

<p>Larimer County District Court 201 La Porte Ave, Suite 100 Fort Collins, CO 80521</p> <hr/> <p>NO PIPE DREAM CORPORATION, et al,</p> <p>Plaintiffs</p> <p>v.</p> <p>LARIMER COUNTY BOARD OF COUNTY COMMISSIONERS, et al.,</p> <p>Defendants.</p>	<p>COURT USE ONLY</p>
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PLAINTIFFS' CONSOLIDATED REPLY BRIEF

Plaintiffs collectively file this consolidated Reply Brief in response to the Answer/Response Briefs filed by the County and Northern respectively.

I. BACKGROUND

Defendants Donnelly and Johnson were both first elected to the Board in the same election cycle in November 2008 and both began their terms in January 2009. On March

25, 2009, within approximately two months of their swearing in, Donnelly and Johnson held a meeting with Northern to discuss NISP. Second Amended Complaint, Exhibit 1, p. 1. Consistently over the next decade, Donnelly and Johnson were public advocates, supporters, and endorsers of NISP. Second Amended Complaint, Exhibit 4. Donnelly and Johnson attended rallies and provided public advocacy, support, and endorsement of NISP at events that were organized by the 1041 permit applicant. Second Amended Complaint, Exhibits 5 and 6.

More specifically:

- within six months of being sworn into his initial term as Larimer County Commissioner, Donnelly publicly expressed his support of NISP. Second Amended Complaint, Exhibit 2.
- Since at least 2011, Donnelly and Johnson allowed Northern to list their names as “Larimer County Commissioners” that support and endorse NISP. Second Amended Complaint, Exhibit 4.
- On June 30, 2009, Northern hosted a “Farmers for NISP Rally.” Second Amended Complaint, Exhibit 2, p. 4 of pdf. The speaker list for the event included the following: “Steve Johnson/Tom Donnelly, Larimer County Commissioners.” *Id.*
- Northern’s August 2009 “Water News” publication stated that “Larimer County Commissioner Tom Donnelly and his Weld County counterpart Doug Rademacher expressed their commissions’ respective support...” of NISP at the Farmers for NISP Rally. *Id.* at p. 2 of pdf.
- On December 22, 2009 Northern prepared a “NISP Public Affairs Internal

Meeting” memorandum identifying a strategy to “identify and meet with key people” including at the top of the list “Steve Johnson, Tom Donnelly” for the purpose of obtaining their “support/endorsements.” Second Amended Complaint, Exhibit 3, p. 3.

- Northern maintained a public list of “NISP Support/Endorsements” which it would publicly disseminate in print and/or email newsletters. Consistently from at least 2011-2019, Northern listed “Tom Donnelly, Larimer County commissioner”, “Steve Johnson, Larimer County commissioner” and/or “Larimer County Commissioners” on its “NISP Support/Endorsement” list. Second Amended Complaint, Exhibit 4.

- On or about May 19, 2011 Donnelly advocated again in support of NISP at another business rally hosted by Northern called “Water, Jobs and the Economy.” Second Amended Complaint, Exhibit 5, p. 2. Johnson was also present at the May 19, 2011 business rally. *Id.* at pp. 5 and 6 of pdf. Northern introduced Donnelly and Johnson at the May 19, 2011 business rally and thanked them for “their continued support of NISP.” *Id.* at p. 4 of pdf.

- On September 4, 2015 Northern issued an “eNEWS” statement claiming that “Larimer County Commissioners Support NISP.” Second Amended Complaint, Exhibit 6, p. 1. On that same day, Brian Werner, a Northern employee, sent the September 4, 2015 eNEWS publication to Commissioner Johnson and stated, “Thanks again for your support” to which Commissioner Johnson replied, “we appreciated the mention!” *Id.* at p. 3.

- On October 27, 2016 Donnelly posted to his “Tom Donnelly, Larimer

County Commissioner” Facebook page a photograph of himself speaking at the “Farmers For NISP” rally. Second Amended Complaint, Exhibit 7.

- On August 14, 2019 Commissioner Donnelly was exchanging text messages about NISP with Northern’s Public Information Officer Jeff Stahla in which Donnelly states “You guys are getting ready to blow this deal...” and “Northern has no idea what is in store for them if they let this slide into the next boards term.” Second Amended Complaint, Exhibit 8.

- In a March 27, 2020 publicly available email, Johnson stated that Plaintiff Save the Poudre has “lost ALL credibility with me” with regards to its opposition to the NISP 1041 application. Second Amended Complaint, Exhibit 9.

Donnelly and Johnson were term limited with their final terms ending on or about January 12, 2021. Together, Donnelly and Johnston constituted a majority-voting block on the three-person Board of County Commissioners. On October 27, 2020, with just 2 full months remaining in their final term on the Board, Donnelly and Johnson voted in favor of approving the NISP 1041 permit and Commissioner Kefalas voted against it. Second Amended Complaint, Exhibit 10, pp. 1 and 21.

“The due process requirement of neutrality in adjudicative proceedings entitles a person to an impartial decision-maker.” *No Laporte Gravel Corp., v. Board of Commissioners of Larimer County, et al.*, 2022 COA 6, ¶ 40 (Colo. App. 2022). A neutral decision-maker requires “both the absence of actual bias and the risk of actual bias.” *Id.* at ¶ 40. A quasi-judicial officer “cannot be both an advocate and an impartial decision maker.” *Keen v. Dane County Bd. of Supervisors*, 676 N.W.2d 154, 159-60 (Wis.App. 2003). “[A]dvocacy surpasses merely forming an opinion about a subject and

overcomes the presumption of integrity and honesty.” *Id.* See also, *Booth v. Trustees of the Town of Silver Plume*, 474 P.2d 227, 229 (Colo. App. 1970)(where the Colorado Court of Appeals found that the trustees abused their discretion by advocating against the a permit applicant prior to a quasi-judicial hearing).

Donnelly and Johnson’s decade long public advocacy and bias in favor of NISP is important background explaining why they would both abuse their discretion in approving the NISP 1041 permit. In approving NISP, Donnelly and Johnson repeatedly misapplied the law and arbitrarily ignored their previous 1041 disapproval of the Thornton pipeline despite the fact that the NISP 1041 application suffered from the same deficiencies. Plaintiffs request that the Court vacate the Board’s approval of the NISP 1041 permit.

1. The Board misapplied the law in excluding Highway 287.

Despite the plain language of the County’s Land Use Code (“LUC”) and County Code, Defendants argue that Northern’s Highway 287 redevelopment falls outside the County’s 1041 regulations. The plain language of the LUC and County Code proves otherwise.

a. The Highway 287 relocation is designated in the LUC.

Defendants argue that the County’s LUC does not designate the redevelopment of arterial highways as a matter of state interest. County Answer Brief, p.7; Northern Response Brief, p. 16. As such, they argue that redevelopment of Highway 287 falls outside the County’s 1041 regulations. The plain language of LUC Section 14.4.K refutes Defendants’ argument.

The plain language of the County's 1041 regulations designates the redevelopment of Highway 287 as a matter of state interest that must be included in Northern's application. Section 14.4.K. of the Code clearly states that "a new 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." (emphasis added). Northern's 1041 application uses words directly out of the LUC by admitting "U.S. Highway 287 is being relocated to the east ***as part of*** the Glade Unit construction." NISP000305 (Binder 1)(emphasis added). Further, the term "road" is specifically defined in the Larimer County Code to include a "highway." Larimer County Code §1-2. The plain language of the LUC and County Code, and Northern's use of that same language in its 1041 application, mandates inclusion of the Highway 287 redevelopment in its permit application. When interpreting a statute, courts first look at statutory language. *Gypsum Ranch v. Bd. of County Cm'rs of Garfield County*, 219 P.3d 365, 368 (Colo. App. 2009). When the legislature defines a term, that definition governs. *Id.* "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 v. Boulder County*, 230 P.3d 1269, 1272 (Colo.App. 2010). In this case, the LUC says that a highway developed as part of a water storage reservoir must obtain a 1041 permit. The Board's failure to require such a permit is a misapplication of the law. The 1041 permit must be vacated.

Defendants then argue that the Highway 287 redevelopment need not be included in Northern's 1041 application because the LUC does not ***separately*** designate arterial highways as an activity of state interest under C.R.S. §24-65.1-203(1)(e). This argument

fails because it again ignores the plain language of the 1041 statute, the LUC, and case law. It is true that the Land Use Code does not *separately* designate site selection of arterial highways construction as an activity of state interest. However, this just means that when an arterial highway is developed in Larimer County and *is not part of a water storage reservoir*, it does not have to obtain 1041 approval from the Board. In contrast, the Land Use Code does specifically designate for 1041 approval *all roads developed as part of a water storage reservoir*. LUC Section 14.4.K. The Answer/Response briefs fail to cite any legal authority requiring a local government to *separately* designate development of an arterial highway *unassociated with a storage reservoir* before it can regulate a highway developed *as part of* a water storage reservoir. Any such suggestion is clearly rejected in the state 1041 law that specifically allows a local government to “adopt regulations interpreting and applying its adopted guidelines in relation to *specific developments* in areas of state interest and to specific activities of state interest” and nothing prohibits “a local government from adopting guidelines or regulations containing requirements which are *more stringent* than the requirements of the criteria listed in sections 24-65.1-202 and 24 65.1-204.” C.R.S. §§ 24-65.1-402(2) and (3)(emphasis added). Larimer County’s approach was also validated in *City of Denver v. Bd. of County Com’rs*, 782 P.2d 753, 758 (Colo. 1989 en banc) in which the full Colorado Supreme Court stated, “the Act permits local government to regulate those areas and activities which directly concern them, and does not force them to issue declarations of state interest about areas and activities which, in their judgment, they need not regulate.” This is precisely what Larimer County has done. The County decided not to regulate the site selection for development of highways *alone* but at the same time has specifically

required 1041 approval for development of roads and highways *as part of* a water storage reservoir.

b. *The Highway 287 redevelopment is appurtenant to Glade Reservoir.*

Defendants then argue that Highway 287 is not “appurtenant” to the water storage reservoir and thus need not be included in the NISP 1041 permit application. County Answer Brief, pp. 7-8; Northern Response Brief, p. 17. This argument fails for several reasons.

First, Highway 287 is directly appurtenant to construction of Glade Reservoir. For example, Northern’s 1041 application admits that Highway 287 is appurtenant to Glade Reservoir by stating:

- Glade Reservoir would be accessed by U.S. Highway 287. NISP000305 (Binder 1).
- “U.S. Highway 287 is being relocated to the east as part of the Glade Unit construction....” *Id.*
- “Glade Reservoir will inundate a portion of U.S. Highway 287 and therefore will necessitate a realignment of the highway.” NISP000006 (Binder 1).
- The construction of Glade Reservoir and its recreational facilities is estimated to increase weekend average daily traffic volumes on Highway 287 in the summer peak season by 15,600-16,750 vehicles. NISP000795 (Binder 1).

Moreover, a further examination of the language of LUC Section 14.4.K. shows that the term “appurtenant” does *not* modify or limit the word “road.” Section 14.4.K.

states, “[a] water storage reservoir shall also include all appurtenant uses, structures and facilities, roads, parks, parking, trails and other uses which are development as part of the water storage reservoir.” As used in LUC Section 14.4.K., the term “appurtenant” only modifies the phrase “uses, structures and facilities...” and not the words “roads, parks, trails” that follows.

However, even if Court finds that the term “appurtenant” modifies the term “roads,” Section 14.4.K. of the Code provides further definition of the word “appurtenant” to mean roads “which are developed as part of the water storage reservoir.” Under the LUC, a use, structure, facility, or road is appurtenant to the development if it is “developed as part of the water storage reservoir.” It is beyond dispute that Highway 287 would be redeveloped as part Glade Reservoir. Thus, it is appurtenant to the development of Glade Reservoir.

Defendants also argue that only *some* roads are appurtenant to the development of Glade Reservoir. Again, this argument ignores the plain language of the LUC that specifically states that “*all* appurtenant uses, structures and facilities, roads” must receive 1041 approval. Use of the word “all” requires a broad interpretation of the words “appurtenant” and “roads.” “Any other interpretation would render superfluous the use of the word ‘all’....” *See, Valdez v. City and County of Denver*, 764 P.2d 393, 396 (Colo.App. 1988)(interpreting the word “all” in the context of a stipulation). Defendants’ self-serving attempt to narrowly limit application of LUC Section 14.4K. is inconsistent with its clear wording and should be rejected. *Shupe*, 230 P.3d at 1272.

Finally, Defendants offer case law in attempt to exclude Highway 287 as an appurtenant road. These arguments fail because the *Zweygardt v. Bd. of Cty. Comm’rs of*

Elbert Cty., 190 P.3d 848, 850 (Colo. App. 2008) and *Petition of Palumbo*, 225 N.Y.S. 2d 98, 99 (N.Y. Sup. Ct. 1962) decisions offer no meaningful support. Northern incorrectly argues that the *Zweygardt* decision stands for the proposition that an appurtenant road is limited to a “road that provides the only method of access to a parcel.” Northern Response Brief, p. 18. The *Zweygardt* decision does not define the contours of the term “appurtenant road.” Instead, the main issue was defining the terms “farm” and “ranch,” not “appurtenant road.” 190 P.3d at 850 (“the issue is whether plaintiffs’ land is a farm or ranch.”). Northern’s argument has also been refuted in more relevant Colorado case law finding that appurtenant roads “are not required to be adjacent to one another.” *City of Lakewood v. Armstrong*, 419 P.3d 1005, 1013 (Colo. App. 2017), citing *Wagner v. Fairlamb*, 379 P.2d 165, 169 (Colo. 1963)(“a right-of-way may be appurtenant to land even when the servient tenement is not completely adjacent to the dominant”).

The *Petition of Palumbo* decision also fails to provide meaningful support. First, the *Palumbo* decision was rendered by the Supreme Court of Westchester County, New York. In New York, County Supreme Courts are trial level courts for civil matters in which claims exceed \$25,000. See, <https://www.nycourts.gov/courts/cts-outside-nyc.shtml>. New York County Supreme Courts are similar to a Colorado District Court. In contrast, the highest courts in New York are Appellate Courts. See, <https://www.nycourts.gov/courts/cts-Appellate.shtml>. Thus, the *Palumbo* decision was rendered by a lowest level trial court in New York. Further, in *Palumbo* “the question is presented as to whether improvements upon an easement may permit the filing of a mechanic’s lien against the property benefited by the easement.” 225 N.Y.S. 2d, 98, 99

(1962). That issue is not before this Court. The New York court noted that it was “unable to discover any New York authority dealing with this issue” of whether a street is appurtenant to an abutting real property. *Id.* at 99. Accordingly, the *Palumbo* decision does not offer meaningful support for Defendants’ argument.

The issue before this Court is an issue of statutory construction where the “[w]ords and phrases must be read in context and construed according to the rules of grammar and common usage.” LUC § 3.3.A. Since Larimer County’s Code has defined the word “road” to include “highway,” the common usage of the wording and context of LUC § 14.4. mandates that:

- “A 1041 permit ***shall*** be required prior to ***any*** of the following activities, ***unless specifically exempted***” [LUC § 14.4]
- “A water storage reservoir ***shall*** also include ***all...roads***...which are developed ***as part of*** the water storage reservoir.” LUC §14.4.K.
(emphasis added).

Defendants fail to cite any legal authority that would “specifically exempt” relocation of Highway 287 from 1041 permitting requirements. LUC §14.4. Both LUC Section 14.4 and 14.4.K. both use the mandatory word “shall.” The term “road” is specifically defined in the Larimer County Code to include a “highway.” Larimer County Code § 1-2. The Land Use Code incorporates the definition of “road” found in the Larimer County Code by stating, “[w]ords and phrases that have acquired a technical or particular meaning, whether by definition under the definition section of this code, by legislative declaration or otherwise, must be construed accordingly.” LUC § 3.3.A. The word “road” has acquired a particular meaning by definition in the County Code and thus “must be

construed accordingly.” In summary, the Highway 287 relocation must obtain a 1041 permit because Section 14.4 uses mandatory language, the County has defined the word “road” to include highway, the common meaning and context of LUC §14.4.K support such a finding, and the Highway relocation is not otherwise specifically exempted. Alternatively, Highway 287 is appurtenant to the water storage reservoir for the reasons stated and is being “developed as part of a water storage reservoir.” LUC §14.4.K.

Finally, Northern’s arguments amount to an untimely challenge to the plain language of Section 14.4.K of the Land Use Code itself. Northern could have challenged the adoption of Section 14.4.K. of the LUC, but did not. Northern has never brought a Rule 56 declaratory judgment action regarding this provision of the LUC. Northern’s disagreement with the plain language of LUC §14.4.K. does not allow the Court to ignore its plain language or otherwise rewrite the law.

2. The Board abused its discretion by approving a corridor approach.

The Board denied the Thornton Northern Pipeline 1041 application for employing a vague pipeline “corridor” approach yet approved the NISP corridor approach that suffered from the same deficiencies. The Court should vacate the NISP 1041 permit because the Board’s interpretation and application of its Land Use Code was not uniform or consistent on this significant issue. *Canyon Area Residents for the Environment v. Bd. of Cnty Comm’rs*, 172 P.3d 905, 910 (Colo. App. 2006); *Friends of Black Forest Preservation Plan v. Bd. of Cnty Com’rs*, 381 P.3d 386, 400 (Colo. App, 2016).

On March 19, 2019, the Board denied the City of Thornton’s Northern Pipeline 1041 permit application. R006857. In doing so, the Board determined that the Land Use Code required “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.” R006851. In its denial, the Board also found that Thornton’s 1041 application failed to meet the criteria of LUC §14.10.D.1. requiring the application to be consistent with the Master Plan. R006850. The Board specifically found that it’s “ability to assess specific impacts to private property along the route is unreasonably limited because of the breadth of the corridor” which exceeded the minimum identification of the 50’ permanent easement. R006849. The Board also found that Thornton’s 1041 application failed to meet the criteria of LUC §14.10.D.2. because a corridor “prevents meaningful evaluation of the two alternatives presented” and that “[i]mpacts can vary significantly depending on where within this corridor the pipeline is actually located.” R006850-51. Again, the Board denied the application because it did not, at a minimum, identify the 50’ permanent easement and “[w]ithout this level of specificity, the siting alternatives proposed by Thornton are not reasonable and cannot be sufficiently evaluated by the Board.” R006850. The Board also found that Thornton’s 1041 application failed to meet the criteria of LUC §14.10.D.4. because the breadth of the corridor “prevents the Board and private property owners from reasonably considering all impacts. This uncertainty is, in itself, a significant impacts of this project.” R006853.

The NISP 1041 permit application suffered from the same deficiencies as the Thornton 1041 application. First, Northern argues that its 1041 application “did not propose a ‘corridor.’” Northern Response Brief, p. 20. Northern’s own 1041 application refutes this fallacious claim and makes clear that Northern proposed a pipeline corridor. *See*, NISP000038 (where the 1041 application makes three references to the “pipeline

construction corridor”); NISP000041 (again referring to the “pipeline corridor”); NISP000529 (in reference to the “Pipeline Siting and Development” again refers to the “corridor location and construction”); NISP000561-62 (in discussing the “Working Area & Corridor” for the pipeline refers to “[t]his 100-foot-wide corridor will be modified as needed in tight construction areas and where existing constraints and utilities limit the construction space” and later again referring to “[t]he corridor developed...” for the pipeline at NISP000562); NISP000573 (again referring to the “construction corridor”); NISP000867 (again referring to the “conveyance corridor”); NISP001044 (referring to Northern’s “preferred corridor”). Further, the Board and County staff both understood Northern to be requesting a pipeline corridor similar to Thornton’s. NISP031856, line 21 (transcript of the August 24, 2020 Board hearing in which Donnelly states, “[similarly, one condition of approval that County staff has recommended is to give Northern a 100 foot wide kind of corridor...”); NISP032283, line 3-7 (transcript of the September 2, 2020 Board hearing with County staff Helmick making clear, “[t]here is a corridor, there is an alignment on the maps which is a line on the map. There is the potential then to deviate a hundred feet from the center line of that line, which provides basically a 200 foot wide corridor”); NISP032293, lines 8-11 (the transcript of the September 4, 2020 hearing in which County Staff Helmick specifically reminded the Board that “[b]ecause of our conversation coming off of Thornton were [sic] ***a corridor was not an acceptable method to analyze the application from the perspective of the Board***”)(emphasis added). It is very clear from Northern’s 1041 application, the County Staff’s remarks, and the Board’s own acknowledgment, that a pipeline corridor was requested by Northern and approved despite the Board’s previous interpretation and application of the LUC that any

corridor failing to specify the permanent 50' easement violates various 1041 LUC criteria.

In Thornton, the Board set a precedent by interpreting and applying Sections 14.10.D.1, 14.10.D.2. and 14.10.D.4. of the LUC to require “at a minimum [a pipeline proponent] should identify where the 50’ wide permanent pipeline easement will be located. Without this level of specificity, the siting alternatives proposed are not reasonable and cannot be sufficiently evaluated by the Board.” R006851. The County argues that there is no requirement for the Board to consistently interpret and apply the LUC. This argument ignores Section 1.3.3 of the LUC that requires the Board to “maintain and enhance[] property values by *stabilizing predictability in land development* and establishing a process that effectively and *equitably applies this Code to individual sites...*” (emphasis added).

The Board failed to predictably and equitably apply the LUC to Northern’s 1041 application. The Thornton pipeline corridor was 500’ wide. The NISP corridor is 200’ wide and allows for a deviation of 100’. Neither application identified the “minimum 50’ wide permanent easement” with specificity. As noted in Plaintiffs’ Opening Brief, Northern’s corridor approach was “rife with ambiguity” and “opacity” that “precluded the Board- or anyone, for that matter- from deducing the exact location of the pipeline within the corridor using method.” *City of Thornton v. Larimer County Board of County Commissioners*, Appendix 1 to Opening Brief, p. 21.

The County cites the decision in *B&M Service, Inc. v. Public Utilities Commission*, 429 P.2d 293 (Colo. 1967) for the proposition that the Board is allowed to arbitrarily apply its Land Use Code. County Answer Brief, pp. 9-10. The *B&M* decision

has no application here. First, as noted above, Section 1.3.3 of the LUC imposes a duty on the Board to “maintain... predictability in land development “ and “equitably app[y] this Code to individual sites.” The B&M decision cites no such corollary provision in the PUC’s governing documents. Further, the PUC was allowed to grant waivers “more as a matter of grace than of right.” *Id.* at 295. Here, the Board lacks discretions to grant 1041 permits as a matter of grace or bias. State law and the LUC mandate that the Board must deny a 1041 permit application if it fails to meet the Code criteria. C.R.S. §24-65.1-301(1)(c) (power to deny); LUC §14.10.B. Having just recently denied a 1041 pipeline application for failure to specify a 50’ wide permanent easement, it must do the same for NISP in order to comply with the LUC mandate to apply the Code with predictability and equitably. *B&M Services* offers no meaningful support to the County’s arguments.

The Board must apply its LUC interpretation of Section 14.10.D.1., D.2., and D.4. in a consistent, predictable, equitable, and uniform manner. *Canyon Area Residents for the Environment*, 172 P.3d at 910. Having failed to do so, the Board should vacate the NISP 1041 permit.

3. The Board’s misapplied LUC §14.13.¹

¹ The issue of impacts and uncertainty to private properties caused by the corridor approach was preserved for review both administratively and in the Second Amended Complaint. NISP006264, NISP013505-07, NISP001223, NISP031682, NISP001251, NISP031689, NISP031912; 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; p. 21, ¶102. 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. NISP032294 (line 16)-NISP032295 (line 5). Thus, it was impossible for the Plaintiffs to specifically preserve the legal issue for review.

Section 14.13.C. of the LUC mandates that “[c]hanges other than technical revisions *shall* be considered 1041 permit amendments. A permit amendment *shall* be subject to review as *a new permit application*” (emphasis added). Under Section 14.13.B. of the LUC, “[a] proposed change shall be considered a technical revision if the planning director determines...any increase in the area or intensity of impacts is *insignificant*” (emphasis added). It follows that under Section 14.13 of the LUC, any changes that are significant “shall be considered 1041 permit amendments” that “shall be subject to review as a new permit application.” Review as a new permit application necessarily reopens the entire 1041 permit, not just the portion of the permit affected. *See*, LUC §§14.9.B and C. (for the substantive and procedural requirements for review of a new 1041 permit application which includes a pre-application conference, a complete application, referral to affected agencies, a public hearing before the planning commission and county commissioners). Because Sections 14.13.B. and 14.13.C both employ the word “shall,” any significant change to a 1041 permit approval requires a mandatory re-opening of the entire 1041 permit under the full 1041 Permit Amendment process.

Defendants argue that “the required process is the same under Section 14.3 as it is under the condition of approval” of the NISP 1041 permit. County Answer Brief, p. 15.² Defendants are wrong. Under the mandatory language of Section 14.13, the Board does not have discretion to exempt significant changes to a 1041 permit from “review as a new permit application.” Yet, this is precisely what the Board did. Under the NISP 1041 permit condition, “review and approval by the Board of Commissioners shall be required

² The County’s reference to section “14.3” should be “14.13.”

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” (emphasis added). NISP030838. This first provision of the NISP 1041 permit condition is consistent with Section 14.13 of the LUC requiring the Board to review ***significant*** changes to a 1041 permit. However, the Board then abused its discretion by ordering that “[r]econsideration by the Board... 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. This 1041 permit condition misapplies LUC §14.13.

The Board misapplied LUC Section 14.13 because the NISP 1041 permit condition illegally exempts Northern from review of the entire permit under the 1041 Permit Amendment process even when changes to the pipeline route are **significant**. More specifically, the only time the Board would review and approve a deviation of the NISP 1041 Permit is when the deviation is determined to have “significant” impacts. NISP030838. Under Section 14.13.C. of the LUC, any changes that are **significant** “shall be considered 1041 permit amendments. A permit amendment shall be subject to review as a new permit application.” Necessarily, review as a new permit application reopens the entire 1041 permit. In approving the NISP 1041 permit, the Board illegally gave Northern an exception to LUC § 14.13 because even ***significant*** deviations to the NISP 1041 permit would never be “considered a 1041 Permit Amendment” and would never “reopen the entire 1041 permit.” NISP030838. Under the plain language of LUC §14.13, the Board had no discretion to exempt significant changes to the NISP 1041

permit from the 1041 Permit Amendment process requiring a reopening of the entire permit.

The Board's error is significant because it denies affected landowners the ability to seek review of the entire permit in the event of pipeline deviations that affect new property or that have significant impacts on one or more properties. Under the language of the NISP 1041 permit condition, Northern could propose numerous sequential deviations from the proposed pipeline route that could have significant effects on multiple property owners that were never considered by the Board during the initial issuance of the permit. These significant deviations could very well call into question the adequacy of the approved pipeline site location requiring re-routing of the entire pipeline or significant portions of the pipeline. However, under the illegal provisions of the NISP 1041 permit, such significant deviations would "not reopen the entire 1041 permit" and would not be "considered a 1041 Permit Amendment" preventing a re-evaluation of the 1041 permit criteria and overall site selection. The Board had no discretion to ignore LUC §14.13 and grant Northern an illegal exemption from the 1041 permit amendment process.

The Court must vacate the NISP 1041 permit because the Board abused its discretion by misapplying the mandatory 1041 permit amendment process in LUC §14.13 for significant changes to the permit.

4. Northern failed to present reasonable siting and design alternatives.

The NISP 1041 permit should be vacated because Northern failed to present reasonable alternatives for consideration by the Board and the Board approved the application without presentation of such reasonable alternatives.

Under the state 1041 law, “[t]he protection of the utility, value, and future of all lands within the state, including the public domain as well as privately owned land, is a matter of public interest.” C.R.S. § 24-65.1-101(1)(a). Further, “land use, land use planning, and the quality of development are matters in which the state has responsibility for the health, welfare, and safety of the people of the state and for the protection of the environment of the state.” C.R.S. § 24-65.1-101(1)(b). Water projects, such as NISP, “may have a substantial impact on the environment and may greatly affect the health, welfare, and safety of Colorado citizens... These are precisely the concerns which the Act was adopted to protect.” *City and County of Denver v. Bd. of County Com’rs*, 760 P.2d 656, 661 (Colo. App. 1988) affirmed in *City of Denver v. Bd. Of County Com’rs*, 782 P.2d 753 (Colo. 1989 en banc).

Moreover, the legislature clearly gave local governments the power to deny 1041 permit applications. C.R.S. §24-65.1-301(1)(c). The legislature also clearly gave local governments of the power over “*site selection*...of major domestic water...systems. C.R.S. §24-65.1-203(1)(a)(emphasis added). Likewise, the County’s 1041 regulations requires a permit applicant to “present reasonable *siting and design alternatives* or explain[] why no reasonable alternatives are available” LUC § 14.10.D.2. (emphasis added).

Prior to ruling on the NISP 1041 application, the Board previously ruled that three “reasonable siting and design alternatives” must be presented for the similar Thornton Northern Pipeline—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. Because the Board previously ruled that these three alternatives

were reasonable, and the absence of which mandated denial of Thornton's 1041 application, failure to present these alternatives in the NISP 1041 application likewise required a denial of the application. As noted above, the Board must apply its land use code in a predictable, equitable, consistent and uniform manner. *Canyon Area Residents for the Environment*, 172 P.3d at 910.

More specifically, the Board previously ruled that the following three siting alternatives were reasonable and must be presented as part of a similar water pipeline 1041 application:

- The Board repeatedly endorsed the reasonableness of a lake-tap alternative that would avoid significant disruptions to western Larimer County neighborhoods. R006851; R006853.
- Thornton previously presented to its City Council reasonable siting alternatives including the possibility of withdrawing water from other points downstream along the Cache La Poudre River, including as far east as Windsor. R006850. One specific example cited by the Board was the Shields Street alternative. R006851. These are examples of a Poudre River alternative where water would be diverted further downstream in the Poudre River.
- The Board's Thornton ruling also stressed the reasonableness of a Thornton/NISP "co-location alternative." The Board ruled that "[a] route that may be appropriate for a single pipeline now may be inappropriate for additional pipelines. If this information is not considered now, future pipelines may not be able to co-locate which will result in disorderly

development. An important factor in Thornton preferring the CR 56 route over the previously preferred Douglas Road route is that Douglas Road may be insufficient for co-location of multiple pipelines.” R006853.

The Board concluded that “[o]ptions vetted and rejected by Thornton have positive attributes which, in combination with the two alternatives presented, could lead to a route that satisfies the approval criteria by better mitigating adverse impacts and ensuring the orderly and efficient development of Thornton’s water pipeline.” R006851.

As displayed in Plaintiffs’ Opening Brief (p. 27), the Thornton and NISP pipelines are very similar and often overlap for significant portions of western Larimer County. As such, the three reasonable alternatives previously identified by the Board are equally applicable to the NISP pipeline. The Board denied the Thornton 1041 application for failure to present these reasonable alternatives, yet the Board ignored these same reasonable alternatives in approving the NISP 1041 application.

Northern argues, “[w]hen assessing the siting and construction of domestic water systems, the Board is tasked with determining where the facilities should be located ***among the reasonable alternatives presented***—not whether they should be built at all or whether a non-pipeline alternative is preferable.” Northern Response Brief, p. 36. First, as noted previously, Northern did not present any reasonable alternatives for the pipeline or Glade Reservoir from which the Board could choose. It presented a single self-serving preferred alternative to the Board. NISP000038 (Northern’s 1041 application stating “it is not possible at this juncture for the Applicant to submit a Permit request for another Project configuration or alternative” and “[h]aving 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”). Second, also noted above, the Colorado legislature gave 1041 powers to local government over “site selection” as well as the power to deny a 1041 application. C.R.S. §24-65.1-301(1)(c) (power to deny); C.R.S. §24-65.1-203(1)(a)(power of site selection). Thus, contrary to Northern’s argument, the Board had the power to deny the NISP 1041 application or direct Northern to choose a shorter pipeline route based on a diversion further downstream in the Cache la Poudre River.³

Third, Northern’s excuse for not presenting any alternatives to the Board violates LUC § 14.6.B. that specifically 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.” Northern’s 1041 application violates this provision because it refused to present additional alternatives to the Board due to the review and approval of the project by other federal and/or state agencies.

Fourth, Northern’s argument that, “[c]onsideration of a river-conveyance ‘alternative’” also may have exceeded the Board’s legal authority by requiring a modification or amendment of “existing laws or court decrees with respect to the determination and administration of [the NISP Enterprise’s] water rights” is belied by its own action. As detailed on pages 31-32 of Plaintiffs’ Opening Brief, Northern itself wrote and supported Senate Bill 18-170, “Reservoir Releases For Fish and Wildlife

³ To the extent the Court of Appeals in the *City of Thornton* decision found that local governments lack the power to alter the point of diversion or otherwise alter the location of a water pipeline, Plaintiffs assert that the decision was in error. As noted, the Colorado legislature granted local governments the power over “site selection” of water pipelines and the power to deny a water pipeline. Since a water diversion point is appurtenant to the water pipeline, local governments have the power over site selection of the diversion point and/or have the power to deny a water diversion point that is not a reasonable alternative.

Mitigation” (<https://leg.colorado.gov/bills/sb18-170>) that specifically allowed for Northern to send water from Glade Reservoir down the Cache la Poudre River through Fort Collins. Specifically, Northern changed the “NISP Enterprise’s water rights” so Northern could create and use a “Poudre River Alternative” which they call the “Conveyance Alternative” and the “river-conveyance alternative” in their application and in their Brief. In fact, in the very next few paragraphs in Northern’s Response Brief, they acknowledge the law they changed in order to create and use a Poudre River Alternative. Further, in its Brief, Northern even describes the benefit of a Poudre River Alternative including that it “will greatly benefit and enhance riverine resources by, among other things, eliminating dry-up points and helping to regulate temperatures in the river, thereby improving existing water quality and aquatic habitat.” Thus, a Poudre River alternative is supported by law and is a better and reasonable alternative that should have been presented to and considered by the Board.

Northern also argues that it cannot send all of its water down the Poudre River, in lieu of a pipeline, because “delivery through the river is not possible due to wildfires, oil spills, or other emergencies.” Northern Response Brief, p. 38. This statement is wild speculation. Nowhere in the record, nor in Northern’s Response Brief, does Northern point to any instance in which “wildfires, oil spills, or other emergencies” have made it “not possible” to send water down the Poudre River through Fort Collins. Further, the NISP water that should be delivered by the Poudre River Alternative is “raw” water that will all have to be cleaned to drinking quality standards by every NISP participant anyway. In fact, every NISP participant has a water filtration plant available to do that downstream of Fort Collins and down-pipe of Northern’s “County Line Pipeline.”

Northern provides no technical or financial analysis describing any “emergency” that would make it “not possible” to use the Poudre River Alternative. Northern’s brief simply brushes off the Poudre River Alternative based on speculation. Further yet, Plaintiffs refuted any such speculation. Save The Poudre even hired an outside consultant, “AB TECH”, to study “cleaning the Poudre” so the river could be used as a conveyance for NISP water, the result of which was that AB TECH found the process to be relatively inexpensive and practicable. NISP3466-67; NISP003492. Northern provided no response or rebuttal to the concept of “cleaning the Poudre” in its Response Brief.

Northern also argues, “[a]nother major reason for not conveying all water in the river is to avoid having to build larger diversion and pumping structures at the river re-diversion point to deliver this larger amount of water. Not building these larger structures minimizes impacts to natural areas along the river.” Northern fails to cite to the administrative record in support of this claim. Instead, Plaintiffs provided ample testimony to the Board during the NISP hearings that the Poudre River Alternative would protect the health of the Cache la Poudre River, and provide dramatic public benefits, including:

- Maintaining the current flow regime at the City of Fort Collins’ new Poudre River Whitewater Park in the “River District” of downtown Fort Collins. NISP010898-99;
- As Plaintiffs’ Opening Brief states, “In fact, in ‘average’ years, NISP would divert out 66% of the river in May, 25% in June, and 54% in July in downtown Fort Collins, which would cause dramatic negative impacts to the ecological health of the Poudre River.” NISP010892. Northern does not dispute these facts.
- Better protect water quality in the river and minimize E coli contamination during warmer months. NISP003446-47.
- Provide cleaner and more healthful water quality and flows in the river through Fort Collins, especially in the Martinez Park section of the river, which is used in hot summer months by disadvantaged communities of people living nearby in mobile home parks to stay cool. NISP3466-67; NISP003528.

Finally, NISP’s “Pipeline Conveyance & Facilities” are predicted to cost \$278,501,000, whereas the Poudre River Alternative would avoid a lot of that cost because there would be fewer pipelines constructed in Larimer County. In the Poudre River Alternative, all NISP water could be delivered to a location near Windsor where the “County Line Pipeline” crosses the Poudre River.

In summary, Northern failed to present reasonable pipeline and reservoir alternatives from which the Board could choose. The Board itself previously recognized the reasonableness of a co-location alternative, a lake tap alternative, and a Poudre River alternative. As such, Northern’s application failed to meet the criteria of LUC §14.10.D.2. Likewise, the Board violated and/or misapplied LUC §14.10.D.2. by failing to require Northern to present alternatives that the Board itself previously deemed “reasonable.”

5. NISP is not consistent with the Master Plan.⁴

Defendants argue that the Board properly concluded that the NISP application was consistent with the Comprehensive Plan and thus complied with LUC criteria 14.10.D.1.. County Answer Brief, p. 19-24. The County describes the application as containing “seven detailed pages of analysis on how NISP is consistent with the 2019 Comprehensive Plan.” Actually, it is much less detailed and contains little analysis.

With regard to “Pipeline Siting and Development,” the NISP 1041 application devotes only 1 page plus one paragraph addressing consistency with the 300+ page Comprehensive Plan. This inadequate “analysis” only provides perfunctory references to

⁴ Plaintiffs adequately preserved this issue for review. NISP006264-65; NISP13508-21, Second Amended Complaint, p. 17, ¶79; p. 17, ¶80; p. 17, ¶81; p. 17, ¶82; p. 18, ¶87; p. 19, ¶92; p. 19, p. §94; p. 20, ¶96; p. 22, ¶107.

“health,” “Watersheds and Natural Resources,” Environmental Stewardship,” “Economic Sustainability,” and “Agricultural Lands Conservation and Stewardship.” For example, with regard to “health,” the application ignores the “health of constituents” and instead only makes cursory references to “revegetate lands affected by construction,” “compensate for land rights and crop losses” and “maintaining both landscape and viability of agriculture.” Nowhere does this section of the application address constituent health issues like air pollution from diesel emissions during pipeline construction, windblown dust construction and earth disturbance, noise pollution, and other known health hazards.

With regard to “Watersheds and Natural Resources,” the application fails to address the fundamental issue that NISP will significantly deplete high flows in the Cache la Poudre River in downtown Fort Collins. The 2019 Comprehensive Plan contains requirements to “secure and enhance in-stream flows that support important ecological and biological functions...” Binder 30-Hyperlinks, hyperlink to “Master Plan effective as of July 17, 2019”)(not Bates stamped), p. 46, W&NR3.4. This section of Northern’s application ignores these requirements and makes no effort to show consistency. In fact, NISP would do the opposite by reducing in-stream flows in Cache la Poudre watershed. These high flows are essential to protecting the ecological viability of the river because the flows scour the river bottom creating habitat for microbenthic organisms and other aquatic species. NISP003526. Moreover, the application’s claim that NISP “is designed to allow flows through the Poudre River through the City of Fort Collins” is intentionally misleading. Instead, NISP will divert Northern’s entire share of water above the City of Fort Collins and then return a small percentage of the removed

flows back into the river only during certain time of the year. The application also fails to admit that any flows that are returned to the river will again be removed upstream of the Mulberry Waste Water Treatment Plant prior to leaving the City of Fort Collins. Just downstream of the Mulberry Plant is City of Fort Collins open space along the Poudre River. The City has evaluated the impact to its publicly-funded open space from reducing flows in the river and found that “[d]egradation of the river threatens the quality of life of City residents.” NISP003666.

Northern’s 1041 application makes little effort to prove compliance with the County Master Plan. As such, the application violated LUC criteria 14.10.D.1.

6. There is no competent evidence that Northern can implement NISP.

Plaintiffs stand by their statement that “there is no competent evidence in the administrative record that the NISP Enterprise has the ability to transfer its South Platte River water rights into Glade Reservoir” and thus there is no competent evidence that the full 40,000 acre-foot NISP project outlined in Northern’s 1041 application can be implemented.

Northern’s 1041 application describes the NISP project as follows:

- “NISP is a proposed water storage and distribution project that will supply 15 Northern Front Range water providers with *40,000 acre-feet* of new and reliable water supplies.” NISP000006 (emphasis added).
- “The *primary two components of NISP* are the Glade Reservoir Complex *and the South Platte Water Conservation Project.*” *Id.* (emphasis added).
- The South Platte Water Conservation Project includes Galetton Reservoir which is a “new 45,624 acre-foot off-channel reservoir located in Weld County,

and its purpose is to facilitate water exchanges with Glade Reservoir to allow the full 40,000 acre-feet of NISP yield to be realized. Diversions into Galeton Reservoir will come from the South Platte River downstream of its confluence with the Poudre River.” *Id.* (emphasis added).

- “Water stored in Galeton Reservoir would be delivered to the Larimer & Weld and New Cache irrigation companies in exchange for a portion of the Poudre River water they currently use.” NISP000025.
- Northern’s “Water Secure” program requires agreements with “willing shareholders in the New Cache La Poudre Irrigating Company and the Larimer and Weld Irrigation Company” to accept South Platte River Water in exchange for the Poudre River water they currently own. NISP000541-42.

The problem for Northern is that there is no competent evidence in the administrative record that they have reached agreement *with any willing shareholders* of the New Cache or Larimer & Weld companies to fully implement NISP. By its own words, without such agreements Northern is unable to fully implement a primary component of NISP.

Northern sold Larimer County “a pig in a poke.” In 2020, Northern’s 1041 application described the South Platte Water Conservation exchange project as *a primary component of NISP*. Now they tell this Court that the “Water Secure” program is only a “risk mitigation response to ensure that the preferred alternative works into the future.” Northern Response Brief, p. 42. Northern also claims it “has demonstrated water availability.” This language is nothing more than double-speak.

The fact remains that NISP cannot be fully implemented without agreements with willing agricultural shareholders who currently own Poudre River water rights. Through the administrative process and to date, there is no competent evidence in the administrative record that all water exchange agreements have been reached to fully implement NISP. The Board abused its discretion in approving the NISP 1041 permit application without competent evidence that a primary component (the South Platte Water Conservation Program) could be implemented. *Ross v. Fire & Police Pensions Ass'n*, 713 P.2d 1304, 1305 (Colo. 1986).

After all, why would Larimer County farmers want to exchange their Poudre River water with polluted South Platte River water that just flowed through the entire Denver metro area? Apparently, Larimer County farmers aren't buying Northern's "pig in a poke." Sadly, Commissioners Donnelly and Johnson did.

CONCLUSION

For the reasons stated herein, the Board abused its discretion and/or exceeded its authority in approving the NISP 1041 permit. Plaintiffs request that the Court rule as such and vacate the Board's NISP 1041 permit approval.

Respectfully submitted this 7th day of March 2023.

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CERTIFICATE OF DELIVERY

I hereby certify that on this 7th day of March 2023, a true and correct copy of the foregoing Plaintiffs' Consolidated Reply Brief was filed via Colorado Courts E-filing System and served on:

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