District Court, Larimer County, State of Colorado 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 494-3500	DATE FILED: September 13, 2023 5:44 PM CASE NUMBER: 2020CV30800
Plaintiff: No Pipe Dream Corporation, et al., v. **Defendant**: Larimer County Board of County Commissioners, et al.	**▲ COURT USE ONLY ▲** Case Number: 20CV30800 Courtroom: 4C

ORDER REGARDING PLAINTIFF'S COMPLAINT FOR JUDICIAL REVIEW UNDER C.R.C.P. 106

This matter is before the Court on Plaintiffs No Pipe Dream Corporation, Save the Poudre, Barry Feldman, Dorothea Aravis, David Johnson, and Jill Lee's complaint seeking judicial review under C.R.C.P. Rule 106(a)(4). Plaintiffs seek relief from Defendants, Larimer County Board of County Commissioners, Commissioner Tom Donnelly, and Commissioner Steve Johnson's (collectively "the Board") decision approving Defendant Northern Integrated Supply Project Water Activity Enterprise's ("Northern") application to construct a water storage reservoir and pipeline located in Larimer County. Defendants oppose the relief Plaintiffs request.

The Court has reviewed the Complaint, Answer, Plaintiff's Opening Brief, Northern's Responsive Brief, the Board's Responsive Brief, Plaintiff's Combined Reply, the Record, and applicable law. The Court Orders as follows.

BACKGROUND

Plaintiffs challenge the approval of Northern's permit application to the Board for the Northern Integrated Supply Project ("NISP"). This proposed project encompasses the creation of a water storage reservoir and associated recreational uses, facilities, and appurtenances (the "Glade Reservoir") and a pipeline distribution network consisting of four separate raw water pipelines and associated facilities and appurtenances. The pipeline network would transport water to communities and water districts in northeastern Colorado.

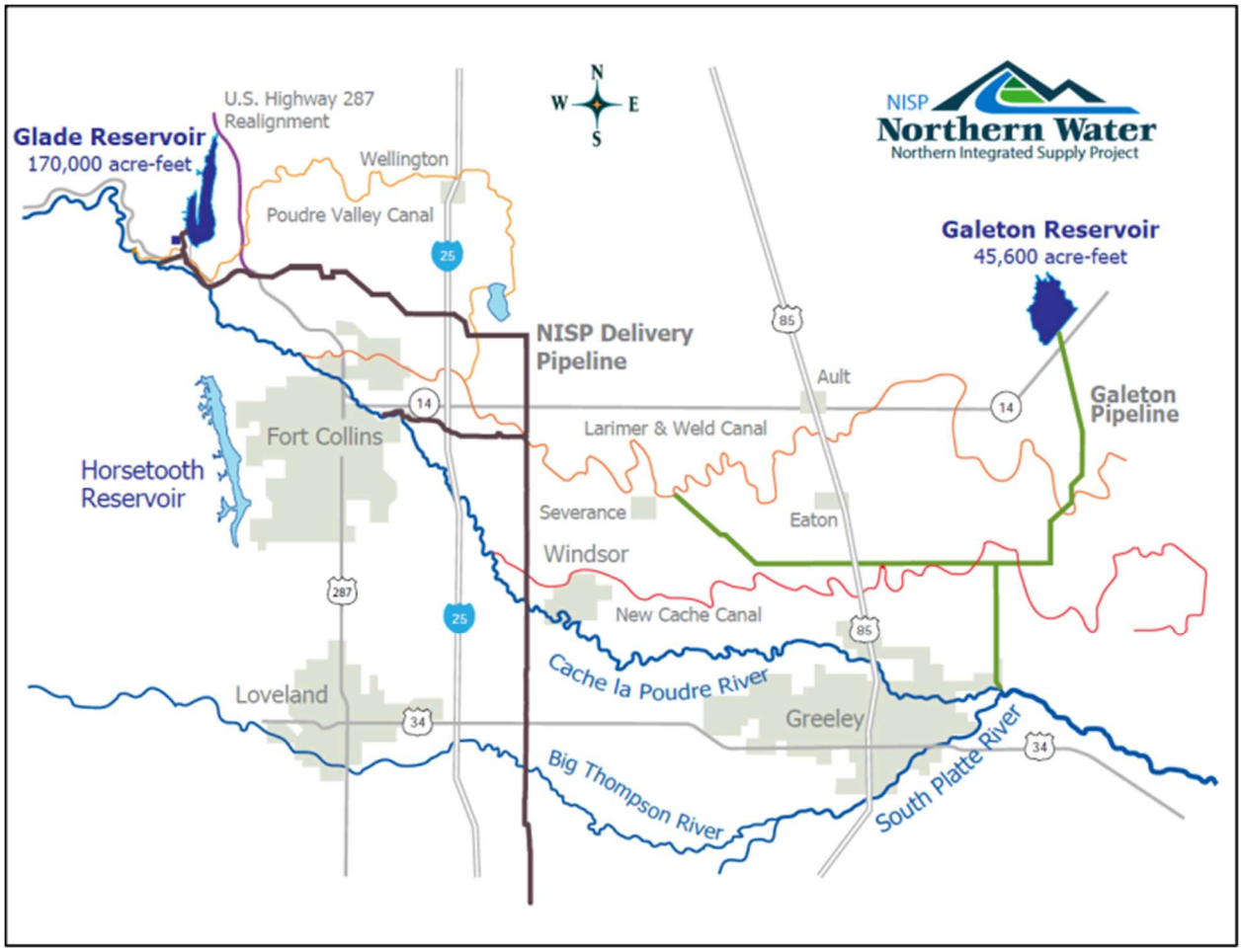
C.R.S. § 24-65.1-101 *et seq*., Areas and Activities of State Interest ("1041 Statute"), enables local governments to designate "[s]ite selection and construction of major new domestic water and sewage treatment systems and major extension of existing domestic water and sewage treatment systems." § 24-65.1-203. The Larimer County Land Use

Code, effective February 3, 2020 ("LUC"), lists the following as a designated matter of state interest.

> Site selection and construction of a new water storage reservoir or expansion of an existing water storage reservoir resulting in a surface area at high water line in excess of 50 acres, natural or manmade, used for the storage, regulation and/or control of water for human consumption or domestic use and excluding a water storage reservoir used exclusively for irrigation.

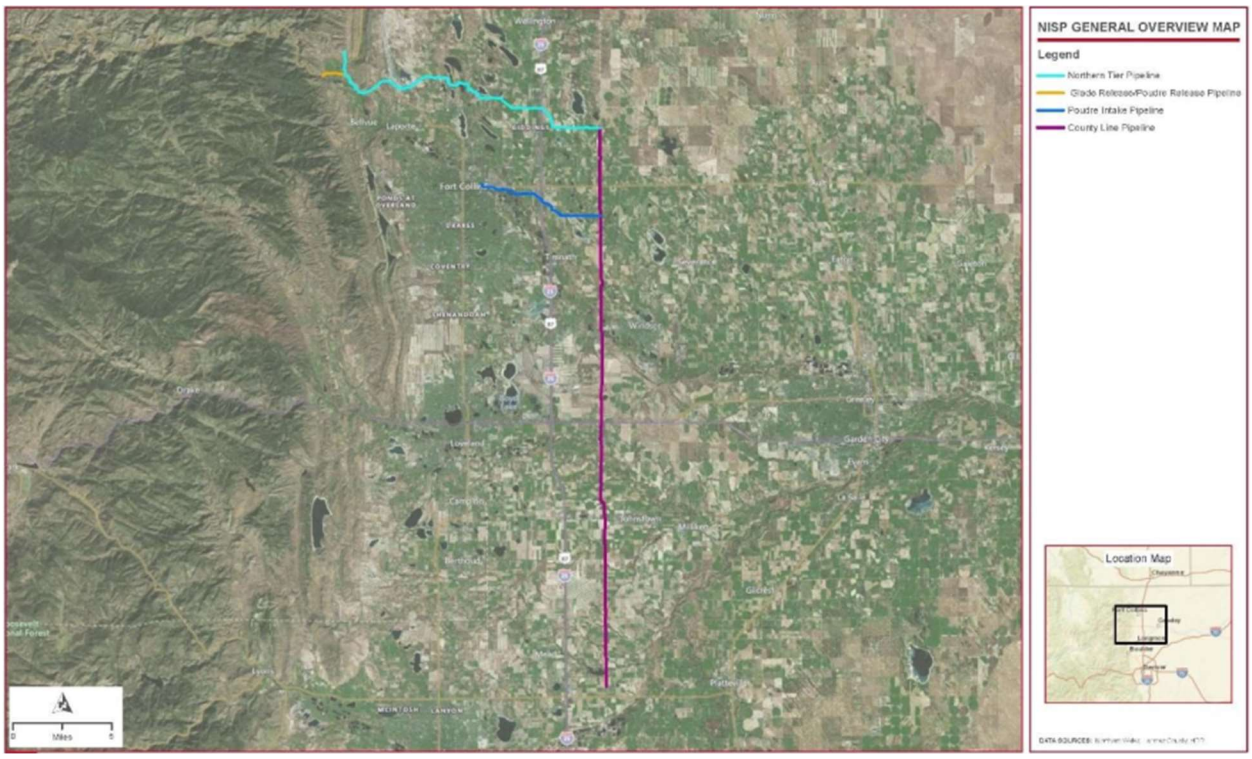
LUC § 14.4(K).

NISP is projected to create a reservoir with approximately 1,700 surface acres and a depth of seventy-five feet. *See* NISP000024. Further, NISP is projected to result in the creation of water conveyance pipelines from the Glade Reservoir to NISP participants.



See NISP000023 at Figure 1.

The main delivery pipeline is the County Line Pipeline, and water would be delivered from Glade Reservoir to the County Line Pipeline using two mechanisms. First, the Northern Tier Pipeline would deliver water directly from the Glade Reservoir to the County Line Pipeline. Second, the Poudre Release Pipeline/Glade Release Pipeline will bring water from the Glade facilities directly to the Poudre River, and the Poudre Intake Pipeline will deliver water from the Poudre River into the County Line Pipeline. The water would travel down thirteen miles of the Poudre River before being pumped into the participant conveyance system via the Poudre Delivery Pipeline. A satellite map detailing the approved pipeline route is below.



See NISP000028 at Figure 2.

It is uncontested that NISP is a designated matter of state interest and that a 1041 permit is required.

PROCEDURAL HISTORY

NISP filed its land use application and 1041 Permit in February 2020. *See* NISP000002-000010. The Planning Commission reviewed and considered the NISP 1041 Permit Application at public hearings on June 24, 2020, July 8, 2020, and July 15, 2020, and recommended by a vote of 4 to 2 that the application be approved subject to certain conditions. *See* NISP030819.

Subsequently, the Board reviewed and considered the proposed NISP 1041 Permit Application at public hearings on August 17, 2020, August 24, 2020, August 31, 2020, September 1, 2020, and September 2, 2020, in the County Board Hearing Room of the Larimer County Courthouse, Fort Collins, Colorado. *Id.*

Notice of the hearings on the NISP 1041 Permit Application was advertised in a local newspaper of general circulation. *See* NISP030819. Written notice of the initial hearing before the Board was delivered or mailed, first class, postage prepaid, to landowners within one-half mile of the proposed reservoir and within 500 feet of the proposed Northern Tier Pipeline (approximately 1,200 notices). *Id.* Additionally, notice of the hearings was posted on the Larimer County website no less than twenty-four hours in advance of the hearings. *Id.*

The Board found that the NISP 1041 Application met the twelve review criteria set out in LUC 14:10 (B) and (D)(l-12). *See* NISP030825-030832. The Board then approved NISP's Permit Application by a vote of two to one, subject to conditions, and issued written Findings and Resolution Approving the Northern Integrated Supply Project 1041 Permit ("Findings and Resolution") on October 27, 2020. *See* NISP30832-030839.

Plaintiffs initiated this matter by filing their Complaint for judicial review under C.R.C.P. Rule 106(a)(4) and declaratory judgment under C.R.C.P. Rule 57 on November 23, 2020. Plaintiffs then amended their Complaint on January 11, 2021. Plaintiffs asserted two claims for relief. First, under C.R.C.P. Rule 106(a)(4), the Plaintiffs' first claim is that the Board exceeded its jurisdiction or abused its discretion in approving Northern's application. Second, Plaintiffs sought a declaratory judgment that Commissioners Donnelly and Johnson's participation in the permitting process violated Plaintiffs' due process rights.

The Board filed its answer on January 28, 2021. Northern filed a Partial Motion to Dismiss on January 28, 2021, and its separate answer on February 1, 2021. On February 3, 2021, Plaintiffs filed a Motion to Hold Proceedings in Abeyance. Plaintiffs argued that the Court should stay this case until an appeal from a different Court within this district, No. 20CA1619, challenging the impartiality of Commissioner Johnson, resolved. Judge Field granted Plaintiffs' request to hold in abeyance.

On November 19, 2021, Plaintiffs notified the Court that the Court of Appeals in Case No. 20CA1619 had dismissed the appeal on mootness grounds. This case resumed as the basis for the abeyance was resolved.

On March 18, 2022, Plaintiffs filed a Motion for Leave to File a Second Amended Complaint; after a briefing on the issue, the Court granted leave to amend. On June 16, 2022, Northern filed a Motion to Partially Dismiss Second Amended Complaint. The

Court granted that Motion on August 30, 2022, leaving the C.R.C.P. Rule 106(a)(4) challenge as the last remaining claim. Any reference to the "Complaint" refers to the Second Amended Complaint.

Subsequently, the Parties agreed upon the scope of the certified record before the Court, and on December 21, 2022, the Board submitted the certified record containing over 32,000 pages of material.

On March 7, 2023, nearly two and a half years after the initiation of this matter, Plaintiff filed their Reply brief, ending briefing on the C.R.C.P. 106(a)(4) claim. This matter is now ripe for resolution by the Court.

STANDARD OF REVIEW

I. Review Under C.R.C.P. 106:

C.R.C.P. 106(a)(4) states:

> (4) Where, in any civil matter, any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law:
>
> (I) 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.
>
> (IX) In the event the court determines that the governmental body, officer or judicial body has failed to make findings of fact or conclusions of law necessary for a review of its action, the court may remand for the making of such findings of fact or conclusions of law.

In a proceeding seeking judicial review under C.R.C.P. 106(a)(4), the court must determine whether the governing body abused its discretion or exceeded its jurisdiction. The district court is limited to a review of the record before it, and the introduction of new or additional evidence is generally not appropriate. *See Hazelwood v. Saul*, 619 P.2d 499, 501 (Colo. 1980).

Review under Rule 106(a)(4) "does not contemplate a new evidentiary hearing at the district court level, but rather contemplates that the district court will review the record of the proceedings conducted elsewhere and determine whether the acting entity abused its discretion or exceeded its jurisdiction." *Widder v. Durango Sch. Dist. No. 9-R*, 85 P.3d 518, 526 (Colo. 2004), as modified on denial of reh'g (Mar. 15, 2004).

"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. v. Bd. of Cnty. Commissioners of Larimer Cnty.*, 507 P.3d 1053, 1060 (Colo. App. 2022), as modified (Jan. 20, 2022).

"Judicial review pursuant to C.R.C.P. 106(a)(4) permits a district court to reverse a decision of an inferior tribunal only if there is 'no competent evidence' to support the decision. 'No competent evidence' means that the ultimate decision of the administrative body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Ross v. Fire & Police Pension Ass'n*, 713 P.2d 1304, 1308–09 (Colo. 1986). Competent evidence has further been defined to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *City of Colorado Springs v. Givan*, 897 P.2d 753, 756 (Colo. 1995).

If a reviewing court finds a lack of competent evidence in the record, or an abuse of discretion or exceeding of jurisdiction by the lower reviewing party, the appropriate remedy is for the court to remand the matter to the lower reviewing body. *Johnston v. City Council of City of Greenwood Vill.*, 177 Colo. 223, 225, 493 P.2d 651, 653 (1972).

"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." Because this Court is not the fact finder, it "cannot weigh the evidence or substitute our own judgment for that of the [board of county commissioners]." *No Laporte Gravel Corp.*, 507 P.3d at 1060.

Additionally, administrative proceedings are accorded a presumption of validity and all reasonable doubts as to the correctness of administrative rulings must be resolved in favor of the agency. *See Van Sickle v. Boyes*, 797 P.2d 1267, 1272 (Colo. 1990).

"In a C.R.C.P. 106(a)(4) review, an agency's legal conclusions are not reviewed de novo, and will be affirmed if supported by a reasonable basis." *Lieb v. Trimble*, 183 P.3d 702, 704 (Colo. App. 2008). "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, we may not set aside the board's decision." *Id.*

II. Statutory Construction of Land Use Codes and Ordinances:

Land use codes and ordinances are subject to the general canons of statutory interpretation. "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." *No Laporte Gravel Corp.*, 507 P.3d at 1060.

"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. However, if the board's interpretation is inconsistent with the governing relevant articles, then that interpretation is not entitled to deference." *Id.*

APPLICATION OF LAW

In their briefing supporting their Complaint for judicial review under C.R.C.P. 106(a)(4), Plaintiffs argue that the Board exceeded its jurisdiction or abused its discretion. The Parties agree that the certified record before the Court is the entirety of the materials for review and encompasses the decision-making process and final decision of the Board.

The certified record before the Court is voluminous, consisting of over 32,000 pages contained within six volumes and 33 binders. The certified record encompasses the application submission documents, comments, and presentations [Vol. 1, Binders 1-22], public comments and Board comments [Vol. 2, Binders 23-26], meeting minutes from the Board and public comment hearings [Vol. 3, Binder 27], findings and resolutions [Vol. 4, Binder 28], additional added documents [Vol. 5, Binders 30-33], transcripts of the Board and public comment hearings [Vol. 6, no binders listed], and the Thornton record [Vol. 7, Binder 29] (collectively the "Record").

Based on this Record, Plaintiffs request that the Court find that the Board acted arbitrarily and capriciously and exceeded its jurisdiction in approving the permit application. As a remedy, Plaintiffs request that the Court vacate the Board's approval of Northern's permit application.

Plaintiffs raise six arguments in this Rule 106 review. Each of these issues is addressed in turn below.[1]

[1] Plaintiffs, in their briefing, dramatically reduced the scope of the issues they are raising in this Rule 106 review, compared to the allegations in the Complaint. The Complaint alleges approximately forty-two errors or bases for relief. In contrast, Plaintiffs raise only six instances where the Board exceeded its jurisdiction or abused its discretion in its briefing. The Court does not address contentions that Plaintiffs have raised in the complaint but not addressed in the briefing. *See Creekside Endodontics, LLC v. Sullivan*, 527 P.3d 424, 430 (Colo. App. 2022).

I. Whether the Board Abused Board Exceeded Its Jurisdiction or Abused Its Discretion in Approving the 1041 Application Without Including Highway 287:

The construction of the Glade Reservoir will result in the flooding of a portion of U.S. Highway 287 ("Highway 287"). *See* NISP000006. As a result, NISP will require the relocation of a portion of Highway 287. *See* NISP030830; NISP000305.

In approving the 1041 permit application, the Board determined that the relocation of Highway 287 was not a part of the 1041 permit. *See* NISP030830.

Plaintiffs contend that the Board erred by approving NISP without also including the relocation of U.S. Highway 287 in the permitting process.

Whether the Board abused its discretion turns on whether the relocation of Hwy 287 was designated by the LUC as a matter of state interest covered by the 1041 permitting process.

In 1974, the Colorado General Assembly enacted measures to further define the authority of state and local governments in making planning decisions for matters of statewide interest. Set forth in C.R.S. 24-65.1-101 et seq., these powers are commonly referred to as "1041 powers," based on the number of the bill of the proposed legislation House Bill 74-1041. These 1041 powers allow local governments to identify, designate, and regulate areas and activities of state interest through a local permitting process. *See Audrey Dakan, Colorado Local Governments' Use of 1041 Regulations*, Colo. Dep't of Local Affairs (May 11, 2017), https://perma.cc/BQJ5-DDYQ.

The County, by virtue of the Larimer County Land Use Code, has designated, among other matters, the siting and development of new or extended domestic water transmission lines and the site selection and construction of a new water storage reservoir or expansion of an existing water storage reservoir. *See* LUC § 14.4(J) and (K) (Effective February 2020).

Specific to Plaintiff's argument, the Land Use Code UC § 14.4(k) defines construction of water storage reservoirs as a matter of state interest as follows:

> Site selection and construction of a new water storage reservoir or expansion of an existing water storage reservoir resulting in a surface area at high water line in excess of 50 acres, natural or manmade, used for the storage, regulation and/or control of water for human consumption or domestic use and excluding a water storage reservoir used exclusively for irrigation. A water storage reservoir shall also include all appurtenant uses,

structures and facilities, roads, parks, parking, trails and other uses which are developed as part of the water storage reservoir.

Plaintiffs argue that the definition of road in the Larimer County Code applies to this section. "The term 'road' shall embrace streets, avenues, boulevards, roads, alleys, lanes, viaducts, bridge, highway, tunnel, underpass, overpass and all other public ways in the county." Larimer County Code § 1.2.

As such, Plaintiffs argue that a road includes highways and that under the plain language of § 14.4(k), the relocation of Highway 287 needed to be included in the Board's approval of Northern's 1041 permit.

Defendants argue that because the LUC designates the construction of water storage reservoirs, but not the construction of arterial highways, as matters of state interest, highway relocation is not a matter of state interest (and subject to 1041 permitting). Further, Plaintiffs argue that the relocation of Highway 287 is not an appurtenant use of Glade Reservoir and, therefore, is not covered by § 14.4(k).

The resolution of this issue turns on the interpretation of the LUC. Land use codes and ordinances are subject to the general canons of statutory interpretation. In interpreting a statute, the Court considers "the entire statutory scheme to give consistent, harmonious, and sensible effect to all of its parts," and words and phrases are construed " in accordance with their plain and ordinary meanings." *Cisneros v. Elder*, 506 P.3d 828, 832, as modified on denial of reh'g (April 11, 2022) (internal citations omitted).

While the issue is one of interpretation of a land use code, the Court does not review the Board's legal conclusions de novo and will affirm the interpretation if it is supported by a reasonable basis. *See Lieb v. Trimble*, 183 P.3d 702, 704 (Colo. App. 2008). However, if there is no reasonable basis for the Board's interpretation, the Court may set aside its decision. *Id.*

When determining a matter of state interest, a local government may designate certain activities from among ten options set forth in C.R.S. § 24-65.1-203(1). Those options include "[s]ite selection and construction of major new domestic water and sewage treatment systems and major extension of existing domestic water and sewage treatment systems" and "[s]ite selection of arterial highways and interchanges and collector highways." § 24-65.1-203(1)(a), (e). "Arterial highway means any limited-access highway which is part of the federal-aid interstate system or any limited-access highway constructed under the supervision of the department of transportation." § 24-65.1-104(3). It is uncontested that Highway 287 meets this definition.

The LUC does not define site selection of arterial highways as a matter of state interest. In contrast, it *does* define the construction of new domestic water systems in the form of water storage reservoirs. *See* LUC § 14.4.

Here, the plain language of the LUC requires a 1041 Permit for the development of a water storage reservoir, but not the relocation of a highway. The drafters of the LUC could have adopted § 24-65.1-203(1)(e) requiring a 1041 Permit for a highway relocation. They did not. This suggests that the LUC does not intend to cover highway relocation projects and supports the Board's reading of LUC § 14.4(k).

Further, the plain language of the LUC limits the breadth of which roads are subject to the 1041 Permit process. "A water storage reservoir shall also include ***all appurtenant uses***, structures and facilities, roads, parks, parking, trails and other uses which are ***developed as part of*** the water storage reservoir." § 14.4(k) (emphasis added). The Parties dispute whether the word "appurtenant" modifies the definition of road enough to include Highway 287 and, accordingly, how broadly "road" should be interpreted.

When "examining a statute's language, we give effect to every word and render none superfluous because we do not presume that the legislature used language idly and with no intent that meaning should be given to its language." *Lombard v. Colorado Outdoor Educ. Ctr., Inc.*, 187 P.3d 565, 571 (Colo. 2008) (internal citations omitted).

Under the series-qualifier canon of statutory construction, "when several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all." *Anschutz v. Colorado Dep't of Revenue*, 524 P.3d 1203, 1207 (Colo. App. 2022). As such, the phrase "developed as a part of" gives meaning to the words before it because it is as applicable to each of them as the last.[2]

Appurtenant means "annexed or belonging to a more important property." Merriam-Webster Dictionary, https://perma.cc/QZ3Q-ZC76. Developed, as used here, means to create or produce and is limited by "as part of." "Developed as part of" modifies the forgoing words, including road, to mean a road created or produced as part of NISP.

Applying these cannons of statutory construction, and the definition of "appurtenant," the Board's interpretation of the LUC was neither erroneous nor without a reasonable basis. The permitting of the water storage reservoir necessarily

[2] Further, "structures and facilities, roads, parks, parking, trails and other uses" is a series words used as nouns. Therefore, they are in parallel construction and under the natural construction of language should be read together.

includes both the reservoir itself, and the other uses (including roads) which are both developed as part of and appurtenant to the reservoir itself.

Highway 287 is neither annexed to nor belonging to NISP; nor is it being developed because of the creation of the water storage reservoir. It is a previously existing inter-state roadway, a portion of which will need to be relocated because of NISP. The relocation of a portion of Highway 287 is a different scenario than building a road to reach parking lots near the recreational area or even building a new major thoroughfare from Wyoming to the Glade Reservoir to ease traffic.

The Board's interpretation that § 14.4(k) does not require Highway 287's relocation to be included in NISP has a reasonable basis in law and is warranted by the record. As such, the Court will not disturb their interpretation.

Therefore, the Board did not misapply the law or abuse its discretion.

II. Whether the Board Abused Its Discretion by Approving NISP's Corridor Approach:

The Board approved the installation of the pipeline within a 200-foot corridor. "The pipelines shall be installed within 100 feet on either side of the centerline of the approved pipeline route in the application, which provides an installation envelope of 200 feet." NISP030838. Although Northern objects to the characterization, an installation envelope is a pipeline corridor (hereinafter "Corridor").[3]

Regardless of how it is characterized, Plaintiffs contend that the approval of a pipeline corridor in excess of a fifty-foot easement violates the Board's precedent and is not a uniform and consistent application of the Land Use Code.

The Board had previously denied an application by the City of Thornton (the "Thornton Application") to construct a pipeline and found that their five-hundred feet to a quarter-mile wide Corridor "prevented meaningful evaluation of the two alternatives presented." R006833 (Thornton Pipeline Admin. Rec. in NISP Folder 7).

With this context, Plaintiffs assert two interrelated arguments: (1) the Board failed to follow its own precedent set by the Thornton Pipe permit application, and (2) the Board action was inconsistent with the goals of the Larimer County Land Use Code to "[m]aintain and enhance property values by stabilizing expectations, fostering predictability in land development and establishing a process that efficiently and

[3] Northern, in Response, argues that the Board did not approve a pipeline corridor. This is refuted by the record. *See* NISP000038, NISP000041, and NISP030839.

equitably applies this code to individual sites." On these grounds, Plaintiffs argue that the Board abused its discretion.

The Court first notes that the Board, when passing on a 1041 application, is not engaged in a judicial proceeding. It is instead an administrative body. As such, the applicability of stare decisis and other doctrines of judicial interpretation on Board decisions is far from clear. *B & M Service, Inc. v. Public Utilities Commission*, 228, 232, 429 P.2d 293, 295 (1967) ("the doctrines of Res judicata and Stare decisis, which exert an important influence upon the course of proceedings in the courts and upon the substantive character of judicial determinations, are not permitted to impose limitations upon the exercise of administrative discretion.").

To be sure, an agency is required to consistently and uniformly interpret statutes, and failure of an agency to do so strips the agency of the deference that is normally extended to them on matters of statutory interpretation. *See Canyon Area Residents for the Env't v. Bd. of Cnty. Comm'rs of Jefferson Cnty.*, 172 P.3d 905, 910 (Colo. App. 2006), as modified on denial of reh'g (Nov. 9, 2006). But that is not the circumstance with which the Court is confronted.

Neither the Land Use Code, nor the controlling statutes prohibit a Corridor approach, nor set forth a standard size for pipeline corridors. The Board has not asserted inconsistent or contradictory statutory interpretations in support of these two decisions.

The Thornton Application "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 … the corridor expanded to a quarter-mile wide to accomplish the same goal." *See* Plaintiffs; Appendix 1, 21CA0467 *Thornton v Bd of Comm* 09-01-2022 ¶ 11 (unpublished opinion).

The Board denied the Thornton Application on multiple grounds; some of which were found to be an abuse of discretion by the reviewing district court. *Id.* ¶ 16. However, the district court and subsequently, the Colorado Court of Appeals, agreed that the Thornton Application's "use of the corridor approach prevented the Board from adequately evaluating the impacts of the project on private property." *Id.*

The Court of Appeals did not take issue with the idea of a corridor approach as a whole but instead stated that the Thornton Application's "use of the corridor approach deprived the Board of the ability to assess the specific impacts to private property owners." *Id.* ¶ 28. The Court explicitly stated that a narrower corridor could allow the Board to assess the impacts on private property owners. *Id.* ("Without a narrower corridor, it remains unclear whether the pipeline could be laid in a less objectionable location.")

Further, the Court of Appeals noted that "the corridor approach is not inherently inconsistent with [the master plan]." However, in Thornton's case, "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." *Id.* ¶ 31.

Here, the Court is confronted with a Board decision based on an application that is fundamentally different from the Thornton Pipeline application, which the Board denied. While NISP's application also utilizes a Corridor, it is far narrower and uniform, substantially differentiating it from the Thornton Application.

The NISP approach is a uniform two-hundred-foot corridor set from a centerline, far narrower than the Thornton Application's five-hundred-foot to quarter-mile (or 1320-foot) wide corridor. Additionally, while the record demonstrates that some property owners were concerned about the pipeline construction on their property, there were little to no public comments regarding landowners' inability to assess the impacts on their property based on the use of the modified corridor approach.

Instead, Plaintiffs cite their own comments made to the Board where they state the specific areas of their property that would be impacted by the construction. *See* NISP001223; NISP031913. These concerns demonstrate that the public and landowners were sufficiently able to assess the potential impacts of the pipeline. This is in direct contrast to the Thornton corridor, in which the Board was unable to resolve "questions about the impact on private property resulting from uncertainties about the pipeline's route." 21CA0467 ¶ 31.

There is competent evidence in the record to support the Board's conclusion that this application is acceptable when Thornton's was not. *See* NISP032170, Line 20 - NISP032172, Line 18; NISP030825–26; NISP032110, Line 16 - NISP032111, Line 20.

These factual differences are substantial, material, and do not undermine the Board's decision. On the record before the Court, the Board's differing conclusions on these two applications cannot be said to be arbitrary and capricious or an abuse of discretion.

The Plaintiffs' second and related argument on this issue is that the use of the Corridor conflicts with the stated objectives of the LUC. LUC § 2.3.1(B)[4] explains that the purpose of the Land Use Code is to:

[4] Plaintiffs cite LUC § 1.3.3. § 1.3.3 does not exist in the 2020 Larimer County LUC. It appears that Plaintiffs intended to cite to 2.3.1 in the 2020 version of the LUC.

> Maintain and enhance property values by stabilizing expectations, fostering predictability in land development and establishing a process that efficiently and equitably applies this code to individual sites while respecting property owner rights and the interests of Larimer County citizens. This requires balancing economic development with community values and individual property rights.

The Board's decision does not violate the stated objectives in the Land Use Code to stabilize expectations and foster predictability. This is because the Corridor here was sufficiently narrow for the Board to evaluate the effects on local property owners and avoid uncertainties about the pipeline's route. The factual differences between the Thornton Application and this application do not undercut the stability and the predictability that the LUC seeks to achieve.

Therefore, the Board did not abuse its discretion in determining that the Corridor approach was acceptable for Northern's permit application.

III. Whether the Board Abused Its Discretion in Determining When a Permit Amendment is Subject to Review Under LUC § 14.13:

LUC § 14.13 - Technical Revisions and 1041 Permit Amendments, states as follows.

> A. Any change in the construction or operation of the project from that approved by the county commissioners shall require staff review and a determination made by the planning director in writing as to whether the change is a technical revision or 1041 permit amendment.
> B. A proposed change shall be considered a technical revision if the planning director determines that there will be no increase in the size of the area affected or the intensity of impacts as a result of the proposed change(s); or any increase in the area or intensity of impacts is insignificant.
> C. Changes other than technical revisions shall be considered 1041 permit amendments. A permit amendment shall be subject to review as a new permit application.

In its findings and resolution, the Board set forth as follows.

> If the Applicant determines a pipeline needs to or should be installed outside this 200-foot envelope, such deviation may occur without further review or approval by Larimer County only if both of the following conditions are satisfied:

i. The deviation will not move the location of the pipeline from one property to a different property; and
ii. The property owner(s) where the deviation will occur consent in advance to the deviation.

If either condition is not satisfied, review and approval by the Board of County Commissioners shall be required if Larimer County Staff considers an alignment deviation outside the 200-foot envelope to have significant additional impacts to the landowner or directly adjoining landowners. If the deviation is deemed by Larimer County staff to not have such significant additional impacts, the Larimer County Development Director shall review and decide the deviation request. Reconsideration by the Board of County Commissioners or Larimer County Development Director shall only reopen the portion of the pipeline alignment for that particular land parcel and will not reopen the entire 1041 permit. A deviation within this condition is not considered a 1041 Permit Amendment.

NISP030838.

Plaintiffs claim that in making this decision, the Board "abused its discretion in finding that deviations of the pipeline corridor causing significant additional impacts is not considered a 1041 Permit Amendment and will not reopen the entire 1041 permit in violation of LUC §14.13." Plaintiffs' Opening Brief at 20. They restate and focus this claim to the contention that the Board "misapplied LUC § 14.13." Plaintiffs' Consolidated Reply at 16.

The first time that Plaintiffs raised this issue was in their opening brief. This issue was not raised in any of the complaints filed in this case, including the operative Second Amended Complaint.[5]

Although sections of Plaintiff's Second Amended Complaint (and its prior iterations) raise in great detail *other issues* raised in their opening brief, Plaintiffs never asserted in any of their complaints that "the Board abused its discretion in finding that deviations of the pipeline corridor causing significant additional impacts is not considered a 1041 Permit Amendment and will not reopen the entire 1041 permit in

[5] Plaintiffs argue that the following cited areas were sufficient to preserve their claims that the Board misapplied LUC § 14.13. Second Amended Complaint, p. 6, ¶23, p. 20, Exhibits 12 and 13; p. 7, ¶24, Exhibit 12; pp. 7-8, ¶25, Exhibit 12; p. 8, ¶26, Exhibit 12; p. 8; ¶27; p. 9, ¶29; p. 20, ¶96; and p. 21, ¶102. Contrary to Plaintiffs' contentions, nothing in the Second Amended Complaint, or its fourteen exhibits, made a claim on this issue or previously raised this issue to the Court. Further, the cited Exhibits #12 and #13 have no relationship to the Board's decision under, or misapplication of law regarding, LUC § 14.13. Exhibit 12 is a map with what appears to be a pipeline route and three parcels of land hand-drawn over it. Exhibit 13 is a letter and proposed grant of right of entry and access to Plaintiff Barry Feldman's property from Northern. Therein, Northern is offering two hundred and fifty dollars to access Mr. Feldman's land and place a survey pin.

violation of LUC § 14.13." Plaintiffs' Opening Brief at 20. Nor do they relate to Plaintiffs' restatement of the same issue, namely that, "the Board's (*sic*) misapplied LUC §14.13." *See* Plaintiffs' Consolidated Reply.[6]

Plaintiffs' failure to plead this claim deprives the Defendants of notice regarding the claims presented. Northern addresses this in its Response, arguing that Plaintiffs failed to preserve this issue for review.

The Court of Appeals has articulated two methods of preservation within a C.R.C.P. 106 review. First, a party may preserve a claim for review by bringing it within their petition or complaint. *See Whitelaw v. Denver City Council*, 2017 COA 47, ¶ 9, 405 P.3d 433, 438 ("The neighbors preserved all of the issues below by raising them in their Rule 106 petition"). As stated above, Plaintiffs did not raise this issue in their Complaint.

Second, Plaintiffs could have preserved this issue for review by bringing it before the Board during the administrative proceedings.

> This claim was not raised before any of the Board hearing officers; rather, it was raised for the first time before the district court. As the district court noted, there was "no evidence that [the] issue was raised in administrative proceedings." Because the district court could only address, in C.R.C.P. 106 proceedings, issues that were properly presented for determination by the administrative agency, the court properly affirmed the discretionary decision of the administrative agency.

Abromeit v. Denver Career Serv. Bd. 140 P.3d 44, 53 (Colo. App. 2005).

Here, no Party has identified anywhere in the administrative record where this issue was raised and addressed by the Board.[7]

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[6] In their citations to the Record and claims made in their Complaint, Plaintiffs implicitly conflate the proposed pipeline route and claims regarding amendments to the Corridor and LUC § 14.13. These are different issues, relying on different aspects of the Findings and Resolution and different parts of the LUC. Indeed, these issues have been raised by Plaintiffs themselves as separate and discrete issues.

[7] Plaintiffs cite to the Record at pages NISP006264, NISP013505-07, NISP001223, NISP031682, NISP001251, NISP031689, and NISP031912. These citations to the Record do not demonstrate that they brought this issue to the attention of the Board or preserved it for review. NISP006264 raises the issues of project feasibility, the use of the 1997 master plan, and that the project designs have changed in the year prior. NISP013505-07 raises the approval under LUC §1 4.10(D)(3), (4), (10), and (11), as well as alterations in the final pipeline route. NISP001223 addresses speaking time during the permitting process as well as the proposed pipeline route as of June 4, 2020. NISP031682 is a transcript of the hearings addressing easements on Mr. Thompson's property and the using the Poudre River as a conveyance choice. NISP001251 raises no specific issues under the LUC; instead, it demonstrates landowner concerns

After reviewing the provided citations to the Record, the Court does not find that Plaintiffs brought their claims of violations of LUC § 14.13 and amendments to the approved Corridor before the Board.

Both before the Board and in their Complaint/Petition, Plaintiffs have failed to preserve this issue for review.

Lastly, Plaintiffs argue that preservation was impossible due to the timing of the Board's decision. Plaintiffs argue that:

> Plaintiffs were denied the opportunity to comment on, and preserve for review, their objection to the final language of the NISP 1041 permit condition violating LUC § 14.13 because that final language was developed after the close of public comment on the last evening during the Board's final deliberations. Thus, it was impossible for the Plaintiffs to specifically preserve the legal issue for review.

Plaintiffs Consolidated Reply at 16, footnote 1.

Plaintiffs' argument implicitly admits that the Record did not preserve this issue for review because the Board's decision occurred after the close of public comment. *See* NISP032294, Line 16 -NISP032295, Line 5. Even if true, Plaintiffs were able to preserve the issue for review under Rule 106 by raising it in their Rule 106 petition (or complaint) to the court. *See Whitelaw*, 405 P.3d 433, 438. They failed to do so and deprived the Defendants of notice of their claims.

Because this Court can only consider issues that were preserved for review or raised within the Complaint, the Court must defer to the discretionary decision of the Board. *See Abromeit v. Denver Career Serv. Bd.*, 140 P.3d 44, 53 (Colo. App. 2005).

IV. Whether the Board Abused its Discretion in Deciding that Northern's Permit Application Met the Requirements of LUC §14.10(D)(2):

An applicant for approval of a 1041 permit must meet the requirements set forth in the LUC. LUC §14.10(D)(2) states, "[t]he applicant has presented reasonable siting and design alternatives or explained why no reasonable alternatives are available."

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regarding the project and worries about the Poudre River and the proposed pipeline route. NISP031689, another transcript excerpt, once again addresses the proposed pipeline route and easements. Lastly, NISP031912 primarily refers to the Halligan Reservoir, a completely separate project, and makes no reference to amendments to the approved Corridor or any issue regarding the interpretation of the LUC.

Plaintiffs argue that the Board abused its discretion when it found that Northern's application presented reasonable project siting alternatives or explained why no reasonable alternatives were available. In support of this, Plaintiffs argue that "Northern's 1041 application failed to present a single reasonable siting or design alternative to the Board or adequately explain why no reasonable alternatives were available." *See* Plaintiff's Opening Brief at 22.

1. Presented Pipeline Alternatives:

In its Findings and Resolution, the Board found and concluded as follows:

> Many alternative pipeline routes for each segment were studied and presented in the application. These route alternatives were along a specific line which allowed for evaluation of actual impacts. Numerous factors for the route combinations were evaluated, including disruption to surrounding property, existing development and utilities, the number of properties impacted, residential and urbanized areas, natural hazards, and environmental and wildlife impacts.
>
> NISP030826.

These findings are supported by the Record. NISP's application presented reasonable pipeline citing and design alternatives for the Board to analyze. In February 2020, Northern drafted a Memorandum titled Route Alternative Analysis Introduction as part of its submittal documents. *See* NISP000565.

This memo explains the criteria used to determine the reasonableness and feasibility of the proposed alternative routes and explains why Northern reached its conclusions regarding the preferred plan. The evaluation criteria included:

a. Capital Cost
b. Conduit Length,
c. Easement Difficulty,
d. Right-of-Way Impact,
e. Landowner Impact,
f. Proximity to Occupied Dwellings,
g. Environmental Impacts.
h. Existing Utilities
i. Hazardous/Permitted Crossings
j. Surface and Street Impacts
k. Traffic Impacts
l. Water Storage Reservoirs Impacts
m. Construction Durations and Relative Constructability

n. Required Trenchless Crossings
o. Development Pressure
p. Operation and Maintenance (O&M) Access
q. O&M Requirements
r. Natural Resources Impacts

See NISP000569-NISP000574.

Northern employed a simplified scoring metric based on comparing the proposed alternatives against each other across three separate categories. Next, each alternative was presented, overlaid on a satellite map with scoring criteria and comments. *See* NISP000581-NISP000651.

The Record demonstrates that Northern presented multiple route options both by pipeline route as well as multiple options for specific sections within each pipeline. Each specific pipeline section offered between one and six alternate options. Together, the options presented are numerous.

For the Northern Tier Pipeline, only one option was presented for project area zero, which encompasses a short section from the Glade Reservoir to the Poudre River and a short section to the conveyance alternatives. Six scored alternatives were presented for project area one, five for project area two, and four for project area three.

The Poudre Intake Pipeline, which is substantially shorter than the Northern Tier, had five alternative routes. Lastly, the County Line Road Delivery Pipeline had five options presented for area one, three options presented for area two, two options presented for area three, four options presented for area four, and four options presented for area five.

Based on this record, the Board considered reasonable siting and design alternatives, as it was required to do under LUC §14.10(D)(2).

Plaintiffs do not contend that the proposed alternatives are all unreasonable. Instead, Plaintiffs argue that the Board abused its discretion in failing to consider three specific alternatives. Namely, 1) the Thornton/NISP co-location siting and design alternative; 2) the lake tap siting and design alternative; and 3) the Poudre River siting and design alternative. *See* Plaintiff's Consolidated Reply at 20-21.

The Court rejects this argument.

The LUC does not require the Board to consider *all possible alternatives*, or any specific alternative, for siting and design. Instead, it requires only that "[t]he applicant has presented reasonable siting and design alternatives or explained why no reasonable

alternatives are available." LUC § 14.10(D)(2). That the Board did not consider these design and siting alternatives does not make the Board's decision improper. *C.f. Johnson*, 417 P.3d at 967 ("An action by an agency is not arbitrary or an abuse of discretion when the reasonableness of the agency's action is open to a fair difference of opinion, or when there is room for more than one opinion.").

The Court is not in a position to decide, in this Rule 106 review, whether the Board made the best possible decision regarding all pipeline alternatives. Instead, "in a C.R.C.P. 106(a)(4) action, judicial review of a governmental agency exercising its quasi-judicial role ... is limited to whether the body has exceeded its jurisdiction or abused its discretion." *Johnson v. Civ. Serv. Comm'n of City & Cnty. of Denver*, 417 P.3d 963, 967 (Colo.App. 2018). The Board considered reasonable siting and design alternatives, as it was required to under LUC §14.10(D)(2). The Court cannot say that the alternatives it considered were wholly unreasonable, or its ultimate decision was an abuse of discretion.

2. The Board's Finding of No Reasonable Alternative for the Glade Reservoir Location:

In its Findings and Resolution, the Board concluded that:

> Northern's application presents a lengthy review of over 200 alternatives to NISP including alternative reservoir locations, expansion of existing reservoirs, use of ground aquifers in lieu of NISP, and a "No Action" plan where NISP would not be developed. Per the Army Corp of Engineers in the FEIS, the proposed Glade Reservoir is the most appropriate and least impactful option when considering the mitigation plans imposed.

NISP030826.

This conclusion is supported by the Record. The application explained why no reasonable alternative was determined to be available.

> After many years of federal scientific studies and required environmental compliance with substantial public input, including input from Larimer County, approvals by the agencies of the State of Colorado and the permits issuing for the current project configuration, which is the subject of this permit application, it is not possible at this juncture for the Applicant to submit a Permit request for another Project configuration or alternative. Having incongruent permit applications at the various agencies is not a viable option, therefore no reasonable alternatives are possible at this time as the other state and federal permitting agencies have acted.

NISP007240

This was consistent with Northern's explanation during the August 17, 2020, hearing before the Board:

> That federal permitting process for NISP really included a lot of big picture alternatives. It included study and analysis of more than 200 potential water storage and delivery options to meet the project needs. Some of these options and alternatives included buy and dry of 60,000 acres of farmland, transmountain diversion projects, groundwater development, aquifer storage and recovery, even rotational fallowing. We had five different project alternatives that were carried forward through the entire federal permitting process with the NISP project as described, anticipated to be the best option. As I mentioned, Larimer County provided comments on these various EIS documents through the last fifteen years starting in 2005 as a cooperating agency.

NISP031583, Line 22 – NISP031584, Line 13.

> From 2017 to 2019 NISP submitted multiple technical documents and memos to the county and Larimer County staff provided feedback on pipeline routing, recreation requirements, and other project components.

NISP031584, Lines 17 – 20.

> So after many years of the federal and state scientific and environmental studies we've gone through with substantial public input. All of our state and federal permits to date have been issued for this current project configuration known as NISP. It's not possible at this juncture to submit a permit request for another big picture alternative for the national and state permitting processes.

NISP031585, Lines 3 – 10.

The Record supports the Board's conclusion that the proposed "Glade Reservoir is the most appropriate and least impactful option when considering the mitigation plans imposed," their decision was not an abuse of discretion.

Plaintiffs argue that the Board abused its discretion by allowing prior permit applications to "obviate the need to comply with LUC § 14.10(D)(2)." *See* Plaintiffs' Opening Brief at 23. Plaintiffs argue that LUC § 14.6(B), which states, "[r]eview or approval of a project by a federal or state agency does not obviate, and will not substitute for, the need to obtain a 1041 permit for that project under this section" supports their position. They argue that because Northern referenced other

applications and permits as a reason for being unable to provide alternative locations for the Glade Reservoir, they have obviated the need to comply with § 14.10(D)(2).

Plaintiffs misinterpret both LUC § 14.10(D)(2) and 14.6(B).

LUC § 14.6(B) merely states that an application's review and approval by a state or federal agency does not remove the obligations to comply with the permitting process imposed by the Larimer Land Use Code. For example, it would have been insufficient for an applicant to have submitted an application with supporting documentation showing approval for a plan by a federal agency without meeting the other requirements of the permitting process. That is not the basis for the Board's conclusion that Northern met the requirement of showing why no reasonable alternatives are available.

LUC § 14.10(D)(2) requires that "[t]he applicant has presented reasonable siting and design alternatives ***or explained why no reasonable alternatives are available***." *Id.* (emphasis added).

The plain language of § 14.10(D)(2) provides two options. An applicant may provide reasonable siting and design alternatives or explain why reasonable alternatives are not available. Here, Northern explained that based on the siting and design process, ongoing since 2005, and the already approved permits, there was only one available siting and design option.

The Board must decide whether an applicant has sufficiently explained why no reasonable alternatives are available. There are no strict criteria for that decision. The Board, having reviewed the application and prior permits that were incorporated into the application, agreed with the assessment of the US Army Corp of Engineers in the FEIS. This is an analysis of alternatives presented through the inclusion of the FEIS and acceptance of the explanation that, at that juncture, no reasonable alternative was available. This decision complies with LUC § 14.10(D)(2) and § 14.6(B) and did not misapply the law. Further, competent evidence in the record supports the Board's decision to approve the 1041 application.

Therefore, the Board did not exceed its jurisdiction or abuse its discretion in determining that, for the Glade Reservoir, the application met the requirements of LUC § 14.10(D)(2).

V. Whether the Board Exceeded its Jurisdiction or Abused its Discretion in Deciding that Northern's Permit Application Met the Requirements of LUC §14.10(D)(1):

LUC §14.10(D)(1) requires that for all 1041 permits, "the proposal is consistent with the master plan and applicable intergovernmental agreements affecting land use and development."

In its Findings and Resolution, the Board determined this requirement had been met and concluded that:

> Northern is obligated by many conditions and plans, such as the Wetland Mitigation Plan and Fish and Wildlife Mitigation and Enhancement Plan, to develop NISP in a way that respects the environment and sensitive areas. Through extensive federal and state review and required mitigation measures through those processes and the 1041 permit, NISP will sufficiently maintain an unfragmented land pattern. Northern will primarily use the natural terrain as the basin for Glad Reservoir and avoid changes to prominent landforms. Installation of the Pipelines underground and restoration of disturbed surface area will preserve natural groundcover and allow for existing land uses to continue.
>
> NISP will also help preserve irrigated agriculture in Larimer County through water sharing arrangements, rather than buy-and-dry. NISP also will help provide for the present and future water needs of communities and is in furtherance of recreational and land preservation goals in Larimer County's Reservoir Parks Master Plan and Open Lands Master Plan. The retention of productive irrigated agriculture and added outdoor recreation from NISP will have a positive economic impact within Larimer County.
>
> Some segments of Pipeline are within Growth Management Areas of Fort Collins and Windsor. Windsor does not identify any issues related to the Pipelines, and Windsor and Timnath have agreements with Northern that relate to the project. Fort Collins noted some concerns about its natural areas. As principally underground facilities, there will be minimal long-term impacts to these areas. Further, Northern has committed to ongoing discussions and cooperation with Fort Collins.
>
> The Pipelines will be installed underground, and the routes avoid homes and other substantial improvements on private property. This is consistent with maintaining compatibility with surrounding uses as existing land uses can continue after the Pipelines are installed. Further, disturbed areas will be restored so the existence of the pipelines will not be apparent.

> NISP is also consistent with predictable land planning. Despite the breadth of the project, a specific route for the Pipelines has been identified and installation must occur within 100 feet on either side of the centerline of the route. This accounts for the need to accommodate unknown obstructions and preferences of property owners during installation while providing reasonable predictability about the Pipeline location.

NISP030825-26.

Plaintiffs argue that Northern failed to prove that its proposal is consistent with the master plan and that the Board abused its discretion by making a finding of consistency.[8]

First, Plaintiffs argue[9] that "Northern erred by initially relying on a superseded Master Plan and then again erred by failing to adequately address the requirements of the 2019 Master Plan." Plaintiffs' Opening Brief at 33.

While it is true that Northern initially relied on a now superseded master plan,[10] two months after filing its original application, Northern filed a supplement that addressed compliance with the 2019 Comprehensive Plan (the "Comprehensive Plan") and explained that when it began preparing its application materials in 2017, the 1997 Master Plan was still in effect. *See* NISP001072-79. Northern corrected any error in its initial application.

Second, in reviewing the *Board's* decision, the Court cannot conclude that its conclusion that the application was consistent with the master plan was an abuse of discretion. *See* C.R.C.P. 106(a)(4). The Board "abuses its discretion if it misinterprets or misapplies the law or if no competent record evidence supports its decision." *No Laporte Gravel Corp.* ¶ 24, 507 P.3d at 1060. "No competent evidence means that the ultimate decision of the administrative body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." Ross, 713

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[8] The phrases "Comprehensive Plan" and "Master Plan" are used interchangeably throughout the Record and cited references to said plan reflect the language used in the Record.

[9] First, Northern argues that Plaintiffs failed to preserve their claim regarding the consistency of the proposal with the county's master plan. "To preserve the issue for appeal all that was needed was that the issue be brought to the attention of the trial court and that the court be given an opportunity to rule on it." *Berra v. Springer & Steinberg, P.C.*, 251 P.3d 567, 570 (Colo. App. 2010), as modified on denial of reh'g (Sept. 23, 2010). Here, the Board functions as the decision-making body. Because Plaintiffs raised this issue before the Board, it is preserved for review. *See* NISP006264-65; NISP13508-21.

[10] The Court notes that Northern did not approve the 1041 permit application, and while Northern may have initially been mistaken in relying on a superseded plan, the question before the Court is not whether Northern erred; instead, it is whether the Board made a decision that is a misapplication of law or arbitrary and capricious in deciding to approve Northern's application.

P.2d at 1308–09. Competent evidence has further been defined to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Givan, 897 P.2d at 756.

Not every aspect of the Comprehensive Plan is relevant to NISP, nor does every aspect of NISP need to further the Comprehensive Plan. LUC §14.10(D)(1) requires consistency, a determination that leaves substantial discretion to the Board. The Board's findings of consistency are aligned with several of the goals and values identified in the 2019 Comprehensive Plan. This includes the goals of Watersheds & Natural Resources (which incorporates the Reservoir Parks and Open Lands Master Plans by reference), Housing, Environmental Stewardship, Rural/Agricultural Heritage, Economic Stability, and a More Resilient Future. *See* Larimer County Comprehensive Plan (2019) at 8-10. Each of these aspects of the comprehensive plan is considered, at least in part, in the findings and resolution above.

Further, these consistency findings are supported by evidence in the record. *See* NISP001072-79 (technical memo stating why NISP is consistent with the 2019 Comprehensive Plan); NISP000997-1023 (fish and wildlife mitigation and enhancement plan summary tables); NISP7188-90 (staff report demonstrating NISP's consistency with the 2019 Comprehensive Plan); NISP018378-88 (NISP slideshow demonstrating how the project meets the goals of the Master Plan); NISP031513-30 (testimony from Daylan Figgs, the Director for the Larimer County Department of Natural resources giving highlights and takeaways regarding the projects conformity with the Master Plan and Reservoir Parks Plan); and NISP031658, Line 7 – NISP031659, Line 22 (Peggy Montaño, counsel for Northern, testifying to the Board regarding NISP's compliance with the Comprehensive Plan).[11]

In essence, Plaintiffs challenge the Board's Findings and Resolution, not because there is no competent evidence in the Record to support its decision, but because they disagree with the Board's conclusions.

This Court, in Rule 106(a)(4) review, is limited to determining whether the Board exceeded its jurisdiction or abused its discretion based on the evidence in the record before the Board. As stated above, the Board "abuses its discretion if it misinterprets or misapplies the law or if no competent record evidence supports its decision." *No Laporte Gravel Corp*. ¶ 24, 507 P.3d at 1060.

There is evidentiary support in the Record to support the Board's decision. Further, the evidence in the Record supports the consistency finding required by LUC § 14.10(D)(1), and therefore, the Board did not abuse its discretion when it determined that Northern's permit application complied with LUC § 14.10(D)(1).

[11] The Record demonstrates nearly fifty pages of evidence supporting the consistency findings.

VI. Whether there is Competent Evidence in the Record that NISP can be Implemented:

Plaintiffs argue that Northern's application was speculative and premature because Northern does not have "the ability to transfer its South Platte River water rights into Glade Reservoir" and "own enough Poudre River water rights to implement NISP." Plaintiffs' Opening Brief at 36. Plaintiffs argue that "[a]s a result, there is no competent evidence in the record to support a finding that the Code 1041 criterion was satisfied."[12] *Id.* at 37.

In support of their argument, Plaintiffs cite their own briefing contained in the record where they argue this same issue to the Environmental Protection Agency. *See* NISP003641. Plaintiffs then requote that argument to this Court. Argument is not evidence.

In contrast, there is evidence in the record to support the conclusion that NISP is able to be implemented as planned. Greg Dewey, a water resource engineer for Northern, testified as follows.

> Northern Water already owns 100 percent of the water rights that will be used to fill Glade Reservoir. And achieve a 40,000-acre foot yield annually. These rights are the 1980 gray mountain water right, and the 1992 south plat water conservation water rights. As I explained a moment ago, water secure is not a program to buy more water to put into Glade Reservoir. It is a program to prevent buy and dry.

NISP032127, Line 23 – NISP032128, Line 8.

Additionally, Mr. Dewey admitted that the reservoir might take longer to fill in dry years based on the water available under the Grey Mountain water rights. *See* NISP032129, Lines 3 – 10. This latter statement shows that Northern provided the Board evidence demonstrating that NISP may not result in the Glade Reservoir being completely full all of the time.[13]

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[12] The Court believes that Plaintiffs meant "LUC" instead of "Code 1041". This reading of Plaintiffs' argument is both more logical and comports with Plaintiffs' next statement, which uses an example of "Code criteria 14.10.D.11 (sic) … cost/benefit analysis." *Id.* There is no code criterion 14.10.D.11 within the 1041 Statute; however, that citation does direct the Court to LUC 14.10(D)(11), which requires that "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."

[13] Mr. Dewy also testified further about the nature of "water secure" a program which Plaintiffs state no competent evidence in the record exists to support. *See* NISP032119 - NISP032129.

The testimony by Mr. Dewey provides competent evidence supporting Northern's ability to effectuate NISP. *Givan*, 897 P.2d at 756. The Board's decision will not be disturbed on review.

CONCLUSION

The determination of the Board granting the 1041 Application is AFFIRMED and Judgment is entered in favor of Defendants.

Dated: September 13, 2023.

BY THE COURT:

Laurie K. Dean
District Court Judge