Larimer County, Colorado, District Court 201 La Porte Avenue, Suite 100 Fort Collins, Colorado 80521-2761 (970) 494-3500	DATE FILED: June 16, 2022 9:23 AM CASE NUMBER: 2019CV30123
Plaintiffs: NO LAPORTE GRAVEL CORP., ROBERT HAVIS, and PETER WAACK, v. **Defendants:** 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.	▲ COURT USE ONLY▲ Case No.: 2019CV30123 Courtroom: 3B

OPINION AND ORDER AFFIRMING 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").[1] No Laporte challenges that decision. As more fully explained below, the Board's decision is affirmed.

[1] No Laporte's motion for determination of subject-matter jurisdiction is denied for two reasons. First, the Court agrees with the Board that the motion doesn't seek a ruling on jurisdiction but on the merits of a different question, which is outside the scope of the present Rule 106 appeal. Second, even if it were within the scope of this proceeding, the Court rejects No Laporte's contention that Ready-Mix hasn't commenced "use" under its application within three years of its approval. The evidence shows that Ready-Mix began using its application in March 2020, because after obtaining a construction permit, it began construction "directly related to the permitted use." *Save Our Saint Vrain Valley, Inc. v. Boulder Cnty. Bd. of Adjustment*, 491 P.3d 562, 571 (Colo. App. 2021). Those construction activities included moving material, building an access road to the site and berms, and installing utilities. Accordingly, the project continues to be valid and viable.

I. FACTS AND PROCEDURAL HISTORY.

The history here is extensive. Given that the parties are familiar with the facts and proceedings, the Court briefly recaps the history and discusses the relevant facts in its analysis below. As for the history, Ready-Mix filed an application with the Board to operate a sand and gravel mine spanning approximately 123 acres in La Porte, Colorado, for a period of up to twelve years. It also seeks to conduct material processing of mining aggregate and to operate a concrete batch plant on the same property as the mine. *Id.* Two residences are located on that land, which is also currently being used for agricultural purposes, including hay production and cattle and horse grazing. After receiving extensive briefing and holding multiple hearings, the Board approved the application.

No Laporte disagreed with the Board's decision and filed a complaint with the Court. It sought declaratory relief under Colo. R. Civ. P. 57, brought facial challenges to sections 2.67(10) and 4.5.3 of the Larimer County Land Use Code (the "Code"), an as-applied due-process challenge, and injunctive relief for several issues under Colo. R. Civ. P. 106(a)(4). But, in essence, it aimed to shut down the project.

The Court dismissed the facial challenges to sections 2.67(10) and 4.5.3) and granted summary judgment in favor of the Board and Ready-Mix on the due-process challenge. But for the relief under Rule 106(a)(4), the Court found that when the Board considered if Ready-Mix's batch plant constituted an accessory use, the Board wrongly failed to apply section 4.3 in the Code. So, it reversed the Board's decision and remanded so that it could make appropriate findings of fact and conclusions of law.

Ready-Mix and the Board appealed, and No Laporte cross appealed. A division of the Court of Appeals affirmed this Court's decision on the due-process challenge but reversed on the Rule 106 issue. *No Laporte Gravel Corp. v. Bd. of Cnty. Comm'rs*, 507 P.3d 1053, 1057 (Colo. App. 2022). The

division observed that although the Board had misapplied the Code, it nonetheless "properly—albeit implicitly—made the requisite finding when ruling on" the accessory use. *Id.* at 1071. As a result, the division concluded that the error was harmless and didn't require reversal. *Id.* It then remanded the case back to the Court so it could resolve any outstanding issues. *Id.*

With that in mind, the parties agree that four issues are unresolved but disagree about a fifth.[2] The parties agree that the Court should determine whether the:

(1) County's plan for extracting commercial-mineral deposits ("deposit plan") meets the relevant statutory requirements.

(2) Board considered the project's cumulative impacts as required under the County's Land Use Master Plan ("Land Use Plan").

(3) Board's decision to approve the project violates a noise ordinance, and

(4) The project is compatible with, and maintains, the integrity and character of the neighborhood.

As for the fifth issue, it centers on whether the Court of Appeals determined whether the batch plant constitutes an accessory use under section 4.3.7(E). The Board and Ready-Mix say that the division resolved the issue, Defs.' Position at 3, and No Laporte says that it didn't, Pls.' Position at 2.

The Court agrees with the Board and Ready-Mix. The division found that the Board's decision would stand if the plant constituted an accessory use under *either* section 4.3.7(E) *or* section 4.3.10. That is, it didn't need to qualify under both sections. The division noted that whether the plant is an accessory use under section 4.3.7(E) is questionable, but it concluded that the plant meets

[2] In their position statements, the parties combine the first two issues. *See* Larimer Cnty. Def.'s Position Statement RE: Outstanding C.R.C.P 106 Claims ("Defs.' Position") ¶ 4; Pls.' Statement of Remaining Issues to be Resolved ("Pls.' Statement") at 3. But because they entail distinct analyses, the Court separates them here.

the definition under section 4.3.10. So, because the plant constituted an accessory use under 4.3.10—which is all the Board needed for its decision to stand—there wasn't a reason to decide if the plant also meets the requirements under section 4.3.7(E)—because whatever the result, it wouldn't change the Board's decision.

Based on that, the Court finds that the division resolved the issue. Because the division determined that the plant constitutes an accessory use under section 4.3.10, the Court needn't decide if the same is true under section 4.3.7(E). Doing so would be irrelevant and wouldn't have any effect on the result. *See ACLU of Colo. v. Whitman*, 159 P.3d 707, 709 (Colo. 2006). Put differently, the Court's decision on the issue would be nothing more than an advisory opinion, which isn't permitted. *Cf. id.* ("Declaratory judgment proceedings may not be invoked to obtain advisory opinions or resolve nonexistent questions . . . ."). As a result, for the purposes here, the issue is resolved.

Therefore, the questions left for the Court are the four mentioned above: whether the (1) deposit plan complies with statutory authority, (2) Board considered cumulative impacts as the Land Use Plan requires, (3) project violates the noise ordinance, and (4) project is compatible with the surrounding neighborhood. Before answering those questions, the Court first turns to the law.

II. STANDARD OF REVIEW.

Under Colo. R. Civ. P. 106(a)(4)(I), judicial review of any governmental body exercising judicial or quasi-judicial functions is limited to a determination of whether, based on the record before the body, the body exceeded its jurisdiction or abused its discretion. *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 no competent record evidence supports its decision. *Alpenhof, LLC v. City of Ouray*, 297 P.3d 1052, 1055 (Colo. App. 2013) (citing *Bd. of Cnty. 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 Cnty. Comm'rs*, 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 for misapplication, 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 Cnty. Comm'rs*, 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.

But if the government body's "interpretation is inconsistent with the governing relevant articles, then that interpretation is not entitled to deference." *Shupe v. Boulder Cnty.*, 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 Am. 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. Mun. League v. Mountain States Tel.*, 759 P.2d 40, 44 (Colo. 1988)).

By contrast, 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 Constr., Inc. v. Rio Blanco Cnty.*, 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 Env't v. Bd. of Cnty. Comm'rs*, 172 P.3d 905, 909 (Colo. App. 2006) (citing *Sundance Hills Homeowners Ass'n v. Bd. of Cnty. Comm'rs*, 534 P.2d 1212, 1216 (Colo. 1975)).[3] Keeping those standards in mind, the Court begins its analysis.

[3] The question of whether such a rule comports with basic requirements of due process, which apply to this proceeding, *No Laporte*, 507 P.3d at 1063, isn't before the Court.

III. DISCUSSION.

As noted, No Laporte asserts that the Board abused its discretion by approving Ready-Mix's application on the following grounds: (1) the County's deposit plan is deficient, (2) the Board's decision undercut its Land Use Plan, (3) the decision violated the County's noise ordinance, and (4) the record evidence shows that the project will have a substantial, adverse impact on the surrounding properties and isn't compatible with that neighborhood. None of those arguments warrants reversal of the Board's decision. The Court addresses each argument in turn.

A. Deposit Plan.

No Laporte contends that the County's deposit plan doesn't pass statutory muster. *See* Pls.' Refiled Consol. Opening Br. on Colo. R. Civ. P. 106(a)(4) Claim and Summ. J. Mot. on Colo. R. Civ. P. 57 Claim ("Opening Br.") at 26, 29 (citing Colo. Rev. Stat. § 34-1-304). More specifically, it says that the plan doesn't comply with section 34-1-304 because the plan doesn't (1) map the Laporte area, which is the project's proposed site; (2) grade gravel mines in Laporte; (3) evaluate the sequencing of gravel mines in Laporte; or (4) maintain the quality of life for the County's Laporte residents.[4] Opening Br. at 29.

On the other hand, the Board and Ready-Mix insist that section 304 doesn't mandate *any* of those things. Bd. Resp. at 17; *see* Ready-Mix Resp. at 19. According to them, it simply requires that

[4] No Laporte also says that the Land Use Plan doesn't comply with section 34-1-304 and rehashes its arguments about grading, sequencing, and quality of life to support its position. *See* Opening Br. at 29. But No Laporte's reliance on that provision is misdirected. Section 304 is about master plans for extraction, not overarching master plans for land use. *See* § 34-1-304. Indeed, its lone reference to different plans is when it requires counties to consider "[o]ther master plans of the county, city and county, city, or town," *id.* § (1)(e), in developing a master plan for extracting commercial-mineral deposits, *id.* § (1). So, because section 304 doesn't implicate the Land Use Plan, No Laporte's argument that the Land Use Plan contravenes section 304 lacks legal support and fails as a result.

deposit plans "consist of text and maps," and the deposit plan here has both. Bd. Resp. at 18 (quoting § 34-1-304(1)).[5]

Looking at section 34-1-304, it requires counties to "conduct a study of the commercial mineral deposits located within its jurisdiction and develop a master plan for the extraction of such deposits, which plan shall consist of text and maps. In developing the master plan, the planning commission shall consider, among others, the following factors:" § 34-1-304(1) (emphasis added). The factors relevant here are:

> (a) Any system adopted by the Colorado geological survey *grading* commercial mineral deposits according to such factors as magnitude of the deposit and time of availability for and feasibility of extraction of a deposit;
>
> (b) The potential for effective multiple *sequential* use which would result in the optimum benefit to the landowner, neighboring residents, and the community as a whole;
> . . .
> (d) The *quality of life* of the residents in and around areas which contain commercial mineral deposits;

Id. § (1)(a), (b), (d) (emphases added).

Based on that, No Laporte argues that because section 304 says that planning commissions "*shall* consider," grading, sequential use, and quality of life, the County *is* required to include those

[5] They also argue that No Laporte lacks standing to raise this issue because the statute that it relies on—section 34-1-304—doesn't allow a private right of action. Ready-Mix Resp. at 17. The Court previously rejected this argument when it ruled on the Board and Ready-Mix's motion to dismiss. *No Laporte Gravel Corp. v. Bd. of Cnty. Comm'rs*, No. 2019CV30123, 2020 WL 2455594, at *3, *4–5 (Dist. Ct. Colo. May 11, 2020) (order granting in part and denying in part motion to dismiss). And the Court rejects it now.

Because No Laporte alleges that when the Board approved the project, the Board didn't meet the criteria in section 34-1-304 and the Land Use Plan, No Laporte's satisfied the protected-interest requirement. *Id.* at *4. And because it alleges that the Board's failure to meet that criteria will cause No Laporte's members to suffer economic, environmental, aesthetic, and health harms, it's also met the injury-in-fact requirement. *Id.* Further, rather than attempt to enforce the statute, No Laporte merely seeks judicial review of the Board's approval. *Id.* at *5. Thus, the Board and Ready-Mix's argument falls flat, and No Laporte has standing to raise the issue. *See id.* at *4–5.

factors in its deposit plan, Reply at 19 (citing § 304(1), (1)(a), (b), (d)) (emphasis added). But No Laporte's mistaken. Subsection 304(1) has two requirements: One, deposit plans must consist of text and maps, and two, the planning commissions must consider grading, sequential use, and quality of life when developing deposit plans. *See* § 304(1).

Thus, contrary to No Laporte's argument, section 304 doesn't require deposit plans to include those factors in the plan itself. *See id.* Rather, it merely mandates the County *consider* those factors when *developing* its deposit plan. *Id.* § (1)(a), (b), (d). In other words, section 304 doesn't require deposit plans to include grading, sequential use, and quality of life. It simply requires that the planning commission consider those factors when crafting the plan. *See id.* As for the plan itself, the only requirements are that it consist of text and maps. *See id.* § (1).

With that resolved, the Court, looks to see if the Board erred in approving Ready-Mix's application because the deposit plan doesn't have text and maps. Doing so, the Court finds that the deposit plan meets both requirements. The plan is filled with text, *see* Vol. V at 156–65, and it includes commercial-mineral-resources maps from a Colorado Geological Survey, *see id.* at 157, 162 (citing Schwochow et al., *Colorado Geological Survey* (1974) (marking commercial-mineral resources as F1 and T1 deposits in the Aggregate Resource Maps portion of the survey). Thus, the plan is faithful to the requirements in section 304.

To the extent that No Laporte argues that the County's planning commission failed to consider grading, sequencing, and quality of life when it developed the deposit plan, that argument exceeds the Court's purview under Rule 106(a)(4). As noted, Rule 106 allows the Court to review "quasi-judicial acts—such as the application of the ordinance to a particular set of facts." *Langer*, 462 P.3d at 70; Colo. R. Civ. P. 106(a)(4). It "does not permit judicial review of legislative acts—such as the passage of a code or ordinance . . . ." *Langer*, 462 P.3d at 70; *see also Garcia v. Harms*, 410 P.3d

561, 564 (Colo. App. 2014) ("Claims that do not challenge quasi-judicial action by the CDOC or its employees are outside the scope of the rule.").

Here, the quasi-judicial act is the Board's decision to approve Ready-Mix's application; not whether it properly developed a deposit plan. And because developing a deposit plan is a legislative act, the Court can't review it. *See Langer*, 462 P.3d at 70l; *Margolis v. Dist. Ct.*, 638 P.2d 297, 305 (Colo. 1981). In sum, because the deposit plan consists of text and maps, it complies with section 304. The Court next evaluates whether the project's cumulative impact adheres to the Land Use Plan.

B. Cumulative Impact.

No Laporte argues that the Board erred because its decision undercut its Land Use Plan. Opening Br. at 30. It says that before the Board may approve gravel-mining projects, the Land Use Plan requires it to first assess the project's cumulative impacts on County residents, which the Board failed to do. *Id.*; Reply at 20.

The Court disagrees with No Laporte for several reasons. First, the cumulative impacts discussed in the Land Use Plan refer to environmental resources, not County residents. *See* Vol. V at 151. Second, the record evidence shows that the Board *did* consider the cumulative impacts that the project may have on those resources.

For example, the Board considered a Project Report that explained how the project complied with the County's wetland, wildlife, and lighting requirements. Vol. I at 3509–22. It also considered a Water Quality Report, *id.* at 2265–451, Drainage and Erosion Control Report, *id.* at 2509–98, and conducted several studies in which it considered the project's effect on irrigation ditches, irrigated farming, draining, erosion, and more, *see id.* at. 1968–69, 2524. It conducted a comprehensive Air Study, *id.* at 2131–262, a Noise Evaluation that evaluated sound-mitigation recommendations, *see id.* at 3845–79, and it implemented a Fugitive Dust Control Plan, *id.* at 4963–5005. Based on that information, it determined that the project adhered to County regulations.

Undeterred, No Laporte insists that those studies and reports are insufficient because they don't explicitly account for the project's cumulative impact when *combined* with other mining projects in the area. Reply at 20–21.

The Court is unpersuaded. As noted, the Court must affirm the Board's decision unless it's "devoid of evidentiary support." *Langer*, 462 P.3d at 62. The burden is light. *See id.* And here, the above evidence is sufficient to both (1) show that the Board considered the project's cumulative impact and (2) support the Board's finding that the project aligned with the Land Use Plan. *See Hudspeth v. Bd. of Cnty. Comm'rs*, 667 P.2d 775, 778 (Colo. App. 1983) ("The absence of express findings by a lay board does not affect the validity of the decision where the necessary findings are implicit in the action taken.").

C. Noise Ordinance.

No Laporte next argues that when the Board approved the project, it violated the County's noise ordinance. Opening Br. at 31. To support its argument, it correctly notes that under the ordinance, noise levels must comply with either residential limits (which are lower) or construction-activity limits (which are higher). *See id.*; Vol. V at 181–82. As for what constitutes construction activity, the ordinance defines it as "any and all activity incidental to the erection, demolition, assembling, alteration, installation or equipping of buildings, structures, roads or appurtenances thereof, including land clearing, grading, excavating, and filling." Vol. V at 179.

Based on that, No Laporte says that the project here involves three (loud) things that aren't construction activities: (1) removing overburden and topsoil from the mine, (2) berm placement, and (3) berm planting. Reply at 22–23. So, No Laporte's argument goes, because those activities aren't construction activities, they must adhere to the residential limits, not the construction limits. *See id.* at 32–33. And because they exceed the residential limits, the Board violated the noise ordinance when it approved that aspect of the project. *Id.* at 32–33.

The Board and Ready-Mix offer two arguments in response.[6] First, No Laporte never raised its construction-activity argument before the Board—i.e., argue that removing overburden and topsoil and placing and planting berms aren't construction activities—so the issue isn't preserved, and the Court shouldn't consider it. Bd.'s Resp. 20–21. Second, even if the Court does consider the argument, it still fails. According to them, all three activities fall squarely within the County's definition for construction activity. *See* Ready-Mix Resp. at 23–24; Bd. Resp. at 21–23. And because the noise levels for those activities are within the construction limits, the Board complied with the noise ordinance when it approved the project. *See* Ready-Mix Resp. at 23–24; Bd. Resp. at 21–23.

The Court agrees with the Board and Ready-Mix. Based on the record evidence, No Laporte failed to present this argument to the Board, which means that the Court can't review it. *See Whitelaw*, 405 P.3d at 441 ("[A court's review] under Rule 106(a)(4) is limited to the record that was before the City Council. Because evidence of the [issue] was not in the record before the Council and the neighbors first raised this issue in the district court, [the court] may not review it").

Indeed, the most detailed discussion on the issue comes from a memo that Larimer County Health and Environment sent to the Planning Department in which it remarked that "overburden removal and stockpiling topsoil are recognized as 'construction activity/land clearing in preparation for the mining operation that will occur during the life of the mine. Larimer County has historically permitted the construction activity decibel parameters for this process throughout the life of the mine." Vol. I at 20. While the memo deems overburden removal as a construction activity, it's a far cry from disputing the classification or asking the Board to determine if it is, in fact, a construction activity.

[6] They also argue that No Laporte lacks standing on this issue. Ready-Mix Resp. at 21. The Court disagrees with them for the same reasons discussed above in footnote two. *See infra* Section III.A; *see also No Laporte*, 2020 WL 2455594, at *3, *4–5.

Yet, No Laporte insists that it did preserve the issue because the Board found that the project "can and will comply with all applicable requirements of this code," Pls.' Consol. Reply Br. on Colo. R. Civ. P. 106(a)(4) Claim ("Reply") at 23 (quoting Vol. IV at 4), that argument misses the mark for a couple reasons. First, the noise requirements are set forth in the noise ordinance, not the Code. *See* Vol. V at 63. So, contrary to No Laporte's assertion, that statement doesn't make any representations about the noise ordinance.

Second, No Laporte seems to conflate the standard for sufficient evidence under Rule 106 with issue preservation. That is, under Rule 106, the Board needn't make express findings if those "findings are implicit in the action taken." *Fire House Car Wash, Inc v. 41 Bd. of Adjustment for Zoning Appeals*, 30 P.3d 762, 768 (Colo. App. 2001). But that isn't the standard for preserving an issue, which requires that parties make their arguments to the Board before they bring them to the Court. *See Whitelaw*, 405 P.3d at 441.

In other words, while existing precedent doesn't require the Board to make express findings, the evidence still needs to show that the issue was before the Board in the first place. *Compare Fire House*, 30 P.3d at 768 ("While more detailed findings of fact and conclusions of law are preferable on appeal, the absence of express findings by a lay board does not affect the validity of the decision when the necessary findings are implicit in the action taken."), *with Whitelaw*, 405 P.3d at 441 ("Because evidence of the [issue] was not in the record before the Council and the neighbors first raised this issue in the district court, [the court] may not review it.").

In short, to preserve the issue, No Laporte needed to put it before the Board. *See Whitelaw*, 405 P.3d at 441. But nothing in the record suggests that it did. Simply saying that the Board considered the Code (not the ordinance) isn't the same as arguing—to the Board—that overburden and berms aren't construction activities. Thus, because the record evidence shows that No Laporte

failed to make that argument (and nothing in the record shows that it was disputed or the Board even considered it), it isn't preserved, and the Court can't review it. *See Whitelaw*, 405 P.3d at 441.

Perhaps anticipating the outcome, No Laporte goes on to say that even if the Court can't resolve the issue, it should remand so the Board may address it. Reply at 23. The Court declines that invitation. Tellingly, No Laporte's failed to provide *any* authority that requires the Court to remand an unpreserved issue in this context. *See id.* Indeed, the opposite true: "The district court is not permitted to . . . remand the matter to the lower tribunal for further findings or proceedings, when faced with an inadequate record." *Prairie Dog Advocs. v. City of Lakewood*, 20 P.3d 1203, 1206 (Colo. App. 2000) (first citing *Hazelwood v. Saul*, 619 P.2d 499 (Colo. 1980); and then citing *Garland v. Bd. of Cnty. Comm'rs*, 660 P.2d 20 (Colo. App. 1982)); *see also Garland*, 660 P.2d at 22 ("[T]he trial court erred in remanding to the Board the issues raised in [a party's] affirmative defenses . . . ."). The bottom line is that when a party first raises an argument with the Court that it failed to present to the Board, the Court's hands are tied, and it can't remand. *See Garland*, 660 P.2d at 23; *Prairie Dog*, 20 P.3d at 1206.

True, Rule 106 allows the Court to remand if the Board "has failed to make findings of fact or conclusions of law necessary for a review of its action." 106(a)(4)(IX). But that's when a party has put the issue before the board in the first place. *See Arndt v. City of Boulder*, 895 P.2d 1092, 1095 (finding remand proper when "[t]he Board specifically noted that the parties had raised a number of issues that it deemed unnecessary to consider"); *cf. Bd. of Cnty. Comm'rs v. Conder*, 927 P.2d 1339, 1350 (Colo. 1996) ("In the event that 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 pursuant to C.R.C.P. 106(a)(4)(IX) . . . ."). But because No Laporte failed to raise its construction-activity argument before the Board, it's missed the boat, and the Court can't remand. *See id.*

In any event, even if No Laporte had preserved the issue, it would lose on the merits. The Court notes that Larimer County Health and Environment found that the removals are "in preparation for the mining operation," classified them as construction activity, and concluded that their noise levels adhered to County regulations (the Noise Study also found the same, *see* Vol. I at 4593), *see* Vol. I at 20. What's more, the Board modified Ready-Mix's application to require berms specifically to *mitigate* the mining noise levels. *See* Vol. IV at 3.

Those conclusions would likely suffice to support a finding that the activities constitute construction activity (i.e., incidental to the mining structure). *See* Vol. V at 6. Thus, even if the issue was preserved, the outcome wouldn't change. *See Langer*, 462 P.3d at 62 (allowing the Court to reverse a board's decision only when the record is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority" (citing *Freedom Colo.*, 196 P.3d at 900)). The Court next turns to No Laporte's final argument: neighborhood impact.

D. Neighborhood Impact.

No Laporte contends that under section 4.5.3 of the Land Use Code, the Board could only approve the project if it's compatible with the neighborhood and doesn't result in a substantial, adverse impact on neighboring properties. Opening Br. at 33–34. According to No Laporte, the record evidence reveals that the project can't meet either requirement, so the Board erred in approving it. *See id.* at 38. To support its position, No Laporte says that the Board failed to consider the plant's impact on traffic, hours of operation, groundwater, the plant's uses aside from gravel mining, and unspecified setbacks. Reply at 25–27. For their part, Ready-Mix and the Board insist that record confirms that the Board considered all those things, did so extensively, and that the record supports the Board's finding that the project's compatible with the neighborhood. *See* Bd.'s Resp. at 24.

Once again, the Court agrees with Ready-Mix and the Board. For traffic, the Board conducted a Traffic Impact Study and Transportation Impact Study. The two studies delved into the project's potential impact on traffic volume, intersections, and congestion through 2030, *see* Vol. I at 4899–962, and concluded that "the key intersections will operate acceptably . . . during the morning and afternoon peak hours[,]"*id.* at 4922.

For hours of operation, the Board considered the plant's location, surrounding area, and—to ensure that most of the plant's activity occurs when residents are typically away from their homes—limited the plant's operating hours to 5:00 a.m. to 5:00 p.m. on Mondays through Fridays and 5:00 a.m. to noon on Saturdays. *See* Vol. II(B) at 112.

For groundwater, the County conducted several studies in which it considered irrigation ditches, irrigated farming, draining, erosion, and the results confirmed that that the project complied with the relevant requirements and wouldn't adversely affect the water. *See* Vol. I at. 1968–69, 2524; Vol. IV at 4. The same is true for continued operation and setbacks. In fact, to mitigate impacts, the Board limited the mining to twenty- to twenty-five-acre increments, capped the plant's lifespan at ten to twelve years, Vol. I at 5360; Vol. II(A) at 39, and required it to shut down once the mining ends, *see* Vol. II(B) at 118. It also concluded that "[s]etback and distance together with a 6-foot berms . . . will be effective measures to mitigate [noise and dust] impacts." Vol. IV at 3.

And that's just the tip of the iceberg. The Board conducted a Noise Evaluation, Vol. I at 3845–79, Air Study, *id.* at 2131–262, Property Values Study, *id.* at 3600–29, Fugitive Dust Control Plan, *id.* at 4963–5005, Water Quality Report, *id.* at 2265–451, Drainage and Erosion Control Report, *id.* at 2509–98, and received a report from the Larimer County Planning Department, *id.* at 5330–6528. Without fail, each of the above reports, studies, and evaluations found that the project wouldn't result in a substantial, adverse impact on the neighborhood.

What's more, the Board solicited (and received) community feedback for over two years. Vol. I at 3477. It held multiple hearings, *id.* at 3754; Vol. II(B) at 188; Vol. III(B) at 4, and it considered testimony from residents who believed that the project would fit with the neighborhood and even improve it. *See* Vol. II(A) at 119, 122–26, 129–30, 155–58, 168. It also heard from Ready-Mix's engineering consultant who told the Board that the project is similar to other mining plants in the County and believed it'd comport with the neighborhood.[7] *Id.* at 32–36, 158.

Even so, No Laporte insists those studies, reports, and testimony aren't good enough. Throughout its briefing, it raises various, specific points and skewers the Board for failing to consider them (e.g., the Board didn't consider that trucks will travel to and from the batch plant every two minutes on Mondays through Fridays). Reply at 25. It pounces on details from the above studies and reports that discuss the project's potential downsides on the neighborhood. *See* Opening Br. at 33–38, Reply at 25–27. And to drive the point home, it notes that former Commissioner Johnson concluded that the project was detrimental to the neighborhood and voted against it. Reply at 25 (citing Vol. II(B) at 79).

To be sure, No Laporte makes excellent points about how the evidence before the Board could've convinced the Board that the project isn't compatible with the neighborhood. And the record leaves no doubt that a legion of residents packed the hearings to make certain that the Board knew how much they opposed the project. *See* Vol. II(A) at 148–54. The Court appreciates the intensity behind No Laporte's arguments and empathizes with the residents who oppose the project. But the Court isn't a county commissioner and it isn't permitted to reweigh the evidence, ensure that

[7] Granted, No Laporte may cry foul and contend that testimony from a Ready-Mix consultant may be biased toward Ready-Mix, but it still constitutes evidence that supports the Board's decision. And that's all that matters under this light standard. *See Bd. of Cnty. Comm'rs v. O'Dell*, 920 P.2d 48, 50–51 (Colo. 1996).

the Board considered *every* possible scenario, or even confirm that the Board made the right call. *See O'Dell*, 920 P.2d at 50–51. Those are policy judgments for the quasi-judicial officers to make.

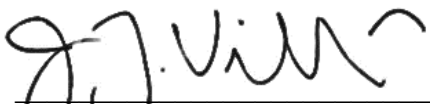
Rather, the Court's task is simply to evaluate the record and see if it contains *some* evidence to support the Board's decision. *See id.* And here, the above studies, reports, hearings, and testimony offer that support. While the Court recognizes that No Laporte disagrees—vehemently—with the Board's decision, the Court is compelled to follow precedent. In sum, because the above evidence offers some support to show that the project is compatible with the neighborhood, No Laporte's argument fails.

IV. CONCLUSION.

For the reasons set forth above, the Board's Findings and Resolution is **affirmed**. Judgment shall enter in the Board's and Ready-Mix's favor and against No Laporte.

SO ORDERED on June 15, 2022.

BY THE COURT:



JUAN G. VILLASEÑOR
District Court Judge