DISTRICT COURT, LARIMER COUNTY, COLORADO 201 La Porte Avenue, Suite 100 Fort Collins, CO 80521 Telephone: (970) 494-3500	DATE FILED: July 9, 2024 4:49 PM CASE NUMBER: 2023CV30781 ▲ COURT USE ONLY ▲
Plaintiff: CONNELL RESOURCES, INC., a Colorado corporation, and Plaintiff-Intervenor STEEL TAILINGS, INC. a Colorado corporation, v. Defendant: BOARD OF TRUSTEES OF WELLINGTON, COLORADO.	Case Number: 2023 CV 30781 Div.: 5A
ORDER REGARDING PLAINTIFF'S COMPLAINT FOR JUDICIAL REVIEW	

THIS MATTER is before the Court on Connell Resources, Inc.'s Complaint for Judicial Review, pursuant to C.R.C.P. 106(a)(4), which also seeks declaratory judgment, filed on September 20, 2023. The Court has reviewed and considered the Complaint, Answer, the record on appeal, and the parties' briefs, as well as the brief of the Intervenor, Steel Tailings, Inc. Being otherwise fully informed in the premises, the Court finds and orders as follows:

I. THE UNDISPUTED FACTS AND PROCEDURAL HISTORY

Based upon a review of the record in this matter, the following facts and basic procedural history appear undisputed. Plaintiff, Connell Resources, Inc. ("Connell"), seeks judicial review of a decision by the Board of Trustees for Wellington, Colorado (the "Town" or the "Town

Board") to overturn the Planning Commission's approval of Connell's "site plan" for an asphalt mixing plant.

The parties agree that the Court has jurisdiction over the parties and subject matter of this action. They also agree that venue is proper and that Connell Resources' claims are ripe under the Town Code for this Court to undertake a C.R.C.P. 106 review.

Connell is a Colorado corporation and general contractor located in Windsor, Colorado. "Connell Resources is both a family and employee-owned business that has 265 full-time employees, which includes approximately 18 Wellington residents. The company is the largest locally-based, full-service sitework and infrastructure general contractor in Northern Colorado. Connell Resources performs earthwork, pipeline utilities (water, sanitary sewer, storm sewer), aggregate production and asphalt paving." Complaint at ¶ 1.

The Town of Wellington is a governmental body created by statute and governed by a Board of Trustees. Connell alleges, and the Town agrees, that its Board has legislative and quasi-judicial roles including the general approval or denial of "site plan" applications under the Town Code. This dispute concerns the Board's decision to overturn the Planning Commission's decision approving Connell Resources' site plan for an "asphalt mixing plant."

The property that is the subject of this Complaint is comprised of 35.56 acres and is located at 3548 E. County Road 66, Wellington, Colorado 80549 (the "Property"). The Property is zoned "I-Industrial" and has been since 2000. It is the only land zoned Industrial within the Town limits. Connell Resources seeks to relocate its existing asphalt mixing plant located near Harmony Road and Interstate 25 to the Property in Wellington.

The parties do not dispute that Town Code permits asphalt mixing plants in a particular zone district. Section 15-4-20 of the Town Code includes a zone for industrial and manufacturing uses. Some industrial and manufacturing uses are defined as "light" uses and others are defined as "heavy" uses.

The definition of "Industrial and Manufacturing, Heavy" includes "asphalt mixing plants," pursuant to Section 15-9-20 that sets forth the definitions for the Land Use Code. Section 15-4-30(v) of the Town Code includes the use specific standards applicable to heavy industrial and manufacturing uses. The Code prescribes certain setbacks for industrial and manufacturing uses depending on whether the use involves "producing and curating toxic chemicals."

The parties agree that an asphalt mixing plant involves the "manufacturing of asphalt." Connell admits that before it could construct and operate an asphalt mixing plant, it first had to follow the application procedures in the Town Code for land use applications and development activity.

The parties also agree that Section 15-2-120 of the Town Code requires submittal of a "site plan" as a threshold step to apply for a building permit for all permitted principal uses of

multi-family, commercial and "industrial developments." The Planning Commission reviews all "site plan" applications. The content of site plans is prescribed by the Code.

Variances are governed by Section 15-2-220 of the Code. Before submitting any site plan for review by the Planning Commission, Connell elected to go to the Board of Adjustment ("BOA") to request two variances. Connell presumably sought the variances sometime before August 22, 2022, when they were granted. The parties agree that the Code does not prescribe which process should be started first.

The first variance sought to reduce the required building "setback" from a residential district regarding a *general* category of "Industrial and Manufacturing, Heavy" uses set forth in the Land Use Code, Section 15-4-30(v)(1), as follows:

> An Industrial and Manufacturing, Heavy use shall be located at least one thousand (1,000) feet from any residential district or use.
>
> Section 15-4-30(v)(1).

Connell requested a variance from the mandated distance of 1000 feet to 800 feet. It will be referred to as the "Setback Variance." It was approved by the BOA.

The variance sought by Connell was not one regarding a more *specific* use category set forth in the next subparagraph, Section 15-4-30(v)(2), which states as follows:

> Any Industrial and Manufacturing, Heavy use producing and curating toxic chemicals or conducting animal slaughtering shall be located at least:
>
> a. Two thousand six hundred forty (2,640) feet from any residential district, religious land use, medical care facility, or school.
>
> b. One thousand three hundred twenty (1,320) feet from any commercial use.
>
> c. Six hundred sixty (660) feet from any Industrial and Manufacturing, Light use.
>
> Section 15-4-30(v)(2).

A second variance was sought to allow for a height increase regarding the silos up to seventy (70) feet. On August 22, 2022, the Board of Adjustment ("BOA") granted both of the variances based upon a unanimous vote.

The approvals included certain findings and imposed certain conditions, pursuant to Section 15-2-220. The parties agree and the record reveals that the BOA granted the Variances with the following explicit conditions of approval:

(a) Site Plans must be reviewed and approved by the Planning Commission.
(b) The height variance (up to 70-ft) is applicable only to the silos;

(c) A 15-foot earthen berm and landscaping is required along the west side of the site;
(d) There is to be no signage on the silos;
(e) Require signage and operator policies to disallow engine braking ("Jake Brakes"); and
(f) Compliance with all applicable County and State permits for operation of an Asphalt Plant.

The parties agree that the BOA's decision on the variances was quasi-judicial in nature. Connell alleges, here, as it argued before the Planning Commission and Town Board, that the approval of the variances was a "final decision." As such, Connell contends that the approval could only be subject to any review by way of an appeal to a district court, as set forth in the Colorado Rules of Civil Procedure meaning Rule 106. The BOA's August 22, 2022, approval was not appealed to the district court.

After obtaining the variances, Connell presented its site plan application to the Planning Commission on March 6, 2023, for review and approval. The site plan included the variances and the conditions of approval imposed by the BOA as noted above. Connell sought approval of its site plan.

At the March 6, 2023, Planning Commission hearing, the Commission and the public raised various questions and requested more information regarding the proposed asphalt mixing plant. The initial hearing was continued to May 1, 2023, to allow Connell Resources to provide additional information requested by the Planning Commission and address concerns that were raised by the public, which included many related to air quality as well as other issues at the March 6 public hearing. The Planning Commission requested that Connell Resources provide additional information regarding emissions from the proposed asphalt mixing plant, and Connell agreed to provide it.

Connell appeared before the Planning Commission on May 1, 2023, to request a continuance because the refined "air modeling" report that was being conducted and prepared by its third-party consultant, Antea Group, was not yet complete. The Planning Commission granted the continuance, and the public hearing was continued to June 5, 2023.

Connell alleges in its Compliant explicitly what it did to address the Commission request and various questions as follows:

> 47. Connell Resources prepared and submitted to the Planning Commission a memorandum dated May 26, 2023, which provided a detailed written response to the questions posed by the Planning Commission and the concerns raised by the public during the March 6, 2023 Planning Commission hearing. The memorandum also attached the studies and information requested by the Planning Commission, including the refined air modeling report dated May 19, 2023 (the "Report"), which analyzed the emissions associated with Connell Resources' current asphalt mixing plant facility and modeled emissions for the Wellington area.

Complaint at p. 7-8, ¶ 47.

Connell's Report from the "Antea Group" was submitted to the Planning Commission on May 26, 2023, which provided, among other things, information, a review of various studies, and an opinion on the modeled potential risks to human health associated with air pollutant emissions from the hot-mix asphalt plant proposed by Connell. It was based in part on the emissions from Connell's existing hot-mix asphalt plant in Timnath.

On June 5, 2023, the Planning Commission considered its "packet," Connell's site plan, the Antea report, the comments, letters, and various reports from Connell and its representatives or affiliates, a Larimer County public health official, and a large number of varying oral and written comments from the public that had been submitted, which included some studies, abstracts, and some opinions on the issues regarding air pollutants and emissions regarding the proposed plant.

Ultimately, after the presentation by the Town planning staff and the presentation by Connell as the applicant, public comment was opened and comments accepted, some questions were addressed by staff and Connell, concluding remarks were offered by Connell, and the Planning Commission members engaged in various discussions,[1] the Commission approved the site plan by a 6-1 vote. The Planning Commission made findings consistent with Section 15-2-120(c)(1)-(6) of the Town Code.

Pursuant to Sections 15-2-120 and 15-2-230 of the Town Code, an appeal from a Planning Commission decision may be made to the Town Board, and they must be filed within seven days from the date of the decision. On June 9, 2023, two residents, through legal counsel, filed a timely appeal of the Planning Commission's approval of Connell Resources' site plan to the Town Board (the "Appeal"). Thereafter, Connell submitted a written response to the resident-appellants' assertions, arguments, and claims set forth in their written appeal all as reflected in the record.

The Town Board considered the Appeal on August 23, 2023. The Town Attorney offered an introduction. Then, the appellants' Counsel offered an opening argument, and Connell presented its argument through Counsel, including a slide presentation, who also answered some questions. Appellants through Counsel then provided a short rebuttal argument.

Thereafter, Connell's Counsel offered Mr. Warren, the President of Connell, to provide additional argument and comments, and he also answer some questions from some of the Board members. Thereafter, Connell's counsel and the resident-appellants' Counsel answered some questions from some of the Board. No Public comment was received.

[1] As alleged by Connell, the Planning Director commented at several points that decisions to grant or deny variances were within the purview of the BOA and not the Planning Commission. Connell's Complaint states as follows: "The Planning Director also opined that the Variances granted by the Board of Adjustment were not within the Planning Commission's purview to reconsider or revise, and at least several members of the Planning Commission agreed." Complaint at p. 8, ¶ 50.

After considering the various arguments, comments, submissions, and the record before the Town Board, it "reversed" the Planning Commission's approval of the site plan in a 4-3 vote. The Board found that the Planning Commission committed "clear error" when it approved Connell's site plan.[2]

On appeal, here, Connell now disputes that the Board's decision to reverse the Commission's approval of Connell's site plan was proper under the Land Use Code and its standards of review set forth in Section 15-2-230.

The Board concluded: (1) it had jurisdiction over the site plan review, and (2) based upon the correct use "classification," the applicable setback under the Town Code and zoning standards was 2,640 feet, not the prescribed 1000-foot setback from which the BOA granted the 200 foot variance.

The Board's decision turned on its conclusion that the *proposed* asphalt mixing plant's operation would fall within the zoning classification for "any Industrial and Manufacturing use producing and curating toxic chemicals." The Board overturned the Planning Commission's approval solely on the basis that the applicable setback for uses "producing or curating toxic chemicals" was prescribed by the Code to be 2,640 feet. There were other objections to the approval presented on appeal, some of which involved other setbacks, and they were argued at the hearing before the Board of Trustees. Nevertheless, the motion, vote upon the motion, and reversal were based only upon the 2,640 foot setback issue.

Under Section 15-2-230(b)(4) of the Town Code, an appeal of a final decision by the Town Board "shall be to the District Court in the manner set forth in the Colorado Rules of Civil Procedure." The parties agree that the Town Board's decision to reverse the Planning Commission's approval of Connell Resources' site plan is a final decision by the Board exercising its quasi-judicial functions. Connell appealed to this Court, pursuant to C.R.C.P. 106(a)(4) and C.R.C.P. 57 as well.

On December 18, 2023, Intervenor Steel Tailings, Inc. (hereafter "STI") filed its motion to intervene in this matter, which was subsequently granted by the Court. STI is the owner of the Property and has entered into a contract with Connell to sell the Property, contingent upon Connell obtaining approval for its site plan. STI submitted its own briefing and is aligned with Connell in challenging the Town Board's decision to reverse the Planning Commission's approval of Connell's site plan.

[2] Connell so states in its Complaint at p. 10, ¶ 57, and the Town Board agrees in its Answer at p. 10, ¶ 57.

II. THE CLAIMS AND ISSUES PRESENTED

Connell asserts two separately pleaded claims seeking relief under C.R.C.P. 106(a)(4). The First Claim for Relief under Rule 106 contends that the Board exceeded its jurisdiction. Complaint at ¶¶ 71-78. Connell alleges the BOA's grant of a variance to the setback was a "final decision that is not subject to further appeal or *modification* by the Planning Commission or the Board, as the period to appeal has long since passed." *Id.* at ¶ 75 (emphasis added).

The Board "nevertheless reassessed the BOA's grant of the Setback Variance and whether a greater setback of 2,640 feet applied to the asphalt mixing plant…." *Id.* at ¶ 77. "Therefore, the Board exceeded its jurisdiction to reverse the Planning Commission's approval of the site plan on the ground that a 2,640-foot setback applies because the proposed asphalt plant would be 'producing and curating toxic chemicals.'" *Id.* at ¶ 78.

Connell further alleges that the "Board had no authority to reverse the earlier decision by the BOA to grant the Setback Variance because that decision was no longer appealable and was not within the Board's authority to reconsider." *Id.*

Connell's Second Claim for Relief under Rule 106 contends that the Board "abused its discretion" by overturing the Planning Commission's Approval of its site plan. *Id.* at ¶¶ 79-97. Connell asserts the Board may only overturn the Planning Commission's approval based upon "clear error," and the Commission did not commit any such error because its decision was "factually supported by credible and competent evidence in the record." *Id.* at ¶¶ 82-85. Connell argues that the "Board also abused its discretion because there was no credible evidence before it that the proposed asphalt plant would 'produce' and 'curate' toxic chemicals." *Id.* at 89.

Connell more specifically asserts that the Board "abused its discretion because there was no credible evidence before it that established the proposed asphalt mixing plant would otherwise cause the presence of 'toxic chemicals' harmful to human health." *Id.* at ¶ 91. Connell alleges that the "only evidence in the record attempting to establish that the proposed asphalt plant would emit toxic chemicals is either outdated, inapplicable, and/or distinguishable from the proposed asphalt mixing plant at issue." *Id.* at ¶ 93.

Aside from its Rule 106 claims, Connell's Third Claim for Relief seeks declaratory relief under C.R.C.P. 57. Connell asks the Court to "set aside the Board's decision because "Section 15-4-30(v) of the Town Code is unconstitutionally void for vagueness." *Id.* at ¶ 99. Connell specifically challenges the provisions of Section 15-4-30(v) that provide that if a Heavy Industrial and Manufacturing use will be "producing and curating toxic chemicals," then it must be setback "two thousand six hundred forty (2,640) feet from any residential district, religious land use, medical care facility, or school." *Id.* at ¶ 104.

Connell asserts that the Town Code does not define "producing," "curating," or "toxic chemicals" and so it "did not have adequate notice as to whether its proposed use would be permissible under the Town Code with a higher or lower setback." *Id.* at 108.

Connell makes two claims regarding vagueness. First, it alleges that Section 15-4-30(v) of the Town Code is unconstitutionally void for vagueness "*on its face*…." *Id.* at 112 (emphasis added). Second, Connell alleges that those provisions are unconstitutionally vague "*as applied*" to its site plan application. Therefore, Connell asserts that the "Town Board's decision overturning the Planning Commission's approval of the site plan is void." *Id.* at 112.

Connell's briefing, of course, parallels its claims, argues the evidence, and presents its legal arguments regarding the merits of the dispute. The Intervenor's briefing is related to the same issues, contentions, and legal arguments. The briefing is discussed more below.

STI asserts similar arguments in its briefing provided to the Court. It first argues that the Town Board abused its discretion and exceeded its jurisdiction when it applied the 2,640-foot setback. It further argues that the Town Board abused its discretion and exceeded its jurisdiction when it overturned the Planning Commission's decision without making required findings under the Town Code. Finally, STI argues that the Town Board erred in determining that the 2,640-foot setback applied.

In its Answer to Connell's Complaint, the Town Board denies that its conduct in overturning or reversing the Planning Commission's approval exceeds the Board's jurisdiction or constitutes an abuse of discretion. The Town Board denies Connell's operative allegations and various contentions in every respect.

First, based upon the host of denials and some affirmative allegations in its Answer, the Town Board contends that it acted within its authority under the Town Code. The Board asserts that it had jurisdiction to review and then approve, modify, or reverse decisions of the Planning Commission, including specifically Connell's site plan.

Second, the Town denies all the allegations that the Board abused its discretion in reversing the Commission's approval. The Board contends that the record and evidence support the Board's factual conclusion that toxic chemicals would be produced and curated by the asphalt mixing plant.

Third, the Town Board also denies all the allegations related to Connell's contention that the Town Code is unconstitutionally vague. The Town denies that its Code provision regarding the setback based "any Industrial and Manufacturing use producing and curating toxic chemicals" is vague on its face or as the Board applied it to Connell's site plan.

The Town Board's briefing addresses the record presented, offers support for its view of the proceedings, the information and evidence submitted to it, the operation of the Town Code, and law governing a judicial review under Rule 106. The Town Board argues that its Code is not unconstitutionally vague in any respect, and the Board properly considered and applied the Code. The Board contends that it properly reversed the site plan approval made by the Planning Commission. The Town Board asserts it applied the correct standards to review the site plan and the Planning Commission made a "clear error" in approving it by applying the wrong legal standard to classify the proposed use under the Code. The Town's briefing is discussed more below.

III. THE APPLICABLE LEGAL STANDARDS

A. Introduction:

A district court's review of a governmental land use decision, pursuant to C.R.C.P. 106(a), is a specialized and limited review. The parties have so noted, and they have addressed many of the standards in their briefs. In short, a Rule 106 review is not a trial, no new evidence is accepted, the court does not make original findings of fact or weigh evidence, and an agency's conduct and decisions are typically given deference.

A detailed recitation of the nature, limitations, and scope of the Court's review, as prescribed by law, is warranted here. Review under C.R.C.P. 106(a) is available where a governmental body or officer "exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion." C.R.C.P. 106(a)(4).

As noted above, the parties agree the Town Board was acting in a quasi-judicial function and not to review a legislative process. Rule 106(a) is "not an appropriate vehicle to review legislative actions." *Condiotti v. Bd. of Cnty. Comm'rs of Cnty. of La Plata*, 983 P.2d 184, 186 (Colo. App. 1999).[3] Here, the Court's judicial review of Wellington's quasi-judicial decision is limited first by the text of Rule 106(a), which states, in part, as follows:

> (4) Where, in any civil matter, any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided by law:
>
> > (I) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body[4] or officer. (Emphasis added.)

Accordingly, a Rule 106 review has only two elements. "Such review is 'limited to a determination of whether: the body or officer has exceeded its jurisdiction, or abused its discretion, based on the evidence in the record' before the agency." *Save Our Saint Vrain Valley, Inc. v. Boulder Cnty. Bd. of Adjustment*, 2021 COA 44 ¶¶ 26-29, 491 P.3d 562, 567 (quoting the rule).

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[3] "Legislative action is usually reflective of some public policy relating to matters of a permanent or general character, is not normally restricted to identifiable persons or groups, and is usually prospective in nature." *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Vill.*, 757 P.2d 622, 625 (Colo. 1988).

[4] Here the Court's review is focused upon the "defendant body," which is the Town Board of Trustees, and the Board's conduct in reversing the Planning Commission decision. The Court is not directly reviewing the Planning Commission's decision itself.

B. <u>The standards regarding jurisdiction</u>:

The question of jurisdiction over the setback was raised by Connell before the Planning Commission and argued extensively. However, the issue may be raised at any stage of the litigation and typically it is a threshold question.[5] "Although the BAA [Board of Assessment Appeals] raises this argument for the first time on appeal, since it involves an issue of subject matter jurisdiction of an administrative body, we address it as a threshold matter." *5050 S. Broadway Corp. v. Arapahoe Cnty. Bd. of Comm'rs*, 815 P.2d 966, 968 (Colo. App. 1991).

In this case, the parties both note that a district court reviews "legal issues regarding interpretation of the law," here, the Town's Land Use Code de novo.[6] *See City of Commerce City v. Enclave W., Inc.*, 185 P.3d 174, 178 (Colo. 2008). "[A]"n agency's determination of its own jurisdiction is subject to de novo review by a court." *Hawes v. Colorado Div. of Ins.*, 65 P.3d 1008, 1015 (Colo. 2003).

"Thus, the power of administrative agencies extends only so far as the authority conferred on them by statute." *Id.* (citing *Flavell v. Dep't of Welfare*, 144 Colo. 203, 206, 355 P.2d 941, 943 (1960)). *See also Colorado Workers for Innovative & New Sols. v. Gherardini*, 2023 COA 80, ¶ 35, 540 P.3d 950, 958 (same).

C. <u>An abuse of discretion has two forms</u>:

"A governmental body abuses its discretion if it misinterprets or misapplies the law or if no competent record evidence supports its decision." *No Laporte Gravel Corp. v. Bd. of Cnty. Commissioners of Larimer Cnty.*, 2022 COA 6M, ¶¶ 24-26, 507 P.3d 1053, 1060 (citing *Alpenhof, LLC v. City of Ouray*, 2013 COA 9, ¶ 9, 297 P.3d 1052).

1. <u>An abuse of discretion occurs when the applicable law is misconstrued or misapplied in making an administrative decision</u>.

To the extent this appeal requires us to review and interpret the Land Use Code, we do so de novo and apply ordinary rules of statutory interpretation. *See City of Commerce City v. Enclave W., Inc.*, 185 P.3d 174, 178 (Colo. 2008) (We review de novo an agency's construction of "a code, ordinance, or statutory provisions that governs its actions."); *Shupe v. Boulder Cnty.*, 230 P.3d 1269, 1272 (Colo. App. 2010) ("Land use codes and ordinances 'are subject to the general canons of statutory interpretation.'" (quoting *City of Colo. Springs v. Securcare Self Storage, Inc.*, 10 P.3d 1244, 1248-49 (Colo. 2000)).

Courts interpret the ordinances of local governments, including zoning ordinances, as they would any other form of legislation. *City of Colorado Springs v. Securcare Self Storage, Inc.*, 10 P.3d 1244, 1248 (Colo. 2000).

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[5] *See United Air Lines, Inc. v. City & Cnty. of Denver*, 973 P.2d 647, 651 (Colo. App. 1998), *aff'd sub nom. United Airlines, Inc. v. City & Cnty. of Denver*, 992 P.2d 41 (Colo. 2000).

[6] De novo means without deference to a decision of a lower court or administrative body. "If, however, the issue being reviewed concerns only legal, rather than factual, questions, we owe no deference to the trial court's ruling and our review is de novo." *Markwell v. Cooke*, 2021 CO 17, ¶ 22, 482 P.3d 422, 426 (internal quotes omitted).

"When construing a land use code, courts look first to the plain language, being mindful of the principle that courts presume that the governing body enacting the code meant what it clearly said." *Shupe*, 230 P.3d at 1272. "If the code's language is ambiguous, we give deference to the board's interpretation of the code it is charged with enforcing ... if it has a reasonable basis in law and is warranted by the record." *Id.* "However, if the board's interpretation is inconsistent with the governing relevant articles, then that interpretation is not entitled to deference." *Id.*

However, in "a C.R.C.P. 106 action, a reviewing court will give 'deference to the interpretation provided by the officer or agency charged with the administration of the code or statute unless that interpretation is inconsistent with the legislative intent manifested in the text of the statute or code.'" *Khelik v. City & Cnty. of Denver*, 2016 COA 55, ¶ 17, 411 P.3d 1020, 1023 (emphasis added) (quoting *Waste Mgmt. of Colo. v. City of Commerce City,* 250 P.3d at 725).

"In that regard, '[t]he agency's interpretation of the rule should be given great weight unless plainly erroneous or inconsistent with the rule.'" *Khelik v. City & Cnty. of Denver*, 2016 COA 55, ¶ 17, 411 P.3d 1020, 1023 (quoting *Bryant v. Career Serv. Auth.,* 765 P.2d 1037, 1038 (Colo.App.1988)).

2. An abuse of discretion occurs when a decision is not supported by any competent evidence.

"When conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency." *Colo. Div. of Revenue v. Lounsbury*, 743 P.2d 23, 26 (Colo. 1987), *Johnson v. Dep't of Safety*, 2021 COA 135, ¶ 22, 503 P.3d 918, 923 (same).

We will conclude that no competent evidence supported an administrative decision only when that decision was "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Freedom Colo. Info., Inc. v. El Paso Cty. Sheriff's Dep't*, 196 P.3d 892, 900 (Colo. 2008), *Langer v. Bd. of Commissioners of Larimer Cnty.*, 2020 CO 31, ¶ 13, 462 P.3d 59, 62 (same).

The lack of competent evidence "means that the governmental body's decision is 'so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.'" *Canyon Area Residents for the Env't v. Bd. of Cnty. Comm'rs*, 172 P.3d 905, 907 (Colo. App. 2006) (quoting *Bd. of Cnty. Comm'rs v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996)).

"[A]dministrative proceedings are accorded a presumption of validity and all reasonable doubts as to the correctness of administrative rulings must be resolved in favor of the agency." *Johnson v. Dep't of Safety*, 2021 COA 135, ¶¶ 18-19, 503 P.3d 918, 922 (quoting *Van Sickle v. Boyes*, 797 P.2d 1267, 1272 (Colo. 1990)).

Because we are not the fact finder, we "cannot weigh the evidence or substitute our own judgment for that of the [administrative body]." *No Laporte Gravel Corp.*, 2022 COA 6M, ¶¶

24-26, 507 P.3d 1053, 1060 (quoting *Kruse v. Town of Castle Rock*, 192 P.3d 591, 601 (Colo. App. 2008)).

3. Additional standards that govern the Court's Rule 106 review.

"The burden is on the party challenging an administrative agency's action to overcome the presumption that the agency's acts were proper." *City & Cnty. of Denver v. Bd. of Adjustment*, 55 P.3d 252, 254 (Colo. App. 2002).

The district court is limited to a review of the record before it, and the introduction of new or additional evidence is generally not permitted. *Widder v. Durango Sch. Dist. No. 9–R*, 85 P.3d 518, 526 (Colo. 2004) ("review is limited to review of the record to determine whether the governmental tribunal has abused its discretion or exceeded its jurisdiction"). Review under Rule 106(a)(4) "does not contemplate a new evidentiary hearing at the district court level, but rather, contemplates that the district court will review the record of the proceedings conducted elsewhere." *Widder*, at 526.

In a review "under C.R.C.P. 106(a)(4), [courts] apply a deferential standard, and we may not disturb the governmental body's decision absent a clear abuse of discretion." *Langer v. Bd. of Commissioners of Larimer Cnty.*, 2020 CO 31, ¶ 13, 462 P.3d 59, 62.

"[A]dministrative proceedings are accorded a presumption of validity and all reasonable doubts as to the correctness of administrative rulings must be resolved in favor of the agency." *Van Sickle*, 797 P.2d 1267, 1272 (Colo. 1990) (citing *Hadley v. Moffat County School Dist. RE–1*, 681 P.2d 938, 944 (Colo. 1984); *U–Tote–M of Colorado, Inc. v. City of Greenwood Village*, 39 Colo. App. 28, 33, 563 P.2d 373, 376 (1977)).

"A hearing officer's decision will not be reversed as an abuse of discretion unless, given the totality of the factual circumstances at the time of the decision, the 'hearing officer's decision exceeded the bounds of reason.'" *No Laporte Gravel Corp.*, 2022 COA 6M, ¶¶ 24-26, 507 P.3d at 1060 (quoting *Rosenberg v. Bd. of Educ. of Sch. Dist. No. 1, Denver Pub. Sch.*, 710 P.2d 1095, 1098–99 (Colo. 1985)).

IV. THE GENERAL PROVISIONS OF THE TOWN'S CODE

As noted above, Wellington is a town founded pursuant to statute and is not a Home Rule City like Fort Collins. Therefore, Wellington's Town Code and its Land Use Code (the "Land Use Code" or just "Code") are rooted in the statutory authority granted municipalities. The parties, however, rely upon the Land Use Code as the source of the zoning ordinances governing the issues presented.

The Town Code sets out some underlying provisions related to all ordinances including the Land Use Code[7] as follows:

[7] All underscoring and bolding are added for emphasis.

- **Sec. 1-3-40. - Purpose of Code.**

  The provisions of this Code, and all proceedings under them, are to be construed with a view to effect their objectives and to promote justice. (Ord. 11-2007 §1)

- **Sec. 1-2-50. - Usage of terms.**

  All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such peculiar and appropriate meaning. (Prior code 1.05.02)

Chapter 15 of the Town Code contains the Land Use Code. Some of the general provisions that relate to the issues, here, include the following provisions.

- **Sec. 15-1-10. - Purpose and organization.**

(a) *Purpose.* The purpose of this Land Use Code is to create a vital, cohesive, well-designed community in order to enhance the Town's small-town character and further the residents' goals as identified in the Comprehensive Plan. These zoning regulations are designed to:

> (1) Promote the health, safety, values, and general welfare of Town residents.
>
> (2) Establish a variety of **zoning district classifications** according to the **use of land** and buildings with varying intensities of uses and standards whose interrelationships of boundary zones form a **compatible pattern of land uses** and ***buffer areas*** which enhance the value of each zone.
>
> (3) Ensure adequate provision of transportation, water supply, sewage disposal, schools, parks, and other public improvements.
>
> (4) **Regulate** and **restrict** the **location**, **use**, and appearance of buildings, structures and **land** for **residence**, business, trade, **industry**, or other purposes, including federal requirements pertaining to floodplains. [Subsections omitted.]

(b) *Organization.* The Wellington Land Use Code is organized into nine (9) articles as follows:

> …

(3) ***Article 3. Zoning Districts***—All zone districts within the Town of Wellington and their **respective list of permitted uses**, prohibited uses and **particular development standards are located in Article 4 Use Regulations** and Article 5 Development Standards.

(4) *Article 4. Use Regulations*—The Use Regulations identify permitted and prohibited use allowances for their respective zoning districts, while also providing use-specific standards that meet certain development needs.

- **Sec. 15-1-50. - Relationship to other ordinances.**

The standards of this **Land Use Code are in addition to all other standards, guidelines, policies, and Municipal Code requirements otherwise applicable to land use and development**. To the extent that there is a conflict between a requirement of this Land Use Code and another Town standard, guideline, policy or requirement, refer to Section 15-1-70 Interpretation and Conflicting Provisions.

- **Sec. 15-1-70. - Interpretation and conflicting provisions.**

(a) *Interpretation.* **In their interpretation and application, the provisions of these zoning regulations shall** be held to be **minimum requirements adopted for the promotion of the public health, safety, values, convenience, comfort, prosperity, and general welfare.**

(b) *Conflicting Provisions.*

(1) Conflict with Other Provisions of Law. Whenever the requirements of this Land Use Code are at a variance with the requirements of **any other lawfully adopted rules, regulations, or ordinances**, the more **restrictive or the higher standards shall govern**.

(2) Conflict with Private Covenants or Deeds. [omitted]

ARTICLE 9 - Definitions

- **Sec. 15-9-10. - Measurements.**

…

(b) *Terminology.*

(1) **As used in this Code, words used in the singular include the plural and words used in the plural include the singular.**

(2) **The words "must," "shall" and "will" are mandatory; "may," "can," "should" and "might" are permissive.**

(3) The word "lot" shall include the words "building site", "site", "parcel", "plot" or "tract".

(4) A "building" or "structure" includes any part thereof.

(5) **Words used in the present tense include the future tense.**

- **Sec. 15-9-20. - Defined terms.**

Industrial and Manufacturing, Heavy. **Manufacturing of** paper, chemicals, plastics, rubber, cosmetics, drugs, nonmetallic mineral products (such as concrete and concrete products, glass), primary metals, acetylene, cement, lime, gypsum or plaster-of-Paris, chlorine, corrosive acid or fertilizer, insecticides, disinfectants, poisons, explosives, paint, lacquer, varnish, petroleum products, coal products, plastic and synthetic resins, electrical equipment, appliances, batteries, and machinery**. This group also includes asphalt mixing plants, concrete mixing plants, smelting, animal slaughtering, oil refining, and magazine contained explosives facilities.**

Industrial and Manufacturing, Light. Manufacturing of products, from **extracted, raw, recycled or secondary materials**, including bulk storage and handling of those products and materials, or crushing, treating, washing, and/or processing of materials. This includes similar establishments, and businesses of a similar and no more objectionable character. It also includes incidental finishing and storage. Goods or products manufactured or processed on-site may be sold at retail or wholesale on or off the premises. ***This does not include any activity listed under Industrial and Manufacturing, Heavy.*** …

Manufacturing means a **business** which makes **products** by hand or by **machinery**.

Vested property rights means the right to undertake and complete the development and use of the property under the terms and conditions of a site-specific development plan.

V. DISCUSSION AND ANALYSIS

ISSUE NO. 1:

Did the Town Board have jurisdiction to review the Planning and Zoning Commission's approval of Connell's site plan, which included the Board of Adjustment's 200-foot variance from the 1000-foot setback?

A. Introduction:

Connell and STI assert, among other things, that "[t]he Board never should have considered whether the Town Code required a 2,640-foot setback for the proposed asphalt mixing plant because the Board lacked jurisdiction under the Town Code to revisit the BOA's grant of the Setback Variance." Connell Opening brief at 16. STI brief at 6. Connell argues that "[o]nce the BOA's decision to grant the Setback Variance was not appealed, the Setback Variance became an *unappealable* part of the *site plan* Connell Resources submitted to the Planning Commission for approval." Opening Brief at 18-19 (emphasis added).[8]

In conclusion, Connell argues that the "Board exceeded its jurisdiction in violation of C.R.C.P. 106(a)(4) when it reversed the Planning Commission's approval of the site plan on the ground that a 2,640-foot setback applies." *Id.* at 21.

The Town argues instead that the BOA "only has jurisdiction to consider variances from numerical or dimensional standards." Answer brief at 2. Moreover, the BOA "has no authority to determine whether Connell Resources' *proposed* use should be *classified* as one producing toxic chemicals*." Id*. (emphasis added). And "[d]eterminations about how to classify a proposed use are solely within the authority of the Planning Commission and the Town's Board of Trustees." *Id.*

The Town asserts that the Code "specifically sets forth which Town-related entity has the authority to consider each type of application. § 15-2-30 ("Procedures Table")." *Id.* Further, the Town states that, as relevant here, the "Planning Commission has the authority to review site plans, but that authority is subject to appeal and review by the Trustees. §§ 15-2-30; 15-2-120(3)(b)." *Id.* at 7. The Town Board argues that a "site plan review is designed, in part, to ensure that a particular use 'complies with all town regulations.' § 15-2-120(a). An approved site plan is necessary for a party to seek a building permit for any industrial development." *Id.*

Finally, the Town Board asserts that "variances may only be sought for relief from 'dimensional and numerical standards.' § 15-2-220(b)." *Id.* And the "LUC specifically forbids the BOA" from considering variances for "the allowed use on a property" citing section 15-2-220(b). Answer Brief at 7.

B. Legal Analysis:

1. Introduction:

The record establishes that the Board of Adjustment did approve the variance from the 1000 foot setback by reducing it by 200 feet, and the parties do not dispute that. Pursuant to the

[8] Connell cites *Eason v. Bd. of Cnty. Comm'rs of Cnty. of Boulder*, 70 P.3d 600, 610 (Colo. App. 2003) and suggests that it had a protected property interest in the variance that vested based upon representations and affirmative actions by the government. *Id.* at 19. Connell further asserts that the "Planning Commission had no authority to review the Setback Variance, and thus neither did the Board." *Id.* at 20.

Code, the authority or jurisdiction to review and approve any request for a variance is vested principally in the BOA.

Turning to the facts of this case, the record establishes that the BOA's approval of the setback variance was *conditional*, and the parties do not dispute that. Connell's submission to the Town Board so states, the minutes from the subject Planning Commission so state, the Minutes of the BOA's meeting approving the 200 foot variance so state, and the parties admit the same in their respective Complaint and Answer.

First, in its submission to the Town Board, Connell provided a letter from its legal counsel, dated August 8, 2023. The letter presented Connell's views about the record and its appellate arguments. Connell stated that the variances were approved with "six conditions of approval" and No. 1 was that "Site Plans must be reviewed and approved by the Commission" as follows:

> Connell first presented its Application to the Town Board of Adjustment (the "**BOA**") on October 27, 2022 for approval of two variances:
>
> 1. To reduce the required building setback from 1,000 feet from a residential district to 800 feet for a Heavy Industrial land use; and
> 2. To allow for a height increase for the silos structure from 45 ft to up to 70 ft.
>
> (each, individually a "**Variance**" and collectively, the "**Variances**").
>
> The BOA approved the Variances with a 5-0 unanimous decision (the "**BOA Decision**") with the following six conditions of approval:
>
> 1. Site Plans must be reviewed and approved by the Commission;
> 2. The height variance (up to 70-ft) is applicable only to the silos;
> 3. A 15-foot earthen berm and landscaping is required along the west side of the site;
> 4. There is to be no signage on the silos;
> 5. Require signage and operator policies to disallow engine braking ("Jake Brakes");
> 6. Compliance with all applicable County and State permits for operation of an Asphalt Plant
>
> Record at p. 18.

Second, the minutes of the June 5, 2023, Planning Commission meeting also state under "New Business" (when the Planning Director Mr. Bird was explaining the prior BOA proceedings) that the BOA approved the variances conditionally as follows:

> TOWN OF WELLINGTON
>
> **TOWN OF WELLINGTON**
> **PLANNING COMMISSION**
> **June 5, 2023**
>
> **MINUTES**
> **REGULAR MEETING – 6:30 PM**
>
> 1. CALL SPECIAL MEETING TO ORDER – 6:30 p.m.
>
> [some text omitted]

Cody Bird, Planning Director said that this was originally submitted for the March 6th Planning Commission Meeting and subsequently it was tabled to allow additional time for the applicant to be gather answers to questions. It was tabled to May 1, 2023. At the May 1st meeting, the applicant requested additional time to finish putting that information together. There were challenges with the consultant's schedule to present the final reports and so that agenda item was also tabled to tonight.

Bird showed slides of where the 35 acre property was located which is at the north side of town along the west side of the railroad. The property is zoned Industrial for heavy industrial uses. A hot mix asphalt plant is a permitted land use within the industrial zone category. The applicant has gone through the variance process and was granted 2 variances with 6 conditions of approval from the Board of Adjustments. They were granted a variance to reduce the 1,000 foot separation setback to 800 feet and a variance for 70 foot silo structure height (from 45 feet). The 6 conditions are:

1) The site plan must be reviewed and approved by the Planning Commission,
2) the height variance is the silo only,
3) a 15 foot earthen berm and landscaping is required on the west side,
4) there is to be no signage on the silo,
5) there is to be signage and operator policies to disallow engine braking ("Jake Brakes") and
6) must comply with all applicable County and State permits for operation of an Asphalt Plant.

Record at pp. 1920-1921.

Third, as noted above, the parties' pleadings admit that the BOA variance approval was conditional. Connell's Complaint so alleged, and the Town admitted the same:

> 34. The BOA approved the Variances with the following six conditions of approval:
>
> (a) **Site Plans must be reviewed and approved by the Planning Commission**;
> (b) The height variance (up to 70-ft) is applicable only to the silos;
> (c) A 15-foot earthen berm and landscaping is required along the west side of the site;
> (d) There is to be no signage on the silos;
> (e) Require signage and operator policies to disallow engine braking ("Jake Brakes"); and
> (f) **Compliance with all applicable County and State permits for operation of an Asphalt Plant.**

Complaint at ¶ 34, Answer at ¶ 34 (bolding added).

"[A]"n agency's determination of its own jurisdiction is subject to de novo review by a court." *Hawes v. Colorado Div. of Ins.*, 65 P.3d 1008, 1015 (Colo. 2003). The BOA's authority and variance procedures are governed by Section 15-2-220, which provides in pertinent part (underscoring and bolding added for emphasis):

Sec. 15-2-220. - Variance.

(a) *Purpose.* A variance provides relief from the **strict application** of ***a standard to a specific site*** that would create an unnecessary hardship or practical difficulties on all reasonable use of the property.

(b) *Applicability.* Variances may be sought for relief from **dimensional and numerical standards** of this Land Use Code. ***Variances may not be sought to*** **vary the allowed use** ***on a property.***

(c) ***Procedure***. **All applications for Variances shall** comply with the following specific procedures ***in addition*** *to* the **general procedures set forth** ***in Section 15-2-40***.

(1) *Pre-application Conference.* A pre-application conference is required for a variance application to discuss specific application procedures, criteria, and requirements for a formal application.

(2) *Application Submittal.* **The variance application shall include**:

a. A **site plan** detailing property boundaries, footprints of all existing and proposed buildings, parking configuration, location of all utilities and easements, and **any other details required** to **demonstrate conformance with all regulations** and ***development standards applicable*** to **the *proposed* zoning district**;

b. A written narrative justifying why the proposed variance fits in with the surrounding neighborhood;

c. Conceptual building plans, including elevations, exterior materials, doors, decks, etc., if applicable;

d. Any other information identified in the pre-application meeting.

(3) *Review and approval.*

a. Board of Adjustments Review.

1. The Board of Adjustments shall hold a public hearing and review the application at a regular meeting. Public notice shall be given pursuant to Section 15-2-20. The applicant or their representative may be present at the meeting to

present the proposal. Staff shall present their staff report and recommendation.

2. The Board of Adjustments shall either approve, ***approve with conditions***, or deny the application, or continue the hearing pursuant to Section 15-2-20(d) with the requirement that the applicant submit changes or additional information …. (All emphases added.)

As emphasized above, the key provisions of Section 15-2-220 provide as follows:

- subsection (b) states that "[v]ariances *may not* be sought to *vary* the allowed *use* on a property" (so the BOA has no authority to grant variances as to any proposed use);

- subsection (c) requires that applications for any variance "*shall* comply" with the following specific procedures for variances "*in addition* to the general procedures set forth in Section 15-2-40" (therefore, the variance process is also subject to the general requirements set out in Section 15-2-40);

- subsection (c)(2)(a) requires that the *variance* application "shall" include a "site plan;"

- subsection (c)(2)(a) also requires explicitly that the site plan "shall" include "any other details" required to "demonstrate *conformance* with *all regulations* and *development standards applicable* to the *proposed* zoning district;" and

- subsection (c)(3)(a)(2) allows the BOA to impose "conditions upon any approval" of a variance. (All italics and underscoring added.)

The BOA's decision was conditioned explicitly upon the Planning Commission's approval of the site plan along with other regulatory compliance, which is important to the issue regarding jurisdiction in three ways:

- First, the BOA decision was never final for purposes of C.R.C.P. 106.

- Second, the conditional variances were made subject to Planning Commission review, which gave the Commission jurisdiction under the Code to review the site plan (which must comply with *all regulations* and *development standards applicable* to the *proposed* zoning district which includes the *conditional* setback variance).

- Third, the BOA condition inviting review by the Planning Commission vested jurisdiction in the Commission, under the general procedural

requirements set out in Section 15-2-40 that give a town administrative body the right to initiate a review by another administrative body.

2. The BOA's approval was not a final decision under the Land Use Code or C.R.C.P. 106, so the conditional approval did not divest the Town of jurisdiction.

The Land Use Code governs appeals under Section 15-2-230(b), which allows for an appeal by any person "aggrieved by a final decision" as follows:

> *Applicability.* **An appeal application may be initiated by any person aggrieved** by a ***final*** **decision** made by an administrative officer or agency, based upon or made in the course of the administration or enforcement of this Code. Appeals are made in accordance with C.R.S. § 31-23-307. (All emphases added.)

The fact the BOA conditioned its variance upon approval by the Planning Commission establishes the Board's approval was not final for appeal under the Code itself.[9] Similarly, the conditional BOA decision could not support any review by the district court under the plain text of C.R.C.P. 106.

The text of C.R.C.P. 106(b) provides for judicial review of "final" decisions:

> **Limitations as to Time.** ... If no time within which review may be sought is provided by any statute, a complaint seeking review under subsection (a)(4) of this Rule shall be filed in the district court not later than 28 days after the final decision of the body or officer. (Emphasis added.)

The 28-day deadline after a "final decision" is a jurisdiction deadline. "This unbroken line of case law over nearly half a century—beginning shortly after we first adopted Rule 106(b)'s deadline—is conclusive. It conveys our intent to treat Rule 106(b)'s deadline as a non-claim limitation period. Accordingly, we reaffirm Rule 106(b)'s deadline as a strict jurisdictional limitation." *Brown v. Walker Com., Inc.,* 2022 CO 57, ¶ 42, 521 P.3d 1014, 1023.

"Precisely what constitutes a 'final decision' within the contemplation of the rule is not further amplified. In both judicial and quasi-judicial contexts, we have characterized a final judgment or decision generally as one that ends the particular action in which it is entered, leaving nothing further to be done to completely determine the rights of the parties." *Citizens for Responsible Growth v. RCI Dev. Partners, Inc.*, 252 P.3d 1104, 1106–07 (Colo. 2011) (emphasis added).

[9] Section 31-23-307 also speaks in terms of "final action" as follows: "Every decision of such board shall be subject, however, to review by certiorari by the district court …. Such appeal shall be filed not later than thirty days from the final action taken by the board of adjustment. (Emphasis added.)

This limitation "period is jurisdictional and begins to run at the point of administrative finality, which occurs when the action complained of is *complete*, leaving nothing further for the agency to decide." *Carney v. Civ. Serv. Comm'n*, 30 P.3d 861, 863 (Colo. App. 2001)(internal quotations omitted) (emphasis added).

Here, the BOA's approval was not final in any sense. By its own terms, the approval required further administrative action—review and approval by the Planning Commission. *See id.* It was neither final, nor was it "ripe" to support any appellate jurisdiction of a district court under the terms of Rule 106. Any such decision must be both "final" as well as "ripe" for a court to review it.

"Whether a claim is ripe for review implicates subject matter jurisdiction because a court can only hear claims that are real, immediate and fit for adjudication, and not those that are speculative, hypothetical or based on a contingent set of facts." *Subject matter jurisdiction—Generally*, 6 COLO. PRAC., CIVIL TRIAL PRACTICE § 1.11 (3d ed.) (emphasis added).

Moreover, the doctrine of ripeness ensures that an issue is "real, immediate, and fit for adjudication." *Developmental Pathways v. Ritter*, 178 P.3d 524, 530 (Colo. 2008) (quoting *Bd. of Dirs., Metro Wastewater Reclamation Dist. v. Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 105 P.3d 653, 656 (Colo. 2005)). *See also Zook v. El Paso Cnty*., 2021 COA 72, ¶ 9, 494 P.3d 659, 662 (Ripeness tests whether an issue is real, immediate, and fit for adjudication.).

Indeed, a "court should exercise jurisdiction in such actions 'only if the case contains a currently justiciable issue or an existing legal controversy, rather than the mere possibility of a future claim.'" *Nat'l Union*, 105 P.3d at 656 (quoting *Cacioppo v. Eagle County Sch. Dist. Re–50J*, 92 P.3d 453, 467 (Colo. 2004)). "Unless and until an administrative matter is reduced to a final judgment, settling all the issues between the parties, we will not review it." *Pub. Utilities Comm'n v. Poudre Val. Rural Elec. Ass'n*, 173 Colo. 364, 369, 480 P.2d 106, 108 (1970) (emphasis added).

"Jurisdiction of the courts to review an administrative decision of the Commission does not exist until all issues between the parties have been resolved and the proceeding before the Commission is final." *Keystone, a Div. of Ralston Purina Co. v. Flynn*, 769 P.2d 484, 489 (Colo. 1989).

Connell, nevertheless, argues at length that the "BOA variance approval was final," and *only* the district court would have jurisdiction to review it. Connell further argues throughout its briefing that because the BOA approval was never appealed to the district court, the setback variance was "final" and effectively "set in stone."

Connell contends that the BOA approval of the variance was in no way subject to any further review directly, indirectly, or otherwise. Connell repeatedly argued before both the Planning Commission and Town Board that the variance from 1000 feet to 800 feet was final and could not be reviewed, considered, or challenged in any fashion. Connell argued repeatedly to the Town Board on appeal that the BOA decision is "final." *See, e.g.*, Record at 2113-2114 (transcript at 45-46).

Before the Town Board on appeal, Connell stated "[t]hat is one of the reasons why the Planning Commission did not end up entertaining that and addressing it in great detail. That Ruling was made by the Board of Adjustment on October 27, 2002." *Id.*

Connell's ongoing arguments on finality and jurisdiction to the Planning Commission were misplaced and erroneous as a matter of law.[10] Connell's erroneous assertions are based upon its incomplete reading of the Land Use Code that ignores the words "final decision." Likewise, Connell fails to consider and address the fact the variance approval was based upon various conditions both inviting and *requiring* further administrative review by the Town.

As set forth by the undisputed record and Connell's own admissions, the variances were explicitly made subject to further administrative review and approval by the Planning Commission. Accordingly, the BOA approval was not final for an appeal to a district court. *See Citizens for Responsible Growth*, 252 P.3d at 1106–07.

Moreover, the approval was not ripe for judicial review under Rule 106. *See, e.g.*, *Developmental Pathways v. Ritter*, 178 P.3d at 530, *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa.*, 105 P.3d at 656, *Zook*, 2021 COA 72, ¶ 9.

For all the foregoing reasons, the Court finds and concludes that the BOA's *conditional* variance approvals for merely a "proposed" zoning district, including specifically the setback variance at issue here, were not final for purposes of C.R.C.P. 106 or under Wellington's Land Use Code.

Accordingly, a review by the Planning Commission and, thereafter, by the Town Board on appeal were not barred. Based upon the record presented, nothing divested the Town of its jurisdiction over the site plan as well as the variances, and nothing vested a district court with jurisdiction.[11]

What is important here regarding the Courts's Rule 106 review is that the Town Board's reversal of the Planning Commission is indeed supported by the "clear error" of the Commission regarding jurisdiction. That clear error is further demonstrated by the provisions of the Land Use Code itself.

3. <u>The Code vests jurisdiction in the Planning Commission to review site plans, classify uses, and to ensure all site plans comply with the letter and intent of the Code overall.</u>

The Town Board argues that the Code vests the Planning Commission with the authority to review any proposed use and classification of a proposed use. Wellington's Land Use Code

[10] Invited error undercuts Connell's arguments under a Rule 106 review.

[11] As to invited error, there were discussions by both the Planning Commission and Town Board whether the variance could or should be sent back to the BOA, but based upon the erroneous arguments of Connell, the Commission and Board did not give the issue meaningful consideration.

does give the Commission (and the Town Board on appeal) the authority to review site plans, classify proposed uses, and review overall Code compliance.[12]

The BOA has no authority over site plans and none over the classification of a use. Section 15-2-220(b) states that "[v]ariances may not be sought to vary the allowed use on a property" (so the BOA has no authority to grant any variances as to an "allowed use").

Second, the Code applies to any development of land, any "new use," and to "any site plan" as follows:

Sec. 15-1-40. - Applicability.

(a) *Generally.* Unless otherwise provided, this Land Use Code applies to any:

(1) Development or redevelopment of **land**;

(2) **New** building or **use**;

(3) Addition or enlargement of an existing building or use;

(4) Change in occupancy of any building; or

(5) **Change of use**.

(b) *Applications.* **Unless otherwise provided, this Land Use Code applies to any of the following development applications**:

(1) Any subdivision plat;

(2) **Any site plan** …. (All emphases added.)

Third, Connell's site plan is governed by the provisions of Section 15-2-120 and that section itself gives the Town Board jurisdiction to review any decision on the site plan by the Commission (in addition to the appellate authority granted to the Board generally by Section 15-2-230(b)(3)):

Section 15-2-120 - Site plan.

(a) *Purpose and Applicability.* **The site plan shall be submitted** to apply for a **building permit for *all*** permitted principal **uses** of multi-family,

[12] The text of the BOA's conditional grant of the setback variance does not dictate otherwise nor could it. Connell cites no code provision that precludes the Town Board from reviewing the Planning Commission's decision on Connell's site plan or the use classification of the proposed hot-mix asphalt plant. Neither the Code itself, nor Rule 106, bars review by the Town Board.

commercial **and *industrial* *developments*.** The site plan shows lot arrangement and *site design* so the **Town can make sure the site plan complies with all Town regulations.** ...

(b) ***Procedure.*** **All site plan applications shall comply with the following specific procedures in addition to the general procedures in Section 15-2-40(b).**

(1) *Preapplication Conference.* [omitted text]

(2) *Land Use Application Submittal.* In addition to the requirements set forth in Section 15-2-40(c), a site plan application shall include:

a. Traffic study or waiver request. In accordance with the Standard Design Criteria and Standard Construction Requirements.

b. **Site plan map**. The **site plan map shall provide information** per the **site plan application checklist** provided by the Planning Director or designee.

c. Demonstrate, in written or graphic form, how the proposed structure is consistent with the Development Standards found in Chapter 5.

d. Final landscape plan per Section 15-5-40.

e. Provide complete building elevations and perspective rendering, drawn to scale ….

(3) ***Review and Approval.***

a. **Planning Commission Approval.**

1. **The Planning Commission shall review the application at a regular meeting**. Staff shall present their staff report and recommendation.

2. **The Planning Commission shall either approve, approve with conditions, or deny the application.**

b. **Town Board consideration of appeals.**

1. **The Town Board shall** consider any appeal within forty-five (45) days of the close of the appeal period, except an appeal associated with a concurrent development

> application requiring Town Board review or approval, which the Town Board shall consider with final action on the concurrent development application. The Town Board shall apply the site plan review criteria to either uphold, modify, or reverse the Planning Commission's decision. (All emphases added.)

The foregoing Code provisions explicitly place authority and jurisdiction over site plan review, approval, or disapproval along with use classification in the hands of the Planning Commission. And in turn, the Code provisions above specifically vest jurisdiction in the Town Board to review any Planning Commission decision on a site plan, including proposed uses and classification of uses. Furthermore, a provision in the Land Use Code allows one administrative body the authority to "initiate" review by another administrative body, and that is what the BOA did as well.

> 4. The BOA variance approval also initiated Planning Commission review, which explicitly gave the Commission jurisdiction and, in turn, jurisdiction to the Town Board on appeal.

Jurisdiction over variances is vested in the BOA, under Section 15-2-220, just as Connell asserts and the Town Board admits. However, the 800-foot setback approval conditioned upon review by the Planning Commission invited additional proceedings. The Code allows one body to seek review by *another administrative body* in addition to the general provisions governing site plan reviews. The BOA's conditional approval did not limit review by the Planning Commission, but instead invited Planning Commission review as follows.

Section 15-2-220 governing variances sets out specific procedures and also incorporates the "procedures set forth in Section 15-2-40," as follows:

> **Sec. 15-2-220. - Variance.**
>
> …
>
> (c) ***Procedure***. **All applications for Variances shall comply** with the following **specific** procedures ***in addition to* the general procedures set forth *in Section 15-2-40***.

In turn, Section 15-2-40(c)(2)(iii) allows a decision-making body of the Town to "initiate a review" by another administrative body as follows:

> **Sec. 15-2-40. - General application procedures.**
>
> *General Review Procedures*
> …
> (c) *Procedure.*
> (1) [text omitted]

(2) *Land Use Application Submittal.*

a. Intent. The intent of the land use application is to formally review an application.

b. Standards. Application submittals shall be made on a form provided by the Town and accompanied by all required submittal documents ….

1. The applicable land use application fees shall be paid ….

2. **Unless otherwise specified in this Land Use Code, applications for *review and approval* may be initiated by**:

i. The owner of the property that is subject to the application;

ii. The property owner's authorized agent … ; **or**

iii. **Any** review or **decision-making body for the Town**.

3. [omitted]

4. **If a review** or ***decision-making body initiates action*** under this Land Use **Code**, **it shall do so *without* prejudice toward the outcome.** (All emphases added.)

Accordingly, nothing precluded the BOA from conditioning and thereby "initiating" a review for approval by the Planning Commission. That conferred jurisdiction over the setback embodied in the site plan by the fact that Connell sought the BOA approval first (based upon an assumed use classification). Based upon the foregoing Code provisions, the jurisdiction based upon the "initiated" review is supplemental to and parallels the Planning Commission's general authority to review every site plan.

As a "decision-making body," when the BOA's explicit conditional approval dictating additional review "initiates action under this Land Use Code, it shall do so without prejudice toward the outcome." That phrase "without prejudice" means the site plan review is not to be influenced or affected by the variance granted or "without injury to or detraction from one's own rights or claims or any cause of action or defense asserted."[13]

[13] "Without prejudice." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/without%20prejudice, May 2024.

Connell asserts that the Planning Commission review and then the Board's review exceeded their own jurisdiction, but Connell does not cite any "exception" that is "expressly identified" in subsequent sections of this article that would preclude the BOA from initiating, or inviting, a Planning Commission review. No provision regarding the BOA limits or bars that body from itself imposing conditions or seeking additional review from any other administrative body whether it be the Planning Commission or the Town Board on appeal.

Connell, more specifically argues that the Town Board lacked jurisdiction and could not review or deny the site plan because the Board cannot act outside its appellate authority as prescribed by Section 15-2-230(c)(4)(b), which states as follows:

> **b.** **No decision of the Board of Adjustments or Town Board of Trustees, as applicable, may exceed the authority granted** to the administrative official or Planning Commission under these regulations,
>
> c. **The appeal authority may reverse** a previous decision in **whole or in part**, or **may modify** the order, requirement, **decision**, or determination **appealed from**.
>
> d. The **appeal authority** may attach **conditions of approval** on any appeal to **ensure the health, safety, and welfare** of the Town. (All emphases added.)

Nevertheless, the discussions above show neither the Planning Commission nor the Town Board exceeded the Commission's authority generally regarding review of a site plan or reviewing the site plan based upon the additional review dictated and "initiated" by the BOA's conditional approval of the variance itself.

On appeal, the Town Board reviewed the matter and reversed the Planning Commission. The Board concluded that the proposed asphalt hot-mixing plant operation effectively would be "producing or curating toxic chemicals" and the Commission had clearly erred, which it did as discussed above and more below. However, the threshold issue presented by Connell is whether the Town Board had jurisdiction to review the Planning Commission's approval of the site plan and thereby, whether directly or indirectly, invalidate the 800-foot setback variance.

C. Conclusion:

For all the reasons set forth above, the Court finds and concludes that the Town Board acted within its authority and possessed jurisdiction to review and make a final decision on appeal regarding the Planning Commission's approval of Connell's site plan.

The Planning Commission erred as a matter of law by not openly and fully considering the nature of the proposed use because it mistakenly believed the 800-foot variance grant was not reviewable, either directly or indirectly, because it was purportedly final. That constitutes clear

error that supports the Board's reversal. Moreover, the Town Board's reversal and findings on the site plan and use classification were well within the Board's authority and jurisdiction. The Board did not exceed its jurisdiction.

ISSUE NO. 2:

Did the Town Board "abuse its discretion" by overturing the Planning Commission's Approval of the site plan by misapplying the Land Use Code, specifically Section 15-4-30(v)?

A. Introduction:

The briefing of the parties is discussed in some detail because it delineates the controlling issues and summarizes the record they rely upon. Connell argues "even if the Town Board had jurisdiction," the Board abused its discretion to overturn the Planning Commission approval of the site plan embodying the setback variance. STI joins this argument.

At the hearing before the Town Board sitting as an administrative appeal body, Connell argued considerable evidence in the record, including a letter from the National Asphalt Pavement Association that the EPA does not consider mixing to constitute manufacturing or producing chemical substances, and the extensive evidence presented to the Planning Commission, which included a host of studies, statements, opinions, and comments as set forth in Connell's Opening brief at pages 26-28.

Connell states simply that "in other words, the Board reasoned that because Section 15-4-30(v)(2) of the Town Code does not specify a limiting factor for when chemicals become 'toxic,' the 2,460-foot setback applies so long as a proposed use emit chemicals at any level." Opening brief at 31.

Connell further asserts that the "Board's rationale is arbitrary and capricious under the Town Code's clear error standard. The level at which chemicals trigger the 2,460-foot setback is already provided for in the Town Code—the chemicals must be at 'toxic' levels." *Id.* (emphasis added). And there was "ample evidence before the Planning Commission that any chemicals emitted would not reach levels toxic to humans." *Id.* (emphasis added).

Connell then asserts that the Board also "abused its discretion because it misinterpreted and misapplied the Town Code." *Id.* at 36. Specifically, error occurred in that "Section 15-4-30(v) cannot be read to support the Board's factual finding that the 2,640-foot setback must be applied if any Heavy Industrial Use would emit trace levels of chemicals not harmful to human health." *Id.* at 36 (emphasis added). Connell also argues about the meaning of the words: toxic, emitting, producing, and curating. *Id.* at pp. 36-38.

The Town Board's briefing essentially presents mirror opposite arguments. The Board views the record, the Code provisions, and specifically those related to industrial uses, classification of a proposed use, and the zoning setback requirements as supporting its decision overturning the Planning Commission's approval. The Board contends that the Commission

"clearly" erred based upon the actual issue presented regarding the correct classification of the proposed use, which in turn prescribes the setback required under the Code.

The Board suggests that Connell's "most pronounced argument is that its proposed plant, when operating under normal conditions, does not produce chemicals at sufficient levels to poison or otherwise harm residents." Answer brief at 2. But, the Board counters that "there is nothing in the Town's code that requires toxic chemicals actually be poisonous to residents for the 2,640-foot setback to apply." *Id.*

"Instead, as aptly summarized by several Trustees, the subcategory does not discuss 'levels' of chemical output at all. Rather, it is simply a black and white analysis of whether toxic chemicals are produced, and if so, a particular heavy industrial use must be categorized as one 'producing and curating toxic chemicals.'" *Id.* "For this reason, the Town did not err in categorizing Connell Resources' proposed use as one involving the production of toxic chemicals." *Id.*

The Town Board argues that "[i]ndustrial setbacks serve many purposes, but one in particular is obvious here: a safety buffer in the event that a plant producing toxic chemicals fails to operate under normal conditions." *Id.* at p. 3.

As to clear error, the Board does not dispute that the "LUC's standard for review in an appellate setting is '[w]hether the decision of the administrative official or Planning Commission was a clear error, as opposed to fairly debatable, according to the provisions of these regulations.' § 15-2- 230(d)(1)." *Id.* at 13-14. The Board considers the issue presented on appeal is straightforward as to the proposed use: if it produces toxic chemicals, the 2,640-foot setback applies as a buffer irrespective of a quantified level of emissions. *Id.* at 14.

The Board further contends that "the Trustees did not overturn the Planning Commission based on the amount of factual evidence in the record concerning the <u>level</u> of chemical production; rather, the decision to overturn the Planning Commission was legal in nature." *Id.* at p. 14 (emphasis added). And the Board argues that the "Trustees correctly reasoned that because the LUC does not discuss the 'levels' of toxic chemical output, but rather simply asks whether toxic chemicals are produced at all, the Planning Commission committed clear error by allowing evidence on the level of chemical output to influence its decision." *Id.* at 14.

In conclusion, the Board contends that "the Planning Commission committed clear error regardless of the quantity and quality of evidence regarding the levels of chemical output by Connell Resources' plant. Because it was undisputed that Connell Resources' plant will produce toxic chemicals, the 2,640-setback applied." *Id.* at 14.

B. Legal analysis:

1. Introduction:

As set forth above, the Town Board had jurisdiction on appeal to review the Commission's decision to approve the site plan and the embodied setback variance based upon the proposed use as well. Therefore, at this point, the issue framed by the pleadings, briefing, and record is whether the Board abused its discretion in misapplying the provisions of the Land Use Code, and specifically Section 15-4-30(v).

2. Did the Board misapply the Land Use Code in concluding that Section 15-4-30(v)(2)'s application is not based upon emission or release of toxic chemicals at a poisonous level meaning one that impairs or threatens human health?

The Code provisions primarily at issue are those regarding the classification of uses, and they are Sections 15-4-10 and 15-4-30(v).[14] Section 15-4-10 strictly limits the uses in each zoning district, which states, in relevant part, as follows:

Sec. 15-4-10. - Purpose and organization.

(a) *Purpose.* Table 4.02-1, Table of Allowable Uses below lists the **uses allowed** within all **zoning districts**. **All uses are defined in Article 9, Definitions**. **Approval of a use** listed in this article, **and compliance with the applicable use-specific standards** for that **use**, **authorizes** that **use only**. Development or **use of a property for any other use not specifically allowed** in this article **and approved under the appropriate process** is **prohibited**. (All emphases added.)

Accordingly, only the approved uses listed that are in compliance with the applicable "use-specific standards" are allowed in a zoning district, and "any other use not specifically allowed" in this article "and approved under the appropriate process is prohibited."

The specific use standards at issue, here, are set forth in Section 15-4-30, as follows:

Sec. 15-4-30. - Use specific standards.

[subsections omitted]

(v) ***Industrial and Manufacturing, Heavy.***

(1) **An** Industrial and Manufacturing, Heavy **use shall** be located at **least one thousand (1,000) feet** from any residential district or use.

[14] *See* Connell's Opening brief at pp. 36-39 and the Board's Answer brief at pp. 20-23.

(2) **Any** Industrial and Manufacturing, Heavy **use producing and curating toxic chemicals or** conducting animal slaughtering **shall** be located **at least**:

a. **Two thousand six hundred forty (2,640) feet from** any **residential** district, religious land use, medical care facility, or **school**.

b. One thousand three hundred twenty (1,320) feet from any commercial use.

c. Six hundred sixty (660) feet from any Industrial and Manufacturing, Light use. (All emphases added.)

As set forth above regarding the standards of review, typically a court's review of a legal issue such as construction of a statute or code provision is de novo. However, deference should be given to an administrative agency's interpretation if it is not contrary to the text or intent. The Court, however, will first consider the subject Code provisions de novo based upon their plain text.

The foregoing provisions and text are straightforward and clear for many reasons.

- First, these provisions all use the word "shall," which prescribes mandatory action as set forth above in the general Code definitions.
- Second, a *strict dichotomy* is mandated between uses not "producing and curating toxic chemicals" as set forth in subsection (v)(1) and the uses "producing and curating toxic chemicals" as set forth in subsection (v)(2).
- Third, the dichotomy is based solely upon the nature of the use and whether the use will be "producing and curating toxic chemicals."
- Fourth, that dichotomy is not based upon any air quality standards of any kind whether regarding emission concentrations or otherwise.
- Fifth, that dichotomy is not based upon any health-related standards of any kind whether regarding exposure levels or otherwise.
- Sixth, the various setbacks are simply set forth in a prescribed number of feet.
- Seventh, the setbacks are prescribed simply in "fractions of a mile" or of 5,280 feet: a half of a mile or 2,640 feet, a quarter of a mile or 1,320 feet, and an eighth of mile or 660 feet.
- Eighth, the setbacks are simply "linear" in nature.

- Finally, the setbacks create "buffers" as described regarding the purposes set forth Section 15-1-10(a)(2). That section explicitly includes "buffers areas," which are consistent with the associated zoning regulations to govern uses, and industrial uses, in Articles 3 and 4 of the Land Use Code.

The plain text of Section 15-4-30 does not reference in any way some sort of air quality standard, or health standard, upon which the setbacks are based. No measure, concentration, or level of any chemical, or set of chemicals, are set forth to define or base the dichotomy upon.

In fact, no quantifiable measure, concentration, or level of any chemical, or set of chemicals, are set forth anywhere in the Code to define or distinguish between any of the four linear setbacks. And that is true even with regard to the three differing, linear setbacks—prescribed where the proposed use would be "producing and curating toxic chemicals." The different setbacks are based upon the nature of the uses being separated or "buffered."

Moreover, the Code overall does not reference, contain, or set forth any standards based upon any air quality measurements or any health risk assessments. Connell cites no such standards in Section 15-4-30 or anywhere in the Land Use Code or Town Code. Perhaps some municipalities have adopted land use codes, or land use regulations, that are based upon specific air quality measurements or levels, or health risk assessments or levels, or a combination thereof, but the Land Use Code of Wellington does not.

Nevertheless, Connell asserts that the Town Board "abused its discretion because it misinterpreted and misapplied the Town Code." Opening brief at 36. "Section 15-4-30(v) cannot be read to support the Board's factual finding that the 2,640-foot setback must be applied if any Heavy Industrial Use would emit trace levels of chemicals not harmful to human health." *Id.* at 36 (emphasis added).

Connell further contends that "Section 15-4-30(v) must be read as requiring a larger setback only if a proposed use would be 'producing and curating' poisonous chemicals. Chemicals, though, are not poisonous if they would have a de minimis effect on human health." *Id.* at 25 (emphasis added). As such "only the 1000-foot setback would be applicable." *Id.*

Connell argues about the meaning of the terms: toxic, emitting, producing, and curating seeking to create a standard based on human health risks and chemical levels that are outright "poisonous." *Id.* at pp. 36-38. It cites dictionary definitions and more technical definitions and makes various arguments about the semantics regarding Section 15-4-30(v).

Connell argues that the chemicals emitted are minor in nature and "would have a de minimis effect on human health." A larger setback would be required "only if only if a proposed use would be 'producing and curating' poisonous chemicals." On their face, these arguments relate to levels of toxic emissions or exposures, which in Connell's words means at a "poisonous" level.[15]

[15] Moreover, Connell advances an argument that turns on the construction and meaning of the word "toxic" to modify the word "chemical." Connell seeks to construe and define toxic to meaning poisonous. And then asserts

Connell contends that the Board misread the Code "despite the plethora of evidence that emissions for the proposed asphalt mixing plant are overseen and controlled by the CDPHE, and that under such rules emissions must be tested regularly to demonstrate compliance with air standards and to obtain a permit." *Id.* at 38. Ultimately, Connell summarizes that the "Board substituted its own judgment in place of the scientific studies, reasoning that the Town Code gave it untethered discretion to overturn the Planning Commission's decision because the setback provisions do not define 'toxic.'" *Id.* at 38-39.

Nevertheless, Connell's efforts to impose an air quality or health-risk based standard for the prescribed buffer setbacks are unavailing because they are not based upon either the text or structure of the Land Use Code. Connell's assertions about an abuse of discretion regarding a purported misapplication of the Code are not supported by: (a) the plain text of Section 15-4-30(v); (b) the structure of the section imposing the prescribed, linear, setbacks; or (c) the Code overall.

As set forth above, the strict dichotomy and prescribed setbacks are not based upon any air quality standards, health risks, or some defined toxicity level for a given chemical,[16] or any combination or set of chemicals. The contention that a "poisonous level" of one or more chemicals must be present to impose the 2,640-foot setback is not well founded in light of the text and structure of the Code at issue.

In simple terms, the Code provides for what are effectively "per se spatial buffers." The Town Board uses the term "buffer" in its briefing, and the text of Section 15-4-30 and the Code overall support that characterization.[17]

Turning to other provisions of the Land Use Code, Section 15-1-70 guides "interpretation" of the "regulations" and sets out some goals as follows:

> (a) *Interpretation.* In their **interpretation** and **application**, the provisions of these **zoning regulations shall** be held to be **minimum requirements** adopted for the promotion of the **public health, safety**, **values**, convenience, **comfort**, prosperity, and **general welfare**. (All emphases added.)

The forgoing purposes and policies inform the Town Board's reading and application of Section 15-4-30(v) and the Code overall. The Town Board's reading of Section 15-4-30(v) was subject to the foregoing provisions, which speak in general terms as to health, safety, values, comfort, and general welfare. They do not speak in terms of any measurable standards based upon any air quality or any level of health risk assessment. And the Land Use Code sets forth minimum standards. Therefore, the specific emission standards imposed by the State of

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that only air emissions that constitute an actual *poisonous* exposure with *predictable* adverse health impacts can trigger the 2,640 foot setback. Again, Connell stretches or conflates the word toxic.

[16] The reference to chemicals in the plural also include the singular form meaning a "chemical" based upon the general Code construction provisions above.

[17] Answer brief at pp. 3, 21 ("The more logical interpretation is that the Town's LUC is designed to create a safety buffer between any residents, schools, or churches and those industrial uses that produce or curate chemicals.").

Colorado (in conjunction with Larimer County) and federal agencies such as the EPA that regulate and thereby reduce toxicity levels are in addition to the Town's per se buffers. The record reveals that the Town Board recognized that Wellington does not have its own air quality staff or expertise so buffers make sense.

Even more fundamentally, Section 15-1-10 of the Land Use Code sets forth its sweeping purposes and explicitly includes a reference to "buffer areas" as follows:

> *Purpose.* The purpose of this Land Use Code is to create a vital, cohesive, well-designed community in order to enhance the Town's small-town character and further the residents' goals as identified in the Comprehensive Plan. These zoning regulations are designed to:
>
> > (1) Promote the health, safety, values, and general welfare of Town residents.
> >
> > (2) Establish a variety of **zoning district classifications** according to the **use** of land and buildings with **varying intensities of uses** and standards whose **interrelationships of boundary zones** form a compatible pattern of land uses and **buffer areas** which enhance the value of each zone.
> >
> > **…**
> >
> > (6) Promote good design and arrangement of buildings or clusters of buildings and uses in residential, business, and industrial development.
> >
> > (7) Encourage innovative and quality site planning, circulation on sites and transportation to sites, architecture and landscaping that reflect land development best practices.
> >
> > (8) **Prevent** the overcrowding of land; poor quality development; waste and inefficiency in land use; danger and congestion in travel and transportation, and **any other use** or development that **might** be **detrimental** to the **stability** and **livability** of the Town. …. (All emphases added.)

The explicit purposes referenced above include "enhancing the small-town character," using "buffer areas" to "enhance the value of each zone," and promote the goal to prevent "any other use" that might be detrimental to the "livability of the Town." These goals are broad and support the use of buffers to promote goals in addition to and that are broader than health or safety.

With these broad purposes and policies in mind, along with the text and structure of Section 15-4-30(v) as analyzed above, the Court finds and concludes upon its de novo review that Section 15-4-30(v) applies where no emission or release of toxic chemicals will impair or impact human health. In short, the 2,640-foot setback is not based upon any emissions standards

or health risk assessments. Moreover, the setback is not based upon any showing that any toxic chemicals must be outright "poisonous" or emitted or released in levels that impact or threaten human health. The Court finds that Connell's arguments are not supported by the Code itself.

Aside from a de novo review, in "a C.R.C.P. 106 action, a reviewing court will give 'deference to the interpretation provided by the officer or agency charged with the administration of the code or statute unless that interpretation is inconsistent with the legislative intent manifested in the text of the statute or code.'" *Khelik v. City & Cnty. of Denver*, 2016 COA 55, ¶ 17, 411 P.3d 1020, 1023 (emphasis added) (quoting *Waste Mgmt. of Colo. v. City of Commerce City*, 250 P.3d 722, 725 (Colo. App. 2010)).

"In that regard, '[t]he agency's interpretation of the rule should be given great weight unless plainly erroneous or inconsistent with the rule.'" *Khelik*, 2016 COA 55, ¶ 17, 411 P.3d at 1023 (quoting *Bryant v. Career Serv. Auth.*, 765 P.2d 1037, 1038 (Colo.App.1988)).

Accordingly, in reviewing the Town Board's reading and application of Section 15-4-30(v) and the Code overall, the Court finds and concludes that the Board's interpretations are not contrary to the plain text or intent of the provisions at issue. Therefore, pursuant to Rule 106's standards, the Court gives deference to the Board's construction of the Code and finds that the Board did not abuse its discretion in reading and applying the Code. The Planning Commission committed clear error by misconstruing the text of Section's 15-4-30(v) to require release of "poisonous" chemicals or toxic chemicals sufficient to impair or harm human health.

3. Did the Board misapply the Land Use Code in concluding that Section 15-4-30(v)(2)'s setback applies to the proposed hot-mix asphalt plant because it falls within the classification of "any Industrial and Manufacturing, Heavy use producing and curating toxic chemicals?"

The site plan and embodied variance approved by the Planning Commission was based on the *general* category of "Industrial and Manufacturing, Heavy uses" set forth in Section 15-4-30(v)(1), as follows:

> "An Industrial and Manufacturing, Heavy use shall be located at least one thousand (1,000) feet from any residential district or use."

The site plan approval and embodied variance were reversed by the Town Board because it concluded that the proposed hot-mix asphalt plant would be one regarding the more *specific* use category set forth in the next subparagraph, Section 15-4-30(v)(2), which states as follows:

> "Any Industrial and Manufacturing, Heavy use producing and curating toxic chemicals or conducting animal slaughtering shall be located at least:
>
> a. Two thousand six hundred forty (2,640) feet from any residential district, religious land use, medical care facility, or school.
>
> b. One thousand three hundred twenty (1,320) feet from any commercial use.

c. Six hundred sixty (660) feet from any Industrial and Manufacturing, Light use." (Emphasis added.)

The majority of the Trustees read "any" heavy use[18] "producing and curating toxic chemicals" to include Connell's proposed use. Its proposed hot-mix asphalt plant admittedly requires various environmental regulatory permits. The proposed plant mixes "aggregate" meaning sand and gravel with "asphalt cement," which is then heated by burning natural gas to produce asphalt. The use produces various regulated air pollutants.

As discussed above, the "toxic chemicals" or pollutants emitted or released need not be produced or released at "poisonous" levels or levels estimated to impact or harm human health in order to trigger the 2,640-foot setback as a matter of law. So, the issue becomes one regarding the plain language, definitions, goals, and purposes of the Land Use Code.

"Industrial and Manufacturing, Heavy" is defined in Article 9 and includes asphalt mixing plants as follows:

> **Industrial and Manufacturing, Heavy.** **Manufacturing** of paper, chemicals, plastics, rubber, cosmetics, drugs, nonmetallic mineral products (such as concrete and concrete products, glass), primary metals, acetylene, cement, lime, gypsum or plaster-of-Paris, chlorine, corrosive acid or fertilizer, insecticides, disinfectants, poisons, explosives, paint, lacquer, varnish, petroleum products, coal products, plastic and synthetic resins, electrical equipment, appliances, batteries, and machinery**. This group also includes asphalt mixing plants, concrete mixing plants, smelting, animal slaughtering, oil refining, and magazine contained explosives facilities.**

Article 9 of the Land Use Code specifically defines that "manufacturing means a business which makes products by hand or by machinery." The record conclusively establishes that Connell is engaged in manufacturing a product.

"Industrial" is not defined by the Code, but as an adjective of course means related to industry. Industrial means: "1**:** of or relating to industry; 2**:** engaged in industry; 3**:** characterized by highly developed industries; 4**:** used in or developed for use in industry *also* **:** HEAVY-DUTY." *See* "Industrial." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/industrial, May 2024.

Producing means several things, but the context suggests that it means "to cause to have existence or to happen **:** BRING ABOUT;" or "to give being, form, or shape to : MAKE."[19]

[18] "Any" means: "1: one or some indiscriminately of whatever kind: a: one or another taken at random; b: EVERY used to indicate one selected without restriction." *See* "Any." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/any. May 2024.

[19] "Produce." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriamwebster.com/dictionary/produce. May. 2024.

Curating is defined as follows: "curated; curating; curates --*transitive verb*:

> **1:** to select (the best or most appropriate) especially for presentation, distribution, or publication,
> **a:** to select and organize (artistic works) for presentation in (something, such as an exhibit, show, or program),
> **b:** to select and organize (articles, images, etc.) for distribution or publication;
> **2:** to select and bring together (people or groups) for a purpose that is dependent on the specific skills or talents of the members."[20]

Therefore, the plain text of Section 15-4-30(v)(2) includes "any" industrial use, which may or may not include a manufacturing use,[21] and "any" manufacturing use meaning "a business that makes a product," which is certainly the case here.

As the record reveals, the proposed hot-mix asphalt plant is part of Connell's business that "makes a product with machinery" and generates "toxic chemicals." The use combines aggregate (meaning sand and gravel) with asphalt cement, which is *heated* by burning natural gas, or in plain terms "cures" the aggregate and asphalt cement by mixing them and then heating the mixture, which in turn produces toxic air pollutants and "toxic chemicals" some of which are subject to capture and some that are vented out of a stack.

Connell argues that the phrase "producing and curating" applies only if the business is *directly* manufacturing a toxic chemical (or chemicals) as an intended or primary product. Or in other words, the phrase cannot apply if the manufacturing process produces or releases toxic chemicals as a "byproduct." At first blush, such a distinction might appear reasonable. However, it is too narrow a reading and not well founded in light of the plain text of the Code and its broad purposes, including the creation of mandated "buffer areas" between differing uses in differing zoning districts.

The Court finds and concludes, even on a de novo review, that the plain language and broad definitions summarized below do not support any distinction between a toxic "primary product" and a toxic "byproduct" of a manufacturing process for purposes of Section 15-4-30(v):

- "Industrial and Manufacturing, Heavy" specifically *includes* hot-mix asphalt plants;
- "manufacturing" means "a *business* which makes *products* by hand or by *machinery*" which is broadly phrased and involves any products (without any distinction between a primary product or byproduct);

[20]"Curate." Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriam-webster.com/dictionary/curate. May. 2024.
[21] "The word 'or' also is used to create a multiple rather than an alternative obligation." *May Dep't Stores Co. v. State ex rel. Woodard*, 863 P.2d 967, 976 (Colo. 1993). "Interpreting the meaning of 'and' or 'or' in statutes, regulations, and ordinances, the substitution of one for the other may be necessary." *Gamble v. Levitz Furniture Co. of the Midwest Inc.*, 759 P.2d 761, 764 (Colo. App. 1988).

- "producing" meaning to bring about or *make* (without any distinction between a primary product or byproduct);
- "curating" means to *organize* or *select* for presentation or *distribution*, or *select* and *bring together* for a *purpose* based on the "skills or talents of the members" (which is fair to mean the qualities of the subject matter selected); and
- the word "any" is used to modify "Industrial or Manufacturing, Heavy "use" producing and curating toxic chemicals, which is broad and "any" does not suggest a distinction between a primary product or a byproduct).

Accordingly, Connell's suggested reading of Section 15-4-30(v)(2) and the phrase "producing and curating," and the Code overall is too narrow and would unduly limit or defeat the text, goals, and purposes set forth in that section and Code's overall purposes, including its explicit creation and use of per se buffer zones. The purposes of creating "buffer areas" when toxic chemicals are produced, emitted, or released inside the Town are not governed or limited by a narrow and isolated reading of one word: "curating."[22]

The Court on a de novo review finds as a matter of law that the Board read and applied the subject text and Code properly. There was no abuse of discretion. The Board used its common sense understanding of the Code's plain terms and provisions in applying the Code to the record as set forth in the transcript of the appeal hearing.[23] The Board overturned the Planning Commission's approval principally on the construction of Section 15-4-30(v). The Board's construction is consistent with the text and Code provisions.

Certainly, the Board's construction and application of the Code in this respect does not conflict with the plain text or intent of the Code provisions at issue. Accordingly, aside from a de novo review, the Court must give deference to the Board's reading and application of the subject text and structure of Section 15-4-30(v) as well as the related provisions of the Code.

To the extent the Planning Commission considered and construed the phrase "any Industrial and Manufacturing Heavy, use producing and curating toxic chemicals" to *exclude* the proposed hot-mix asphalt plant in approving Connell's site plan, the Commission clearly erred as a matter of law.

Contrary to Connell's and the intervenor's arguments, the discussions and/or "debates" over how to read and construe the Land Use Code do not support any argument that the Planning Commission's decision at issue was "fairly debatable" for several reasons.

First, the text and structure of the Code is reviewed de novo, and the Court's analysis herein does so. Furthermore, on appeal here, the Board's construction of the Land Use Code also deserves deference by this Court here, pursuant to the case law governing Rule 106 reviews.

[22] As noted above, it is also reasonable to read "producing and curating" as "producing or curating." *See* footnote 22 above.

[23] The discussion about the reading and application of Section 15-4-30(v) has been excerpted and argued in the respective briefing by the Town Board and Connell and only a few portions are set forth below.

Second, the "clear error" standard as opposed to the "fairly debatable standard" does not require the Board to give the Planning Commission's legal interpretation of the Code any deference. The Code does not so state. Moreover, the appeal provisions in the Code expressly give the Board *appellate authority over* the Planning Commission both directly under the "site plan" provisions set forth in Section 15-1-120(b)(3)(b) and under the general appeal provisions of Section 15-4-230(b)(3).

Third, the Code cites to and incorporates Rule 106, and thereby the Code acknowledges the associated procedures and applicable case law. Moreover, an appellate administrative body is free to review and consider legal issues de novo. That appellate authority parallels the Rule 106 standards and is consistent with the explicit standards prescribing de novo appellate review of the law whether it be any code, regulation, ordinance, or statute at all levels of review. Hence, the arguments that the "fairly debatable" standard applies to legal issues and the construction of the subject Code provisions are misplaced.

C. Conclusion:

The Court finds as a matter of law that the Board read and applied the subject text and Code properly. The Board used its common sense understanding of the Code's plain terms and provisions in applying the Code to the record as set forth in the transcript of the appeal hearing.

The Board's construction and application of the Code does not conflict with the plain text or intent of the Code provisions at issue. Accordingly, aside from a de novo review, the Court must give deference to the Board's reading of the subject text and structure of Section 15-4-30(v) as well as the related provisions of the Code and hereby does so. For these reasons, the Court finds the Board's conduct in this regard is not an abuse of discretion.

ISSUE NO. 3

Based upon the Rule 106 review standards, did the Board abuse its discretion by overturning the Planning Commission's approval with "no competent evidence" that the proposed hot-mix asphalt plant would produce, curate, and emit toxic chemicals?

A. Introduction:

The motion to reverse the Planning Commission's approval of Connell's site plan passed, and the majority of the Board concluded based the 2,640-foot setback applied because Connell's proposed hot-mix asphalt plant was "any Industrial and Manufacturing Heavy, use producing and curating toxic chemicals." The Board argues that the issue presented on appeal is straightforward as to the proposed use in that if "it *produces* toxic chemicals, the 2,640 foot setback applies as a buffer *irrespective* of a quantified level of emissions." Answer brief at 14 (emphasis added). The Board further contends that the Planning Commission committed clear error "[b]ecause it was undisputed that Connell Resources' plant will produce toxic chemicals, the 2,640-setback applied." Answer Brief at 14.

Connell, however, argues at length that the Board decision is not supported by any competent evidence. Specifically, "there is no competent evidence in the record supporting that the proposed asphalt mixing plant would be 'producing and curating' chemicals or that 'producing and curating' equates to "emitting." *Id.* at pp. 33-35. Connell reargues the information and "evidence" before the Planning Commission and Town Board, here, on appeal.

Connell asserts that "before the Planning Commission were numerous studies, letters, and reports concluding that any possible emissions from the proposed asphalt mixing plant would have a de minimis effect on human health and were therefore not toxic." *Id.* at p. 26. Connell's briefing highlights the rather vast array of information and its air emissions modeling study, which it presented to the Planning Commission.

Connell details the information submitted to the Commission about the levels of emissions, the nature of the chemicals involved, the issues and information about chemical toxicity, and the issues regarding possible adverse effects upon human health. That information certainly is not insignificant. *See* Opening Brief at pp. 26-30.

Finally, Connell summarizes that Planning Commission reached the correct factual conclusion based on the extensive evidence it presented, but the Board on appeal got it wrong and had no basis to overturn the Commission, as follows:

> Based on this factual evidence in the record, the Planning Commission approved the site plan application and rejected claims made by the public that it should deny the application because a 2,640-foot setback from a residential district or use applied pursuant to Section 15-4-30(v) of the Town Code. Considering the amount of evidence in the record supporting the decision, the Planning Commission did not commit clear error as, at minimum, the issue was fairly debatable.

Opening Brief at p. 30.

B. <u>Legal analysis</u>:

First, Connell appears to seek or invite this Court to step in and re-weigh the nature, quality, and purported validity of the evidence in the record. Nevertheless, "[w]hen conflicting testimony is presented in an administrative hearing, the credibility of witnesses and the weight to be given their testimony are decisions within the province of the agency." *Colo. Div. of Revenue v. Lounsbury*, 743 P.2d 23, 26 (Colo. 1987), *Johnson v. Dep't of Safety*, 2021 COA 135, ¶ 22, 503 P.3d 918, 923 (same).

Because we are not the fact finder, we "cannot weigh the evidence or substitute our own judgment for that of the [administrative body]." *No Laporte Gravel Corp.*, 2022 COA 6 ¶¶ 24-26, 507 P.3d 1053, 1060 (quoting *Kruse v. Town of Castle Rock*, 192 P.3d 591, 601 (Colo. App. 2008)). Accordingly, this Court cannot step in to weigh the evidence on a Rule 106 appellate review. *See id.*

Instead, the Court is tasked with a record review to determine if there is "any competent evidence" to support the Board's reversal of the Planning Commission approval of Connell's site plan. The lack of competent evidence "means that the governmental body's decision is 'so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.'" *Canyon Area Residents for the Env't v. Bd. of Cnty. Comm'rs*, 172 P.3d 905, 907 (Colo. App. 2006) (quoting *Bd. of Cnty. Comm'rs v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996)).

A court may conclude that no competent evidence supported an administrative decision only when that decision is "so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Freedom Colo. Info., Inc. v. El Paso Cty. Sheriff's Dep't*, 196 P.3d 892, 900 (Colo. 2008), *Langer v. Bd. of Commissioners of Larimer Cnty.*, 2020 CO 31, ¶ 13, 462 P.3d 59, 62 (same).

Based upon the discussion, analyses, findings, and conclusions already set forth above, the issue regarding the existence of competent evidence is not about how much, how toxic, how poisonous, or how dangerous the toxic air pollutants will be when emitted or released by the proposed hot-mix asphalt plant. The issue is whether there is "any competent evidence" in the record to support the Board's finding on that issue to support its reversal of the Planning Commission site plan approval.

Connell consistently has argued the evidence and cast the issues throughout the briefing here, and proceedings below, apparently to avoid the issue now presented. That is whether the record contains "any competent evidence" that toxic chemicals will be produced and emitted or released by the asphalt plant within the Town's limits. Connell virtually concedes as much: "At most, it would be *emitting certain* chemicals at *trace* levels far below *toxicity* levels as part of the *blending* process." Opening brief at p. 24. Nevertheless, the issue deserves a detailed record review, pursuant to Rule 106's standards.

The record review, however, as follows reveals that the Board's conclusion is supported by some "competent evidence" in the record. The record supports the Board's findings in several respects. First, the abstracts, studies, and lay or even purported expert opinions[24] set forth in the public comments are some evidence that the asphalt plant will produce and emit toxic chemicals or pollutants. They may, or may not, be as "well founded" or scientifically supported as some of Connell's evidence, but the Court is not allowed to re-weigh such evidence.

Second, aside from the public comments, Connell's own briefing establishes that hazardous air pollutants and toxic chemicals will be produced and emitted or released. Even if as Connell asserts, the projected or modeled emissions would be at low, or very low, levels given the anticipated and updated measures to limit or contain such pollutants, toxic chemicals would be produced and emitted over the life of the plant.

[24] A "pediatric and adult cancer" nurse offered some comments, concerns, and objections regarding health risks and emissions. See the record at 1987. An individual with a "Ph.D. and Master's Degree in atmospheric science" from Colorado State University presented comments and some evaluation of the air quality modeling done for Connell. In general, he questioned some of the methodology and assumptions involved, which he suggested limited the validity or accuracy of the study's results. He also offered his opinion that the proposed hot-mix asphalt plant in some ways was not consistent with the Land Use Code and would produce and emit toxic chemicals.

Third, the record shows that the hot-mix asphalt plant will being producing and emitting toxic pollutants and other emissions that require Connell to obtain and maintain various state and federal permits, which involve some monitoring, reporting, and potential enforcement. In its briefing, Connell candidly sets forth and recaps some of the regulatory agencies involved, the nature of some of the required permits, and some of the related standards as follows:

> As part of the site plan application process, Connell Resources explained that it must comply with a multitude of regulations, licensing, and monitoring requirements. (AR – 543-44; 602.) [emphasis added] The state has promulgated rules and standards to determine the safety of the operation of an asphalt mixing plant and ensure ongoing compliance with such regulations. (AR – 543-44.) Connell Resources also provided a list of all the environmental permits it must obtain and comply with, including the penalties for noncompliance. (AR – 602.)
>
> The following state and federal experts would be monitoring and ensuring that Connell Resources' asphalt operations do not cause impact to human health and that Connell Resources complies and continue to comply with promulgated air standards ….

Opening Brief at pp. 28-29 (emphasis added).

Connell then candidly lists some of the agencies and sets out some of the regulatory actions they must undertake to seek to obtain permit its hot-mix asphalt plant:

> • The Colorado Department of Public Health and Environment ("CDPHE"). The CDPHE, oversees and **controls emissions** of **harmful pollutants**, recognizes asphalt mixing plants as **minor sources** of air pollution. (AR – 30.) **Stringent limits are set for a range of emissions based on their known effects to human health and environment**. (Id.) **Technology and control systems are available** to asphalt mixing facilities to ensure compliance with the State's air quality standards. (Id.) **CDPHE requires asphalt mixing plants to install controls or undertake other measures to reduce harmful air emissions**. (Id.)
>
> • The Air Pollution Control Division (the "APCD"). The APCD, which **monitors air pollution for the State of Colorado**, **has an enforcement staff that conducts routine inspections of asphalt mixing plants to ensure that plant operators are properly maintaining the required air pollution equipment, keeping records, and complying with all conditions of the air permit**. (AR – 31.) Most asphalt mixing plants are inspected every 3 to 5 years, while others are inspected annually. (Id.) If a permit violation or noncompliance issue leads to enforcement proceedings, **APCD requires corrective action and may levy fines up to $15,000 to $54,000 per day against the violator**. (Id.) 30

> • **New Source Performance Standards** ("NSPS"). Asphalt mixing plants are also required to comply with NSPS provided in Colorado Regulation No. 6, Part A, Subpart I, Standards of Performance for **Hot Mix Asphalt Facilities**. (AR – 31.) The NSPS limits the allowable particulate emissions from an asphalt mixing plant. (Id.) To show that the asphalt mixing plant can meet the NSPS air emission limits, the owner/operator must conduct a performance test for **particulates, opacity, and sometimes carbon dioxide emissions**. (Id.) Generally, the test is conducted within six months after the asphalt mixing plant receives an initial approval to construct the plant. (Id.)

Opening Brief at pp. 28-29 (bolding and emphasis added).

Next, the comments and information provided by Lea Schneider from the Larimer County Health Department regarding air quality, emissions, and regulation of toxic pollutants further provides record support that toxic chemicals will be produced and emitted or released. *See, e.g.,* Record at 1961-1965. She reported the levels should be low and well within regulatory standards based upon modeling, but produced and emitted toxic chemicals nevertheless.

As to some well-known hazardous air pollutants ("HAPs or haps") and toxic emissions such as formaldehyde, toluene, benzene, ethylene, benzene, and xylene, she reported the modeled emissions would be low as follows:

> Next slide. And actually, you can skip this one too just because Steve went over this and his so we'll just go, we're going to go right into some of these assessments. so, this is the risk assessment for the acute exposures air mod, the air mod modeling was used for this and we looked at the primary haps from asphalt, such as like the formaldehyde, toluene, benzene, ethylene, benzene, xylene. These are the most primary or most common hazards or pollutants, and then we added a couple of others just that are also known to be emitted, but also at much lower concentrations in some cases, and then in my in the second, the first column is the acute screening value levels that the consultant used. And then I brought in CDPHE'S recommended screening levels. So and again, this is the acute. So, the acute levels, the screening levels that are CDPHE recommended are more protective and conservative than the EPA screening levels that the consultant used. CDPHE referred to many of the, and I'm going to use the acronym, but I'll explain it ATSDR MRL levels and this is the Agency of Toxic Substances and Disease Registry and it's their max minimal risk levels for adverse effects for one to 14 day exposures.

Record at 1963.

Later the transcript, regarding Speaker 15, who appears to be Ms. Schneider as referred to by Connell's Counsel Ms. White, addressed some questions regarding the toxins mentioned above. Ms. Schneider noted dispersion modeling may not be required for the proposed plant and such plants were delisted because there were deemed not to be major polluters, but also noted the toxins mentioned were carcinogenic as follows:

> to be honest about that upfront. And then, I don't know all of the studies. We have to be honest, we don't know all of the studies about asphalt plants. There are a lot of older ones out there. There are a lot that don't have modern technology used. There's a lot that do use modern technology. I don't know all of them that have been quoted tonight, so unfortunately, I can't talk to it. But yes, benzene, toluene, ethylene, xylene, they're BTEX compounds that are known to be carcinogens, and you have to control them, or else they could get to levels that could cause cancer. That could cause short term health impacts, such as the irritation, the lung, respiratory damage, things like that. We have worker, we don't use worker exposure in these community assessments. I do want you guys know that's a time weighted average more. It's more for an 8-hour work day on site versus community exposures

Record at 1998 (which is also consistent with the Minutes of that Meeting).

Nevertheless, such toxins would be produced and emitted or released. *See id.* She also commented about unexpected problems and that the local Larimer County Health Department and the state effectively take 911 calls as follows:

> before of true risk really. So even with the results of this, though, we understand there's going to be significant concern in the area. We've got residents nearby, there's there could be odors, there could be unexpected events where we could see, you know, equipment malfunction or something along those natures. So we understand. But we want to be a contact and we are a local contact. For your residents, that can respond. So anytime they see visible emissions such as dust, smoke, steam, if there's odors of concern, you know we're going to be here.
>
> **...**
>
> Next slide, I provided some agency contact information. I do want residents to reach out, though. If they do have concerns, we always say reach out to the operator as well, just in case it's something they can fix quickly, but we'll still investigate. So, I want people to know that. So, we're your local contact and we do have a complaint system online and you can call us directly at our front desk, the Colorado Department of Public Health and Environment. Their toxicology department has a tox call line, too. That's available and an e-mail address. This is primarily related to odors, but still a good consulting group to talk to if you have concern. The Colorado Environmental Incident reporting line we that's the 24-hour line and you have the one 800 number. They also have an online complaint form, so if anything happens after hours, residents can get in touch with these agencies we get a lot of still reports with through this, a lot of it ends up being like a car in the _____ River or something? But we also get dispatch 911 calls, so if it's a significant after-hours event, we are part of the dispatch response. So, we actually get calls like if a

Record at 1964.[25]

Finally, the Board's motion and vote to reverse the Planning Commission approval of the Planning Commission relied explicitly upon Connell's own commissioned study by Antea. The

[25] The concerns about unexpected problems or malfunctions are included in some public comments regarding the need for buffers irrespective of the low levels of emissions projected based upon modeling.

Antea study as discussed by the Board of Trustees and referenced by them further supports their findings about the production and curation, and emission or release of toxic chemicals as modeled by Antea. *See* the record at 2212; *see also* the Antea Report and the "Addendum to Refined Modeling Report by Antea Group" dated May 26, 2023.[26]

The Antea report sets out a host of projections about the nature, levels, and types of toxic chemicals that will be produced and emitted. The Board's motion specifically referenced that study, but also discussed other such evidence in the record. For example, the Board also discussed the EPA emissions study on such plants found at pages 2146-2150 of the record, which offers some competent evidence as well.

In any event, the Court finds and concludes that the record contains some competent evidence to support the Board's reversal based upon its finding that toxic chemicals would be produced and curated and thereafter emitted or released by the proposed hot-mix asphalt plant. However, the appellate standards governing the Board of Trustees reversal of the Planning Commission site plan approval need to be considered and addressed as well. Connell contends the issues were "fairly debatable" and cannot rise to a level of "clear error."

First, as noted above, a distinction exists between purely legal issues such as reading and construing the Land Use Code and mixed questions of fact and law, or purely fact questions. How the Code is read and interpreted by this Court, as set forth above in the Rule 106 standards of review, and how the Board of Trustees acting as an administrative appellate body reads the Code are legal issues are reviewed de novo or as a matter of law.

Second, the issue presented about "competent evidence" existing in the record regarding "any" Industrial and Manufacturing, Heavy "use producing and curating toxic chemicals" is factual in nature. But, as clarified above, the issue presented is not about the projected: emission levels, toxicity levels, health risks, or health effects. As the Board contends, the issue is whether the proposed "use" will "produce and curate toxic chemicals."

The evidence that some level of toxic chemicals will be produced and emitted or released is not "fairly debatable, according to the provisions of these regulations." That is true even as an issue of fact or as a mixed question of fact and law. The evidence in the record explicitly set out above shows there is no "fairly debatable" factual issue.[27]

The "fairly debatable" argument relied upon by Connell and the intervenor is not fully considered by them in several respects. First, the issue has to be "fairly" debatable —not just debated.

Second, it is only "one factor" listed among the "Findings for Approval" listed in Section 15-2-230(d). Section 15-2-230(d) provides additional factors to consider as well. And no one factor is deemed controlling, or given more weight than any other factor, as follows:

[26] Record at approximately 862-890 (the Bates numbers are difficult to read; however, they are also Bates numbered as CR-TOW-1214 to 1241].

[27] That may account for what appears to be careful and guarded wording by Connell to skirt that more focused and narrow issue throughout the administrative proceedings below, as well in its briefing here before the Court.

In reviewing and determining whether to affirm, reverse, or amend a decision of another decision-making body, the current decision-making body *shall* consider the following findings:

(1) Whether the decision of the administrative official or Planning Commission was a *clear error*, as opposed to *fairly debatable*, *according to the provisions of these regulations*.
(2) The *interpretation instructions* of these regulations.
(3) The *purposes, intent, and design objectives of any standards* that are subject to the appeal.
(4) The *record* on the application, including the official plans and policies of the Town used to *evaluate* the application or *make the decision*.
(5) Whether the final decision and the grounds for relief requested in the appeal are *within* the authority granted by these regulations.[28]
(6) Whether there are *other* more appropriate and applicable *procedures* to achieve the applicant's proposed objective, such as a plan amendment, text amendment, planned zoning districts, a zoning map amendment, or a variance."

Section 15-2-230(d)(emphasis added).

What is more, the Planning Commission's discussions or debates were less than "fair" in light of the content of the Land Use Code and legal errors about the construction of the relevant Code provisions. Those discussions or "debates" were based upon, flawed by, or "infected" by several clear legal errors regarding the Code as set forth above.

The clear legal errors reflected in the record relate to the scope of the Planning Commission's jurisdiction relative to the BOA's conditionally granted variance; the text, structure, and construction of Section 15-4-30(v)(2) related to "any" Industrial and Manufacturing, Heavy use "producing and curating toxic" chemicals; the purposes and goals of the mandated buffers; and the departure from the purposes and intent of the Land Use Code overall.

In any event, all the forgoing clear errors undercut and render the purported "debates" less than fair and less than legitimate "according to the provisions of these regulations" and "the interpretation instructions of these regulations." Accordingly, the Court is not persuaded, on review here, that the Town Board failed to properly apply and adhere to the review standards, including the "clear error as opposed to fairly debatable" standard "according to the provisions of these regulations." *See* Section 15-2-230(d).

C. <u>Conclusion</u>:

[28] This factor was argued by Connell, but was addressed above and the Court concluded that the Board had the authority to review the site plan approval (and effectively the BOA's variance since it was in no sense final).

The Court finds and concludes that Connell has not carried it burden to demonstrate the Town Board erred in reversing the Planning Commission's approval of the site plan and embedded variance conditionally granted by the Board of Adjustment. More specifically, the record contains competent evidence that the proposed hot-mix asphalt plant will produce and curate toxic chemicals that will be emitted or released within the Town.

ISSUE NO. 4:

Is the Land Use Code and more specifically the terms used in Section 15-4-30(v) unconstitutionally vague?

Introduction:

On this issue, the Court first finds that the Plaintiffs did not raise this objection below in the administrative hearings in order to "preserve" it for review here. That failure may preclude review before this Court because the argument was not made in the administrative hearing.[29] C.R.C.P. 106(a)(4) "contemplates that the district court will review the record of the proceedings to make this determination*." Canyon Area Residents for the Env't v. Bd. of Cnty. Comm'rs of Jefferson Cnty.*, 172 P.3d 905, 907 (Colo. App. 2006).

"Because evidence of the contributions was not in the record before the Council and the neighbors first raised this issue in the district court" the issue was not reviewed by the district nor the court of appeals. *Whitelaw v. Denver City Council*, 2017 COA 47, ¶ 35, 405 P.3d 433, 441. Where an issue is not preserved for this Court to review, and it will not be considered. *See Canyon Area Residents* at 907, *Whitelaw* at ¶ 35.

In its Complaint, Connell sets forth a claim for "declaratory relief" as their "Third Claim for Relief." Connell seeks review of one section Land Use Code, which is distinct from their request to review the Board of Trustee's decision to reverse the Planning Commission as discussed above.

Connell's constitutional argument does not relate to the Board of Trustees' conduct and as such does not constitute a basis to review the Board's conduct under Rule 106. Instead, the argument is a direct challenge to the content of the Land Use Code itself, which was adopted and recodified in August of 2022.

In addition to a Rule 106(a)(4) review, Connell requested declaratory relief, pursuant to C.R.C.P. 57. As a matter of completeness and to resolve the issue regarding constitutional vagueness, the Court will consider and rule on such issues presuming it is properly before the Court.

Legal Analysis:

[29] That procedural principle requiring preservation of an issue is well established and followed throughout all sorts of review and appeal processes. It is not a "mere technicality" because such a purported error should be addressed in the decision-making stage of any case, which permits the parties and decision maker to resolve the issue immediately in those proceedings.

"A facial challenge to legislative action such as a zoning ordinance or resolution is permitted under C.R.C.P. 57(b). *Condiotti v. Bd. of Cnty. Comm'rs of Cnty. of La Plata*, 983 P.2d 184, 186 (Colo. App. 1999). "Generally, municipal ordinances are presumed to be constitutional, and the party challenging an ordinance bears the burden to prove its unconstitutionality beyond a reasonable doubt." *Town of Dillon v. Yacht Club Condominiums Home Owners Ass'n*, 2014 CO 37, ¶ 22, 325 P.3d 1032, 1038.

Connell asserts that it was "denied due process" because certain terms were not explicitly defined. Indeed, the "vagueness doctrine is rooted in principles of procedural due process." *Rocky Mountain Retail Mgmt., LLC v. City of Northglenn*, 2017 CO 33, ¶ 20, 393 P.3d 533, 539.

"Due process requires laws to give fair warning of prohibited conduct so that individuals may conform their actions accordingly; it also demands that a penal statute establish standards that are sufficiently precise to avoid arbitrary and discriminatory enforcement." *Id.* However, a "law is not unconstitutionally vague simply because it could have been drafted with greater precision." *Id.*

"[D]ue process of law has never required mathematical exactitude in legislative draftsmanship." *Id.* (quoting *Arvada v. Nissen*, 650 P.2d 547, 550 (Colo. 1982). "Rather, a law is unconstitutional only if it is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all." *Rocky Mountain Retail Mgmt., LLC*, 2017 CO ¶ 21, 393 P.3d at 539 (internal quotation and citation omitted).

Overall, "[t]he vagueness doctrine is not an exercise in semantics to emasculate legislation; rather, it is a pragmatic means to ensure fairness. Where fairness can be achieved by a commonsense reading ... we will not adopt a hypertechnical construction to invalidate the provision." *Ams. United for Separation of Church & State Fund, Inc. v. State*, 648 P.2d 1072, 1086 (Colo. 1982) (quoting *People v. Garcia*, 197 Colo. 550, 595 P.2d 228, 231 (1979)).

As to vagueness, the standards are articulated further by the Colorado Supreme Court in *City of Colorado Springs v. Blanche*, 761 P.2d 212, 219 (Colo. 1988). First, as to facial vagueness the Court explains as follows:

> A statute is vague <u>on its face</u> if it is "impermissibly vague in all its applications;" that is, there is no conduct that it proscribes with sufficient clarity. *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982); *People v. Milne*, 690 P.2d 829 (Colo.1984); L. Tribe, *American Constitutional Law* 1033–35 (2d ed. 1988).

Blanche, 761 P.2d at 219 (emphasis added).

The Court has done a detailed review and considerable analysis above regarding the plain text, the structure of the relevant section, the related Code definitions, and the ordinary meaning of the subject words at issue (any, use, industrial, manufacturing, producing, curating, and toxic chemicals, etc.). The provisions and words analyzed above reveal that the Code it is "not

impermissibly vague in *all* its applications." Furthermore, Section 15-4-30(v) sets forth "with sufficient clarity" that some uses are not permitted unless the 2,640-foot setback is applied.

Accordingly, the Court is not persuaded that the Land Use Code is unconstitutional on its face as to all applications. Connell's arguments effectively are an "exercise in semantics" to invalid Wellington's Land Use Code provisions imposing prescribed buffers, specifically for "any" use producing and curating toxic chemicals. In any event, the Court finds and concludes that Connell has not carried its burden to show beyond a reasonable doubt that Wellington's Land Use Code is unconstitutionally vague on its face.

Next, as to vagueness as applied specifically to Connell's proposed hot-mix asphalt plant, the Court notes that to "declare an act of the legislature unconstitutional is always a delicate duty, and one which courts do not feel authorized to perform, unless the conflict between the law and the constitution is clear and unmistakable." *Cantina Grill, JV v. City & Cnty. of Denver Cnty. Bd. of Equalization ex rel. Pumilia*, 2012 COA 154, ¶ 15, 292 P.3d 1144, 1149 (quoting *People v. Goddard*, 8 Colo. 432, 437, 7 P. 301, 304 (1885)).

We review de novo whether a statute is constitutional as applied. *Adams v. Sagee*, 2017 COA 133, ¶ 5, 410 P.3d 800. "Because we presume statutes are constitutional, to succeed on an as-applied challenge, the challenger must establish the unconstitutionality of the statute, as applied to [them], beyond a reasonable doubt." *No Laporte Gravel Corp. v. Bd. of Cnty. Comm'rs*, 2022 COA 6M, ¶ 40, 507 P.3d 1053.

"A statute is vague as applied if it does not, with sufficient clarity, prohibit the conduct against which it is to be enforced." *City of Colorado Springs v. Blanche*, 761 P.2d 212, 219 (Colo. 1988)(citing *Palmer v. City of Euclid*, 402 U.S. 544, 91 S.Ct. 1563, 29 L.Ed.2d 98 (1971)). "A statute is vague as applied if it does not, with sufficient clarity, prohibit or require the conduct against which it is to be enforced." *Cantina Grill, JV*, 2012 COA at ¶ 21, 292 P.3d at 1149.

Again, the Court has done a detailed review and considerable analysis above regarding the plain text, the structure of the relevant section, the related Code definitions, and the ordinary meaning of the subject words at issue (any, use, industrial, producing, curating, and toxic chemicals, etc.). The words and phrases involved, although they are not specifically defined by the Land Use Code, the Town Code prescribes that "all proceedings are to construed to effect their objectives and promote justice." Town Code Section 1-3-40.

As to the words and phrases, the Town Code also directs that they be "construed and understood according to the common and approved usage" of the language. Section 1-2-50 states:

> All words and phrases shall be construed and understood according to the common and approved usage of the language; but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such peculiar and appropriate meaning.

Section 1-2-50.[30]

The Court set forth the common and approved usage of the subject words and phrases based upon the definitions in the Merriam-Webster Dictionary above. It also has construed Section 15-4-30(v) based upon those definitions and the structure of the section, while citing to and putting all of the foregoing in the context of the Land Use Codes' purposes and goals, including the explicit creation and use of prescribed buffers.

Accordingly, the Court finds and concludes that the plain text and structure of Section 15-4-30(v) is set forth "with sufficient clarity" that some uses clearly are not permitted unless the 2,640-foot setback is applied. They do so "with sufficient clarity, prohibit or require the conduct against which it is to be enforced." *See, e.g., Cantina Grill, JV,* 2012 COA at ¶ 21; *City of Colorado Springs v. Blanche,* 761 P.2d at 219. *See also People v. Couillard,* 131 P.3d 1146, 1151 (Colo. App. 2005)(The term "suspected" is defined as 'that one suspects or has a suspicion of: believed guilty, likely, or doubtful. *Webster's Third New International Dictionary* 2303 (1976). Therefore, "suspected of" can be readily understood by persons of common intelligence.).

In any event, the Court finds and concludes that the subject text and provisions are not unconstitutionally vague as applied. In fact as noted above, Connell elected to seek the seemingly modest 200-foot variance from the Board of Adjustment based upon a presumed use classification well before it submitted its application and site plan for approval by the Planning Commission. Therefore, if Connell had sought approval of its site plan first, it could have settled the issues over the proper use classification for its hot-mix asphalt plant and the proper associated buffer before seeking any possible variance before the Board of Adjustment. However, seeking a 200-foot variance from a 1000-foot buffer poses perhaps an easier issue for the BOA to decide than seeking a much larger variance from a 2,640-foot buffer.

CONCLUSIONS AND ORDER

The Board of Trustee's reversal of the Planning Commission approval of Connell's site plan and conclusion that the proposed use requires a buffer is 2,640 feet is hereby affirmed for all the reasons set forth above. The Town Board did not abuse its discretion by either misreading or misconstruing the Land Use Code in voting to reverse the Planning Commission approval of Connell's site plan. The reversal is supported by competent evidence.

Further, the Court finds that Code provisions at issue are neither unconstitutionally vague on their face nor are they vague as applied to Connell's proposed hot-mix asphalt plant. The Code overall and the plain text and meaning of the words and phrases in Section 15-4-30(v) are sufficiently clear to meet due process standards as set forth above.

[30] Similarly, the Town Code Section 1-2-60(4) regarding "grammatical interpretation" states that "[w]ords and phrases not specifically defined shall be construed according to the context and approved usage of the language."

SO ORDERED: July 9, 2024.

BY THE COURT:

District Court Judge