

<p>DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO Court Address: 201 La Porte Avenue Fort Collins, Colorado 80521-2761 Phone Number: (970) 494-3500</p> <hr/> <p>Plaintiff: CITY OF THORNTON, a home rule municipality of the State of Colorado,</p> <p>v.</p> <p>Defendants: THE BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY, State of Colorado; JOHN KEFALAS, in his official capacity, STEVE JOHNSON, in his official capacity, and TOM DONNELLY, in his official capacity,</p> <p>and</p> <p>Intervenors: NO PIPE DREAM CORPORATION and SAVE THE POUFRE.</p>	<p>DATE FILED: February 15, 2021 2:44 PM CASE NUMBER: 2019CV30339</p> <hr/> <p>▲ FOR COURT USE ▲</p> <hr/> <p>Case No. 2019 CV 30339</p> <p>Courtroom: 3C</p>
<p>ORDER REGARDING PLAINTIFF’S COMPLAINT FOR JUDICIAL REVIEW UNDER C.R.C.P. 106</p>	

THIS MATTER is before the Court on Plaintiff City of Thornton’s (“Thornton”) complaint seeking judicial review under C.R.C.P. Rule 106(a)(4), as well as for declaratory relief under C.R.C.P. 57. Plaintiff seeks relief with regard to Defendant, Board of County Commissioners of Larimer County’s (“BOCC”), decision denying Thornton’s 1041 permit application to construct a water pipeline located in Larimer County. Defendant BOCC and Intervenors oppose the relief Thornton requests.

In addition to the filing of the Complaint in this matter, Thornton separately filed a Motion for Declaratory Relief and Determination of Questions of Law, seeking declaratory relief under Colo. R. Civ. P. 57 and a determination of questions of law under Colo. R. Civ. P. 56(h). The issues are addressed in a separate order of the court, issued contemporaneously with this ruling.

The Court has reviewed the Complaint, Answer, Motion for Declaratory Relief and Determination of Questions of Law, Thornton's Opening Brief, the Amicus Curiae Briefs of Eagle Lake Association and the Water Supply and Storage Company, the BOCC's Combined Answer Brief and Response to Thornton's Motion on Declaratory Judgment, and the briefing of the Intervenor No Pipe Dream and Save the Poudre. The Court also allowed extensive oral argument from the parties in a hearing conducted before the Court on September 9, 2020. Being otherwise fully informed in the premises, the Court finds, and orders as follows:

BACKGROUND AND PROCEDURAL HISTORY

Thornton initiated the present suit with the filing of its Complaint for judicial review and declaratory relief on March 16, 2019. Thornton asserts twelve separate claims for relief against Defendant BOCC under C.R.C.P. Rule 106(a)(4), alleging that the BOCC abused its discretion or exceeded its jurisdiction in denying Thornton's 1041 permit application. In addition, Thornton asserts a separate claim for declaratory relief under C.R.C.P. 57, with regard to the decision of the BOCC denying Thornton's 1041 permit application.

The BOCC filed its answer on June 3, 2019, generally denying the allegations of the complaint. Subsequently, No Pipe Dream and Save the Poudre were allowed to intervene. On February 24, 2020, Thornton filed a separate motion for declaratory relief and determination of questions of law under C.R.C.P. 57 and 56(h) and then filed its Opening Brief, with regard to relief requested under C.R.C.P. Rule 106, on February 27, 2020. On June 1, 2020, the BOCC and No Pipe Dream filed responses and Answer Briefs to both Thornton's initial Rule 106 claims and the C.R.C.P. 57 motion. Thornton filed reply briefs in support of its positions the following month, on July 20, 2020. In addition to the briefing of the parties, the Court has received and reviewed amicus briefs from Water Supply and Storage Company and Eagle Lake Association.¹

On September 9, 2020, the Court heard extensive oral argument from the parties with regard to the pending motions. On September 8, 2020, the day prior to the scheduled oral argument, Thornton filed a motion seeking to supplement the record that is the subject of its C.R.C.P. Rule 106 appeal with additional materials and briefing regarding a subsequent 1041

¹ Eagle Lake is a rural subdivision consisting of 88 lots that are approximately 2 acres each in area. Twenty-five lots are sited along Water Supply and Storage Reservoir Number 4 ("Reservoir 4") and the connected Reservoir 3 near the point of origin of the proposed pipeline and will be impacted with regard to siting of the pipeline.

permit application review and approval by the BOCC for the Northern Integrated Supply Project (“NISP”).² The parties were granted the opportunity to submit appropriate briefing with regard to Thornton’s request to supplement the record in this matter. On December 19, 2020, the court issued an order denying Thornton’s request to supplement the record with regard to its Rule 106 appeal. Accordingly, the matters are ripe for resolution by the court.

LEGAL STANDARDS

I. Application of C.R.C.P. Rule 106 Appeal Standards

In relevant part, C.R.C.P. Rule 106(a)(4) provides:

(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*. (emphasis added)

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) (*See e.g., Hessling v. City of Broomfield*, 193 Colo. 124, 563 P.2d 12 (1977); *Toland v. Strohl*, 147 Colo. 577, 364 P.2d 588 (1961)); *see also Hellas Const., Inc. v. Rio Blanco Cty.*, 192 P.3d 501, 504 (Colo. App. 2008) (citing *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 (“review is limited to review of the record to determine whether the governmental tribunal has abused its discretion or exceeded its jurisdiction”). Review under Rule 106(a)(4) “does not contemplate a new

² The NISP sought approval of a 1041 permit to allow siting and development of the Northern Integrated Supply Project consisting of four separate raw water pipelines, associated facilities, and the siting and development of a water storage facility. 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, recommending by a vote of 4-2 that the application be approved subject to certain conditions. The BOCC reviewed and considered the NISP permit application at public hearings on August 17, 2020; August 24, 2020; August 31, 2020; September 1, 2020; and September 2, 2020. In a 2-1 vote, the BOCC issued its findings and resolution approving the NISP permit application. Subsequent to the filing of Thornton’s motion to supplement, written findings and a resolution of the BOCC approving the NISP permit application were issued on October 20, 2020.

evidentiary hearing at the district court level, but rather, contemplates that the district court will review the record of the proceedings conducted elsewhere.” *Widder*, 85 P.3d 518 at 526.

In a review under C.R.C.P. Rule 106, an abuse of discretion may be found if “the decision under review is not reasonably supported by any competent evidence in the record.” *Van Sickle v. Boyes*, 797 P.2d 1267, 1272 (Colo. 1990) (citing *E.g., Ross v. Fire & Police Pension Ass’n*, 713 P.2d 1304, 1308–09 (Colo. 1986)). Competent evidence is absent when “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.” *Van Sickle*, 797 P.2d at 1272; *see also, Ross v. Fire & Police Pension Ass’n*, 713 P.2d 1304, 1309 (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).

Further, “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.” *Van Sickle*, 797 P.2d at 1272 (citing *Hadley v. Moffat County School Dist. RE-1*, 681 P.2d 938, 944 (Colo. 1984); *U-Tote-M of Colorado, Inc. v. City of Greenwood Village*, 39 Colo. App. 28, 33, 563 P.2d 373, 376 (1977)). If the reviewing court finds a lack of competent evidence or an arbitrary and capricious abuse of discretion by the administrative body, it may remand the matter to the administrative body to make the appropriate findings. C.R.C.P. 106(a)(4)(ix). How to address on remand any deficiency found by the reviewing court is within the discretion of the administrative body. *Wolf Creek Ski Corp. v. Bd. of Cty. Comm’rs of Mineral Cty.*, 170 P.3d 821, 831 (Colo. App. 2007) (citing *Carney v. Civil Serv. Comm’n*, 30 P.3d 861, 866–67 (Colo. App. 2001)).

DISCUSSION AND ANALYSIS

I. Thornton's Request for Judicial Review under C.R.C.P. Rule 106

In its Complaint seeking judicial review under C.R.C.P. Rule 106, Thornton argues that the BOCC abused its discretion and/or exceeded its authority in denying Thornton's 1041 permit application. Thornton generally concedes in its Opening Brief that C.R.C.P. Rule 106(a)(4) limits the review of the BOCC's denial to the record developed during the BOCC's public hearings, the relevant record, and competent evidence presented to the BOCC.³ Thornton requests that the court find that the BOCC both acted arbitrarily and exceeded its jurisdiction in denying the permit application. Thornton requests that this court reverse the BOCC's decision and grant Thornton's permit application.

A. The Record on Review

The record before the court is substantial consisting of 8,688 pages. The certified record encompasses the Executive Summary of the Thornton 1041 permit application [Vol. 1], the transcripts and video recordings of eight public hearings on Thornton's pipeline proposal held before the Planning Commission and the Board of County Commissioners that occurred between May 16, 2018 and February 11, 2019 [Certified Record: Transcripts, Vol. 7A-H; Videos, Vol. 8], the minutes from the BOCC and PC hearings [Vol. 3A-B], documentation of the pertinent Land Use Regulations for Larimer County [Vol. 5A-B, 6, 9, 10], and comments from the public and intervenors regarding the pipeline project. The BOCC's written Findings and Resolution Denying Thornton's Water Project 1041 Permit is located in the record at R6827-6843 (hereafter referred to as "Findings").

Review of the record reveals the process followed with regard to consideration of Thornton's 1041 application, which included both a first and second round of public hearings. At the conclusion of the second round of public hearings on February 11, 2019, the BOCC deliberated; each of the commissioners made statements on the record identifying criteria that Thornton had failed to satisfy, and the BOCC voted to deny the permit application. On March

³ Subsequently, Thornton requested that the Court supplement the record to include the 1041 permit application review and approval by the BOCC for the Northern Integrated Supply Project ("NISP"). As noted above, the court denied Thornton's motion to supplement the record.

19, 2019, the BOCC adopted its written Findings. In its Findings, the BOCC addressed whether Thornton met each of the twelve criteria considered in evaluation of its 1041 permit application. The BOCC determined that Thornton's proposal met Criteria 5, 7, 8, 9, and 12.⁴ Conversely, the BOCC found that Thornton's proposal did not meet Criteria 1, 2, 3, 4, 6, 10, and 11. Based upon these findings, the BOCC denied Thornton's permit application.

Initially, Thornton argues that the Court should strike the written Findings passed by the BOCC on the consent agenda on March 19, 2019, denying the permit application. Thornton argues that the Findings do not reflect the reasoning provided by commissioners at the conclusion of the hearing on February 11, 2019. Thornton argues that the court should only consider whether its proposal met Criteria 2 and 4 and that the court should not consider the Findings as to Criteria 1, 3, 6, 10, and 11 because they were not the subject of a majority consensus of the commissioners on February 19, 2019, at the conclusion of the public hearing. Further, Thornton argues that issuance of the BOCC Findings is in violation of the open meetings law under C.R.S. §24-6-402(8). Thornton argues that the Findings related to Criteria 1, 3, 6, 10, and 11 should be stricken as impermissible, post-hoc rationalizations manufactured by the BOCC outside of the public eye.⁵

The BOCC argues that if the final determination of the BOCC is as reflected in the oral statements made by commissioners at the conclusion of the February 19, 2019, hearing, Thornton's complaint for relief under C.R.C.P. Rule 106 review was not timely filed and should be dismissed. Alternatively, the BOCC argues that the Section 12.4.3 of the LUC requires that a written decision be issued and that this is both the custom and practice of the BOCC. The BOCC further argues that the board fully complied with the open meetings law and considered the Findings at the March 19, 2019, meeting, which was passed on the consent agenda, albeit

⁴ Criteria 5 requires that the proposal will not adversely affect [sic] any sites and structures listed on the state or national registers of historic places; Criteria 7 requires that the proposal will not be subject to significant risk from natural hazards including floods, wildfire or geologic hazards; Criteria 8 requires adequate public facilities and services available for the proposal or will be provided by the applicant, and that the proposal will not have significant adverse effect on capability of local government to provide services or exceed the capacity of service delivery systems; Criteria 9 requires that the applicant will mitigate any construction impacts to county roads, bridges and related facilities, and construction access will be regraded and revegetated to minimize environmental impacts; and Criteria 12 requires that recommendations of staff and referral agencies are addressed to the satisfaction of the county commissioners.

⁵ In support of its position, Thornton relies upon *Sierra Club v. California Coastal Comm'n*, 133 Cal.Rptr.2d 182, 197 (Cal. App. 2003), aff'd, 111 P.3d 294 (Cal. 2005); *Ellis v. City of Minneapolis*, 2007 WL 1815743, at *8 n.5 (Minn. App. 2007) (questioning whether quasi-judicial findings may be adopted via consent agenda).

without discussion. The BOCC argues that Thornton had constructive, if not actual notice, of the meeting on March 19, 2019, and could have attended. Accordingly, the BOCC argues that the final determination of the BOCC is as reflected in its written Findings and that the court's review should include a consideration of whether Thornton's proposal met the Criteria 1, 2, 3, 4, 6, 10, and 11.

In the absence of any plain, speedy, and adequate remedy otherwise provided by law, C.R.C.P. Rule 106(a)(4) provides a procedural vehicle for the judicial review of governmental bodies or officers exercising quasi-judicial functions. Unless a time within which review may be sought is separately provided by statute, a complaint for review pursuant to the rule must be filed in a timely manner (28 days per rule) after the "final" decision being challenged. C.R.C.P. 106(b). Precisely what constitutes a "final decision" within the contemplation of the rule is not explicitly set forth. However, in both judicial and quasi-judicial contexts, the courts have characterized a final judgment or decision generally as one that ends the particular action in which it is entered, leaving nothing further to be done to completely determine the rights of the parties. *Citizens for Responsible Growth v. RCI Development Partners, Inc.*, 252 P.3d 1104 (Colo. 2011) (board of county commissioners written resolution was necessary for final decision related to 1041 application); *see also, Wilson v. Board of County Com'rs of Weld County*, 992 P.2d 668 (Colo. App. 1999) (court determines that the commission's decision was "final" when it issued the revised "written resolution that detailed its findings and conclusions); *Luck v. Board of County Com'rs of County of Clear Creek*, 789 P.2d 475 (Colo. App. 1990) (final decision in a rezoning application before the county commission board occurred not when the board took an oral vote, but when it approved a final written decision).

Here, Section 12.4.3 of the LUC requires the BOCC's decision to be in writing. Accordingly, a final written decision is contemplated and reflected in the issuance of the BOCC's written Findings and resolution. Issuance of the BOCC's written Findings was the proper subject of an open meeting, albeit without further discussion on the consent agenda. Based upon the foregoing, the court finds that it is proper to consider the final decision of the BOCC as reflected in its written Findings and resolution.

B. Thornton's 1041 Permit Application

Review of the record indicates that as part of its 1041 permit application, Thornton proposed alternative routes for its proposed water pipeline in the west to east segment,⁶ and that ultimately, the BOCC considered two alternatives advanced by Thornton for the west to east portion of the pipeline. The BOCC considered both what has been described as the Douglas Road route (“DR Route”) and the County Road 56 Route (“CR 56 Route”). The CR 56 Route was proposed and documented as part of Thornton’s Supplement 3 to the permit application as the “preferred” route. The alternative proposals were the subject of the second round of public hearings culminating in the final public meeting on February 11, 2019.

In its briefing with regard to its complaint for relief under C.R.C.P. Rule 106 and for relief under C.R.C.P. 57, Thornton argues that the BOCC decision denying its permit application infringes both on Thornton’s decreed water rights as well as Thornton’s constitutional right to use eminent domain to condemn private property for the purpose of constructing its pipeline. Thornton’s decreed water rights, reflected in shares of the Water Supply and Storage Company (“WSSC”), allow only two points on the Poudre River where Thornton can lawfully divert its water from the river, and both points are upstream of Fort Collins. Further, Thornton notes that its decreed water rights must be transported in the WSSC system through the Larimer County Canal and that Thornton is required as part of its decree to withdraw its water at WSSC Reservoir 4 to carry its water via pipeline to Thornton.⁷ Accordingly, Thornton argues that the BOCC exceeded its jurisdiction in considering a Poudre river alternative which would interfere with Thornton’s decreed water rights.

In response to Thornton’s argument that the BOCC’s denial of the permit application infringes on Thornton’s water rights or the right to use eminent domain to condemn property to construct its pipeline, the BOCC argues that it has the right to properly regulate construction of the pipeline under C.R.S. §24-65.1-101 *et seq.* and the 1041 regulations enacted by Larimer

⁶ Thornton argues in its briefing that it provided four reasonable alternatives for the siting of its west to east pipeline. The BOCC disputes that there were four alternatives advanced by Thornton. Ultimately, the BOCC’s decision addresses the two preferred routes advanced by Thornton, the DR Route and the CR 56 Route.

⁷ WSSC filed an amicus brief with the court in which it argues that alternatives to Thornton’s proposals which would involve the water to be delivered downstream via the Poudre River is prohibited both by Thornton’s decreed water rights and a 1986 Agreement between Thornton and WSSC. Intervenor No Pipe Dream refers to this alternative as the “Poudre River alternative.”

County and that it has not infringed on Thornton’s water rights. The BOCC states that it specifically recognizes that “it may not deny Thornton the use and benefit of its water rights and that the Board’s authority is limited to the siting and development of pipelines.” [BOCC Answer Brief, p. 15]. The BOCC’s decision does not require or otherwise condition approval of permit requiring a Poudre river alternative. As to Thornton’s argument that it has a constitutional right to exercise a right of eminent domain, the BOCC again recognizes Thornton’s constitutional right to exercise a right of eminent domain but notes that it is not arbitrary or capricious for the Board to express a preference to utilize a public right of way rather than taking private property when considering adverse impacts related to the proposed pipeline.

Whether or not the BOCC exceeded its jurisdiction in denying Thornton’s permit application on the basis that it either infringed on Thornton’s decreed water rights or that its decision denies Thornton’s right to use the power of eminent domain will be more fully addressed below. As reflected in the holding in *City and County of Denver v. Board of County Commissioners of Grand County*, 782 P.2d 753 (Colo. 1989), local government regulation authorized under C.R.S. §24-65.1-101 is valid, provided it does not undermine established rights. The existence of Thornton’s decreed water rights and its right to condemn private property for construction of its pipeline are not, according to the BOCC, in dispute. The BOCC argues that the decision to deny Thornton’s permit application does not explicitly deny Thornton either its decreed water rights, nor does it restrict its authority to condemn private property.

C. Is there Competent Evidence in the Record to Support BOCC’s Denial of Thornton’s 1041 Permit Application

Criterion 14.10(D)(1) Consistency with the Master Plan

In its Findings, the BOCC determined that Thornton’s 1041 permit application failed to meet the requirements of consistency with the Master Plan. The Findings indicate that the BOCC considered six principles implicated under the Master Plan⁸ and cite the undetermined

⁸ The BOCC’s Findings and Resolution states under IV(1)(i) that “[T]he Master Plan has many themes and principles implicated by Thornton’s application, including:

- a.) natural and cultural resources shall be identified, conserved and protected, and long-term cumulative impacts shall be monitored;
- b.) Agriculture will remain a viable long-term segment of Larimer County’s economic, cultural and social fabric;

location of the proposed pipeline within a corridor ranging from 500 feet to a ¼ mile in width as a primary reason for this criterion being unmet. Specifically, the BOCC states that the size of the proposed corridor limited its ability during the 1041 review process to assess specific impacts to private property and existing residential spaces in the area in accordance with the purposes of the Master Plan which requires that “the planning and review development process be fair, open and predictable...without infringing on the rights of individuals.” The BOCC noted that its concerns regarding those impacts were: the potential need for Thornton to gain access to private property via eminent domain; burdening private property with a ban on construction of permanent structures, improvements, or deep-root landscaping that could interfere with the pipeline or its maintenance; community concerns about the impacts of construction and maintenance crews accessing private property; and a lack of information from Thornton about the impacts of irrigated farmland in the area becoming dryland, which the BOCC stated directly conflicted with the Master Plan. The BOCC Findings assert that Thornton inadequately addressed or analyzed all of these impacts, and in its response to Thornton’s Opening Brief reiterated that a 1041 permit application must satisfy *all* the review criteria for approval, not just some of the elements. [BOCC’s Response Brief, p. 16, citing Larimer County Land Use Code §14.10(B) and R6892 of the record].

Thornton argues that the Criterion 1 only requires consistency or compatibility between Thornton’s proposal and the Master Plan, which is merely an advisory document. Thornton further argues that the Master Plan does not include guiding principles on matters relating to pipeline construction, siting or design; accordingly, it argues that its proposal cannot be inconsistent with non-existent provisions.⁹ Moreover, Thornton argues that its proposals are not

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- c.) Logical settlement patterns that reflect the existing character of Larimer County and protect existing neighborhoods will be supported;
 - d.) The planning and development review process shall be fair, open and predictable, and meet the needs and interest of the community without infringing on the rights of individuals;
 - e.) Agriculture shall be recognized as an important economic, cultural and environmental resource value-provider for the County;
 - f.) Agricultural land and water in Larimer County shall be protected through incentives, voluntary participation and measures to strengthen viable agriculture.

⁹ Thornton cites *Crawford v. McLaughlin*, 473 P.2d 725, 731 (Colo. 1970) (adopting doctrine of equitable estoppel to preclude governing authority from taking a contrary position after detrimental reliance by permittee) in support of this position. The facts in *Crawford* are, however, distinguishable from the present case. *Crawford* involved a C.R.C.P. Rule 106 review regarding the issuance of a building permit where the applicant expended resources for land purchase and building plans in reliance on a building permit already issued. The Colorado Supreme Court upheld the trial court’s application of equitable estoppel in a C.R.C.P. Rule 106 review based upon what it deemed competent evidence in the record.

inconsistent or incompatible with any of the principles set forth in the Master Plan. Finally, Thornton argues that the Master Plan cannot, in any event, “supersede, abrogate or otherwise impair the allocation of water pursuant to the state constitution or laws, the right to beneficially use water pursuant to decrees, contracts, or other water use agreements, or the operation, maintenance, repair or replacement, or use of a water facility” under C.R.S. § 30-28-106(3)(a)(IV). Thornton argues that the BOCC abused its discretion in finding that Thornton’s proposal was not consistent with the Master Plan and that the BOCC’s specific findings lack substance and do not address the purpose of the criterion. Thornton also contends that the BOCC improperly cites the width of the proposed pipeline corridor as a reason for finding the Criterion unmet, as this approach was part of both preferred pipeline routes included in its proposal and the BOCC did not offer comment or direction regarding this approach at any time prior to its deliberations.¹⁰ [Opening Brief, p. 27, ¶ 2].

The BOCC in its response argues that its findings related to Criterion 1 were not arbitrary and capricious and do not deprive Thornton of its water rights; in particular, that the concerns the BOCC listed regarding the purpose of the Master Plan not being met on the matters of fundamental fairness and respect of the rights of Larimer County citizens, in addition to the maintenance and enhancement of quality of life in the county, were raised by Larimer County area residents. [Findings, p. 5, IV(1)(i)]. The BOCC also stated that its expression of a preference for Thornton to use a route where the pipeline could be laid in a public right-of-way did not infringe on Thornton’s right of eminent domain, as that preference did not amount to a statement or mandate that the BOCC would only approve one such option. Furthermore, the BOCC stated that it “has not mandated or excluded any specific diversion point for Thornton’s water” in violation of Thornton’s water rights or authority to undertake water projects, as its authority was constrained to the review of pipeline siting and development only. [Response, p. 14-15]. The BOCC argues that its inquiries regarding alternative pipeline routes, such as the Shields Street/Poudre River alternative, were based upon Thornton’s initial inclusion of those routes in its presentation to the Thornton City Council and did not amount to an abuse of discretion, as they were mere inquiries and not a requirement or order that Thornton select such alternative pipeline siting options. [Response, p. 15, ¶ 1].

¹⁰ Thornton also argues that it used corridors for siting of the pipeline at staff’s request and that the BOCC never objected to this approach, even though it was included and considered when the BOCC deliberated the first time on August 1, 2018.

The BOCC also argues that Thornton’s references to the number of hearings, proposal revisions, and evidence in favor of Thornton’s proposal have no relevance to the Court’s Rule 106 review, as such review is limited to the assessment of whether there exists competent evidence to support the BOCC’s decision.

The BOCC, as part of its function, has the responsibility to review 1041 permit applications.¹¹ Both Thornton and the BOCC cite *Bd. of Cty. Comm’rs v. Conder*, 927 P.2d 1339 (Colo. 1996), in support of their contrasting views on the regulatory nature of the Master Plan for Larimer County; Thornton contends that the Master Plan is merely an advisory document and that the planning themes relied on by the BOCC fail to provide standards specific enough to ensure that the permit denial was both “rational and consistent” and to allow for proper judicial review. Thornton argues that the generalized policy statements do not provide the specificity required to provide “notice of the particular standards and requirements imposed by the county for approval.” [Thornton Reply Brief, p. 18].

In contrast, the BOCC contends the Master Plan is a regulatory document whose provisions are sufficiently clear. The Court in *Conder* held that:

...master plans are purely advisory documents, absent (1) formal inclusion of sufficiently specific master plan provisions in a duly-adopted land use regulation by a board of county commissioners or (2) a statutory directive from the General Assembly that landowners must comply with master plan provisions in pursuing land use development proposals.

and determined that the BOCC’s inclusion of a Master Plan compliance requirement in its adoption of subdivision regulations met exception (1) above, making the Master Plan regulatory

¹¹ The Larimer County Land Use Code, Section 14.9(B), provides a detailed process for considering a 1041 permit application:

(B) *General process outline*. The following is a general outline of the steps required for any permit decision under this section. More specific information regarding these referenced steps is contained in section 12 common procedures for development review and in the technical supplement to the Land Use Code.

1. Pre-application conference.
2. Complete and sufficient application received.
3. Referral to affected agencies.
4. *Public hearing before the planning commission and county commissioners.* (emphasis added)
5. Post-approval requirements.

in that context. *Conder*, 927 P.2d 1339 at 1346. That court in *Conder* also noted that, while the terms of the Master Plan must be sufficiently specific to clearly advise participants of the approval standards to be applied, “broad criteria such as “[c]ompatibility with the surrounding area and [h]armony with the character of the neighborhood” (internal quotations omitted) could be sufficient if applied in conjunction with specific criteria on related matters, such as utility access or management. *Conder*, 927 P.2d 1339 at 1348.

Under the LUC Section 14.10(D)(1), review criteria for all 1041 permits requires that “[T]he proposal is consistent with the master plan and applicable intergovernmental agreements affecting land use and development.” Based upon the Supreme Court’s holding and reasoning in *Conder*, the Master Plan in the context of a 1041 permit application constitutes a regulatory document, and the list of six specific sub-categories¹² which the Master Plan covers provide, in the court’s view, a sufficient degree of specificity as to how the BOCC applies the Master Plan when considering a 1041 permit; the Master Plan may therefore be properly considered by the BOCC in its permit review process.

The BOCC’s conclusion in its Findings that Criterion 1 was not met, due to the inability of the BOCC to assess the specific impacts of the pipeline to the surrounding areas based upon a proposed corridor width of 500-feet to ¼ mile is, in the court’s view, supported by competent evidence in the record.¹³ The record reveals numerous concerns raised in the public hearing process as to concerns about where the pipeline would be located within described corridors. Without a more definite location for the pipeline, property owners are unable to assess impacts to their own properties; this is inconsistent with the specific provision that the “planning and development review process shall be fair, open and predictable, and meet the needs and interest of the community without infringing on the rights of individuals.” In making this determination, the court is cognizant that the inclusion of a corridor approach has been utilized in the past and appears to have been approved, at least in concept, by the planning commission staff.¹⁴ Thornton further argues that the BOCC never objected to the use of a corridor or sought greater detail

¹² See footnote 8.

¹³ The record reveals that each of the preferred alternatives, the DR Route and CR 56 Route considered by the BOCC include a corridor approach. Both proposals include a corridor of ¼ of a mile for that portion of the proposed pipeline east of County Road 9. The proposed DR Route provides for a more precise placement of the pipeline west of County Road 9 and the CR 56 route includes a 500’ corridor approach for the proposed pipeline for portions west of County Road 9. [R1123-1124 regarding the DR Route, R1132, 1222, 1249 and 1253, CR 56 Route]

¹⁴ See record references [R7176]. Thornton further argues that the BOCC’s position that the proposed routes were too vague is exaggerated based upon the record before the court.

through approval conditions and should not be allowed to raise this issue for the first time in its Findings. The court is not persuaded that the BOCC forfeited its right to raise this issue in considering Thornton's application based upon concerns raised in the public hearing process as reflected in the record. [R7043-7044, R7072, R7105-7106, R7344, R7850-7851, R7966]

In its Findings, the BOCC also determined that Thornton's proposal was inconsistent with the Master Plan in that the proposal fails to consider the cumulative impacts of irrigated farm land turning to dry land, the long-term viability of Larimer County's agricultural communities, and the impact of drying up irrigated farmland.¹⁵ Thornton argues that the BOCC improperly considered this criteria because the specific "proposal," "proposed development" or "project" before the BOCC is solely for the construction of a pipeline and that the proper scope of review is therefore limited to the impacts related to construction of the pipeline and not "removal of water from irrigated farmland." The court agrees that the BOCC exceeded its authority and improperly considered this criterion in denying Thornton's 1041 permit application. This will be addressed more fully below with regard to Criterion 10.

Based upon the foregoing, the court does find that there is competent evidence in the record to support the BOCC's denial of Thornton's permit application based upon the lack of a more definite location of the pipeline within the alternative proposals advanced, and that the lack of greater specificity as to the location of the pipeline provides a proper basis to determine that Thornton's permit application failed to meet the requirements of Criterion 1.

Criterion 14.10(D)(2) Reasonable Alternatives not Present

The second criterion considered by the BOCC requires Thornton to present reasonable siting and design alternatives or explain why no reasonable alternatives are available. The BOCC determined that this criterion was not met. In its Findings, the BOCC notes that Thornton's initial application focused on three separate alternatives related to the Douglas Road Route. The BOCC determined that the DR Route and related alternatives were not the "best option" citing traffic impacts on Douglas Road, the length of time to construct the pipeline, and the inconvenience to area residents from construction. The BOCC also noted concerns related to

¹⁵ Intervenor No Pipe Dream ("NPD") similarly argues in its briefing that Thornton's proposals fail to consider the transfer of existing water resources without considering the impacts on present and future land uses including agriculture.

whether or not pipeline construction would remain in the right-of-way or require condemnation of private property. As a result of the concerns related to the DR Route alternatives, Thornton submitted its Supplemental Application based on the CR 56 Route. In its Findings as related to Criterion 2, the BOCC again notes its concern regarding the corridor approach, which, according to the BOCC, prevented meaningful evaluation of the two preferred alternatives. The BOCC noted that the impacts related to the CR 56 Route would vary significantly depending upon where within the corridor the pipeline is actually located. This is particularly true east of County Road 9 where the corridors broaden out to ¼ of a mile. The BOCC noted that, at a minimum, Thornton should identify where the 50-foot-wide permanent easement would be located. Finally, in its Findings, the BOCC finds that Thornton failed to provide reasonable siting alternatives for the pipeline, having self-selected two routes (the DR Route and CR56 Route) and excluding other possible alternatives, including the “Shields Street alternative,” which would better “mitigate adverse impacts and ensure the orderly and efficient development of Thornton’s pipeline.”¹⁶

With regard to design issues, the BOCC noted that Thornton identified the use of tunneling rather than open ditch construction as the primary method of installation of the pipeline. The BOCC noted that some alternative design options were mentioned, such as lake taps to avoid private property and other construction disruption. It is not clear to the court, based upon the Findings that the BOCC determined that reasonable design alternatives were not properly considered, or that this provided a basis to find that Thornton did not meet Criterion 2. Indeed, it appears from the record that there continues to be a question as to whether the use of lake taps are, in fact, a reasonable design alternative, and this issue is not resolved in the record. Based upon a review of the Findings, the court does not believe that the BOCC provided competent evidence upon which to deny Thornton’s permit application based upon the failure to consider appropriate “design alternatives.”

Thornton contends that it presented four reasonable siting alternatives as part of its permit application, including the CR 56 Route included in its Supplemental Application. According to

¹⁶ The so-called “Shields Street alternative” would take Thornton’s water from WSSC 4 in a pipeline along Shields Street south to the Poudre River, immediately north of Fort Collins, and divert the water into the Poudre River to be taken out of the Poudre east of Fort Collins and transported in a pipeline south to Thornton [R8077]. Commissioner Johnson’s comments specifically focused on whether this concept would be a reasonable alternative. For various reasons, Thornton argues that this is not a reasonable alternative and would infringe on Thornton’s decreed water rights and violate Thornton’s 1986 Agreement with WSSC.

Thornton, the corridor approach provides both the BOCC and Thornton with flexibility in the decision-making process to decide on a path that would minimize impacts to the surrounding community. Thornton contends that it addressed various aspects of each reasonable alternative, including construction and design requirements, and that the BOCC's determination that the criteria was unmet is arbitrary and capricious and not supported by competent evidence in the record. Thornton emphasizes that the planning commission staff recommended approval for both the DR Route and CR 56 routes proposed. Thornton also argues that the BOCC improperly applied the plain text of the criterion, focusing not on whether reasonable design and siting alternatives had been proposed, but rather on whether there were *other* reasonable alternatives.

The BOCC argues that its finding that Criterion 2 was unmet was not arbitrary and capricious because the proposed routes included broad corridors which did not allow the BOCC to evaluate resulting impacts. The BOCC argues that without knowing more precisely the physical location of the proposed pipeline, the preferred routes proposed by Thornton were not reasonable alternatives. The BOCC further argues that Thornton's self-selection of two out of four routes to present did not constitute sufficient reasonable alternatives, and that, while Thornton may not be required to use design alternatives such as lake taps, its lack of inquiry into that area was insufficient to convince the BOCC that Thornton had presented sufficient reasonable alternatives.

In determining whether there is competent evidence in the record to support the BOCC's Findings as to Criterion 2, the court notes that "reasonable alternatives" is not defined within this criterion, nor is a number given to illustrate just how many alternative design or siting options would be considered reasonable. The criterion requires Thornton to provide "reasonable siting and design alternatives or explain why no reasonable alternatives are available." It is clear from the record that each of the preferred alternatives proposed by Thornton has different impacts and would impact different parties.¹⁷ However, because each of the preferred routes proposed by Thornton propose a corridor approach, the BOCC determined that the siting alternatives cannot be sufficiently evaluated by the BOCC and the BOCC could not properly determine that these were reasonable alternatives. As noted above, the court finds that this determination is supported by competent evidence in the record.

¹⁷ In its Amicus brief, Eagle Lake Association argues that the BOCC denial of the DR Route proposed by Thornton was arbitrary and capricious and has resulted in great harm and uncertainty for its property owners.

The court notes that the BOCC also found the criteria unmet based upon a finding that Thornton had excluded other possible alternatives including the “Shields Street alternative,” which would better “mitigate adverse impacts and ensure the orderly and efficient development of Thornton’s pipeline.” Much of the briefing before the court addresses whether or not this is, in fact, a reasonable alternative. Intervenor No Pipe Dream (NPD”) argues that this is a reasonable alternative that should be properly considered and would mitigate many of the impacts resulting from the construction of a pipeline in the preferred routes proposed by Thornton. Indeed, a review of the record makes it clear that many of the Larimer County residents that addressed the BOCC in the hearing process favor a “Poudre River alternative.” NPD argues strenuously in its brief that a Poudre River alternative is the preferred solution, “avoiding a pipeline in the western portion of Larimer County and at the same time increasing flows in the River through the City thus preserving both recreation and ecology.”

Thornton argues that the proposed DR Routes and CR 56 Route are reasonable siting alternatives and therefore consideration of other alternatives is not required. Further, Thornton argues that any Poudre River alternative is precluded both by the terms of its water decree, which requires diversion of its water at a specific location from the Poudre River, and the 1986 Agreement with WSSC. In its amicus filing with the court, WSSC also argues that any Poudre River alternative in which Thornton would leave its water in the Poudre is not permitted under either Thornton’s water decree or the 1986 Agreement. WSSC made several objections in the proceedings related to Thornton’s 1041 application for consideration of any Poudre River alternative, noting that removal of waters from the WSSC system would be extremely detrimental to WSSC and its shareholders. Based upon these specific concerns, WSSC requested that the Working Group eliminate any alternative that would require Thornton to leave is decreed water in the river for downstream diversion.

The BOCC concedes in its briefing that the 1041 regulations relating to the siting and design of pipelines do not allow Larimer County to regulate Thornton’s water rights, source water, or amend Thornton’s Water Decree. Notwithstanding this fact the BOCC found Criterion 2 unmet based upon the failure to consider the “Shields Street alternative.” The BOCC specifically acknowledges in its Findings and in its briefing before the court that “that it may not deny Thornton the use and benefit of its water rights and that the Board’s authority is limited to

approving the siting and development of pipelines.” [R6839]. The court finds that denying Thornton’s proposal based upon the failure to include a Poudre River alternative, or requiring the consideration of a non-pipeline alternative as part of Thornton’s 1041 application, goes beyond the BOCC’s authority to regulate and determine the appropriate siting and development of a “pipeline” under C.R.S. §24-65.1-204 and the 1041 regulations adopted by Larimer County, included in the Larimer County Land Use Code, Chapter 14.¹⁸

Based upon the foregoing, the court finds that there is competent evidence in the record to support the BOCC’s finding that Criterion 2 was not met based upon the corridor approach utilized by Thornton, with regard to the preferred routes proposed which prevented sufficiently meaningful evaluation of the alternatives presented and lacked the necessary specificity to determine appropriate impacts. The court is unable to find that the ultimate decision of the BOCC is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of its authority. To the extent that the BOCC determined that Thornton’s permit application did not meet the criteria based upon the failure to consider a Poudre River alternative, the court finds that the BOCC exceeded its jurisdiction in doing so.

Criterion 14.10(D)(3) Non-Conformity with County Standards, Review Criteria,
Environmental Mitigation Requirements

Criterion 3 requires that Thornton’s proposal conform to county standards, review criteria, and mitigation requirements concerning environmental impacts, including those contained in Section 8 of the LUC. The BOCC determined that Thornton’s proposal did not meet the requirements of the LUC, Sections 8.4 and 8.8. LUC Section 8.4 relates to mitigation of impacts to wildlife as a result of construction or development. Section 8.8 relates to irrigation facilities and protection of irrigation facilities from adverse development impacts. As to Section 8.4, the BOCC Findings indicate that the Board is not convinced that mitigation, including avoidance, seasonal limitations, or prohibitions on activities, is adequate. As to Section 8.8, relating to Irrigation Facilities, the Findings indicate that the Board would seek alternative alignments that eliminate or reduce impacts on irrigation ditches.

¹⁸ See also, C.R.S. §24-65.1-106(1)(b) which provides, in relevant part:

Nothing in this article shall be construed as: Modifying or amending existing laws or court decrees with respect to the determination and administration of water rights.

Thornton argues that the BOCC's decision regarding wildlife impacts was arbitrary and capricious. Thornton notes that the BOCC simply ignored a Staff statement in the submitted reports that the Colorado Parks and Wildlife recommended that the mitigation efforts in Thornton's proposal were sufficient, citing both state and federal regulations to which Thornton would have to conform throughout the pipeline construction process. Thornton also contends that the BOCC used the wrong standard in evaluating the Section 8.8 irrigation requirements by considering alternative alignments instead of whether the pipeline proposal met "irrigation facility" requirements.

A review of the BOCC's Findings regarding the impacts to wildlife in the area of the pipeline demonstrates a lack of any real detail and explanation as to why the BOCC was not convinced that Thornton's proposal included adequate mitigation of these impacts. The Findings just state that the BOCC was not convinced that mitigation was adequate. The Findings do not identify specific standards, criteria or mitigation requirements for which Thornton's proposals are non-conforming. In its responsive brief, the BOCC notes that testimony received during the hearing process regarding concerns related to established trees used for nesting and perching by raptors, disruption of rattlesnake dens and osprey nesting sites, disruption of hawks, osprey and other federally protected raptors along the reservoirs in Thornton's pipeline corridor, and displacement of wildlife that use the property proposed for Thornton's pumphouse. However, the BOCC Findings do not identify or address how Thornton's proposed mitigation of these impacts fails to comply with required standards. The record indicates that Thornton provided mitigation plans reviewed by the Colorado Division of Parks and Wildlife, which the planning staff determined were sufficient.¹⁹ There is no indication that the BOCC based its decision in regard to Criterion 3, Section 8.4, on any specific scientific data or expert testimony. Based upon the record, the court finds that the BOCC's finding that Thornton's proposal failed to meet the requirements related to mitigation of impacts under Section 8.4, is not supported by competent evidence.

In regard to the LUC Section 8.8, the BOCC simply finds that it "would seek alternative alignments that eliminate or reduce impacts on irrigation ditches." [R6835]. It is, again, unclear

¹⁹ The record reveals that Thornton submitted a Wildlife Conservation Plan consistent with the requirements of LUC Section 8.4.4 and 8.4.7, as well as a Natural and Cultural Resources Assessment to further address wildlife, habitat, mitigation, and monitoring. [R30-34, 231, 617-877, 1259 and 1336-1384].

from the Findings how Thornton’s proposals fail to conform to county standards, review criteria, and mitigation requirements as related to any adverse impacts related to “irrigation facilities” set forth in LUC Section 8.8. In the absence of identification of the manner in which Thornton’s proposals fail to conform with the requirements of LUC Section 8.8, the court is unable to find that there is competent evidence in the record to support the BOCC’s finding that Thornton’s preferred routes failed to meet the requirements of Section 8.8 with regard to irrigation facilities.

In determining whether Thornton’s application met the requirements of Criterion 3 the BOCC also notes concerns regarding “noise and impacts” from the pumphouse. [R6835]. Thornton argues that the proposed pump station is not subject to the 1041 Regulations because the LUC does not regulate “appurtenant” facilities like the pump station. The BOCC does not address this in its briefing. However, even assuming that the pump station is the proper subject of the applicable regulations, there is a lack of competent evidence in the record to support a conclusion that the proposal fails to conform with specific county standards, review criteria or mitigation requirements concerning environmental impacts. Accordingly, the record before the court does not provide a basis for finding that Criterion 3 is unmet on this basis.

Based upon the foregoing findings, the court determines that the BOCC’s denial of Thornton’s permit application based upon the failure to meet Criterion 3 is not supported by competent evidence in the record and was arbitrary.

Criterion 14.10(D)(4) Significant Adverse Effects on Associated Land Without Adequate Mitigation

Criterion 4 requires a finding that the proposal will not have a significant adverse affect on, or will adequately mitigate significant adverse affects on, the land on which the proposal is situated and on lands adjacent to the proposal. The BOCC found this Criterion unmet, citing significant impairments to the surrounding residential areas’ quality of life, use of their property, and again citing an inability to assess the impacts of the pipeline due to the size of the proposed corridors and the uncertainty as to where in that corridor the pipeline might eventually be constructed. The Findings cite impacts to groundwater, drainage, eminent domain proceedings, easements, rattlesnake habitat disruption, noise, change in views, loss of established trees, a four-year construction timetable on the DR Route causing traffic congestion, and emergency vehicle

access concerns as a few of the reasons for finding this Criterion unmet. The BOCC also argues that it is unable to properly consider the cumulative impacts related to all three phases of Thornton's pipeline project because Thornton's alternative proposals only address Phase I of the project. In its Findings, the BOCC notes, "[B]y presenting Phase I in isolation, Thornton deprives the Board and public of the opportunity to consider the cumulative impacts and the effectiveness of mitigation." [R6836].²⁰

Thornton contends that the BOCC's denial of its proposal as to this Criterion was an abuse of discretion. Thornton argues the BOCC fails to point to competent evidence in the record related to significant adverse impacts to the "land" on which the proposed pipeline would be situated or the "adjacent land." Thornton further objects to what it characterizes as the BOCC's "scattershot 14-item list of testimony" in its response, which fails to constitute competent evidence as a matter of law. Thornton argues there exists a lack of specificity as to the specific properties affected or what the specific adverse impacts to the land upon which the pipeline would be constructed. Thornton points out that many of the record citations and statements relied upon by the BOCC are made by persons who do not live adjacent to where the pipeline would be located under its alternative proposals.²¹ Further, Thornton notes that most of the comments relied upon by the BOCC to support its determination relate to impacts inherent in the construction process, which would only be temporary and do not properly relate to permanent adverse effects to the land or lands adjacent to the proposed pipeline. Thornton also notes that the BOCC's noted concerns regarding temporary impacts related to construction and traffic is inconsistent with the BOCC's determination that Thornton's proposal met the requirements for Criteria 8, 9 and 12.

The BOCC argues that it is proper to consider both short and long-term adverse impacts under this criterion and argues that there is competent evidence in the record to support its

²⁰ Intervenor NPD similarly argues in its briefing that Thornton failed to submit a complete and sufficient permit application seeking approval of all pipelines and appurtenances related to the Thornton project in Larimer County. NPD argues that by limiting its application to Phase I of the project, neither the BOCC or the citizens of Larimer County can fully assess the cumulative impacts.

²¹ Thornton argues that the BOCC identifies only two witnesses that live or own property on or adjacent to the land where the pipeline would be situated: John Carroll (Vista Lake Drive resident) and Dick Brauch (property owner of the pump station location but lives elsewhere).

Findings (*see* Response, p. 28-31), and that the language of this regulatory criterion supports a measure of deference to the BOCC's interpretation of this particular rule.²²

Based upon a review of the relevant portions of the record and considering the arguments advanced, the court does find that there is competent evidence to support the BOCC's determination that Thornton's permit application failed to meet Criterion 4. As noted above, the court is persuaded that the corridor approach underlying Thornton's alternative proposals prevents both the BOCC and, more importantly, affected property owners from considering the specific impacts related to the siting of the pipeline.

The court has further considered the position of both the BOCC and Intervenor No Pipe Dream that the BOCC is unable to properly consider the cumulative impacts involving the proposed pipeline because Thornton has only submitted its permit application as to Phase I of the pipeline. There is no indication in the record that the court was able to find that this issue has been raised at any prior time in the process of considering Thornton's permit application as to Phase I. Thornton argues that it intentionally segmented its 1041 application for Phase I of the TNP. Thornton further argues that Phase II and Phase III, if ever developed, are separate "domestic water systems" under the 1041 Statute and, as such, will be required to go through their own respective permitting processes at the appropriate time and meet required criteria. Having failed to alert Thornton at any time that the BOCC believed that Thornton's application was incomplete and lacking because it did not include Phase II or Phase III, does not provide, in the court's view a proper basis upon which to deny Thornton's application as it relates to Phase I of the proposed pipeline. The court notes that other specific concerns cited by the BOCC related to impacts on residential development, groundwater and drainage, as well as wildlife, are not sufficiently developed in the record to establish competent evidence of significant adverse impacts without appropriate mitigation.

²² The BOCC's Response Brief at p. 28, citing *Sierra Club v. Billingsley*: "[i]f the language of an administrative rule is ambiguous or unclear, [the court] give[s] great deference to an agency's interpretation of a rule it is charged with enforcing, and its interpretation will be accepted if it has a reasonable basis in law and is warranted by the record." *Sierra Club v. Billingsley*, 166 P.3d 309, 312 (Colo. App. 2007).

Criterion 14.10(D)(6) Negative Impacts to Public Health and Safety

This Criterion requires a finding that the proposal will not negatively impact public health or safety. The BOCC's findings as to this criterion cited concerns expressed by residents adjacent to the Douglas Road area as to safety issues regarding emergency service access and strangers accessing their properties both during the pendency of the construction process and the subsequent future monitoring and upkeep required. The concern related to emergency services access to the area appears to be the primary reason for this finding. Response, p. 32, citing [R6837, R7006-7007, R7023].

Thornton argues that the BOCC's reasons for finding this Criterion unmet are impermissibly vague and insufficiently supported in the record. Thornton contends that only one person indicated a concern about "strangers" traipsing about their property in connection with the construction. [See R6832, R5269 and 7958L]. Thornton further argues that construction of its pipeline will necessitate construction crews and other associated persons to be present during the construction process. Aside from the mere presence of construction crews, Thornton argues that there was insufficient evidence as to how construction crews would pose a threat to the public health and safety during pipeline construction. Thornton notes that persons employed in connection with the pipeline would be required to stay in the public right-of-way and conform to state and federal laws. The record before the court does not provide specific, competent evidence from which to conclude that the mere presence of construction crews would negatively impact public health or safety. Further, Thornton argues that a concern that limited access could delay emergency services is not a basis for finding that the proposal would negatively impact public health and safety. Thornton argues that these concerns are entirely speculative and cannot provide the basis for finding the criteria unmet. Thornton notes that both an emergency response and traffic mitigation plan would be provided and maintained throughout the construction process.

Based upon the sparse record before the court, the BOCC's Findings that Criterion 6 was unmet due to resident concerns regarding emergency services access and strangers being around the surrounding properties during the construction and maintenance processes do not appear supported by competent evidence in the record. Rather, it appears that the concerns are simply speculative in nature. Further, this finding appears to the court to be inconsistent with the

BOCC's finding as to Criterion 9, in which the Board determined that Thornton's proposal met the requirements for mitigation with regard to construction impacts to county roads, bridges and related facilities. The court determines that there is not competent evidence to support the BOCC's Findings as to Criterion 6, and that denial of the permit application on this basis was arbitrary.

Criterion 14.10(D)(10) Benefits do not Outweigh Losses of any natural resources or reduction of productivity of agricultural lands as a result of the proposed development

Criterion 10 requires a finding that the benefits of the proposed development outweigh the losses of any natural resources or reduction of productivity of agricultural land as a result of the proposed development. The BOCC's Findings on this criterion conclude that, while the benefits of Thornton's pipeline proposal are significant to the City of Thornton, by providing a clean and sufficient water supply to that city, those benefits do not outweigh the significant detrimental impact to the agricultural productivity of Larimer County resulting from the conversion of agricultural land to dryland as a result of the pipeline project. The BOCC notes in its Findings that the "shift of irrigated farmland to dryland grass will significantly reduce agricultural productivity of those lands and will, unless sufficiently mitigated, jeopardize the long-term viability of the agricultural segment of Larimer County from an economic, cultural and social perspective." [R6838]. In its relevant Findings, the BOCC notes that additional mitigation might help Thornton satisfy this criterion but that evidence in the current record supported the opposite finding.

Thornton argues the BOCC impermissibly interprets the "proposed development" as a "proposal" to remove water from irrigated farmland. However, Thornton argues that reference to the "proposed development," read in conjunction with the "activity of state interest" that LUC 14.4.J designates, relates solely to the *construction* of a water pipeline. Thornton argues that this interpretation is consistent with the 1041 Statute, C.R.S. § 24-65.1-102(1), which defines "development" to mean "any construction or activity which changes the basic character of the use of the land on which the construction or activity occurs." Accordingly, Thornton argues that the BOCC's broad reading of "proposed development" extends far beyond "the land on which the construction occurs" and is erroneous, and that the BOCC is only empowered to focus on the loss of natural resources and agricultural productivity "as a result of" the installation of a

pipeline in a 50-ft easement or right-of-way along the CR 56 or DR Routes. Thornton argues that planning staff recognized this in its findings noting that “the pipeline and its construction will not cause” a reduction in productivity of agricultural lands. [R2944, 4975]. Thornton also argues that any resulting impacts to agriculture, which it notes can only be measured after the pipeline construction has commenced, would be temporary, noting that its Water Decree and project guidelines would require either revegetation of the affected land or compensation paid to impacted landowners.

Based upon the record and review of the applicable legal authority, the court agrees with Thornton that the BOCC misinterprets the scope of Criterion 10. A plain reading of the applicable LUC regulation, read in conjunction with C.R.S. § 24-65.1-102(1), makes it clear that the Board’s review of the benefits and impacts related to natural resources or the reduction of productivity of agricultural lands is limited to “the land on which the construction or activity occurs.” Accordingly, the BOCC exceeded its jurisdiction in broadly considering the detrimental impact to agricultural productivity in Larimer County generally resulting from the conversion of agricultural land to dryland as a result of the pipeline project. Accordingly, the court finds that the BOCC acted arbitrarily in finding that Criterion 10 was not met.

Criterion 14.10(D)(11) Proposal Demonstrates a reasonable balance between costs to the applicant to mitigate significant adverse affects [*sic*] and the benefits achieved by such mitigation

Criterion 11 requires that the proposal demonstrate a reasonable balance between the costs to the applicant to mitigate significant adverse affects and the benefits achieved by such mitigation. In its Findings, the BOCC finds that other alternative routes (presumably Poudre River alternatives) may result in fewer adverse impacts to the County which would reduce or equal the costs of mitigating impacts related to the CR 56 Route or the Douglas Road Route. The BOCC indicated that, though it was not Thornton’s preference, several attorneys testified that there would be no legal barrier to Thornton altering its water delivery point in accordance with its Water Decree, and that Thornton indicated only that it did not seriously consider such alternatives due to the associated costs. Response, p. 34-36.

Thornton argues that the BOCC's reliance on the suggested alternative that Thornton consider the option of running its water through the Poudre River and then putting it through an additional filtration method as an appropriate alternative does not address the specific criteria or any actual adverse impacts resulting from the proposed pipeline. Thornton also argues that to the extent any significant adverse impacts were to be had, it had included in its proposal appropriate means of mitigation. Opening, p. 67-68.

The BOCC's statement that it was unconvinced that the benefits to Thornton relating to the proposed pipeline routes would outweigh the costs of it pursuing a Poudre River alternative appears to be just that, a general statement of preference. The Findings do not, however, specifically address the stated criterion; that is, whether Thornton's proposal demonstrates a reasonable balance between costs to the applicant to mitigate significant adverse affects from the proposed pipeline and the benefits achieved by such mitigation. Based upon the lack of specific factual findings which address this proposed criterion, the court finds that the BOCC's finding that Criterion 11 was unmet is not supported by competent evidence in the record.

CONCLUSION AND ORDER

For the reasons set forth above, the court determines that there is competent evidence in the record to support the BOCC's denial of Thornton's 1041 permit application as to Criterion 1, 2 and 4. Alternatively, the court determines that there is a lack of competent evidence in the record to support the BOCC's determination that Criteria 3, 6, 10 and 11 were not met. Because the court has determined that there is competent evidence to support the conclusion that at least one of the Criterion was not met, Thornton's request that this court grant its permit application is hereby denied.

SO ORDERED: February 15, 2021.

By the court:



Stephen J. Jouard
District Court Judge

