HB 1041 Regulation by Municipalities and Counties in Colorado

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A. HOUSE BILL 1041: ORIGIN AND SCOPE

Legislative History

The Colorado Legislature enacted House Bill 1041 in 1974. It is now codified at C.R.S. 24-65.1-101, et seq. In keeping with a peculiar habit in Colorado, many people continue to refer to the statute by its house bill number, and to regulations adopted under the authority of the statute as "HB 1041 regulations."

House Bill 1041 (hereinafter, HB 1041 or the "Act") was enacted at a time when the Legislature was particularly concerned with the effects of growth and development upon the physical environment of the state and its residents. The nineteen seventies were a time of rapid growth, and the Legislature was concerned that the traditional zoning and subdivision tools used by local governments might not be adequate to fully address the impacts caused by a number of specific development activities, or to adequately protect and plan for development in certain physical areas. After a summer interim committee study, the Legislature considered and adopted two measures designed to give local governments expanded authority to deal with these issues. HB 1041 was one of those measures. The other, HB 1034, is found at C.R.S. 29-20-101, et seq.

Interestingly, as originally proposed by the 1973 interim committee, HB 1041 gave primary authority to the Colorado Land Use Commission to adopt and enforce the regulations authorized by the Act. In the final version of the bill as enacted, this authority was granted to counties and municipalities only, giving the Land Use Commission the authority to provide review and nonbinding comments on the adoption of local regulations. While the basic thrust of the legislation was ultimately altered to grant power primarily to local governments, the terminology of "matters of state interest" was not changed.

Over the years, the funding for the Land Use Commission was continuously reduced, to the point of the Commission having less than one full time staff. In 2005, the Legislature eliminated the Commission entirely and removed all references to it from C.R.S. 24-65.1-101, et seq.

Areas & Activities of State Interest

The Act authorizes counties and municipalities to designate and adopt regulations for the administration of any of a list of "areas and activities of state interest." The Act provides that once an activity or area is designated as one of state interest, local governments may administer that activity or area subject to certain criteria, found at C.R.S. 24-65.1-202 and 204. Importantly, the local government may adopt more stringent regulations than those criteria. C.R.S. 24-65.1-402(3). See also, City & County of Denver v. Grand & Eagle County, 782 P.2d 753 (Colo. 1989) at 760. The Act requires that "any person desiring to engage in the development in an area of state interest . . . shall file an application for a permit with the local government in which such development is to take place. C.R.S. 24-65.1-501(1)(a). The local government may deny the permit if the proposed activity does not comply with the locally adopted guidelines and regulations. C.R.S. 24-65.1-501(4).

Areas of State Interest: C.R.S. 24-65.1-201:

1. Mineral resource areas;

2. Natural hazard areas;

3. Areas containing or having a significant impact upon historical, **natural** or archeological **resources of statewide importance**;[1] and

4. Areas around **key facilities**[2] in which development may have a material effect upon the key facility or the surrounding community.

Activities of State Interest: C.R.S. 24-65.1-203:

1. Site selection and construction of major new domestic water and sewage treatment systems and major extension of existing domestic water and sewage treatment systems;

2. Site selection and development of solid waste disposal sites except those sites specified in C.R.S. 25-11-203(1), sites designated pursuant to part e of Article 11 of Title 25, C.R.S., and hazardous waste disposal sites, as defined in C.R.S. 25-15-200.3;

3. Site selection of airports;

4. Site selection of rapid or mass transit terminals, stations, and fixed guideways;

5. Site selection of arterial highways, interchanges and collector highways;

6. Site selection and construction of major facilities of a public utility;

7. Site selection and development of new communities;

8. Efficient utilization of municipal and industrial water projects; and

9. Conduct of nuclear detonations.

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[1] "Natural resources of statewide importance" is defined in the Act to include shore lands of major public land reservoirs and significant wildlife habitats in which the wildlife species, as identified by the Division of Wildlife Department of Natural Resources, in a proposed area could be endangered. This definition has been used by counties in the Arkansas Valley to address topsoil loss caused by agricultural dry-up.

[2] "Key facilities" is defined in the Act to include “major facilities of a public utility.” That term, itself is defined to include, among other things, transmission lines, power plants and substations of electrical utilities and pipelines and storage areas of utilities providing natural gas or other petroleum derivatives.

B. PROCESS AND PROCEDURE: ADOPTING AND ENFORCING HB 1041 REGULATIONS

Initiating the Process

The local government first prepares draft regulations and guidelines for the administration of the matters of state interest. Next, at a public meeting, the governing body makes a finding that the county/municipality wishes to initiate the designation of matters of state interest pursuant to C.R.S. 24-65.1-101, et seq, and issues notice of the time and place of a public hearing for the designation of matters of state interest and adoption of regulations and guidelines for the administration thereof. C.R.S. 24-65.1-404(2)(a). The notice must be published once at least 30 days and not more than 60 days before the public hearing in a newspaper of general circulation in the county. The notice should include:

- the place at which materials relating to the matters to be designated and any guidelines and regulations for the administration thereof may be examined;
- a telephone number where inquiries about the proposed regulations may be answered;
- a description of the areas or activities proposed to be designated in sufficient detail to provide reasonable notice as to the property which would be included; and
- the legal description of the property affected as well as any general or popular names of the property.

Public Hearing

Procedure: The Act is silent with respect to procedures for conduct of the hearing itself. The public hearing should be conducted in the same manner as a public hearing for the adoption of other land use regulations. The adoption of guidelines and regulations for the administration of matters of state interest is a legislative function. It is most closely analogous to the adoption of a general zoning plan or amendments to the land use code. Public hearings associated with legislative deliberations are not required to afford the opportunity for cross-examination or rebuttal, although the local government may choose to allow either or both.

Record of the Hearing: The following items constitute the minimum record of the public hearing:

- Notice of the hearing/certification of its publication;
- Names and addresses of persons who presented written or oral statements or who offered documentary evidence;
- Any written statements or documents presented in support of or in opposition to the proposed designation, including statements from staff;
- Any recording or transcript, if requested to be made by any person.
- The order(s) of designation of matters of state interest;
- The regulations as adopted; and
- A map or maps depicting each area of state interest designated.

Designation Order

Either at the conclusion of the hearing or within 30 days after its completion, the local government may adopt, adopt with modifications, or reject the proposed designations and guidelines (regulations) for administration thereof. The local government must take its action by resolution (county) or ordinance (municipality). Each designation order should include, at a minimum;

- a specification of the boundaries of the proposed area of state interest or the boundary of the area in which the activity of state interest has been designated. C.R.S. 24-65.1-401(2)(a); and

- reasons why the particular area or activity is of state interest, the dangers that would result from uncontrolled development of the area or uncontrolled conduct of the activity, and the advantages of development of the area or conduct of the activity in a coordinated manner. C.R.S. 24-65.1-401(2)(b).

Permitting Process

Application: The procedure for obtaining a permit for a matter of state interest is generally controlled by C.R.S. 24-65.1-101 through 204. Permit applications are submitted directly to the governing body of the county or municipality, rather than the planning commission. However, the recommendations of the planning commission are appropriate and can be required by the regulations if locally provided. In general, the process for review and permitting of a matter of state interest includes:

- an application with accompanying fee;

- notice of permit hearing;

- conducting the permit hearing; and

- approval or denial of the permit application.

Typically, HB 1041 regulations establish a Permit Authority to administer the program. The Permit Authority (normally, the Board of County Commissioners, City or Town Council or Town Board of Trustees) has the power to reject the application if it is considered incomplete, and may not act on the application until it is complete. More than one area or activity of state interest may be combined in the same application. The Permit Authority may charge a fee to cover its costs to process the application.

Permit Hearing: Within 30 days of receipt of a completed application for a permit, the Permit Authority must set and publish notice of the date, time and place for hearing on the application. This notice must be published once within 30 and 60 days before the date set for the hearing. The notice is also given to all of the persons and entities on the list for the notice of designation hearing itself. C.R.S. 24-65.1-501(2).

The Permit Authority must provide procedural due process to the applicant and opposers. This hearing may best be compared to a rezoning or conditional use application. It is quasi-judicial in nature. Distinguished from the legislative act of adopting the general regulations for areas and activities of state interest, the action of approving, approving with conditions, or denying individual applications to develop in an area of state interest or conduct an activity of state interest, is quasi-judicial and subject to certiorari review. City of Colorado Springs v. BOCC, Eagle County, supra; Snyder v. City of Lakewood, 189 Colo. 421, 542 P.2d 371 (1975). It is appropriate to allow cross- examination and rebuttal.

Action on the Application: In approving or denying the permit application, the Permit Authority has a number of considerations:

- If there is not sufficient information upon which to make a decision, the Permit Authority should either deny the application or continue the hearing to give the applicant an opportunity to present additional information. Such continuances are limited to 60 days.

- As with any land use application, the burden of proof is upon the applicant to show compliance with the regulations.

- The Permit Authority should state, in writing, the reasons for its decision.

- HB 1041 regulations typically impose an absolute outside time frame after the completion of the permit hearing for the Permit Authority's action to approve or deny.

C. APPLICATION OF HB 1041 REGULATIONS TO STATE AGENCIES

In two relatively recent district court decisions, HB 1041 regulations adopted by Douglas County and by the City of Idaho Springs have been challenged by the Colorado Department of Transportation (CDOT). In each case the district court judge upheld the local regulations, rejecting a number of arguments raised by CDOT. These two cases are significant in that they raise the question of whether counties and municipalities may adopt and enforce HB 1041 regulations and require state agencies to comply with those regulations. The cases were consolidated for appeal to the Court of Appeals, which upheld the district court; the Colorado Supreme Court denied certiorari, ending the case.