Larimer County, Colorado, District Court 201 La Porte Avenue, Suite 100 Fort Collins, Colorado 80521-2761 (970) 494-3500	DATE FILED: June 8, 2020 8:06 AM CASE NUMBER: 2019CV30123
NO LAPORTE GRAVEL CORP., ROBERT HAVIS, and PETER WAACK, **Plaintiffs**, v. BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY (including all of the individual Commissioners in their official capacities: Chair Tom Donnelly, Steve Johnson, John Kefalas), and LOVELAND READY-MIX CONCRETE, INC., **Defendants**.	▲ COURT USE ONLY▲ Case No. **2019 CV 30123** Courtroom **3B**

OPINION AND ORDER REVERSING AND REMANDING AGENCY DECISION

Plaintiffs No Laporte Gravel Corporation, Robert Havis, and Peter Waack (collectively, "No Laporte") seek judicial review under Colo. R. Civ. P. 106(a)(4) of a zoning decision by the Board of County Commissioners of Larimer County ("Board") to approve an application for use by special review filed by Loveland Ready-Mix Concrete, Inc. ("Ready-Mix"). Ready-Mix sought and obtained approval to operate a sand and gravel mine, on-site material processing, and a concrete batch plant in La Porte, Colorado (cumulatively "the project").

On May 22, 2020, the Court heard oral argument on the matter. Upon careful review of the administrative record, the parties' briefs, and their arguments, the Court concludes that the Board abused its discretion because it misapplied the applicable law in two crucial respects. First, the Board erred when it concluded that provisions in § 4.3 of the Larimer County Land Use Code ("Code"), which contains descriptions of the different types of uses allowed under each principal use, didn't

apply to the project. To the contrary, Ready-Mix's submissions to the Board, Larimer County staff's presentations, and the Board's arguments before this Court clearly show that for the concrete batch plant to be part of the project, it must be an allowable accessory use under either §§ 4.3.7 or 4.3.10 of the Code.[1] No Laporte's opposing submissions also make it exceedingly clear that the concrete batch plant must be an accessory use under the Code. (Naturally, No Laporte forcefully argues that the concrete batch plant isn't an allowable accessory use.)

Second, the Board erred because it concluded that Ready-Mix had shown that its project complied with all applicable requirements of the Code. Because the Board failed to determine whether the project complies with the applicable provisions under § 4.3, it also abused its discretion. Given the disposition reached, the Court doesn't address the parties' remaining contentions.

Accordingly, the Board's final decision approving Ready-Mix's project is reversed. The matter is remanded to the Board so that it may make appropriate findings of fact and conclusions of law in a manner consistent with this Opinion.

I. FACTS AND PROCEDURAL HISTORY.

Ready-Mix, a closely-held corporation, produces and sells concrete, and intends to operate a sand and gravel mine spanning approximately 123 acres in La Porte, Colorado, for a period of up to twelve years. Vol. I at 3476, 3479; Vol. II.A at 42; Vol. IV at 8. Ready-Mix also wishes to conduct material processing of mining aggregate and to operate a concrete batch plant on the same property as the mine. *Id.* The property where the mine, processing facility, and batch plant will be located are zoned Open ("O-Open")[2] under the Code. Vol. I at 3479. Two residences are located on that land,

[1] The Court expresses no opinion as to which provision should apply. The Board must make that determination in the first instance upon remand.

[2] The Court notes that the Findings and Resolution approving Ready-Mix's application that the Board drafted erroneously states that the land is zoned O-Open and C-Commercial. Vol. IV at 1.

which is also currently being used for agricultural purposes, including hay production and cattle and horse grazing. Vol I. at 3482, 3784.

A. Ready-Mix's application.

In December 2016, Ready-Mix submitted a special review permit application ("application") to the Larimer County Planning Department seeking approval of the project. Vol. I at 3477. The application included a lengthy document called "sketch plan project description," which was authored by Telesto Solutions, Inc. ("Telesto"), an engineering firm that Ready-Mix hired for the special-review process. *Id.* at 3479–96. In the sketch plan, Ready-Mix provided a description of the following operations, among others, that will occur on the property:

- During the life of the mine, sand and gravel will be delivered by a conveyor or a truck from the mining pit to a crusher, where the material will be washed and "sorted into a sand stockpile and multiple gravel stockpiles." *Id.*
- Next, "aggregate from the gravel stockpiles will be hauled to a hopper to be conveyed to the batch plant." *Id.*
- At the concrete batch plant itself, "aggregates [will be] mixed with cement and additives." *Id.*
- The product from the concrete batch plant will be mixed with water at a concrete mixer truck load out facility located next to the batch plant and the trucks will deliver the concrete product to customers. *Id.*

Ready-Mix also addressed in the sketch plan the six criteria under § 4.5.3 that the Board must consider in any special review application. In particular, Ready-Mix explained that § 4.5.3(F) was applicable and that its project "will meet applicable criteria listed in Section 4.3" of the Code. *Id.* at 3454. It also invoked § 4.3.7(E)(1) of the Code, stating that an accessory to the sand and gravel

mining was included in the application because it included "on-site processing of mined materials": "The Project includes a concrete batch plant as central to proposed operations." *Id.*

B. The administrative record establishes that all parties believed that § 4.3 applies to the project.

The administrative record amply demonstrates that all parties believed that to decide the application, the Board had to consider and apply § 4.3 of the Code.[3] In June 2018, Telesto submitted a letter to Robert Helmick, the County's senior planner for the project, responding to comments by an individual named Tara Waters. In relevant part, Waters argued that because the O-Open zoning district didn't allow concrete batch plants, Ready-Mix should "try to rezone their site from Open to Industrial," or "propose their batch plant on one of their other parcels that are not located directly beside the Laporte community." Vol. I at 1500. In response, Ready-Mix disagreed, specifically invoking § 4.3.7(E)(1) of the Code: it contended that the concrete batch plant "is an ancillary facility to gravel mining operations, [and] thus is an allowed use in the Open [zoning district]. Ancillary facilities are approved as part of the special review." *Id.* at 1501.

In a September 2018 letter submitting comments against the project, No Laporte also invoked § 4.3.7 of the Code. There, No Laporte argued that the concrete batch plant isn't an allowable accessory use under the Code because, according to Ready-Mix, "the batch plant is a 'central use,' not a secondary use," citing to § 4.3.10. *Id.* at 1525. No Laporte also argued that under that provision of the Code, "concrete batch plans are specifically prohibited as an accessory uses on rural occupation lots in Open zoned areas." *Id.* at 1526. And in a different part of the letter, No Laporte contended that Ready-Mix's application sought "approval of industrial uses in a rural/residential/commercial area." *Id.* at 1523.

[3] In selecting the examples here, the Court expresses no opinion on the merits of the parties' respective contentions.

While Ready-Mix strongly disagreed with No Laporte's contentions, it nevertheless also invoked § 4.3 of the Code, leaving no doubt that it applies to the project. In its November 2018 letter to the Board, Ready-Mix argued that the batch plant is an allowable accessary use to the mining operation. Ready-Mix cited to § 4.3.7(E)(1) of the Code, arguing that "the concrete batch plant will be used for the on-site processing of mine materials." Vol. I at 360. It also argued that No Laporte's argument to the contrary relied "on a hyper-technical construction of" § 4.3.10 of the Code. *Id.* at 361. "Simply put," Ready-Mix continued, "Section 4.3.7 considers on-site batch plants processing mined materials to be accessory uses to the mining operation. There is no requirement in either section 4.3.7 or section 4.3.10 that the batch plant's processing involve only materials mined on-site." *Id.*

Earlier in the special-review process, Ready-Mix asserted that § 4.3 of the Code applied to the project in at least two submissions to the County in August 2017 and March 2018. In the 2017 submission, Telesto said that the "project will meet applicable criteria listed in Section 4.3 of the [Code]." Vol. I at 3522. And, as § 4.3.7(E)(1) requires, Telesto noted that Ready-Mix's application included a provision for on-site processing of mined materials. *Id.* Later, in March 2018, Telesto again repeated the same statements from its March 2017 submission. *Id.* at 3783.

C. There were multiple hearings on the application where § 4.3 was discussed.

In June 2018, the Larimer Area Planning Advisory Committee ("LAPAC") held a hearing on Ready-Mix's application and voted 4-2 to recommend denying the application because it was "not consistent with [the] overall Laporte Area Plan." Vol. I at 3754–63. LAPAC's decision was grounded on multiple concerns, including that the project "doesn't belong in the middle of Laporte," environmental, traffic, water, air, and noise concerns, and negative of effects on local businesses. *Id.* at 3763.

At the hearing before LAPAC, Ready-Mix gave a PowerPoint presentation in which it argued, in part, that § 4.3.7(E)(1) supports the concrete batch plant as an allowable accessory use to the mine. Ready-Mix explained that the batch plant would be located in a remote part of the property, noting that batch plants are clean, quiet, and don't generate dust. *Id.* at 3756.

Two months after LAPAC's hearing, the Larimer County Planning Commission ("Planning Commission")[4] held two hearings in 2018 on Ready-Mix's application and voted 6-0 to unanimously recommend that the application be approved. Vol. I at 5339–44; 5355–58. During the second hearing, an engineer from Telesto, who appeared for Ready-Mix, told the Planning Commission that § 4.3 of the Code applies with respect to the concrete batch plant: "Zoning Code 4.3 of the Land Use Code connects the batching with the mining and that a batch plant can't be permitted as an independent site." *Id.* at 5342.

During that same hearing, the Telesto engineer responded to several arguments that No Laporte made against the project. Specifically, Telesto stated that the concrete batch plant is an allowable accessory use under § 4.3.7(E)(1). *Id.* at 5349. The engineer provided two cases for the commissioners' consideration and also quoted the preceding provision in full, arguing that although the concrete batch plant isn't limited to processing materials that are mined on-site, § 4.3.7(E)(1) doesn't specify that materials must be mined "solely" on-site. *Id.*

On September 24 and November 19, 2018, the Board conducted public hearings on the application. At the second hearing, the Board voted 2-1 in favor of approving the application, with Commissioners Tom Donnelly and Sean Dougherty voting in favor and Commissioner Steve Johnson voting against it. Vol. II.B. at 188; Vol. III.B. at 4.

[4] Planning Commission members who were present and voted were Jeff Jensen (chair), Bob Choate, Anne Johnson, Curtis Miller, Steven Lucas, and Nancy Wallace.

During the public hearings on Ready-Mix's application before the Board, neither party left any doubt that § 4.3 of the Code was applicable to the project and asked the Board to apply it to the evidence in the administrative record. At the September 24, 2018 land-use hearing, No Laporte's counsel argued during his presentation that Ready-Mix's concrete batch plant *isn't* an allowable accessory use to the mining activity, referring to that portion of his argument as the "fundamental" part of his presentation against approval of the project. 9/24/2018 Tr. at 80. In doing so, No Laporte's counsel contended that the batch plant isn't an accessory use under § 4.3.10 of the Code. *Id.* at 83–84. Counsel also argued that the batch plant didn't meet the criteria under § 4.3.7(E)(1) either. *Id.* at 84.

Then, at the November 19, 2018, land-use hearing, Telesto, which appeared on behalf of Ready-Mix, gave an extensive presentation about the project. In responding to No Laporte's arguments against the project, a Telesto engineer was emphatic that the concrete batch plant is an allowable accessory use to the mine, thus explicitly invoking § 4.3:

> A fair amount of argument was made at the batch plant is not an allowable accessory you. Stated again on page 17 of [No Laporte's] letter. That's in, in sort of a clear obfuscation of the land use code, which uses quite simple language to state that on site processing of mined material is considered accessory to the mining activity.
>
> And as we propose, it must be included with the special review application that we've brought before the Board. I'm not an attorney, of course. But in a letter addressed to the Board by Ready-Mix's attorney Don Ostrander there is case law that supports what the land use code defines as an accessory use.

11/19/2018 Tr. at 117.

At the conclusion of the second hearing, the commissioners voted to approve Ready-Mix's application by a 2-1 vote. *Id.* at 188.

D. The Board's final decision.

Consistent with the commissioners' vote on the application, on January 15, 2019, the Board issued its written "Findings and Resolution Approving the Petition of Loveland Redi-Mix Concrete,

Inc." ("Findings and Resolution"), in which it formally approved the application. *See* Vol. IV. The Board's Findings and Resolution approved the proposed land use of "sand and gravel mining, processing and concrete batch plant" on the site. Vol. IV at 1. It limited the operation of the mine to a period of no longer than twelve years, but didn't place any similar limit on the operation of the concrete batch plant. *Id.* at 7–8.

The Findings and Resolution addressed the required six special-review criteria in § 4.5.3 of the Code. To approve a special review use, the Board must determine that the criteria either have "been met" or are "inapplicable." *Id.* at 3–7. The Board found that Ready-Mix's application met criteria A through E and that criterion F was inapplicable.

As to § 4.5.3(A), the Board reasoned that the proposed use "will be compatible with the existing and allowed uses in the surrounding area and be in harmony with the neighborhood." *Id.* at 3. Specifically, it noted that "with the additional measures [Ready-Mix] will put in place to reduce adverse impacts, the Board finds the proposed uses to be compatible." *Id.* The Board also stated that "[t]he mining will be an interim use in that it will be concluded in approximately twelve years per the applicant's representations." *Id.* "The mining will be performed in increments of 20-25 acres to reduce impacts that could occur from opening and mining the entire area at one time." *Id.* And the Board highlighted that it previously "approved successful mining operations in proximity to residential areas; however, diligent operations, management and attention to impacts and community engagement are critical to create this success." *Id.*

On the § 4.5.3(B) factor, the Board concluded that the "site is not in a Growth Management Area. It is an area which has adopted a special area plan known as the LaPorte Plan Area," which allows for mining to occur "as an interim use." *Id.* at 4. Moreover, because the site is on the County Commercial Mineral Plan, the Board must "act on a mining request prior to allowing any change in zoning." *Id.* The Board also noted that gravel supplies are limited in the Front Range and, as a result,

"[s]ome suppliers have taken to importing those resources from out of the area and out of state." *Id.* In sum, the Board concluded that the "proposed mine and [concrete] batch plant are consistent with the master plan elements adopted pursuant to [Colo. Rev. Stat. § 34-1-304] regarding commercial mineral deposits." *Id.*

Addressing § 4.5.3(C) next, the Board concluded that Ready-Mix "demonstrated that this project can and will comply with all applicable requirements of this code." *Id.* Here, the Board listed multiple provisions of the Code that, in its view, were applicable and with which Ready-Mix's application had complied. *Id.* at 4–6. By way of illustration, the Board found that the application complied with § 8.11, Air Quality, because "the estimated controlled emissions from the mine combined with current background levels are well below the Colorado Ambient Air Quality Standards used for regulatory (permitting) purposes." *Id.* at 5. But the Board didn't discuss how the concrete batch plant complied with other provisions of the Code or addressed how, if at all, it was an allowable accessory use for Ready-Mix's mining operations.

As to § 4.5.3(D), the Board found that the "proposed use will not result in a substantial adverse impact on the property in the vicinity of the subject property," highlighting multiple adverse impacts of the proposed use like "noise, traffic, and air and water quality." *Id.* at 6. But, the Board observed, Ready-Mix provided multiple studies and analyses to address those adverse impacts, which showed that it "can meet code standards and state and local regulations outright or through mitigation measures." *Id.*

The Board also found that, under § 4.5.3(E), it considered the "recommendations of referral agencies." *Id.* at 7. It noted that Ready-Mix responded to the referral agencies' comments and also adequately addressed them through its "submittals, including its proposed measures to reduce impacts." *Id.*

Lastly, as to § 4.5.3(F)—that "[t]he Applicant has demonstrated that this project can meet applicable additional criteria listed in the Section 4.3 Use Descriptions"—the Board tersely concluded that "[t]his criterion is not applicable. There are no special criteria or standards listed for mining." *Id.* Because of that legal conclusion, the Board didn't address how the batch plant is an accessory use to the mining operations under two potential Code provisions found in § 4.3. As described above, those provisions are either §§ 4.3.7(E)(1) or 4.3.10.

On February 11, 2019, No Laporte timely filed a complaint for judicial review under Colo. R. Civ. P. 106(a)(4) challenging the Board's Finding and Resolution. The case is fully briefed. On May 22, 2020, the Court heard oral argument.

II. STANDARD OF REVIEW.

Under Colo. R. Civ. P. 106(a)(4)(I), judicial review of any governmental body or officer exercising judicial or quasi-judicial functions is limited to a determination of whether such body or officer exceeded its jurisdiction or abused its discretion, based on the record before the body or officer. *Kruse v. Town of Castle Rock*, 192 P.3d 591, 601 (Colo. App. 2008). "This provision does not permit judicial review of legislative acts—such as the passage of a code or ordinance—but only of quasi-judicial acts—such as the application of the ordinance to a particular set of facts." *Yakutat Land Corp. v. Langer*, 462 P.3d 65, 70 (Colo. 2020) (citing *Liquor & Beer Licensing Advisory Bd. v. Cinco, Inc.*, 771 P.2d 482, 486 (Colo. 1989)).

A governmental body exceeds its jurisdiction or abuses its discretion if it either misapplies the law, or if no competent record evidence supports its decision. *Alpenhof, LLC v. City of Ouray*, 297 P.3d 1052, 1055 (Colo. App. 2013) (citing *Bd. of County Comm'rs v. Conder*, 927 P.2d 1339, 1343 (Colo. 1996)). Misapplication of the law means, as the term suggests, that the government agency misinterpreted or misapplied governing law. *Whitelaw v. Denver City Council*, 405 P.3d 433, 438 (Colo. App. 2017); *see also Eason v. Bd. of County Com'rs of County of Boulder*, 70 P.3d 600, 609 (Colo. App.

2003) ("In determining whether an agency has abused its discretion, the court may consider whether the agency misconstrued or misapplied the applicable law"). As the Supreme Court recently explained, under the misapplication ground, the Court must review "whether the [Board] correctly construed the applicable Code provisions and, if so, whether it abused its discretion in applying those provisions to the facts before it." *Langer v. Bd. of Cty. Comm'rs of Larimer Cty.*, 462 P.3d 59, 64–65 (Colo. 2020) (affirming a judgment of this Court that held that the Board correctly construed the Code).

A governmental body's interpretation of a local code is reviewed de novo, and the reviewing Court applies ordinary rules of statutory construction. *Whitelaw*, 405 P.3d at 438. Further, in construing the applicable zoning code, the Court affords the language of the provisions at issue their ordinary and common-sense meaning. *City of Commerce City v. Enclave W., Inc.*, 185 P.3d 174, 178 (Colo. 2008). Upon de novo review, "interpretations of the code by the government entity charged with administering it deserve deference if they are consistent with the drafters' overall intent." *Whitelaw*, 405 P.3d at 438. However, if the government body's "interpretation is inconsistent with the governing relevant articles, then that interpretation is not entitled to deference." *Shupe v. Boulder County*, 230 P.3d 1269, 1272 (Colo. App. 2010). Indeed, "courts are not bound by the agency's interpretation. Deference is not warranted where the agency's interpretation is contrary to the statute's plain language." *BP America Prod. Co. v. Colo. Dep't of Revenue*, 369 P.3d 281, 285 (Colo. 2016) (citations omitted).

In the alternative, the Court may find an abuse of discretion if the government agency's decision lacks any "competent record evidence." *Alpenhof*, 297 P.3d at 1055. "Competent evidence" "'means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,' … and must be enough to justify, if the trial were before a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury. *City of Colo.*

Springs v. Givan, 897 P.2d 753, 756 (Colo. 1995) (quoting *Colo. Municipal League v. Mountain States Telephone*, 759 P.2d 40, 44 (Colo. 1988)). No competent evidence exists in the record when the decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Langer*, 462 P.3d at 62 (citing *Freedom Colo. Info., Inc. v. El Paso Cty. Sheriff's Dep't*, 196 P.3d 892, 900 (Colo. 2008)).

Legal conclusions aren't factual evidence that would amount to competent evidence. *See Hellas Const., Inc. v. Rio Blanco Cty.*, 192 P.3d 501, 507 (Colo. App. 2008). Yet, "express factual findings are not a prerequisite to a valid decision by an administrative board if the necessary findings may be implied from the action taken." *Canyon Area Residents for the Environment v. Board of County Com'rs of Jefferson County*, 172 P.3d 905, 909 (Colo. App. 2006) (citing *Sundance Hills Homeowners Ass'n v. Bd. of County Comm'rs*, 534 P.2d 1212, 1216 (Colo. 1975)).

III. DISCUSSION.

No Laporte contends that the Board abused its discretion by approving Ready-Mix's application on six grounds. Pls.' Opening Br. at 17–38. No Laporte's principal ground is that the Board abused its discretion by misapplying the Code when it either wrongly concluded that Ready-Mix's proposed concrete batch plant is an "accessory use" to the mine under §§ 4.3.7(E)(1) or 4.3.10, or when it failed to make appropriate findings of fact and conclusions of law that the concrete batch plant was an allowable accessory use under the Code. Pls.' Opening Br. at 21. At oral argument, No Laporte stressed that the Board had not rendered an opinion on the accessory-use issue because it decided that special-review criterion § 4.5.3(F) was inapplicable.

In its response brief, the Board didn't directly respond to No Laporte's argument that the Board misapplied the Code on the accessory-use ground. Instead, the Board obliquely contends that competent evidence supports its decision that the concrete batch plant is an accessory to Ready-Mix's mine. Bd. Ans. Br. at 14. Ready-Mix also leads with the same argument as the Board. Ready-

Mix Ans. Br. at 6–7. But later it does argue that the Board didn't misapply the Code because the concrete batch plant is an accessory use under § 4.3.7(E)(1). *Id.* at 8. Still, Ready-Mix posits that because it's so "obvious" the concrete batch plant is an allowable accessory use, "the [Board] spent little time deliberating over the issue during the hearing, and did not feel the need to address the issue in its decision." *Id.*

The Court ordered the parties to address several cases from other jurisdictions on the issue of whether the concrete batch plant is an allowable accessory use to Ready-Mix's mining operations. In its supplemental brief, the Board confirms that § 4.3.7(E)(1) applies to the project because "[t]he purpose of a batch plant is to process the mineral mined on site." Bd. Supp. Br. at 2. The Board further notes that according to Mr. Helmick, of the Larimer County Planning Department, the County has "historically considered batch plants—whether asphalt or concrete—to be a normal accessory use to mining operations." *Id.*; *see also* Vol. II.A at 20.

In its supplemental brief, Ready-Mix also confirms the application of § 4.3.7(E)(1) to the project. It forcefully argues that the text of that provision says that "a batch plant is considered an accessory use to a mining operation." Ready-Mix Supp. Br. at 1. And Ready-Mix follows that with a remarkable assertion without legal support: the Board, so the argument goes, "had no obligation to issue any particular finding of fact or conclusion of law that [Ready-Mix's] batch plant was an accessory use because the code explicitly defines it as an accessory use. Obviously, a board of county commissioners need not find or conclude that the law says what it says." *Id.* at 2.

A. The Board abused its discretion by misapplying the Code.

The Court agrees with No Laporte and concludes that the Board abused its discretion because it misapplied § 4.5.3 of the Code in two critical and related respects. First, it erred as a matter of law when it concluded that § 4.5.3(F)—that "[t]he applicant has demonstrated that this project can meet applicable additional criteria listed in the section 4.3 use descriptions"—was

inapplicable to the project. To the contrary, the administrative record demonstrates that § 4.3 was applicable to the project and that the Board had to make findings of fact and conclusions of law to that effect. In the supporting materials to the application submitted on Ready-Mix's behalf, Telesto claimed that the project will meet all applicable criteria in § 4.3 of the Code and, specifically, referenced § 4.3.7(E)(1), stating that an accessory use to the mine—the concrete batch plant—was included with the application.

Moreover, Ready-Mix made nearly identical representations in later submissions to the Planning Commission and to the Board. During its presentation to the Planning Commission, Telesto again stated that the concrete batch plant is an allowable accessory use under the Code. In a November 2018 letter to the Board, Ready-Mix argued that the concrete batch plant is an allowable accessory use under § 4.3.7 of the Code.

Even before this Court, all parties spent considerable time in their briefs sparring about whether Ready-Mix's concrete batch plant is an allowable accessory use under §§ 4.3.7(E)(1) or 4.3.10 of the Code. By doing so, they agree that § 4.3 applies to the project. Indeed, the Board's leading argument urging affirmance is that competent evidence supports its decision that the concrete batch plant is an accessory use under § 4.3.7(E)(1). Br. at 14. By making that argument, the Board thus admits that § 4.3 *is* applicable, which undermines the Findings and Resolution.

For its part, No Laporte forcefully argues that the concrete batch plan isn't an accessory use at all because Ready-Mix is in the business of producing concrete, not of mining sand and gravel. As such, the concrete batch plant is the main attraction, with the sand and gravel mine being the supporting character in the play.

Second, and as a corollary to the first reason, the Board misapplied § 4.5.3(C) when it concluded that the "project can and will comply with all applicable requirements of this code." By wrongly deciding that § 4.3 didn't apply, the Board also erred as a matter of law by finding that the

project complied with all other applicable provisions of the Code. It's unclear whether the project complies with § 4.3 because the Board didn't make any findings or conclusions in that regard.

The issue presented requires the Court to interpret multiple provisions of the Code. In doing so, the Court applies "general canons of statutory interpretation" but it must "look first to [their] plain language, being mindful of the principle that courts presume that the governing body enacting the code meant what it clearly said." *Shupe*, 230 P.3d at 1272. If a term is defined in a statute, "that definition governs," but if a term of "common usage" remains undefined, then courts "may refer to dictionary definitions in determining the plain and ordinary meaning" of that term. *Roalstad v. City of Lafayette*, 363 P.3d 790, 796 (Colo. App. 2015).

When interpreting the meaning of "any one statutory section," the Court also may "look to the legislative scheme as a whole in order to give effect to the General Assembly's intent." *Dep't of Transp. v. Stapleton*, 97 P.3d 938, 943 (Colo. 2004). Additionally, "the rule of consistent usage" prescribes that "absent a 'manifest indication to the contrary, the meaning attributed to the words or phrases in one part of the statute should be ascribed to the same words or phrases found elsewhere in the statute.'" *People v. Delgado*, 410 P.3d 697, 700 (Colo. App. 2016) (quoting *Colo. Common Cause v. Meyer*, 758 P.2d 153, 161 (Colo. 1988)). If a statute is "silent on an issue that would be expected to be within its scope," the Court may rely upon additional tools of statutory interpretation, including "legislative history, prior law, the consequences of a particular construction and the goal of the statutory scheme." *In re Marriage of Alvis*, 446 P.3d 963, 965 (Colo. App. 2019).

The Board has promulgated zoning regulations pursuant to the authority conferred under Colo. Rev. Stat. §§ 30-28-111 and 115. Those regulations designate zoning districts in unincorporated Larimer County. *See generally* Code § 4.1. The Code also identifies within each zoning district the types of "principal uses" that are permitted. *Id.* Certain uses are allowed by right and don't require a permit, license, or other form of approval from the Board, while others require

approval from the Board by means of special review after a public hearing. *Id.* Once approved, a use by special review is allowed in addition to any other uses allowed by right and runs with the land. *Penrose Hosp. of Colo. Springs v. City of Colo. Springs*, 802 P.2d 1167, 1168 (Colo. App. 1990).

To approve a special review application, the Board must determine whether six criteria enumerated in Section 4.5.3 of the Code have either "been met" or are "inapplicable." Code § 4.5.3. The six review criteria in § 4.5.3 are:

> A. The proposed use will be compatible with existing and allowed uses in the surrounding area and be in harmony with the neighborhood;
>
> B. Outside a [Growth Management Area ("GMA")] district, the proposed use is consistent with the county master plan. Within a GMA district, the proposed use is consistent with the applicable supplementary regulations to the GMA district, or if none, with the county master plan or county adopted sub-area plan;
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> C. The applicant has demonstrated that this project can and will comply with all applicable requirements of this code;
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> D. The proposed use will not result in a substantial adverse impact on property in the vicinity of the subject property; and
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> E. The recommendations of referral agencies have been considered.
>
> F. The applicant has demonstrated that this project can meet applicable additional criteria listed in the section 4.3 use descriptions.

Id.

The provisions in § 4.5.3 are unambiguous and the Court applies them according to their ordinary and common-sense meaning. *Enclave*, 185 P.3d at 178; *see also Shupe*, 230 P.3d at 1272

(concluding county code was unambiguous and then "examin[ing] the plain language of the code to determine whether it permits residential use as the principal use of the [] property" at issue).

As relevant to this appeal, subsection 4.5.3(F) requires an applicant to demonstrate that the project for which it seeks approval "can meet applicable additional criteria" under § 4.3. Code § 4.5.3(F). That is, the applicant must show that, if a provision under § 4.3 *applies* to the project, the applicant must demonstrate that the project meets that provision or provisions. Similarly, if the applicant has demonstrated that all "applicable additional criteria" under § 4.3 are met, then it has satisfied § 4.5.3(F). On the other hand, if none of the criteria in § 4.3 applies, the applicant's job is done as far as that subsection is concerned.

Subsection 4.5.3(C) also requires an applicant to demonstrate that its project "can and will comply with all applicable requirements of this code." *Id.* § 4.5.3(C). That is, if a requirement under the Code applies to the project, the applicant must comply with such a requirement or requirements. The common-sense interpretation and inferences of this subsection aren't hard to fathom: If the applicant fails to comply with an applicable requirement under the Code, the application must be denied. And, as with § 4.5.3(F), the Board must initially determine whether a provision in § 4.3 applies and, if so, it must reach such a legal conclusion and apply it to the facts in the administrative record. *Yakutat*, 462 P.3d at 70.

The following principles flow from the preceding interpretations of those two provisions. If the Board *erroneously* concludes that the criteria in § 4.3 are "inapplicable," that's a misapplication of the law and constitutes an abuse of discretion. In the same vein, if the Board *wrongly* determines that the application complied with "all applicable requirements of this code," when the application, in fact, didn't, that also constitutes a misapplication of the law and an abuse of discretion.

With those principles in mind, the Court concludes that the Board misapplied § 4.5.3(F) of the Code when it decided that § 4.3 of the Code was inapplicable to Ready-Mix's application.

Similarly, the Board misapplied § 4.5.3(C) when it decided that the "project can and will comply with all applicable requirements of this code." Since § 4.3 was applicable to the project—because Ready-Mix sought approval of a concrete batch plant as an allowable accessory use to the mine—the Board had to make findings of fact and conclusions of law showing how the project, in fact, met those requirements. Specifically, the Board had to make such findings and conclusions showing that the concrete batch plant is an allowable accessory use under the Code. The Board's legal error requires reversal of its Findings and Resolution.

All parties agree that to secure approval of the project at the property in Laporte, the concrete batch plant *must* be an allowable accessory use to Ready-Mix's mining operations under §§ 4.3.7(E)(1) or 4.3.10 of the Code. At oral argument, the Board and Ready-Mix agreed with that assertion. While No Laporte disagrees that the concrete batch pant is an allowable accessory use for mining, it still conceded that §§ 4.3.7(E)(1) and 4.3.10 are key provisions at issue here. But, as No Laporte noted at oral argument, the Board *didn't* decide that issue because it explicitly concluded that § 4.3. of the Code was inapplicable. The bottom line is that *all* parties agree that § 4.3 of the Code is applicable to determining whether the concrete batch plant is an allowable accessory use.

The parties' understanding comports with the Court's interpretation of the unambiguous provisions of the Code. As noted above, the Code prescribes multiple zoning districts. Each of those zoning districts has, in turn, multiple principal uses. A description of each type of principal use is enumerated in section 4.3 of the Code, which is titled Use Descriptions and Conditions. As relevant here, mining is a permissible principal use under the O-Open zoning district, where the property for the project is located. Code § 4.1(F). And a mining use requires approval through the special-review process under § 4.5. *Id.* § 4.1.5(A)(45).

Subsection 4.3.7(E) describes the meaning of "mining" found in § 4.1.5.(A)(45). It says that mining is:

> The act of exploring for and recovering stone, soil, peat, sand, gravel, limestone, coal, granite or other mineral resources from the ground for sale or for use off the property where it was recovered. Mining does not include the removal of loose surface stone, excavation solely for farm practices, excavation for a basement or footing for a structure authorized by a valid building permit or grading authorized by a valid grading permit.

Code § 4.3.7(E). The provision further explains that "on-site processing of mined materials is considered accessory to the mining activity" and requires that any such accessory use "be included in the special review application and reviewed simultaneously with the mining special review application." *Id.* § 4.3.7(E)(1).[5] The provision is unambiguous: if the applicant seeks approval of an accessory use to the mining activity, it must include that proposed accessory use in its special-review application. And that's what Ready-Mix did here: it included a proposed concrete batch plant—the proposed accessory use—in its application. Vol. I at 3476.

Further, the administrative record is replete with evidence that Ready-Mix expected the Board to consider and apply § 4.3.7 to the project. In its application and supporting materials, for instance, Ready-Mix told the Board that the project met the "applicable criteria listed in Section 4.3" of the Code, and then invoked § 4.3.7(E)(1). Vol. I at 3783. In those materials, Ready-Mix stated that there'd be on-site processing of mined materials with a concrete batch plant. Then, in later project submissions, Ready-Mix reiterated that the "project includes a concrete batch plant as central to the proposed operations as a nonconforming special use." *Id.* at 3522, 3783.

Moreover, during the hearings before the Board, Ready-Mix in Ready-Mix's November 13, 2018 letter, which the Board found "persuasive," forcefully argued that its proposed concrete batch plant was an allowable accessory use under § 4.3.7(E)(1) because it "will be used for the on-site processing of mined materials." Vol. I at 360.

[5] The Code, however, doesn't define the phrase "on-site processing of mined materials." Given the disposition reached, the Court expresses no opinion on the meaning of that phrase.

No Laporte has pointed to § 4.3.10 as another provision that may be applicable but that the Board decided wasn't. Under the Code, the only way to build a concrete batch plant in an "O-Open" zone is if the plant will serve as an "accessory use" to the principal use of the land. *Id.* § 4.3.10. The Code provides slightly different definitions of "accessory use" in two different places. First, under the Definitions section, "accessory use" is defined as follows:

> A use of land or of a building or portion thereof *customarily incidental and subordinate* to the principal use of the land or building and located on the same lot with the principal use.

Id. at § 0.1.1 (emphasis added).

Then, the Use Descriptions and Conditions section provides a similar definition of "accessory use":

> Accessory uses and structures are intended to allow property owners the full use of their property while maintaining the integrity and character of the neighborhood. To accomplish these goals, accessory uses and buildings must be erected and used only for purposes that are *clearly secondary and incidental* to the principal use of the property and must be located on the same lot with the principal use.

Id. § 4.3.10 (emphasis added). These provisions, however, don't further define or explain what constitutes an accessory use to the principal use of mining.

Given the above considerations, the Board erred when it decided that § 4.3 of the Code was inapplicable to Ready-Mix's application and project. The Code is silent on whether a concrete batch plant is an accessory use to mining and the Board agrees that the Code "does not define 'process' or 'processing'." Bd.'s Answer Br. at 16. That's why it's critical that the Board apply all relevant provisions of the Code "to a particular set of facts," *Yakutat*, 469 P.3d at 70—namely, to Ready-Mix's application, including whether the concrete batch plant is an allowable accessory use. But, as No Laporte rightly points out, the Findings and Resolution failed "to make any findings of fact, conclusions of law, or otherwise state how the concrete batch plant meets the applicable accessory

use [] criteria" of the Code. Pl.'s Opening Br. at 19. Accordingly, given that the Board abused its discretion by misapplying the Code, it follows that reversal of the Board's decision is necessary.

B. The Board and Ready-Mix's arguments are unpersuasive.

Ready-Mix and the Board make several arguments urging affirmance, but their contentions are unavailing. In general, both parties contend that the Board correctly decided that the concrete batch plant is an allowable accessory use and that competent evidence exists in the administrative record to support that interpretation. Bd. Ans. Br. at 14; Ready-Mix Ans. Br. at 6–8. But Ready-Mix also contends that § 4.3.7(E)(1) specifically provides "that a concrete batch plant is considered an accessory use to a mining operation." Ready-Mix Supp. Br. at 1. Thus, the argument goes, the Board "had no obligation to issue any particular finding of fact or conclusion of law that [Ready-Mix]'s batch plant was an accessory use because the code explicitly defines it as an accessory use."[6] *Id.* at 2. The Board doesn't go as far as Ready-Mix; instead, it argues that the "Code expressly allows on-site processing of the mineral in connection with a mining operation" because "the County's administrative staff has historically treated batch plant operations to be part of mineral processing." Bd. Supp. Br. at 3.

There's one principal flaw with defendants' argument. It rests on the flawed premise that the Board actually decided that the project's concrete batch plant is an allowable accessory use to the mining operations. But, as noted above, the Board didn't reach that decision. To the contrary, the Board erroneously ruled that § 4.3 of the Code was inapplicable to the project and, as things now

[6] The Board, however, doesn't seem to share Ready-Mix's confidence. In its answer brief, the Board didn't think the provision was as clear, noting that the Code "does not define 'process' or 'processing'." Bd.'s Answer Br. at 16. The Court expresses no views on whether the parties' competing interpretations of the Code are correct.

stand, the Board hasn't said one way or the other whether the concrete batch plant is an allowable accessory use.[7]

Ready-Mix's additional argument—that the Board wasn't required to decide the issue at all because the concrete batch plant proposition is so "obvious"—turns quasi-judicial actions on their head and is equally flawed. It's uncontested that the Board had to decide whether Ready-Mix's application met the special-review criteria under the Code. When a body acts in a quasi-judicial capacity, it must apply "legislative or quasi-legislative requirements to an individual under a particular set of facts." *Gilpin County Bd. of Equalization v. Russell*, 941 P.2d 257, 262 (Colo. 1997). Put differently: "If the governmental decision is likely to affect the legal interests of specific individuals, and if the governmental decision is reached through the application of preexisting legal standards or policy considerations to present or past facts developed at a hearing, then 'one can say with reasonable certainty that the governmental body is acting in a quasi-judicial capacity in making its determination.'" *Colo. State Bd. of Land Comm'rs v. Colo. Mined Land Reclamation Bd.*, 809 P.2d 974, 981 (Colo. 1991) (quoting *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village,* 757 P.2d 622, 627 (Colo. 1988)).

Here, that's exactly what the Board had to do: apply legal standards—the § 4.5.3 special-review criteria under the Code—to the facts developed during the hearings through the special-review process. Ready-Mix is wrong that the Board may simply say that the issue is "obvious" and not decide it especially when the Code requires that the accessory-use issue be before the Board as

[7] Ready-Mix also contends that the Board did, in fact, address the accessory-use issue because it found Ready-Mix's letter, which addressed that issue, persuasive. Ready-Mix Ans. Br. at 9. Assuming, *arguendo*, that contention were accurate, the argument fails. If that were correct, it'd render the Board's decision internally inconsistent—§ 4.3 would be inapplicable in one place, yet applicable in another. In that event, a remand also would be necessary for clarification of the Board's conclusions of law.

part of the application. (In any event, the Board didn't say that the issue was "obvious" and required no decision.)

Adopting Ready-Mix's legally unsupported argument would render § 4.3.7(E)(1) superfluous, a construction the Court can't endorse. *Kinder Morgan CO2 Co., L.P. v. Montezuma Cty. Bd. of Commr's*, 396 P.3d 657, 664 (Colo. 2017) ("We strive to avoid statutory interpretations that render certain words or provisions superfluous or ineffective."). If Ready-Mix were correct, the provision that requires any proposed accessory use to mining activity to "be included in the special review application and reviewed simultaneously with the mining special review application," Code § 4.3.7(E)(1), would be rendered superfluous and ineffective. It'd require inclusion of a proposed accessory use to a special-review application for the Board's consideration, but then the Board wouldn't have to decide that issue. That makes little logical sense.

Ready-Mix's argument also leads to an absurd result in its construction of § 4.3.7(E)(1). And the Court must avoid those, too. *Reno v. Marks*, 349 P.3d 248, 253 (Colo. 2015) ("We avoid interpretations that would lead to an absurd result."). One the one hand, the Code requires that an applicant include a proposed accessory use to a mining application in its application, but on the other, according to Ready-Mix, if the issue is "obvious," the Board need not decide it. (Ready-Mix never explains how an issue is "obvious," either.) As noted above, that's not how quasi-judicial decisions work and the Court rejects that construction. *Colo. Mined Land Reclamation Bd.*, 809 P.2d at 981.

Lastly, the Court rejects Ready-Mix's argument that the Board wasn't required to make express findings of fact on whether the concrete batch plant is an allowable accessory use. Ready-Mix Ans. Br. at 8–9. Ready-Mix cites *Dillon Cos. v. Boulder*, 534 P.2d 1212 (Colo. 1975), and *Canyon Area Resident v. Bd. of Cty. Comm'rs*, 172 P.3d 905 (Colo. App. 2006), for the proposition that the Board need not make express factual findings for its decision to be valid, especially as it relates to

the concrete batch plant being an allowable accessory use under the Code. But the flaw here isn't with a failure to make findings of fact: it's that the Board reached an erroneous legal conclusion in saying that § 4.3 of the Code was inapplicable to begin with. And, naturally, because the Board erred in concluding that § 4.3 was inapplicable, it didn't make any findings of fact on that issue. In sum, none of the arguments urging affirmance are persuasive.

C. The action must be remanded to the Board to make the required findings of fact and conclusions of law.

The Court has determined that the Board abused its discretion because it misapplied the Code in two important respects. Apart from reversal of the Findings and Resolution, the Court must also determine the appropriate remedy. Because the Board erred when it concluded that § 4.3 was inapplicable, it's necessary to remand the matter to the Board so that it may make appropriate findings of fact and conclusions of law consistent with this Opinion.

Rule 106 provides, in relevant part, that when the administrative body has failed to make required findings of fact or conclusions of law to review its decision, a court may remand so that the body may enter such findings and conclusions:

> In the event the court determines that the governmental body, officer or judicial body has failed to make findings of fact or conclusions of law necessary for a review of its action, the court may remand for the making of such findings of fact or conclusions of law.

Colo. R. Civ. P. 106(a)(4)(IX).

Such an approach is supported by Court of Appeals and Supreme Court precedent. In *Widder v. Durango School Dist. No. 9-R*, 85 P.3d 518 (Colo. 2004), for example, the Supreme Court held that the record of a hearing at which a school district terminated a custodian was insufficient for meaningful judicial review on whether the school district abused its discretion. *Id.* at 529. There, a custodian who broke up a fight between two children by head-butting one of them was fired after a hearing before the superintendent. *Id.* at 521.

The Supreme Court concluded that it couldn't conduct meaningful judicial review under Colo. R. Civ. P. 106(a)(4) for several reasons. But, as relevant here, the Court ruled that the decision maker who terminated the custodian "never addressed the relevant issues of [the custodian's] good faith and his compliance with the conduct and discipline code, which were legal defenses to his discipline." *Widder*, 85 P.3d at 528. In the end, the Court concluded that there "should have been findings of fact and conclusions as to whether [the custodian] was acting in good faith and whether his actions were indeed in compliance with" the discipline code. *Id.* 528–29. So, the Court remanded the case to the school district under Rule 106(a)(4)(IX) to make the appropriate findings and conclusions. *Id.* at 529.

Arndt v. City of Boulder, 895 P.2d 1092 (Colo. App. 1994), which involved a Rule 106(a)(4) for judicial review of a municipal permit decision, reached a similar conclusion. There, the district court remanded the case to the city board for further findings because the board's decision lacked sufficient evidentiary support. *Id.* at 1095. On remand, the city board heard oral arguments and made specific findings of fact and conclusions of law. *Id.* The plaintiff again sought judicial review and, this time, the district court affirmed the city board's decision. *Id.* The Court of Appeals also affirmed, holding that the district court's decision to remand the case to the city board "for further findings on issues that were presented to it but not decided" wasn't an abuse of discretion. *Id.*

Similarly, in a Rule 106 action dealing with Larimer County's master plan, the Supreme Court remanded the matter to this Court so that it or the Board could make appropriate findings of fact and conclusions of law. In *Board of County Com'rs of Larimer County v. Conder*, 927 P.2d 1339 (Colo. 1996), the Supreme Court addressed whether an application by land developers "to develop a 560.76 acre subdivision" zoned in the farming district may be denied "based on noncompliance with [Larimer County's] master plan provisions that the board adopted as part of the county's subdivision

regulation requirements." *Id.* at 1340, 1344. The Board (the same board here) denied the developers' application "based on noncompliance with the provisions in the master plan." *Id.* at 1348.

But the Supreme Court concluded that "the district court never referenced the specific master plan provisions that the Board relied upon in denying the subdivision application, and the court therefore did not consider explicitly each applicable master plan provision. *Id.* at 1350. Accordingly, the Supreme Court remanded the case to the district court to make more detailed findings regarding Larimer County's master plan provisions "pursuant to due process standards relating to specificity." *Id.* And the Court noted that "in the event the district court is unable to ascertain the exact basis in the master plan for the Board's denial of the subdivision application, it is appropriate for the court to remand the case to the Board" under Rule 106(a)(4)(IX). *Id.*

Here, as in *Widder*, *Arndt*, and *Conder* a remand to the Board is necessary so that it may make findings of fact and conclusions of law on §§ 4.5.3(C) and (F). While Ready-Mix and the Board both claim that the concrete batch plant is an allowable accessory use under § 4.3 of the Code, the Findings and Resolution never decided that. As noted above, the Board erroneously decided that § 4.3 was *inapplicable*. Thus, the Board hasn't considered each applicable provision under § 4.3, which it must do if it's to approve the concrete batch plant as part of the project. *Conder*, 927 P.2d at 1350; *see also Widder*, 85 P.3d at 528 (observing that the agency "never addressed the relevant issues" relating to the employee's legal defenses). Nor has the Board specified what competent evidence, if any, there is to support a conclusion that Ready-Mix's concrete batch plant is an allowable accessory use. Similarly, the Board hasn't decided, though it's expressed a view in this Court, the Code provision under which the batch plant is an accessory use. But the Board itself, in its Findings and Resolution, didn't decide that. Given those shortcomings, it's necessary to remand this matter to the Board to make additional findings of fact and conclusions of law as to the concrete batch plant.

IV. CONCLUSION.

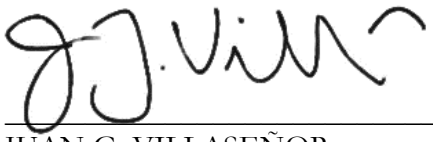
While the Board approved Ready-Mix's application for use by special review, it failed to answer an essential question: is the proposed concrete batch plant an allowable accessory use under § 4.3 of the Code? The Board erroneously concluded that § 4.3 didn't apply to the project at all. That conclusion stands in stark contrast to the Board and Ready-Mix's arguments before this Court in which both parties strenuously claim that the concrete batch plant is an accessory use to the mining operations. That may or may not be the case. But the Court can't review something that the Board didn't decide or, for that matter, make any findings of fact about. It's thus necessary for the Board to interpret the Code and decide the issue in the first instance.

More importantly, the Court can't decide the case as both Ready-Mix and the Board urge. That would improperly transform this Court into "a zoning board of appeals," wrongly placing it in the role of weighing the evidence presented before the Board. *Board of County Comm'rs of Routt County v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996) (citing *Garrett v. City of Littleton*, 493 P.2d 370 (1972); *Bentley v. Valco, Inc.,* 741 P.2d 1266, 1267–68 (Colo. App. 1987)). Instead, the Court is limited to *review* whether the Board "correctly construed the applicable Code provisions and, if so, whether it abused its discretion in applying those provisions to the facts before it." *Langer*, 469 P.3d at 64–65. Here, the Board incorrectly construed § 4.5.3(C) and (F) and abused its discretion in misapplying those provisions to Ready-Mix's application. Those errors require reversal of the Board's Findings and Resolution.

For the reasons set forth above, the Board's Findings and Resolution is **REVERSED** and this action **REMANDED** to the Board to make findings of fact and conclusions of law consistent with this Opinion.

SO ORDERED this 8th day of June, 2020.

BY THE COURT:



JUAN G. VILLASEÑOR
District Court Judge