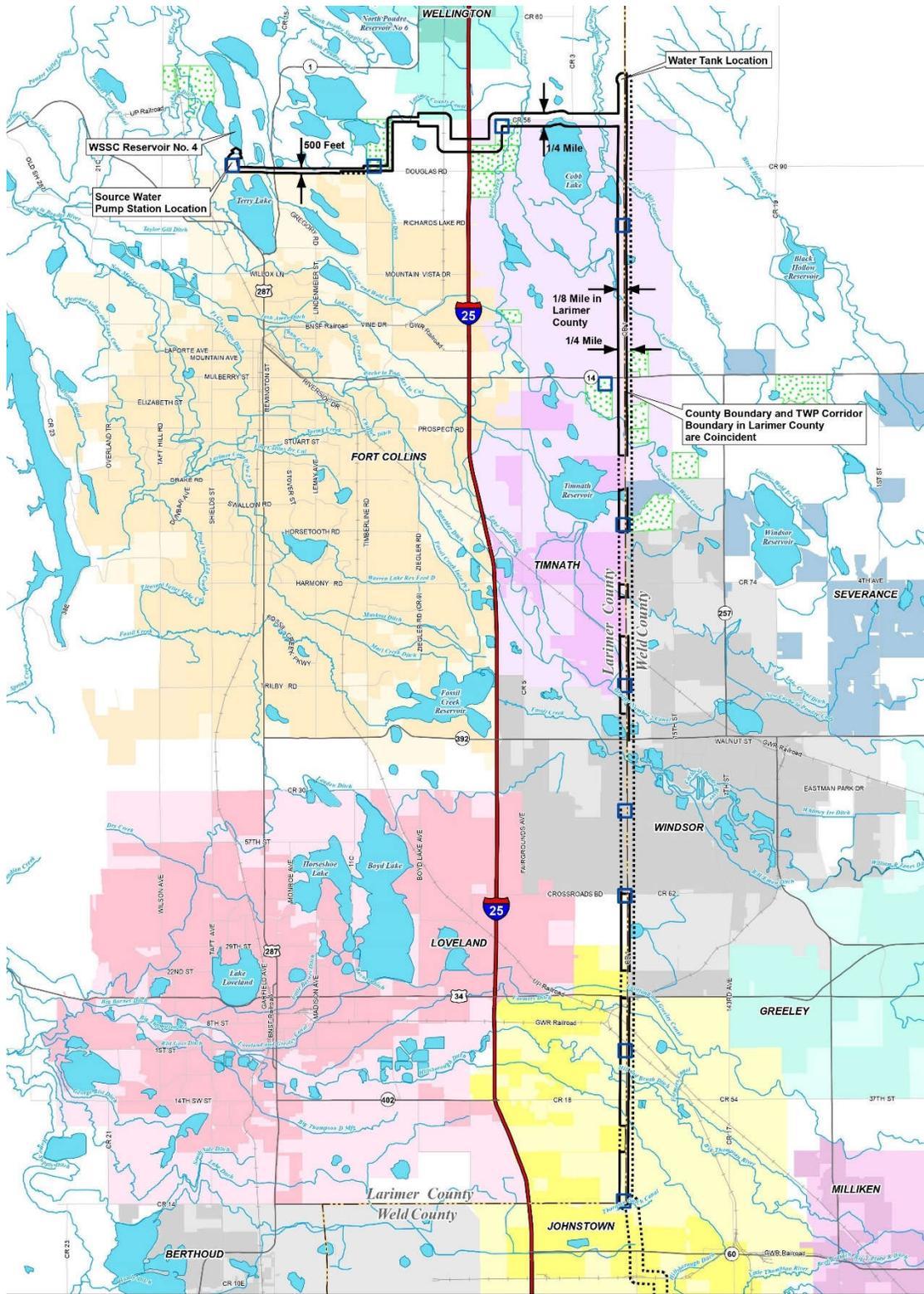
¶ 7 In accordance with this scheme, Thornton submitted a 1041 permit application for a domestic water pipeline known as the “Thornton Water Project” (TWP) on January 5, 2018.² The TWP would empower Thornton to utilize its water shares in the WSSC System. The TWP contemplates a forty-eight-inch underground pipeline that would run from the WSSC Reservoir No. 4 north of

¹ This term stems from House Bill 74-1041, which was later codified as the Areas and Activities of State Interest Act, see § 24-65.1-101, C.R.S. 2021, the statute that empowers local governments to regulate areas and activities of state interest. See Audrey Dakan, *Colorado Local Governments’ Use of 1041 Regulations*, Colo. Dep’t of Local Affairs (May 11, 2017), <https://perma.cc/DKA7-8MG9>.

² The TWP’s application solely concerns Phase I of three phases authorized by the water decree. Phases II and III, if ever developed, would seek to ensure Thornton’s water source for a greater population, and would include the construction of additional facilities and pipelines through Larimer County (among others). As discussed in Part III.C.2, *infra*, the Board may only consider the impacts associated with Phase I — and not any theoretical impacts from yet-to-be-developed pipelines connected to Phases II and III.

Fort Collins to Thornton, eighty miles south. The pipeline would pass through approximately twenty-seven miles in Larimer County and would be capable of transporting around forty million gallons of water per day.³ The pipeline's original proposed route through Larimer County is as follows:

³ This capacity is substantially more than the amount of water to which Thornton's 289 shares entitle it. There is evidence in the record, however, that the pipeline would be constructed at this size for other practical reasons.



**CITY OF THORNTON
COLORADO**

12450 WASHINGTON ST
THORNTON, CO 80241-2405

12/29/2017



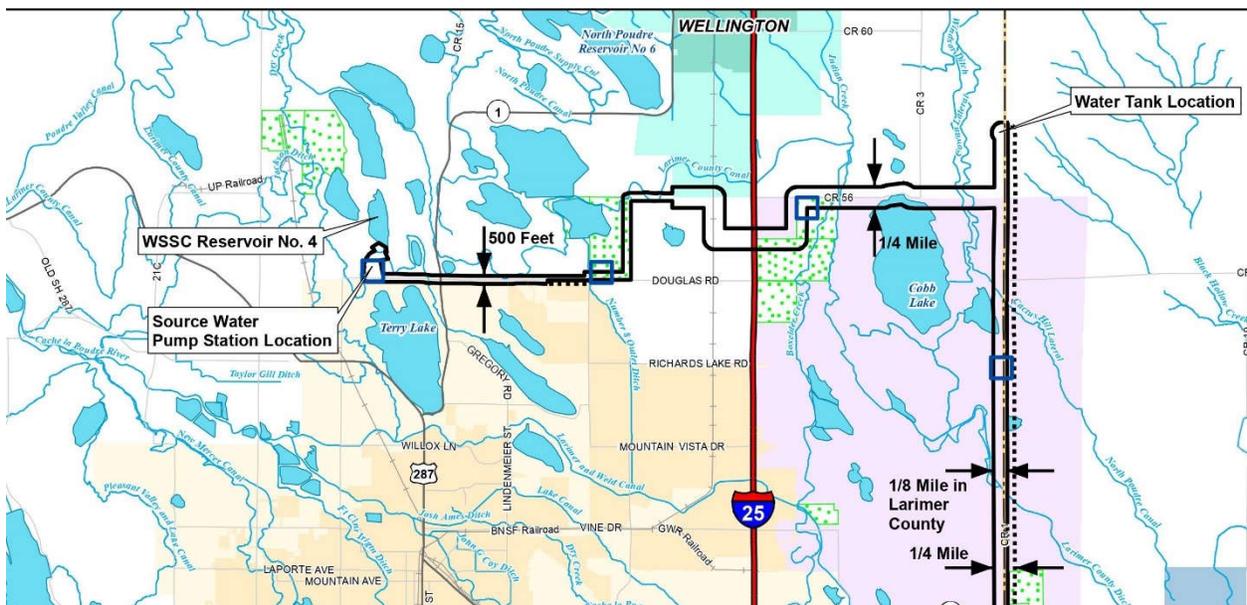
1 inch = 1.8 miles
0 0.9 1.8 Miles

- TWP Corridor in Unincorporated Larimer County
 - TWP Corridor outside Unincorporated Larimer County
 - Railroad
 - Thornton Farm
 - County Boundary
 - Lake/Reservoir
 - River/Stream/Canal/Ditch
 - Potential Staging Area
- Boundaries Crossed by the Proposed Corridor**
- | | |
|--|--|
| Fort Collins | GMA Boundary |
| Johnston | Fort Collins |
| Loveland | Johnston |
| Timnath | Loveland |
| Wellington | Timnath |
| Windsor | Wellington |
| | Windsor |

**Figure ES-1
TWP Corridor Map**

Sources: NHD, USGS, CDWR, Larimer and Weld Counties, CDOT, City of Thornton

¶ 8 Although Thornton twice supplemented its application in response to concerns expressed by the Larimer County Planning Commission, the Commission voted to deny the permit on May 16, 2018. Its decision was based, in part, on lingering concerns with the portion of the route between WSSC Reservoir No. 4 and I-25 since the section could potentially impact numerous private properties (as depicted below).



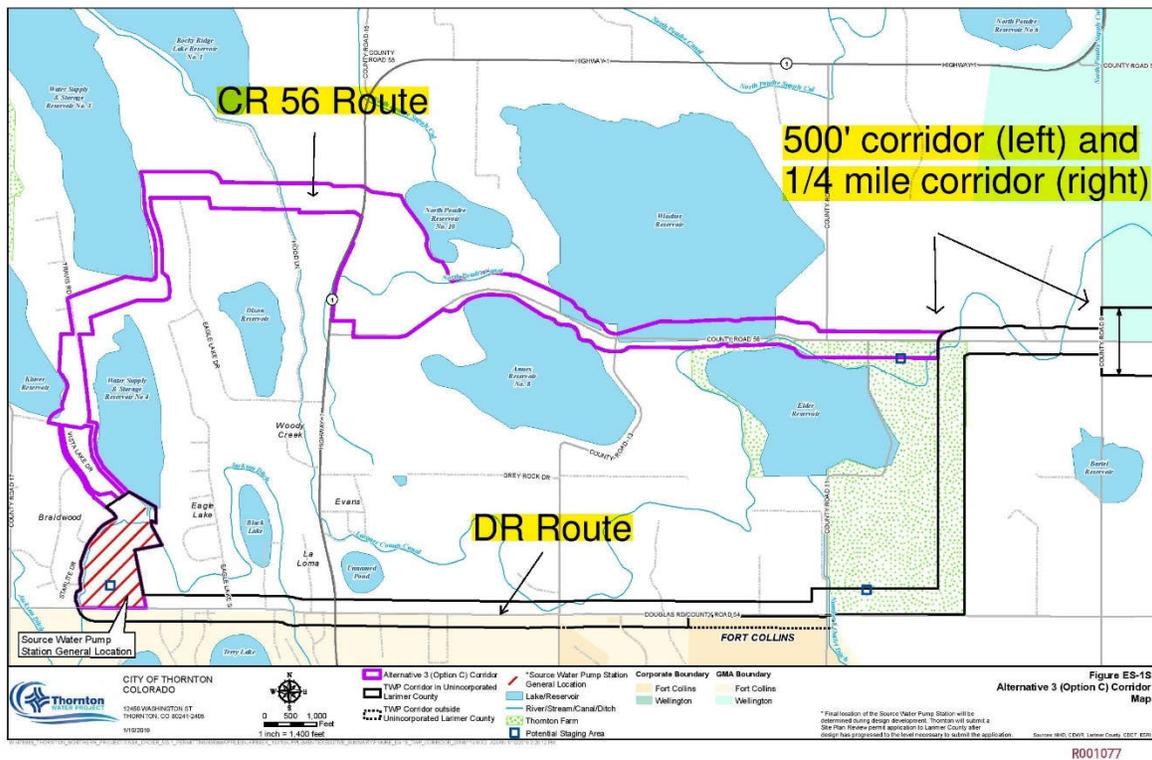
¶ 9 Over the next year, Thornton worked strenuously to modify its application to address these concerns. This included participating in four well-attended public hearings before the Board, creating a working group that partnered with local stakeholders to better

understand the needs of the affected communities, and engaging in outreach to property owners.

¶ 10 After receiving this feedback, Thornton submitted a revised application known as “Supplement 3.” Among other things, Supplement 3 included a change in Thornton’s preferred route. Initially, Thornton planned the pipeline to run along Douglas Road (the DR Route); in Supplement 3, the pipeline largely followed County Road 56 (the CR 56 Route).

¶ 11 Critically, for the first several miles of both routes, Thornton utilized a “corridor approach” whereby it designated a 500-foot-wide path in which it would bury the pipeline within a 50-foot easement. After several miles of a 500-foot corridor (mainly through suburban neighborhoods), the corridor expanded to a quarter-mile wide to accomplish the same goal (once it reached a predominately rural area). Thornton used this approach at the Commission’s suggestion, with the expectation that the corridor would give Thornton flexibility in placing easements — thus minimizing conflicts with property owners. The Commission recommended the Board approve Thornton’s application, subject to thirty-two

conditions.⁴



¶ 12 After submitting its revised application, Thornton participated in an additional three public hearings with the Board. Throughout these seven hearings, numerous speakers expressed their preference for a “Poudre River Alternative.” This proposal,

⁴ The Commission recommended approval of Thornton’s application on July 9, 2018 — that is, before Thornton changed its preferred route to CR 56. But since both routes utilized the corridor approach, and since the Commission’s thirty-two conditions were not specific to the DR Route, we presume that the Commission supported the CR 56 Route — especially given the Commissioners’ comments at the final public hearing in support of the application.

articulated by intervenors No Pipe Dream Corporation and Save the Poudre (two entities representing property owners that oppose the pipeline), asserted that Thornton should release its water into the Poudre River and let the water flow through Fort Collins before collecting, cleaning, and transporting it via a pipeline installed southeast of town. Although Thornton considered this proposal, it ultimately concluded it was not a reasonable alternative because it may degrade its water quality and require alteration of the water decree.

¶ 13 At the final hearing, on February 11, 2019, the Board voted unanimously to deny Thornton’s application. The three board members each offered several reasons why the application failed to meet one or more of the twelve criteria. See Land Use Code § 14.10(D).

¶ 14 Five weeks later, on March 20, 2019, the Board issued a written decision titled “Findings and Resolution Denying the Thornton Water Project 1041 Permit.” It concluded that Thornton had failed to meet criteria 1, 2, 3, 4, 6, 10, and 11. The Board’s written decision explained why Thornton satisfied or failed to satisfy each criterion.

¶ 15 Pursuant to C.R.C.P. 106(a)(4), Thornton appealed the Board's decision to the district court, arguing that the Board had abused its discretion in denying Thornton's application.⁵ The Board opposed the action, and the court ordered oral argument on the pending motions. Before oral argument, however, Thornton moved to supplement the record with materials from a 1041 application for a similar domestic water pipeline that the Board had approved after rejecting Thornton's. The court denied Thornton's motion to supplement the record, concluding that C.R.C.P. 106(a)(4) review was limited to the record before the Board at the time of its decision.⁶

⁵ Thornton concurrently sought declaratory relief under C.R.C.P. 57, essentially arguing that the Board denied its permit for improper reasons. The district court denied this motion because it was duplicative of the relief sought under C.R.C.P. 106(a)(4). Thornton does not challenge that conclusion on appeal. Nonetheless, as discussed in Part III, *infra*, we agree with Thornton's substantive contentions that several of the bases for the Board's denial of its application were improper.

⁶ Thornton again seeks to supplement the record with (1) evidence concerning another 1041 permit application and (2) Larimer County's apparent moratorium on 1041 permit applications. The Board filed a motion to strike the portions of Thornton's opening brief that referenced these supplemental materials. Because the law is clear that C.R.C.P. 106(a)(4) review is limited to the record before the Board at the time of its decision, and since the other

¶ 16 On review, the district court agreed that the Board’s conclusions concerning criteria 3, 6, 10, and 11 were not supported by competent evidence and therefore constituted an abuse of discretion. But the court determined that, while some of its reasons were improper, there was competent evidence to support the Board’s conclusions regarding criteria 1, 2, and 4 — namely, that the use of the “corridor approach” prevented the Board from adequately evaluating the impacts of the project on private property. For this reason, it could not conclude that the Board’s decisions regarding these three criteria constituted an abuse of discretion. And, because Thornton’s application needed to satisfy all twelve criteria to be approved, the court affirmed the Board’s ultimate decision denying Thornton’s 1041 permit.

II. Standard of Review

¶ 17 “Review of a governmental body’s decision pursuant to Rule 106(a)(4) requires an appellate court to review the decision of the

1041 permit and the 1041 moratorium occurred after the Board’s decision in question, we decline to consider that supplemental record. See C.R.C.P. 106(a)(4) (“Review 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.”).

governmental body itself rather than the district court's determination regarding the governmental body's decision." *Bd. of Cnty. Comm'rs v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996). Our review is limited to deciding whether the governmental body's decision was an abuse of discretion, based on the evidence in the record before it, or was made in excess of its jurisdiction. C.R.C.P. 106(a)(4)(I); *No Laporte Gravel Corp. v. Bd. of Cnty. Comm'rs*, 2022 COA 6M, ¶ 23.

¶ 18 A governmental body abuses its discretion if it misinterprets or misapplies the law or if no competent record evidence supports its decision. *No Laporte Gravel Corp.*, ¶ 24. The record lacks competent evidence if "the governmental body's decision is 'so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.'" *O'Dell*, 920 P.2d at 50 (quoting *Ross v. Fire & Police Pension Ass'n*, 713 P.2d 1304, 1309 (Colo. 1986)).

¶ 19 "An action by an administrative [body] is not arbitrary or an abuse of discretion when the reasonableness of the [body's] action is open to a fair difference of opinion, or when there is room for more than one opinion." *Khelik v. City & Cnty. of Denver*, 2016 COA 55, ¶ 13. Because we are not the fact finder, we "cannot weigh the

evidence or substitute our own judgment for that of the [administrative body].” *Kruse v. Town of Castle Rock*, 192 P.3d 591, 601 (Colo. App. 2008).

¶ 20 We review and interpret the Land Use Code de novo and apply ordinary rules of statutory interpretation. *See City of Commerce City v. Enclave W., Inc.*, 185 P.3d 174, 178 (Colo. 2008) (We review de novo an agency’s construction of “a code, ordinance, or statutory provisions that govern its actions.”); *Shupe v. Boulder County*, 230 P.3d 1269, 1272 (Colo. App. 2010) (“Land use codes and ordinances ‘are subject to the general canons of statutory interpretation.’” (quoting *City of Colorado Springs v. Securcare Self Storage, Inc.*, 10 P.3d 1244, 1248-49 (Colo. 2000))). “When construing a land use code, courts look first to the plain language, being mindful of the principle that courts presume that the governing body enacting the code meant what it clearly said.” *Shupe*, 230 P.3d at 1272. “If the code’s language is ambiguous, we give deference to the board’s interpretation of the code it is charged with enforcing . . . if it has a reasonable basis in law and is warranted by the record.” *Id.* “However, if the board’s interpretation is inconsistent with the

governing relevant articles, then that interpretation is not entitled to deference.” *Id.*

III. Discussion

¶ 21 We address the three criteria on which the district court affirmed the Board’s decision (1, 2, and 4), ultimately agreeing with the district court’s narrow conclusion.⁷ In so doing, we reiterate the district court’s admonishment of the Board for relying, in part, on improper considerations to reach its conclusions.

A. Criterion #1

1. Additional Background

¶ 22 The first criterion requires that “[t]he proposal is *consistent with the master plan* and applicable intergovernmental agreements affecting land use and development.” Land Use Code § 14.10(D) (emphasis added). The Larimer County Master Plan (adopted Nov.

⁷ Although Thornton provided argument in its opening brief as to why the Board abused its discretion with respect to criteria 3, 6, 10, and 11, that brief was struck for its excessive word count. In its amended opening brief, Thornton does not provide argument as to why the Board abused its discretion regarding these four criteria. In addition to the fact that this omission is arguably fatal to its appeal, *see IBC Denver II, LLC v. City of Wheat Ridge*, 183 P.3d 714, 717-19 (Colo. App. 2008), we do not address the Board’s conclusions on these criteria because such analysis does not alter our ultimate conclusion.

19, 1997) is a voluminous document with dozens of themes, values, and guidelines meant to shape land use decisions affecting the county.⁸

¶ 23 The Board concluded that Thornton’s application was inconsistent with the Master Plan. In so concluding, it listed six different themes found in the Master Plan⁹:

- (1) Natural and cultural resources shall be identified, conserved and protected, and long-term cumulative impacts shall be monitored.

⁸ In its initial C.R.C.P. 106(a)(4) briefing, Thornton argued that the Master Plan lacked standards specific enough to ensure that reliance on it was rational, consistent, and amenable to judicial review, and that it was therefore an advisory document devoid of legal force. The district court, relying on *Board of County Commissioners v. Conder*, 927 P.2d 1339 (Colo. 1996), concluded that the Master Plan’s standards were specific enough to constitute a regulatory document. Because Thornton does not challenge that determination on appeal, we deem the argument abandoned and will treat the Master Plan as a regulatory document. See *Armed Forces Bank, N.A. v. Hicks*, 2014 COA 74, ¶ 38 (“[A]rguments raised in the trial court and not pursued on appeal are deemed abandoned[.]” (citing *People v. Dash*, 104 P.3d 286, 293 (Colo. App. 2004))).

⁹ Specifically, themes 1-4 are “Master Plan Themes” (corresponding to criteria 2, 3, 4, and 13), while themes 5-6 are “Guiding Principles and Implementation Strategies for Growth Management” (corresponding to criteria 8 and 10).

- (2) Agriculture will remain a viable long-term segment of Larimer County's economic, cultural, and social fabric.
- (3) Logical settlement patterns that reflect the existing character of Larimer County and protect existing neighborhoods will be supported.
- (4) The planning and development review process shall be fair, open, and predictable and meet the needs and interests of the community without infringing on the rights of individuals.
- (5) Agriculture shall be recognized as an important economic, cultural, and environmental resource value-provider for Larimer County.
- (6) Agricultural land and water in Larimer County shall be protected through incentives, voluntary participation, and measures to strengthen viable agriculture.

¶ 24 Although it did not articulate how Thornton's application was inconsistent with each of these themes, the Board explained why it believed the application generally failed to meet the first criterion. It began by noting that

Thornton's proposed pipeline route is a yet-to-be-determined location within a 500 foot to ¼ mile wide corridor. *The Board's ability to assess specific impacts to private property along the route is unreasonably limited because of the breadth of the corridor.* Testimony was provided about the pipeline potentially splitting a private property in two, going through front or backyards, and traversing through significant amounts of private property.

(Emphasis added.)

¶ 25 The Board provided two additional reasons why Thornton's application contravened the Master Plan. First, the Board faulted Thornton for failing to analyze the "cumulative impacts of irrigated farmland turning to dryland" as a result of the TWP. Although it qualified that the "fate of Thornton's application does not rest on how other municipalities use their water in the future," it nonetheless determined that Thornton needed to provide such information to ensure consistency with the Master Plan. Second, it noted that if Thornton could not secure easements, it would need to use eminent domain to acquire the property, "a process generally disfavored by property owners."

¶ 26 In affirming the Board's decision, the district court focused on the fourth enumerated theme cited by the Board, concluding that

[t]he record reveals numerous concerns raised in the public hearing process as to concerns about where the pipeline would be located within described corridors [sic]. *Without a more definite location for the pipeline, property owners are unable to assess impacts to their own properties*; this is inconsistent with the specific provision that 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.”

(Emphasis added.)

2. Analysis

¶ 27 Thornton asserts that the Board abused its discretion for several reasons.¹⁰ It contends that the term “development review process” only applies to the process itself and not impacts implicated by that process; it argues that the TWP is consistent with the “only pertinent” provision of the Master Plan — namely, to “support municipal authority to maintain the quality of domestic water supplies,” Larimer County Master Plan § 6.6; and it avers

¹⁰ Thornton repeatedly faults the Board and the district court for treating testimony from potentially affected property owners as “competent evidence” since, in its view, such testimony was either vague or speculative. This argument misses the forest for the trees; indeed, the corridor’s breadth — and the attendant uncertainties about the exact location of the pipeline — could only yield vague or speculative fears about the actual impacts.

that the Master Plan is vague so as to deprive it of notice that the corridor approach could be inconsistent with the Master Plan.

None of these arguments hold water.

¶ 28 Thornton’s use of the corridor approach deprived the Board of the ability to assess the specific impacts to private property owners. While both plans mainly follow the road (i.e., the County’s right-of-way), the corridor also includes sections that deviate from the road. For instance, a homeowner objected that one portion of the corridor would bisect his property, running between his home and his barn. Without a narrower corridor, it remains unclear whether the pipeline could be laid in a less objectionable location.¹¹ This is but one example of how the corridor leaves property owners — and, by extension, the Board — in the dark about the impacts that the TWP will have on property owners.

¹¹ We recognize that this route is conceptual in nature and that under the Commission’s conditions of approval, Thornton would be required to consult with the county’s engineering department to minimize property impacts. But this condition is ultimately irrelevant to the threshold analysis about the *possible* impacts to property owners in the first place. Such future decisions could still result in substantial impacts to property owners.

¶ 29 Thornton’s arguments to the contrary do not undermine this conclusion. We are unpersuaded by the contention that the “development review process” cannot include impacts associated with the permit itself; in fact, such considerations are essential to ensuring that the process is “fair” for everyone.¹² See *Prairie Mountain Publ’g Co. v. Regents of Univ. of Colo.*, 2021 COA 26, ¶ 12 (When interpreting statutes, courts “look first to the statute’s language, giving words and phrases their plain and ordinary meanings.” (quoting *Bd. of Cnty. Comm’rs v. Dep’t of Pub. Health & Env’t*, 2020 COA 50, ¶ 14)). Similarly, the argument that the TWP is consistent with what is, in Thornton’s view, the only relevant provision also misses the mark. Granted, the TWP is consistent with this provision insofar as it ensures that its water quality

¹² We emphasize that this fairness extends to applicants (such as Thornton) as much as to those affected by such applications. The Larimer County Land Use Code (effective Sept. 3, 2017) (Land Use Code) itself confirms this principle by providing, for instance, that “[i]f the proposal does not comply with all the applicable criteria, the permit shall be denied, *unless the county commissioners determine that reasonable conditions can be imposed on the permit which will enable the permit to comply with the criteria.*” Land Use Code § 14.10(B). This language is but one example that underscores that the Master Plan contemplates fairness for both community members and applicants.

source remains high. But such consistency does not obviate its inconsistency with other provisions.

¶ 30 Thornton also posits that the Master Plan’s standards are so vague as to deprive it of notice. Of course, such provisions must be “sufficiently specific . . . ‘to provide all users and potential users of land with notice of the particular standards and requirements imposed by the county’ for approval.” *Bd. of Cnty. Comm’rs v. Conder*, 927 P.2d 1339, 1347-48 (Colo. 1996) (quoting *Beaver Meadows v. Bd. of Cnty. Comm’rs*, 709 P.2d 928, 936 (Colo. 1985)). And we agree that, based on the foregoing, the corridor approach is not *inherently* inconsistent with this provision.

¶ 31 But that is not the relevant inquiry; instead, what matters is that, in this instance, it was readily apparent that the corridor approach *could be* inconsistent with this provision. Uncertainties about the precise impacts on private property wrought by the breadth of the corridor dominated the public hearings. And while it is true that the Board did not specifically ask about the corridor approach, questions about the impact on private property resulting from uncertainties about the pipeline’s route are effectively the same concern. Accordingly, we conclude that the Master Plan’s

standards, when read in context, are sufficiently specific to give Thornton notice. *See id.*

¶ 32 Although we conclude the Board’s decision was based on competent evidence in this regard, two other aspects of its conclusion were fundamentally invalid.

¶ 33 First, the Board abused its discretion by effectively requiring Thornton to analyze the “cumulative impacts of irrigated farmland turning to dryland” as a result of the TWP. As the district court concluded, such considerations are beyond the Board’s jurisdiction to regulate the “siting and development” of certain domestic water pipelines. *See* Land Use Code § 14.4(J); § 24-65.1-102(1), C.R.S. 2021 (“‘Development’ means any construction or activity which changes the basic character or the use *of the land on which the construction or activity occurs.*”) (emphasis added).

¶ 34 But even putting that aside, the consideration would still be improper. While various provisions of the Master Plan concern protection of agricultural lands, Colorado law prohibits such master plans from being used to “supersede, abrogate, or otherwise impair . . . the right to beneficially use water pursuant to decrees.” § 30-28-106(3)(a)(IV)(E), C.R.S. 2021. So, even if Thornton *did* show that

the TWP would detrimentally impact agricultural lands in Larimer County, such considerations could not count against Thornton’s application since such weighing would abrogate its water rights — in direct contravention of section 30-28-106(3)(a)(IV)(E). *See also* § 24-65.1-106(1)(a), C.R.S. 2021.

¶ 35 Second, the Board abused its discretion by suggesting that Thornton’s potential use of eminent domain weakened its application because it is “disfavored by property owners.” The Colorado Constitution guarantees municipal corporations “the right-of-way across public, private and corporate lands . . . for the purpose of conveying water for domestic purposes . . . upon payment of just compensation.” Colo. Const. art. 16, § 7. And section 24-65.1-106(1)(a) bars local governments from using 1041 regulatory powers to “diminish[] the rights of owners of property as provided by the state constitution.” Read together, it is clear that the Board may not consider Thornton’s potential use of eminent domain during its 1041 review.

B. Criterion #2

1. Additional Background

¶ 36 The second criterion requires that “[t]he applicant has presented *reasonable siting and design alternatives* or explained why no reasonable alternatives are available.” Land Use Code § 14.10(D) (emphasis added).

¶ 37 In crafting its application, Thornton engaged in an iterative, community-centric process over the span of several years. In so doing, it explored siting alternatives, ultimately providing two routes. Additionally, it considered design alternatives (such as lake taps, which locate a pipe under bodies of water to avoid property disturbances) but determined that the only feasible design was to bury the pipeline underground. In the end, its final application contained two siting routes with the same design: the CR56 Route and the DR Route, both buried underground. Each route utilized the corridor approach (though the DR Route traversed significantly fewer private properties).

¶ 38 In its written decision, the Board concluded that Thornton had failed to provide reasonable siting *and* design alternatives. With

respect to siting alternatives, the Board determined that the CR 56 Route was

problematic in its imprecision, identifying a 500-foot corridor in some places where the pipeline might ultimately be installed. *The corridor of 500' to ¼ mile in width prevents meaningful evaluation of the two alternatives presented. Impacts can vary significantly depending where within this corridor the pipeline is actually located, and at a minimum Thornton should identify where the 50' wide permanent pipeline easement will be located.* Without this level of specificity the siting alternatives proposed by Thornton are not reasonable and cannot be sufficiently evaluated by the Board.

(Emphasis added.)

¶ 39 The Board also faulted Thornton for failing to analyze in its final application the “Shields Street Concept” (another name for the Poudre River Alternative).

¶ 40 With regard to design alternatives, the Board appeared to take issue with Thornton’s failure to evaluate the viability of lake taps.

Thornton identified the use of tunneling rather than open ditch construction as the primary method of installation and proposes to bore under certain sensitive areas. *Some alternative design options were mentioned, such as lake taps to avoid private property and other construction disruptions, but were not*

presented as design alternatives. (Emphasis added.)

¶ 41 The district court concluded that the Board did not abuse its discretion as a whole. This decision was essentially based on the same grounds as the first criterion — namely, that since both routes utilized the corridor approach, and since the corridor approach prevented the Board from evaluating the impacts on private property owners, it had failed to provide reasonable siting alternatives.

¶ 42 As for the Board’s criticism of Thornton for failing to provide a “Shields Street” siting alternative, the court concluded the request was outside the Board’s power. Again, Thornton had reason to believe that this proposal would require it to degrade its water source by running it through Fort Collins vis-a-vis the Poudre River before collecting, cleaning, and transporting it to Thornton. In addition to the fact that this would require modification of the water decree, the court concluded that such a request was not part of the Board’s power to regulate the “siting and development” of domestic water pipelines. See Land Use Code § 14.4(J); § 24-65.1-204(1)(a), C.R.S. 2021. For these reasons, the Board could not justify its

denial of Thornton’s application on this aspect of the application — or require it to include such a route in future applications.

¶ 43 With respect to design alternatives, the court concluded that the Board’s decision was not based on competent evidence. Given the disagreement between the parties as to whether such a lake tap was feasible, it was unclear whether lake taps were, in fact, a “reasonable” design alternative. For this reason, said the court, the Board’s decision faulting Thornton for not including lake taps in its application — a design the Board implicitly deemed “reasonable” without evidence or explanation — constituted an abuse of discretion.

2. Analysis

¶ 44 Thornton contends that the Board abused its discretion because the application provided enough information to determine precisely where the pipeline would go within the corridors. It bases this argument on several design criteria it adopted from the Commission for the “Final Water Pipeline Alignment.” Generally speaking, the criteria require Thornton to use the County rights-of-way (i.e., roads), utilize Thornton-owned property where feasible, and minimize impacts to environmental resources and existing

structures. It then argues that the Board could have deduced where the pipeline would be located within the corridor by cross-referencing the proposed corridor routes with the alignment criteria.

¶ 45 We are unpersuaded. Even if we ignore that these alignment criteria appear to be included only in Thornton’s first application (and not Supplement 3), the argument still fails. These criteria are malleable; after all, what Thornton believes are “minimal” impacts to an existing structure may not align with the views of that structure’s owner. The alignment criteria are rife with this ambiguity, a reality that firmly precluded the Board — or anyone, for that matter — from deducing the exact location of the pipeline within the corridor using this method.

¶ 46 At the end of the day, the Board is empowered to determine what constitutes a “reasonable” siting alternative — provided, of course, that that determination is based on competent evidence. Here, there is *some* competent evidence that Thornton’s use of the corridor approach leaves in doubt the pipeline’s location. Without objective tools that would equip it to delineate the pipeline’s location with greater precision, the Board was unable to meaningfully evaluate the impacts on private property owners. And that is

sufficient to render routes that utilize a corridor approach with widths up to a quarter mile “unreasonable.”

¶ 47 Likewise, the Board did not abuse its discretion in concluding that Thornton failed to provide reasonable design alternatives. To be sure, Thornton’s decision to not include lake taps in its application was based on competent evidence — specifically, expert opinion that the length of the proposed lake taps were unprecedented and expensive. But that testimony does not, on its own, obviate the Board’s countervailing expert opinion that suggested such lake taps were feasible. Because that evidence was competent, and since it is the Board’s prerogative to determine what constitutes a “reasonable” alternative, we cannot conclude it abused its discretion in this respect.

¶ 48 Nevertheless, we agree with the district court that the Board abused its discretion in faulting Thornton for not including the Shields Street Concept in its application. The Board’s criticism — and the related notion that the Board may require that such alternative be included in future applications — is beyond the Board’s regulatory power. See Land Use Code § 14.4(J); § 24-65.1-204(1)(a). Our conclusion is further bolstered by the implication of

this scheme: In lieu of its high-quality water source, Thornton would be forced to clean the water after it passes through Fort Collins. Such a proposal would apparently diminish Thornton’s water rights in direct contravention of section 24-65.1-106(1)(a).

¶ 49 In sum, although we agree that the Board did not abuse its discretion on the ultimate issue of whether Thornton provided reasonable siting alternatives, we also conclude that the Board may not fault Thornton for not offering the Shields Street Concept in future applications — let alone require it to be included.

C. Criterion #4

1. Additional Background

¶ 50 The fourth criterion requires that “[t]he 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.” Land Use Code § 14.10(D).

¶ 51 The Board cited a litany of reasons why Thornton failed to meet this criterion. It explained that the CR56 Route would impact numerous private properties (more than the DR Route, though that

route would still impact private properties). And it again pointed to the corridor as a foundational issue, stating

[t]he sheer size of the proposed 500' to ¼ mile wide corridor prevents the Board and private property owners from reasonably considering all impacts. This uncertainty is, in itself, a significant impact of this project.

¶ 52 The Board also cited several other perceived shortcomings, including

- Thornton’s decision to not include the “cumulative impacts” of yet-to-be-developed pipelines associated with potential future Phases (i.e., Phases II and III, *supra* n.2) of the TWP as authorized by the water decree;
- traffic delays and detours arising from construction, and potential impediments to emergency services for homeowners;
- detrimental impacts to groundwater, drainage, established trees, and other vegetation;
- disruption of rattlesnakes in the area; and
- discomfort with pending easement negotiations and potential use of eminent domain.

¶ 53 In its review, the district court concluded that the use of the corridor approach — and the resultant uncertainty for private

property owners within the corridor’s path — constituted, in itself, a “significant adverse effect” that Thornton had failed to adequately mitigate.

¶ 54 But it further determined that the Board’s other justifications were invalid. The court noted that at no time during the lengthy application process did the Board or the Commission request information on potential future phases of the TWP. For this reason, it found that rejecting the application for failing to provide information on those theoretical projects after the fact constituted unfair surprise and was therefore not a proper basis for denial. The court further concluded that all of the other reasons were not supported by competent evidence; in fact, they were each directly refuted by competent evidence Thornton provided demonstrating compliance with the criterion.

2. Analysis

¶ 55 Thornton contends that the Board abused its discretion because none of the impacts are permanent and any temporary impacts will be “fully mitigated.” Both arguments are unavailing.

¶ 56 Potential impacts from the pipeline could be permanent. If, for example, the pipeline is constructed on a private property that

requires removal of a mature tree, that tree will be removed — permanently. And it cannot, per the TWP guidelines, be replaced since no plants with deep roots (or structures for that matter) may be located on top of the pipeline. Such impacts cannot by definition be “fully mitigated.” Even if we assume that the pipeline would not cause such permanent impacts, the term “significant adverse impacts” is broad enough to encompass certain nonpermanent impacts. *See Prairie Mountain Publ’g Co.*, ¶ 12.

¶ 57 But regardless of whether such impacts are permanent or temporary, what matters is that the width of the corridor clouds the ability of the Board to analyze those impacts (or lack thereof). This opacity, in and of itself, is sufficient to qualify as a “significant adverse [e]ffect” for purposes of section 14.10(D) of the Land Use Code.

¶ 58 That said, it was improper for the Board to fault Thornton for not including information on the “cumulative impacts” of potential future pipelines (i.e., Phases II and III). In addition to the fact that each of these theoretical pipelines would require its own complex application per the County’s own guidelines, *see* Land Use Code § 14.9(A), it is unclear whether these pipelines will ever be built. To

require Thornton to provide information on the impacts of pipelines it may never develop is a near-textbook definition of arbitrary decision-making. *See O'Dell*, 920 P.2d at 50. Accordingly, the Board abused its discretion by demanding Thornton include such information.

IV. Conclusion

¶ 59 For the reasons stated, the Board's denial of Thornton's 1041 permit application is affirmed.

JUDGE GOMEZ and JUDGE TAUBMAN concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

Notice to self-represented parties: You may be able to obtain help for your civil appeal from a volunteer lawyer through The Colorado Bar Association's (CBA) pro bono programs. If you are interested in learning more about the CBA's pro bono programs, please visit the CBA's website at www.cobar.org/appellate-pro-bono or contact the Court's self-represented litigant coordinator at 720-625-5107 or appeals.selfhelp@judicial.state.co.us.
