

Litigation Under 1041

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References

Citations and full references to cases can be found in the brief accompanying this PowerPoint in your handouts



1041 Overview

- “1041,” the original bill number in 1974, is Colorado’s Areas and Activities of State Interest Act (“AASIA”), C.R.S. § 24-65.1-101 *et seq.*
- The legislature enacted 1041 to give local governments a growth management tool and greater control over development issues
- By design, 1041 serves to protect resources and balance their use among competing interests

1041 Overview: History of 1041

- Enacted in 1974
- Original concept was a state land use permitting agency
- Bill amended to vest authority in local governments but bill title remained “areas and activities of *state interest*”
- Land Use Commission: its life and death

1041 Overview, cont.

- 1041 grants local governments authority to enact regulations to control and mitigate development of certain kinds or in certain areas
- Type of development at issue is that having a significant impact on resources of statewide importance. C.R.S. § 24-65.1-101
- Both cities and counties have the choice – but not obligation -- to exercise this 1041 power

The 1041 Process

Two step process for local governments:

1. Designation - local government must designate certain **areas** of land, or development **activities**, as *matters of state interest*, C.R.S. § 24-65.1-201 and -203
 - a) **Areas:**
 - mineral resource areas
 - natural hazard areas
 - areas around key facilities
 - areas containing, or having a significant impact upon, historical, natural, or archaeological resources of statewide importance

Designation step, cont'd

b) Activities:

- Site selection major new domestic water and sewage treatment systems
- Site selection solid waste disposal sites
- Site selection airports
- Site selection rapid or mass transit stations
- Site selection arterial & collector highways & interchanges
- Site selection major facilities of public utility
- Site selection new communities
- Efficient utilization of M&I water projects
- Conduct of nuclear detonations

Designation Step, cont'd.

- Statute contains criteria for the administration of such areas and activities, C.R.S. § 24-65.1-202, -204
- Allows local governments to develop more stringent regulations, C.R.S. § 24-65.1-402(3)
- Must have notice and public hearing, C.R.S. § 24-65.1-404
- Findings required, C.R.S. § 24-65.1-401

Regulation step

2. Regulation - local government permit process to ensure compliance with established criteria.
 - Local government cost recovery for permit processing, C.R.S. § 24-65.1-501(1)(a)
 - Must have notice and public hearing, C.R.S. § 24-65.1-501(2)
 - Written findings and conclusions required, C.R.S. § 24-65.1-501(5)

1041 Permitting Requirements

- Permit Required - any person who would develop land in a designated area or conduct a designated activity must obtain a permit. C.R.S. § 24-65.1-501(1)(a)
- Compliance Required – if a proposed development or activity does not comply with each of the applicable regulations, the local government must deny the permit application. C.R.S. § 24-65.1-501(3)-(4)
- Injunction - failure to obtain a permit may result in an injunction against conducting the development or activity. C.R.S. § 24-65.1-501(6)

Litigation Issues and Administrative Process Strategies

1. Litigation over initial promulgation of 1041 regulations
2. Litigation over application of 1041 regulations to an individual permit application
3. The administrative process preceding either type of litigation

Litigation over Initial Promulgation of 1041 Regulations

“Facial” challenges to all or part of
a set of regulations generally
unsuccessful



Grounds for Facial Challenges of 1041

1. Inconsistent with State Constitution

– *See Univ. of Colo. v. Boulder County*



Grounds for Facial Challenges of 1041, cont'd

2. Conflict with other language in 1041

- See *CDOT v. Douglas County* and *CDOT v. Idaho Springs*, 2008 WL 1903523 and 2008 WL 1902497 (Colo. Ct. Apps. 2008), *cert. denied*, Sept. 22, 2008
- CDOT claimed that application of County's 1041 regulations to a CDOT project conflicted with the definition of a covered "person" under 1041

Grounds for Facial Challenges of 1041, cont'd

3. Preemption

– *See CDOT* cases

- CDOT argued that 1041 was preempted by the state Transportation Code, Title 43 of C.R.S.
- Held, 1041 not in conflict with CDOT's broad authority over transportation planning - authority not absolute
- Court suggests that any conflict between 1041 powers and the statutory authority of a regulated agency is for the legislature to resolve

Grounds for Facial Challenges of 1041, cont'd

4. Unconstitutional Infringement on exercise of constitutional home rule powers

– *See Denver v. Grand County*



Grounds for Facial Challenges to 1041, cont'd

5. Unconstitutional delegation of state legislative authority to a local government
 - *See CU v. Boulder County*
 - The Land Use Commission dilemma
 - 1041 regulations promulgated while LUC existed but dormant
 - To re-enact or not re-enact, that is the question



Grounds for Facial Challenges to 1041, cont'd

6. Adequate Findings - whether the local government made adequate findings required by the 1041 statute in promulgating its regulations
 - Claim initially pleaded in *Colorado Springs v. Pueblo County*, but dropped in Amended Complaint

Are facial challenges to procedural regulations unconstitutional?

- The U.S. Supreme Court has heard oral argument in *Summers v. Earth Island Inst.*, 490 F.3d 687 (9th Cir. 2007), *cert. granted*, to consider whether a challenge to procedural regulations is nonjusticiable because the plaintiff experiences no injury until those regulations are applied.

Litigation over Application of 1041 Regulations

Challenges to Decisions on Permit
Applications

Grounds for As-Applied Challenges

1. Preemption, Generally

- Express preemption – another statute expressly occupies the entire field
 - Implied preemption – another statute implicitly evidences a legislative intent to occupy the field due to a dominant state interest
 - Operational preclusion – application of another statute or permit conflicts directly with the 1041 permit or its conditions
- *See La Plata County v. Bowen/Edwards* (leading case on three types of preemption)

Grounds for As-Applied Challenges, cont.

1. Preemption, cont.

– *See Colo. Springs v. Eagle County*

- Board can apply its regulatory criteria regarding wetlands protection and nuisance abatement to a municipal water project permit review under 1041
- Regulations as applied must bear reasonable relationship to legitimate planning concerns

Grounds for As-Applied Challenges, cont'd

2. Zoned Land Use Exemption, C.R.S. § 24-65.1-107(1)(c)(II)
 - See *Colorado Springs v. Pueblo County*, 07 CA 2543 (appeal pending, Colo. Ct. of Appeals)
 - District court held that City not exempt from 1041 permitting process when seeking a use by special review, instead of a use by right
 - On appeal, City argues that plain meaning of exemption is that lands zoned for the use contemplated by the activity as of May 17, 1974 (the date of 1041 enactment) are exempt from regulation under 1041
 - See also *Droste v. Pitkin County*, 85 P.3d 852 (Colo. App. 2003) (County had right to use Land Use Enabling Act to regulate a use that came within 1041's zoned land use exemption)

Grounds for As-Applied Challenges, cont'd

3. No competent evidence; record so devoid of evidentiary support as to render the decision arbitrary and capricious. See *Colo. Springs v. Eagle County*



Grounds for As-Applied Challenges, cont'd

4. Challenging the outer limits of permissible regulation
 - “Act gives the Board the power to regulate, but not to prohibit, the operation of extraterritorial water projects.” *Colorado Springs v. Eagle County*
 - “The cities' entitlement to take the water ..., while a valid property right, should not be understood to carry with it absolute rights to build and operate any particular water diversion project.” *Id.*; see also *Denver v. Grand County*
 - “Alternative configurations could be designed which would meet the regulatory criteria. ... The cities are not prohibited from resubmitting the proposed project with changes or from submitting a different proposal.” *Id.*

Grounds for As-Applied Challenges, cont'd

5. Requirement of “conformance” with, or “avoiding direct conflict with,” local, state and regional master plans when siting highways, interchanges, transit stations and terminals, and public utility facilities.
C.R.S. § 24-65.1-202, 204

- Open question: What if the various plans are not consistent with one another?



Miscellaneous Claims

- Challenge to local government's failure to record and index its 1041 regulations and 1041 maps under C.R.S. § 30-28-125, see *Colorado Land and Ranches v. Costilla County*
 - Justice Quinn, sitting as a senior district judge, held Costilla County 1041 regulations void because not recorded (decision not appealed)

Venue

- C.R.C.P. 98(b)(2) – venue is proper “in the county where the claim, or some part thereof, arose” when the claim involves a public official’s conduct
- Therefore, 1041 challenges must be brought in the district court for the jurisdiction where the 1041 regulations were promulgated. See *Colorado Springs v. Pueblo County*, 147 P.3d 1 (Colo. 2006)

Venue, cont'd

- Open question where venue lies for a challenge to a party's failure or refusal to apply for a 1041 permit
 - If, e.g., the Transportation Commission or Executive Director of CDOT had decided to proceed with a project in Douglas County without applying for a permit due to CDOT's position that 1041 did not apply to it, C.R.C.P. 98 suggests that venue for a suit to enjoin CDOT may lie in Denver County, where CDOT headquarters are located

Strategic Milestones of 1041 Process

- Pre-application stage: examine whether 1041 regulations require the local government to consider alternatives to the proposed project
 - Carefully consider relationship of 1041 process to any other applicable statute with an alternatives requirement, e.g. National Environmental Policy Act if federal funds, control or permit is involved, or Clean Water Act if a 404 dredge and fill permit is needed

Strategic Milestones, cont'd

- Pre-application stage: review statutory requirement that local government consider consistency with state, regional and local plans, and any enacted 1041 regulatory requirement implementing it
 - Design and choose alternatives with any consistency requirement in mind
 - Participate in planning processes to understand and influence consistency requirements

1041 Permitting Process

- The most important litigation is the administrative process
 - Creation of administrative record
 - Administrative record must support the decision reached by the local government (“show your work”)
 - Little or no opportunity for any party to introduce new evidence in a challenge to a 1041 permit decision, see C.R.C.P. 106

Participation by Affected Third Parties in 1041 Permit Process

- Most 1041 permits are granted with little controversy and little or no participation by third parties
- Those involving a third party, such as a citizens' group, HOA or environmental organization, may entail additional witnesses, evidence, arguments and briefing. *See e.g. Colo. Springs v. Eagle County* (Holy Cross Wilderness Defense Fund witness)

Administrative Process

- Local government must ensure reasonable responses to all major comments and issues
 - Failure to respond to critical issues could be viewed as arbitrary
 - Opposition strategy to fill record with arguments

Administrative Process, cont.

- Watch for Inconsistencies
 - Inconsistent positions taken by permitting entity could be found to be arbitrary
 - Show your work, but check your work, too



Administrative Process, cont'd

- Remember standard of review and its impact on any later challenge
 - Holy Cross Wilderness case example

