Environmental Services
222 Laporte Avenue
Fort Collins, CO 80521
970.221-6600
fcgov.com

MEMORANDUM

NATURAL RESOURCES ADVISORY BOARD

DATE: January 19, 2023

TO: Mayor and City Council Members

FROM: Natural Resources Advisory Board

SUBJECT: Recommendations Regarding 1041 Regulations Draft

Dear Mayor and Councilmembers,

On December 15, 2022, Kirk Longstein, Senior Environmental Planner, presented on the updated draft of 1041 Regulations. The purpose of this memo is to express considerations and recommendations regarding the potential future adoption of 1041 Regulations. As a Board that prioritizes the conservation of natural resources and the impact they have on the future of our community, the Board views the 1041 Regulations as a legal method to offer the City greater authority over public development projects, specifically those that deal with *Highways and Interchanges* and *Water Projects*, that qualify as areas or activities of statewide interest.

In the most recent draft of the 1041 Regulations, the change of threshold definition from "Finding of No Significant Impact" (FONSI) to "Finding of No Adverse Impact" (FONAI) is supported by the Board. Additionally, the Board further strongly advocates for the consideration of cumulative impacts as it pertains to environmental degradation and disproportionately impacted communities. To assess short, and long-term effects of projects evaluated under the umbrella of 1041 Regulations, the Board recommends adoption of a monitoring program. A defensible monitoring program that includes measurable indicators of project impacts, both positive and negative, and how these metrics change over space and time. By analyzing the cumulative effects and monitoring project impacts, potential long-term environmental, social, and economic impacts can be more adequately understood. Utilizing the *Considering Cumulative Effects Under the National Environmental Policy Act* is one recommended starting point for consideration for creating a system on monitoring and cumulative impacts.

City of Fort Collins

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Additionally, the Board recommends an adoption of 1041 Regulations that do not impose geographic limitations as a filter at the front end of the review process (as currently defined and proposed in "Version 2 of the Draft 1031 Regulations"). Ecological systems, and their social impacts, are open systems that do not recognize ownership or political boundaries.

Further, the Board advocates for the addition of a definition of "Natural Resources" in the 1041 Regulations. The Board would recommend considering the existing definition for "Natural Habitats and Features" that can be found in the *Land Use Code*, but with the intentional addition of ecological corridors, including waterways, to incorporate not only habitat protection but also to secure the connectivity patterns that Northern Colorado flora and fauna need to thrive. Habitat protection, corridors, and connectivity as defined in the Nature in the City's Habitat Corridor Analysis and through Colorado Parks and Wildlife's classification of High Priority Habitats.

The Board is concerned that currently proposed development projects will have permanent and pronounced reductions in the integrity of the Cache la Poudre River ecosystem and various Natural Areas within the bounds of Fort Collins. Through the adoption of 1041 Regulations with the aforementioned considerations, proactive efforts can minimize adverse impacts to natural features, historical cultural resources, and disproportionately impacted communities.

The Board views the 1041 Regulations as instrumental in achieving Our Climate Future goals, particularly as it pertains to the "Big Move 3: Climate Resilient Community," "Big Move 11: Healthy Natural Spaces," and additional environmental health goals outlined in the City's strategic plan.

Thank you for your time and consideration on this issue and its future implications for the community.

Very Respectfully,

Dawson Metcalf, MS
Chair, Natural Resources Advisory Board

FORT COLLINS AREA CHAMBER OF COMMERCE

225 South Meldrum Street
Fort Collins, Colorado

970.482.3746
970.482.3774 fax

www.fortcollinschamber.com

November 11, 2022

Fort Collins City Council
300 Laporte Ave.
Fort Collins, CO 80521

To: Mayor Arndt, Mayor Pro Tem Francis, and Council Members Gutowsky, Pignataro, Canonico, Peel and Ohlson;

As a business community, we take great interest in matters that impact the economic vitality of not just Fort Collins, but the entire region. After all, our employees, customers, suppliers and partners are not strictly limited to political boundaries. Preserving the character of our region and the integrity of our precious natural resources is a vital component of our collective success. Often overlooked is the fact that businesspeople also live here, raise families here, and make significant investments that advance our collective well-being.

What the business community doesn't do is build water treatment facilities, diversion pipelines or reservoirs. We don't expand highways (though we have successfully lobbied for such projects). Rather, these type projects are undertaken by government and quasi-governmental entities that exist for the purpose of delivering vital services to the public. As such, there are very concrete and deliberate processes under which significant infrastructure improvements are analyzed, designed and implemented through the benefit of public input.

The product of this existing framework is evident. Environmental disturbances that result from infrastructure placement are remediated to a level that is equal to or superior to pre-existing conditions. We fail to see how introducing a whole new process under 1041 Powers provides any tangible benefit to the community – unless it's assumed the community is better off with higher utility costs, slower processes for meeting basic needs, or dictating the terms under which other jurisdictions across the region are allowed to function.

The Fort Collins Area Chamber of Commerce strongly encourages Council to reconsider imposition of 1041 Powers. Should you feel compelled to move forward, the next best option is to extend the current moratorium at least 90 days while City staff and Council recommit to an engagement process that was short-circuited by special interests. In the haste to stop a single project, the collateral damage was made to appear inconsequential. We now recognize that to be a false narrative.

Thank you for your consideration of our concerns and we welcome the opportunity to bring greater clarity to this issue while demonstrating the commitment of the business community to strengthen and preserve a verdant, healthy environment upon which we can all thrive.

Sincerely,
Fort Collins Area Chamber of Commerce

Ann Hutchison, CAE
President & CEO

cc: Kelly DiMartino

BUILDING COMMUNITY
Fort Collins Area Chamber of Commerce

225 S Meldrum • Fort Collins, CO 80521
(970) 482-3746
www.FortCollinsChamber.com

January 10, 2023

Kirk Longstein
City of Fort Collins
Fort Collins, CO 80521

RE: 1041 Regulations

Kirk -

The Fort Collins Area Chamber of Commerce continues to express tremendous concern about the timeline for the local 1041 regulations. As currently designed, Council members and the community would have four days to read, study and understand incredibly complex policy that will have far reaching regional impacts. We contend that such an aggressive schedule serves no one.

Additionally, we remain concerned that these regulations are out of place in our community. All the projects that would come under these regulations already have expansive and demanding layers of regulation and review at the local, regional, state and national level.

Should the City charge ahead with these regulations, we are very supportive of the suggestions that Peggy Montano of Trout Raley has made regarding permit denial, criteria and timeline for appeal. Her observations and recommendations for change are important and pragmatic should we adopt such regulation in Fort Collins. She has submitted for consideration the following changes:

- *Whenever City Council determines that a permit will be denied, the denial must specify the criteria used in evaluating the proposal, the criteria the proposal fails to satisfy, the reasons for denial, and the action the applicant would have to take to satisfy the permit requirements.*
- *The denial document will be served upon the applicant and the applicant may, within sixty (60) days of such service, be allowed to modify the proposal.*

We would very much like to see this process allow for ample opportunity for external stakeholders, the community and the Council to analyze this final draft and provide constructive feedback.

Sincerely,
Fort Collins Area Chamber of Commerce

Ann Hutchison, CAE
President & CEO

cc: Caryn Champine; Paul Sizemore; Rebecca Everette; Kelly DiMartino, Carrie Daggett, Peggy Montano

Fort Collins City Council
City Hall West, 300 LaPorte Ave.
Fort Collins, CO 80521

November 7, 2022

Re: 1041 Regulations Concerns

Dear Mayor Arndt and City Council members:

The undersigned environmental organizations, with members who reside, recreate, and otherwise utilize developed and undeveloped lands and resources within the City of Fort Collins, write to express our significant concerns regarding both the adoption process and substantive contents of the draft City of Fort Collins Colorado Guidelines And Regulations For Areas And Activities Of State Interest (hereafter, the "1041 Regulations"). We respectfully request the City Council to postpone further action pertaining to the 1041 Regulations' adoption to allow time for additional public input and for discussion and resolution of the issues raised below.

Substantive Concerns: In our view, the latest revised draft falls far short of the Council's prior commitment to utilize the C.R.C. § 24-65.1-101 *et seq.* regulatory process to avoid or mitigate negative impacts of uncoordinated and uncontrolled development upon public health, safety, and welfare, the environment and wildlife resources, and the City's operations and projects. *See,* City Ordinance No. 122, 2021. Although, as of this letter's date, the Council has not released an official revised draft for public review, the pre-release briefing materials provided by City staff indicate that the revised version differs significantly from the earlier draft provided for public review. These major changes reduce the document's coverage and weaken its substantive provisions to the point where the document bears scant resemblance to either the prior draft or the public commitments expressed in Ordinance No. 122, 2021. Several of the most serious substantive deficiencies in the revised draft are summarized below:

Coverage Scope: Consistent with Ordinance No. 122, 2021, the prior draft asserted the City's 1041 authority over Water and Sewer System Activity and Highway Activity (hereafter, the "Designated Activities") throughout the *entire geographical limits* of the City of Fort Collins. However, the revised draft limits 1041 authority to City Parks, Natural Areas, Natural Habitat Buffer Zones, and Cultural Resources. This unjustified scope reduction excludes the vast majority of City lands and resources from the Regulations' protective coverage and denies Fort Collins citizens their rightful voice in the siting, design, and approval of Designated Activities that affect their daily lives and well-being. In addition, as discussed below, the proposed scope reduction fails to comply with the terms of Ordinance No. 122, 2021. We urge the City Council to retain the full-City coverage of the prior draft regulations.

Financial Security Requirement: The revised regulations discard the Financial Assurance Requirement contained in the prior draft. Financial assurance requirements are critical to ensuring that Designated Activities (including where applicable, infrastructure decommissioning) are conducted in compliance with project specifications, public commitments, and applicable legal requirements. While one can certainly engage in a legitimate policy discussion over the nature and extent of financial assurance that is appropriate for any project or project category, the City's fundamental ability to require an appropriate level of financial

assurance should never be forfeited. We urge the City Council to retain a meaningful financial assurance requirement.

FONSI vs. FONAI: The revised draft alters the standard for evaluating Designated Activities impacts from a "Finding of No Significant Impacts" (FONSI) to a "Finding of Negligible Adverse Impacts" (FONAI). While seemingly trivial linguistically, this change, which was apparently made at the behest of development interests, significantly weakens the 1041 Regulations. The FONSI concept is well established as a widely-used standard in environmental law and practice. Over the decades, it has been well defined through practical application, regulatory interpretation, and case law. In contrast, FONAI, is a nebulous concept that is neither well-established, widely-used, nor well-defined. The effect will be a weakening of environmental and community public-interest protections, while allowing developers and City decisionmakers to construe undefined "negligible adverse consequences" in an arbitrary and ad hoc fashion. We urge the City Council to retain the prior draft's FONSI evaluation standard.

Procedural Concerns: In addition to above-noted examples of substantive weakening, the City's process leading to the 1041 Regulations' adoption raises significant concerns:

Last-minute major revisions: As discussed above, the pre-release briefing materials provided by City staff indicate that the revised version of the 1041 Regulations significantly weakens the language of the prior draft. However, the public, including the undersigned environmental organizations, have not been provided an opportunity to view the actual revised draft's language. The extent to which development interests have been engaged in, and made privy to, the revised draft's revisions remains, of course, unclear. However, the revised draft's one-way, pro-development weakening certainly raises the specter of significant (and quite effective) behind-the-scenes involvement. While all legitimate interests are entitled to a full and fair role in the regulation development process, the City Council should strive to ensure the process, and opportunities for involvement, are even-handed. In this case, the substantially modified, and substantially weakened, draft will be released with only minimal time for public review and input prior to the Council's First and Second reading. Moreover, this limited time frame falls squarely during the busy Holiday period where residents are often absent or occupied with Holiday preparation and engagements with families and friends. Sound public process entails meaningful opportunities for input from *all* affected stakeholders – not simply the segments that are the best-financed and the most vested in minimizing the Regulations' coverage. We urge the City Council to delay the First and Second readings to allow sufficient time for meaningful and effective public import on these significant regulatory changes.

Non-Compliance with City Ordinance No. 122, 2021: Perhaps the revised draft 1041 Regulations' most problematic deficiency is their failure to comply with the express terms of City Ordinance No. 122, 2021. Ordinance 122, 2021 states, in multiple locations, that the 1041 Regulations "shall apply" to Designated Activities "located partially or entirely within the boundaries of the City." *See, e.g.,* Ord. 122, 2021 at §§ 2(2), 2(4), 2(5), 3(2), 3(4), 3(5). In contrast, where the City Council chose to limit the Regulations' geographical scope, such as in the areas subject to the moratoria, it did so expressly. *See, e.g., Id.* at § 4(3)(ii). In short, the Ordinance's express language mandates that the Regulations shall apply throughout the City's geographical boundaries except for the limited exceptions stated therein. The revised

regulations' non-compliance with the Ordinance, coupled with the draft's significant last-minute weakening changes and the limited opportunity provided for public input on those changes, vastly increases the potential for legal challenges by aggrieved members of the public under Colorado Rule of Civil Procedure 106(a)4)[1]. Challenges such as these may often arise at the most inopportune times of a project's development cycle; and, even if unwarranted or ultimately unmeritorious, may result in a project's delay or economically-driven cancellation. This can occur even where the project is in the broader public interest and enjoys strong public support. No legitimate public interest, whether development or environmental, is served in rushing through a regulation that exhibits a glaring process deficiency that subjects it to potential challenge. Rather, the City Council should take the time necessary to address and cure the deficiency -- and minimize the attendant risks of subsequent litigation and project delay -- prior to finalizing the 1041 Regulations. We urge the City Council to take the time necessary to effectively and publicly address this deficiency prior to final passage.

We appreciate the extensive effort City staff and City Council have expended on the 1041 Regulations development process. We recognize the potential value the Regulations provide in assuming and maintaining local control over critical Designated Activities. We look forward to working constructively with the Council, City staff, and all affected stakeholders to ensure a publicly-responsive and legally sound resolution.

Thank you for your efforts on behalf of the residents and environment of Fort Collins.

Respectfully,

Sierra Club, Poudre Canyon Group
By: Doug Henderson, Elena M. Lopez

Larimer Alliance for Health Safety and the Environment
By: John McDonagh

Fort Collins Sustainability Group
By: Mark Houdashelt

[1] C.R.C.P. 106(a)(4) provides that an aggrieved party may seek judicial relief in Colorado district court, "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....".

Boxelder Sanitation District

MEMORANDUM

3201 E. Mulberry Street, Unit Q
P.O. Box 1518
Fort Collins, CO80522
Phone 970 498-0604

To: **Kelly Smith, City of Fort Collins**

From: **Brian Zick**

Date: **July 28, 2022**

Re: **City of Fort Collins Draft 1041 Regulation Review**

General Comments

1. Boxelder Sanitation District has made an initial review of the draft regulations and looks forward to subsequent meetings where the City can provide more information on the background and intent of the regulations and how they would apply to District projects.
2. The regulations appear to be specific to land use type projects with significant reference to growth and impacts from growth. The District is only a service provider and does not get involved in land use decisions and does not initiate development activity, so it is unclear how the regulations affect the District.
3. The purpose and findings of regulations are to protect public health, which the District is already doing at a high level.
4. The timing of those capital projects that will be subject to these regulations is not triggered by a specific development project, but stems from long-term planning done in a comprehensive manner.
5. The draft regulations will need further legal review and presentation to the District's Board of Directors, which may impact the proposed timeline established by the City. We would like to understand, since this is a Council-initiated measure, whether the Council will be reaching out our Board of Directors to explain its intent and expectation of working with a fellow utility and sister local government.
6. Currently we are regulated by state and federal agencies include NPDES permitting.
7. We actively work with the regional 208 planning agency (NFRWQPA) on water quality planning issues.
8. The cost of compliance with these regulations will have to be borne by the District's customers through monthly service charges. Some of the District's customers are City of Fort Collins residents and a portion of those are disadvantaged; those persons would be impacted by rate increases, which would directly affect housing affordability and other social equity issues.
9. The District is interested in determining how it can be exempt from the regulations.
10. Understanding of the master plans of all the utilities could be a better approach for the City than trying to have regulations that duplicate existing stringent public health regulations by higher levels of government and which will likely cause hardship for the District and its customers.

LEAGUE OF WOMEN VOTERS®
OF LARIMER COUNTY

November 17, 2022

Fort Collins City Council
City Hall West
300 LaPorte Ave.,
Fort Collins, CO 80526

Dear Mayor Arndt and City Council Members:

The League of Women Voters of Larimer County is deeply concerned regarding the contents of the draft City of Fort Collins Guidelines and Regulations for Areas and Activities of State Interest (the "1041 Regulations").

The League strongly urges Council to postpone any decisions concerning the revised Regulations for several months, allowing time for public input and discussion, and urges Council to allow time for input from the appropriate advisory committees involved in this issue. The Council should aggressively seek out and provide multiple and varied opportunities for public comment.

The League of Women Voters believes that governmental bodies must protect the Citizens' right to know by giving adequate notice of proposed actions, holding open meetings, and making public records accessible. We have very serious concerns that recent revisions to the proposed 1041 regulations have been made without those actions.

The pre-release briefing materials indicate that the revised version differs significantly from the earlier draft provided for public review and seems to weaken several essential regulations designed to protect the city and public interest. Changes this substantive must not be made without extensive public review and input.

We appreciate the work by City Staff and Council on the expanded 1041 Regulations and urge you to open the review process to the citizens of Fort Collins.

Sincerely,

Jane Hamburger

Jane Hamburger, Spokesperson
League of Women Voters of Larimer County
mjbhamburger@gmail.com
(970) 689-3663

LEAGUE OF WOMEN VOTERS®
OF LARIMER COUNTY

Northern Water
Northern Colorado Water Conservancy District
220 Water Avenue • Berthoud, Colorado 80513
800-369-7246 • www.northernwater.org

January 20, 2023

Honorable Jeni Arndt, Mayor
P.O. Box 580
Fort Collins, CO 80522
jarndt@fcgov.com

Fort Collins City Council
P.O. Box 580
Fort Collins, CO 80522
cityleaders@fcgov.com

Re: 1041 Regulations Comments

Dear Mayor Arndt and Councilors Gutowsky, Pignataro, Canonico, Peel, Ohlson, and Francis:

These comments are submitted on behalf of the Northern Colorado Water Conservancy District ("Northern Water"), the many constituents who receive water from existing facilities within the boundaries of the City of Fort Collins, and the NISP Participants. These comments apply solely to the issue of the development of domestic water systems under 1041. The designation of highways, interchanges, and sewerage are not addressed in these comments.

Initially, Northern Water wants to acknowledge the open and transparent process of the City staff in drafting regulations. Hosting the many stakeholder meetings and listening to the various groups with numerous interests is a difficult task and was done with great professionalism throughout the past several months.

The focus of the comments below is to propose changes to the draft regulations of November 2, 2022, which appear to create confusion or run afoul of existing authority, including being inconsistent with the statute which created the authority for 1041 regulations, and the law as interpreted through primarily case law; and to make Council aware of concerns of neighboring cities, towns and water districts regarding the potential consequences of the regulations.

As you consider our and other comments, we ask that Council seek to find a middle ground with these regulations which allow water projects to go forward without unduly burdensome provisions. We ask that you reduce costly criteria which require the use of numerous experts, particularly when state or federal permits already cover certain issues, and we ask that you seek to avoid expensive and time-consuming litigation while protecting the interests of the City as allowed under the 1041 statute.

Overview of the Scope of 1041

The thrust of the 1041 statute when passed in 1974 was to provide local governments a measure of land use permitting authority which did not previously exist. Prior to this time transportation projects could be constructed such as airports, highways and interchanges or actions taken such as building power plants or substations within the boundaries of a local government with no input from that government.

Initially, it is critical to bear in mind what is "*a matter of state interest*" under the law and, which elected body is to identify such matters. The scope of the 1041 law was created 50 years ago by the 1974 state legislature which created 1041 to identify a certain category of land uses "of state interest" to be regulated by both counties and municipalities if they so choose. The list of "*matters of state interest"* is now set by statute, and no new "areas or activities" are within the jurisdiction of the regulating county or city to add. While some constituents may ask for a broader list, it is not within the purview of the City to do so. The published designation addresses two of the statutory activities concerning domestic water: "the site selection and construction of Major New Domestic Water and Sewage Treatment Systems and the Major Extension of Existing Domestic Water and Sewage Treatment Systems" which are the two activities "of state interest" by statute.

A second area that is critical to bear in mind is the land use/water use interface of the 1041 law. The legislative history, which is testimony of bill sponsors and witnesses recorded at the time the law was passed, is available through Colorado State Archives and has been studied to support these comments. Excerpts of that history are provided to you in the *Legislative History Summary* attached. The designation was about regulation of land use (it was titled the "Land Use Act") and made clear that water rights and the use of water was protected. The legislative declaration provides that the "*Protection and utility, value and future of all lands … is a matter of public interest." [1]* This law is about regulation of facilities; not denial of the use of water. The legislative history makes clear that no veto was provided or intended.

For example, during the house reading Representative Dittemore (one of the bill's sponsors) quoted the water rights savings clause in the 1041 statute and said that Colorado's bill goes "further" than similar federal legislation, noting that the bill:

> "speaks to an issue that is so very important to every individual in the state of Colorado. And that is the right of water…. [water rights] are protected by the bill and are protected by the United States Constitution."[2]

And as one testifying representative stated, this is not for local government to

> "use as an excuse for a club to simply arbitrarily prevent some developer they don't like, they have to make a disposition and come up with some guidelines."[3]

[1] C.R.S. 24-65.1-101 (a)
[2] House Second Reading (Feb. 27, 1974, approximately 30:00)
[3] House Second Reading (Feb. 28, 1974, approximately 13:00)

In plain language, the right to use water is outside the authority of local governments to deny and the 1974 legislature included a specific section protecting water rights in 1041.

> "Nothing in this article shall be construed as: (b) Modifying or amending existing laws or court decrees with respect to the determination and administration of water rights." [4]

This also applies to groundwater: [5]

> "mineral does not include surface or groundwater subject to appropriation for domestic, agricultural or industrial purposes, nor does it include geothermal resources".

Lastly, in the general definitions a key portion of the 1041 law states, "Development" means any construction or activity which changes the basic character or *the use of the land on which the construction or activity occurs*."[6]

In the face of this legislative history one might reasonably ask, how does this fit with the several reported cases which uphold the denial of 1041 permits over the last decades? In the most recent case, *City of Thornton v. Larimer County* issued in September of 2022, the Court of Appeals made it clear that Thornton can reapply for a permit.[7] The denial therefore may be temporary and both governments will again face the cost and struggle for a balanced solution. In the *Eagle County v. Colorado Springs* litigation of the 1990's,[8] the parties ultimately negotiated a settlement; and in other counties, such as Adams concerning Aurora's Prairie Waters Project, a balance through an agreement was reached. The challenge here is how to balance the reasonable regulation of land use within City boundaries with the protected right under state law to divert and use water for domestic purposes either through a major expansion of a domestic water system or a development of a new domestic water system.

We ask that Council provide a method within the regulations for an applicant to obtain a permit and build its project without the need to engage in repeated permit applications as a result of contested denials and appeals. This can be done by adopting some of the process suggestions made during the stakeholder engagement meetings.

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[4] C.R.S. 24-75.1-106
[5] C.R.S. 24-65.1-104 (10)
[6] 24-65.1-102 (1)
[7] "As for the Board's criticism of Thornton for failing to provide a "Shields Street" siting alternative, the court concluded the request was outside the Board's power. Again, Thornton had reason to believe that this proposal would require it to degrade its water source by running it through Fort Collins vis-a-vis the Poudre River before collecting, cleaning, and transporting it to Thornton. In addition to the fact that this would require modification of the water decree, the court concluded that such a request was not part of the Board's power to regulate the "siting and development" of domestic water pipelines. See Land Use Code § 14.4(J); § 24-65.1-204(1)(a), C.R.S. 2021. For these reasons, the Board could not justify its denial of Thornton's application on this aspect of the application —*or require it to include such a route in future applications." (emphasis added)* Thornton slip opinion at 26-27.
[8] 895 P.2d 1105 (1994)

Selected Comments concerning and proposed refinements to the Standards affecting water facilities in the regulations

Create a set of Standards solely applicable to Major New Domestic Water and Major Extension of Domestic Water Systems. To provide clarity for the water community and the City, we request the City enact a stand-alone section of standards for regulation of water projects. Currently there are two separate sections of standards; Common Review Standards for all applications and second section of Review Standards for Major new Domestic Water and Major Extensions of the same. Many of the Common Standards do not seem applicable, but we are not sure. It would make the process cleaner and more efficient for both the Applicant and the City if the Applicant does not have to try and sort through the Common Review Standards and add those to the specific water standards to discern what the City's intended standards are in total for domestic water supply projects. For example, included within Common Review standards are "changes to view sheds; quality of recreation fields or courts; changes in access to recreational resources". These appear to be more focused on the highway designation, but it is quite unclear.

Include Standards supported by the plain language of the statute and interpretive case law. The litigation of the last decades is instructive that requiring an Applicant to evaluate certain alternatives to a water project is not supported by law. Those include regulations that require the applicant to degrade its domestic water quality and includes requests to run the water down the river to a lower point of diversion that is not included in a water court decree.[9] We believe that an applicant's engaging with staff prior to coming to council can be very useful to seek detailed on-the-ground alternatives to a proposal and the regulations should require this be done as a part of the overall project permitting. The language concerning alternatives can be modified to provide that alternatives protect water quality and align with water court decrees.

Avoid attempted regulation of augmentation plans, exchanges and substitutions of water supplies. These are singularly regulated and administered by the State and Division Engineer and also subject to frequent changes. In a year of relative water abundance, no augmentation may occur for a domestic water user while in a drought year, the State Division of Water Resources may permit exchanges during specific days or months under certain conditions to meet a temporary need. It is highly doubtful that the City may regulate these unique water supply activities which are allowed by water court decree or administratively through the substitute water supply plan statute. We suggest modification of Regulation 1-110 to eliminate these words in the City's definition of major new domestic water system.

Exercise regulatory authority so that City regulations acknowledge and work in concert with County regulatory authority. The City can regulate within the authority set forth under the 1041 statute but so can the County. The basis of the authority is identical in for both governments. In addition to the City and County, permit applicants also may be required to comply with a plethora of state and federal laws. We request that the regulations expressly seek to work in concert with the county 1041 regulations and recognize the scientific work done by an applicant for state and federal permitting. It may well be that you or your staff disagree with some of those studies but,

[9] See City of Thornton v. Larimer County slip opinion at 26 and 27.

recognizing them allows for a reasoned discussion of City concerns. If no coordination exists, an applicant may be caught between conflicting levels of government to the detriment of water users.

Set realistic baselines for evaluation under the standards and avoid vague language. Regulations 2-401 (F)(G)(H)(I)(J)(K)(L)(M)(O)(P) and (Q) encompass hiking, fisheries, reservoir levels, quality of horseback riding trails, microclimates, soil deterioration, biomass, terrestrial food webs and many more items. While the 1041 statute in its section 402(3) allows the guidelines to be "more stringent" those more stringent requirements are to be related to the statutory criteria. This result was set out in the *Eagle County* litigation discussed above. We have submitted requests for clarification to many of these sections of the draft regulations in attempt to have clear objective science-based standards so all parties can understand the requirements and subjectivity can be minimized. While the City may now look at the regulations as to be applied to others, in the future the City may likely be an applicant subject to these regulations as well.

Ensure that the statutory definition of "development" is included in the regulations and is applied to a permit request. The 1041 statute regulates the basic character of limited lands, not all lands within a jurisdiction. The definition is: "any construction or activity which changes the basic character or use *of the land on which the construction or activity occurs*".[10] Including the statutory definition will ensure that the regulations will not inadvertently be applied outside of these parameters. The definition of Impact Area in the regulations at 1.110 (…"shall mean the geographic areas, including the development site, in which any adverse impacts are likely to be caused by the development") appears to be inconsistent with the statutory definition and could be modified to be consistent.

Before concluding this comment letter, we also want to take the opportunity to outline an often-overlooked portion of the work of Northern Water; the environmental programs as set out below.

Northern Water's Environmental Stewardship

In addition to water collection and distribution, in 2018 Northern Water created an Environmental Services Division that has continually expanded since that time. Northern Water understands that operating and managing large scale water supply projects comes with an environmental footprint. We take very seriously our responsibility to protect and manage the natural resources affected by our operations and infrastructure. We also deem ourselves and integral part of the communities that surround our systems, on both sides of the continental divide and are vested in their overall well-being and the protection of the resources that they depend on for economic vitality, quality of life and recreation. As a raw water provider on whom over one million people rely for their drinking water supply, protecting watersheds is of utmost importance, and we take pride in providing strong leadership in watershed protection and restoration. These commitments are embodied in the breadth and scope of our programs and initiatives as well as an organization-wide attention to environmental matters.

- This Division is responsible for managing water quality, water efficiency, environmental regulatory compliance and planning, and environmental data collection and dissemination.

[10] C.R.S. 24-65.1-102 (1)

Additionally, the Division provides guidance on operational environmental stewardship, including but not limited to, environmental impact avoidance and minimization, and water conservation. As a part of its environmental services, Northern Water maintains ongoing water quality monitoring that is publicly available on the Northern Website including general water chemistry, metals, nutrients, physical parameters, chlorophyll a, zooplankton, phytoplankton and approximately 150 emerging contaminants such as pharmaceuticals and cosmetics.

- Northern Water spearheaded a regional Source Water Protection Plan in 2019, which encompasses all watersheds adjacent to our facilities and is focused on safeguarding the highest water quality possible. In the wake of the catastrophic 2020 wildfires, Northern Water agreed to sponsor the post-fire watershed restoration for the East Troublesome Fire and has worked in tight partnership with the Cities of Greeley and Fort Collins, and the Coalition for the Poudre Watershed to leverage Federal and State resources for the benefit of the communities affected by fire-impacts from these burn scars and the wildlife and aquatic resources that depend on these watersheds. In addition, Northern Water has partnered with the National Park Service, U.S. Forest Service, U.S. Bureau of Land Management, and others to reestablish vegetation and ecosystem functions in the headwaters of the Colorado River within and around Rocky Mountain National Park.

- Northern Water is a signatory to the Colorado-Big Thompson Project (C-BT) Headwaters Partnership Memorandum of Understanding, and broadly engaged in forest health management and protection initiatives in all watersheds connected to the C-BT, Windy Gap and NISP projects. Northern Water is a founding member of the Kawuneeche Valley Ecosystem Restoration Collaborative whose mission to restore the headwaters of the Colorado River. Northern Water is actively pursuing other watershed restoration projects through Learning By Doing in the Fraser and Colorado Rivers, as well as via the Windy Gap Firming Environmental Fund established in 2021, which will distribute $15 million towards river restoration projects over the next five years.

- Northern Water has for many years participated in the aquatic nuisance species boat inspection programs to keep nuisance species from becoming established in the water bodies that form the C-BT system and serve much of the front range including the City of Fort Collins.

- Northern Water is a national leader in water conservation and has received the EPA Partner of the Year Award four years in a row (2019, 2020, 2021, and 2022). Northern Water is deeply committed to continuing to enhance our water efficiency programs in service of our constituents and allottees in Northern Colorado. We also look within when examining environmental impacts and have evaluated ways to improve our facilities and operations to reduce adverse effects to wildlife. Northern Water has installed wildlife crossings to protect elk, deer, moose and other animals from being trapped in water collection and delivery canals. Northern Water completed the Watson Lake Fish Bypass project on the Poudre River, which allows for aquatic life movement through a formerly impassible barrier.

- For over two decades, Northern Water has played a critical role in the recovery of endangered species on both sides of the Continental Divide through the Upper Colorado River Endangered Fish Recovery Program and the Platte River Recovery and Implementation Program.

- Finally, as a part of both the Windy Gap Firming Project and the NISP Project, many environmental improvements will be implemented, including but not limited to, reconnecting portions of the Upper Colorado River, restoring and enhancing wildlife habitat, improving water quality, releasing flows to enhance ecological health and boating opportunities, and providing new recreation sites, in a partnership with Larimer County, at the Chimney Hollow and Glade Reservoir sites.

In conclusion, we recognize the authority of the City to regulate water supply activities as set forth in 1041 but ask that it be done in an efficient and predictable manner for the benefit of the residents of the region, including those within Fort Collins, who, as water customers, ultimately pay for the permit program adopted by the City. We appreciate the opportunity to provide these comments to you.

Sincerely,

Peggy E. Montaño
For Trout Raley,
General Counsel to Northern Colorado Water Conservancy District

Enclosure: Summary of HB74-1041 Legislative History
CC:
City of Dacono
City of Evans
City of Fort Lupton
City of Fort Morgan
City of Lafayette
Fort Collins Loveland Water District
Left Hand Water District
Morgan County Quality Water District
Town of Eaton
Town of Erie
Town of Frederick
Town of Severance
Town of Windsor
Weld County Water District

SUMMARY OF HB 74-1041's LEGISLATIVE HISTORY, FOCUSING SOLELY ON WATER RIGHTS/WATER SUPPLY PROJECTS

Attached to January 20, 2023 comment letter to Fort Collins

BACKGROUND AND OVERVIEW OF C.R.S. § 24-65.1-101 *et seq*.
Colorado's "Land Use" Bill

Repeatedly throughout the 1974 hearing testimony, the legislators emphasized that H.B. 74-1041 was meant to an "effective and sensible land use package." House Second Reading (Feb. 27, 1974, approximately 05:00). The problem the bill was intended to address was the fact that local governments were not making uniform decisions when approving or disproving land use/development projects with respect to those projects' impacts on areas and activities of statewide interest. House Local Government Committee (Feb. 4, 1974, approximately 1:32).

As set forth in the statute, the legislators were concerned with land development activity that would impact things like mineral resource development and natural hazard areas – including floodplains, mining, wildfire and geological hazards – or public health dangers in areas surrounding key facilities. *See* C.R.S. §§ 24-65.1-201 -202. The original concept of H.B. 1041 (as enacted and amended in 2005) was to establish a state permitting agency for zoning and land-use issues concerning these areas of statewide importance and eliminate the problem of disparate land-use decisions that were occurring on a county-by-county and municipality-by-municipality basis. The statute does not directly address or contemplate 1041 regulations that would impede water distribution and supply beyond the confines of a given development project or its impacts on the immediate community.

The intent of the bill overall was to give local governments a growth management tool to work in tandem with technical and financial assistance from the State when identifying, designating, and regulating these "areas and activities of state interest," but without giving local governments free

license to override other pre-existing resource regulatory frameworks in place. During hearings, the legislature shifted the permitting function from a central stage agency to local governments and then, at a late stage in the bill's lifecycle, the Colorado legislature determined that the "State Land Appeals Board," which was meant to be the arbiter of disputes between state agencies and local government decisions and other independent stakeholders, was both unfunded and unnecessary, and the appeals board was written out of the bill.

Despite the fact that intermediary disputes process was written out of the bill at a late stage (the disputes process is and remains the district court system) the legislative history makes clear that the legislators – both the sponsors and amendment drafters, as well as those speaking during the hearings – did not anticipate that the 1041 process of identifying, designating, and regulating areas and activities of state interest would allow local governments to "veto" the decisions of water districts (or other regulating bodies) with respect to developing, overseeing, and administering water issues or other resources. For example, in an earlier session, one legislator addressed the issue of RTD route site selection, and expressed the concern that 1041 might give local government the power to override RTD route selection, noting that

> The question, that, that comes up is can local government prevent the RTD route from through its jurisdiction. I believe that there's language in [the bill] that prevents the local government from doing that. **And, I would defend strongly the idea that local governments should not be permitted to veto the RTD route.**

House Second Reading (Feb. 27, 1974, approximately 1:37).

Rather, throughout the bill cycle, the legislators were primarily concerned with impacts connected with the "footprint" of a given land use project. 1041 addresses development projects having a "significant impact" on resources of statewide importance. *See* C.R.S. § 24-65.1-101. The bill attempted to strike a balance between land and resource use and the decision-making process amongst competing state and local interests and stakeholders. Pursuant to the statute, local

governments are empowered (via permissive, but not mandatory, authority) to enact their own regulations and exert certain control over development in areas falling within the statute's purview. Certain of the statute's provisions concerning "areas and activities" relate to water project development. *See id.* § 24-65.1-203(a), (b), (h). The statutory scheme provides certain criteria for how these areas and activities should be administered*, see e.g., id.* §204(8), and also provides for notice and hearing procedures for designation as well as a permitting process for compliance with regulations once an area or activity has been designated, *id.* §§ 401 – 501.

BILL'S PURPOSE AND INTENT OVERALL

One legislator testified that the rhetorical question of "What do we intend this bill to do?" could be answered with "To me, the need for this bill, is because the local government has not been looking uniformly at what is state interests when they make their decisions." House Local Government Committee (Feb. 4, 1974, approximately 1:32). Sponsoring legislators noted that "the work of the interim committee … was based upon the American Law Institute recommendations and some of the other bills that were passed in other states …. There have been very few states in the West at this time who have adopted any kind of meaningful land use legislation." House Second Reading (Feb. 27, 1974, approximately 09:00).

Although the bill granted local government certain powers in administering (including permitting) areas and activities of state interest, it was not meant, as one testifying representative stated, for local government to "use as an excuse for a club to simply arbitrarily prevent some developer they don't like, they have to make a disposition and come up with some guidelines." House Second Reading (Feb. 28, 1974, approximately 13:00). Late in the bill cycle a senator framed both the central goal of the bill and its central conflict as follows: "To me what we're trying to do in this land use thing is simply to determine what is the state's role in land use? What should the state be

doing what should the state not be doing." Senate State Affairs Committee (April 10, 1974, approximately 25:00).

WATER RIGHTS AND DEVELOPMENT ISSUES

Regarding water issues, the Bill includes a savings clause providing that

> **Nothing in this article shall be construed as: … Modifying or amending existing laws or court decrees with respect to the determination and administration of water rights.**

C.R.S. § 24-65.1-106(b). When water issues or conflicts between water rights and potential 1041 regulations arose as hypotheticals during hearing testimony, the legislators frequently just referenced this savings clause without additional explication, clearly not envisioning that 1041 regulations would interfere with the existing system of water law in Colorado.

For example, during the house reading Representative Dittemore (one of the bill's sponsors) quoted the water rights savings clause and said that Colorado's bill goes "further" than similar federal legislation, noting that the bill

> speaks to an issue that is so very important to every individual in the state of Colorado. And that is the right of water…. **[water rights] are protected by the bill and are protected by the United States Constitution.**

House Second Reading (Feb. 27, 1974, approximately 30:00). Any time a legislator would bring up water, the response would be that it was clear in the bill that it did not have an effect on existing water law or decrees, without deeper analysis.

With respect to another provision directly addressing water systems[1] the legislators frequently raised the issue of what constituted "major" during the hearings and debated what precisely delineated "major" vs. "non-major" within the meaning of the statute. One senator in a committee hearing described "major" as "an activity that has a really significant impact on the present local patterns of the community." Senate State Affairs Committee (Mar. 27, 1974, approximately 24:00). The senators recognized the inherent difficulty in measuring "major" by its impact on a community, as what might be "major" in a tiny town would be absolutely irrelevant under other circumstances. The senators attempted to determine what percentage of a water pipeline extension would become "major" but noted that number of different variables in a given project would make such baseline determinations unworkable. *See id.* One senator noted that some types of industrial activity and extension of water lines would have "virtually zero demographic" while other similar extensions might have an effect on highway congestion, road services,…

Earlier in the bill cycle, in the House, a representative raised the concern about the development of water resources, testifying in opposition to an amendment. He felt the development of the state's water resources was adequately covered under existing law. House Second Reading (Feb. 28, 1974 Part 2, approximately 1:18).

In response, sponsor Representative Dittemore noted that "[c]oming back to the original contemplation of the committee … we have very clearly stated that this bill does not modify or amend existing laws or court decrees with respect to the determination and administration of water rights."

[1] "[A] local government may designate certain activities of state interest from among the following: (a) Site selection and construction of **major new domestic water** and sewage treatment systems and **major extension of existing domestic water** and sewage treatment systems; (b) site selection and development of solid waste disposal sites except those sites specified in section 25-11-203(1), sites designated pursuant to part 3 of article 11 of title 25, C.R.S., and hazardous waste disposal sites, as defined in section 25-15-200.3, C.R.S." C.R.S. § 24-65.1-203(a), (b) (emphasis added).

LAW OFFICE OF
JOHN M. BARTH

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December 19, 2022

By email to: bvatabe@fcgov.com

Brad Yatabe
Assistant City Attorney
City of Fort Collins
300 La Porte Avenue
Fort Collins, CO 80521

Re: Response to Trout Raley letters of August 30 and September 16, 2022 regarding Fort Collins Draft regulations on Area and Activities of State Interest, § 24-65.1-101 et seq.

Mr. Yatabe:

I am writing on behalf of my client, Save the Poudre, in response to two (2) letters dated August 30 and September 16, 2022 sent to you by the law firm Trout Raley on behalf of Northern Colorado Water Conservancy District ("Northern") taking issue with language in the City's draft 1041 regulations. We provide this response to the two letters.

August 30, 2022 letter

Northern's letter of August 30, 2022 takes issue with two aspects of the City's proposed 1041 regulations, namely section 2-201 (Intergovernmental Agreements) and section 3-201 (L)(water conservation mitigation measures).

a. Section 2-201 (Intergovernmental Agreements "IGA")

Northern first argues section 2-201 of the draft regulations allowing an IGA in lieu of a 1041 permit is not authorized under the state 1041 enabling legislation. Save the Poudre agrees and suggests that any reference to an alternative IGA process be removed from the regulations prior to enactment. In addition to the reasons set forth in Northern's August 30, 2022 letter, we also specifically take issue with the draft language of section 2-201 stating that "the approval of any intergovernmental agreement is a ***legislative act***…" (emphasis added).

The state 1041 enabling legislation authorizes local governments to establish a 1041 permit process for regulation activities of state interest. Local government land use permit processes are "quasi-judicial" processes that guarantee public notice and due process rights of participation by the local citizenry. Any final 1041 land use permits are appealable by citizens

pursuant to Colorado Rule of Civil Procedure 106 and are governed by the standard of review outlined in that rule.

There is no support in the state 1041 statute allowing a local municipality to fundamentally change the legislature's mandated 1041 permit process to a "legislative" act, thus depriving its citizenry of its quasi-judicial due process rights and ability to appeal under Rule 106. A change from a quasi-judicial process to a legislative process would also alter both the procedure and standard of review of any challenge to a local 1041 decision. Accordingly, we likewise request that section 2-201 be removed from the draft regulations prior to adoption and that all references to an IGA be eliminated.

b. Section 3-201 (L)- water conservation mitigation measures.

Northern's August 30, 2022 letter also argues that the City may not impose water conservation mitigation measures on a water distribution system despite the fact that the water diversion would be located within the City limits. We strongly disagree and recommend that you adopt section 3-201(L) of the draft regulations.

Northern's argument is based on a self-serving interpretation of the state 1041 law. Notably absent from Northern's August 30, 2022 letter is any evaluation of Colorado Supreme Court case law interpreting the state 1041 law. Both the Colorado Supreme Court and federal U.S. District Court for the District of Colorado have stated that a local government's power to supervise land use extends to matters that "may have an impact on the people of the state beyond the immediate scope of the land use project." *City and County of Denver v. Bergland,* 517 F.Supp. 155 (D.Colo. 1981); *City and County of Denver v. Bd. of County Comm'rs*, 782 P.2d 753 (Colo. 1989 *en banc*). Northern's letter ignores that Section 203(1)(h) of the state 1041 law specifically allows local governments to regulate "efficient utilization of municipal and industrial water projects." C.R.S. § 24-65.1-203(1)(h). This is precisely what draft section 3-201(L) does—namely, it ensures that Northern's diversion of historically agricultural waters in Larimer County is efficiently utilized as municipal water elsewhere. The Colorado Supreme Court has recognized that the state 1041 law is "designed to protect Colorado's land resources and allocate those resources among competing uses." *City and County of Denver,* 782 P.2d at 755. Further, the Court has also recognized that the "Land Use Act gives [local governments] the power to regulate…operation of extraterritorial waterworks projects." *Id.* at 762.

We also disagree with Northern's argument that the City cannot regulate "water diversions" within the City limits. The state 1041 law defines the term "water distribution system" to include definitions in "section 25-9-102(5), (6), and (7), C.R.S…" C.R.S. § 24-65.1-104(5). In turn, C.R.S. § 25-9-102(6) defines "water distribution system" to mean "any combination of pipes, tanks, pumps, or other facilities that delivers water from a source…to the consumer." It is clear that the General Assembly gave local governments broad power to regulate water distribution systems anywhere from the "source to the consumer." This includes any "water diversion" that is appurtenant to the water distribution system.

Accordingly, we believe there is strong legislative and case law support for section 3-

201(L) of the draft 1041 regulations and request that the City adopt the provision as written.

September 16, 2022 letter

The focus of Northern's September 16, 2022 letter is a self-serving interpretation of the Court of Appeals decision in *City of Thornton v. Larimer County.* Importantly, the City should note that County's decision to ***deny*** Thornton's 1041 permit was upheld by the court. The City must remember that its future decisions regarding 1041 applications will carry a presumption of validity and the City's interpretation of its own 1041 regulations will be given deference.

Second, none of the Thornton litigants brought an appeal of the decision to the Colorado Supreme Court. Thus, the highest court in the State has not validated any of the Court of Appeals findings in the *Thornton* decision. For the reasons stated below, we disagree with Northern's reading of the Thornton decision and believe several of the Court of Appeals findings are inconsistent with prior overriding Colorado Supreme Court decisions and statutory language.

A. Northern's September 16, 2002 letter argues that local government regulation is "limited to the land area being disturbed by the project." As noted above, this argument has been specifically rejected by the Colorado Supreme Court. See*, City and County of Denver v. Bergland,* 517 F.Supp. 155 (D.Colo. 1981); *City and County of Denver v. Bd. of County Comm'rs*, 782 P.2d 753 (Colo. 1989 *en banc*)(a local government's power to supervise land use extends to matters that "may have an impact on the people of the state beyond the immediate scope of the land use project").

B. For the same reasons noted above, we disagree that a local government cannot consider "farm land dry up" in evaluating a 1041 permit application. The state 1041 law specifically allows local governments to consider "[t]he [protection of the utility, value, and future of all lands…" C.R.S. § 24-65.1-101(1)(a).

C. The state 1041 law specifically allows local governments to consider impacts to "privately owned land." C.R.S. § 24-65.1-101(1)(a). Thus, we disagree with Northern's argument that consideration of eminent domain impacts to private property is beyond the consideration of local governments in a 1041 permit proceeding.

D. As noted above, a local government's ability to regulate the siting of "water distribution systems" extends from the "source to the consumer." C.R.S. § 25-9-102(6). Thus, local governments may consider water distribution system siting alternatives that may differ from a water developer's preferred alternative.

E. Further, applying to NISP and Fort Collins, just because some of the construction of NISP occurs outside the City of Fort Collins' annexed boundary, the City of Fort Collins still has state authority to regulate any impact that will occur within the City of Fort Collins including negative impacts to City property, wetlands and Natural areas, habitat and riparian forests, and aquatic resources in and surrounding the Cache la Poudre River in Fort Collins.

In summary, we urge the City to adopt strict and comprehensive regulations to

regulate matters of state interest, including development of water distribution systems that will have irreversible harm to the City's great resource…the Cache la Poudre River.

s/ John Barth
Attorney at Law
P.O. Box 409
Hygiene, CO 80533
(303) 774-8868
barthlawoffice@gmail.com

cc: Gary Wockner, Save the Poudre

1-5-2023

My comments regarding Version 2 of the City's Draft 1041 Regulations.

First, eminent domain is the right of the government to take property, including private property for public use.

Examples of entities that have eminent domain powers:

Northern Water, like other water providers, stores and delivers water for irrigation, municipal, domestic and industrial purposes. Northern Water is a public agency that contracts with the U.S. Bureau of Reclamation to build and maintain the Colorado-Big Thompson Project. https://www.northernwater.org/about-us

The East Larimer County Water District is a pollical subdivision of the State of Colorado. ELCO has the authority to condemn property. https://www.elcowater.org/about-us

CDOT is a Colorado state government agency. https://www.codot.gov/about

All Fort Collins residents and property should be protected under the City's 1041 regulations. I would like to see the City adopt 1041 regulations without geographic limitations.

Using regulations with geographic limitations that only protect City interests such as existing or planned future City natural areas or parks, City owned right of ways, existing or potential future buffer zones for natural habitat or feature and historic resources puts City residents and their property at risk for the following reasons:

- Property owners are left to their own resources to deal with monied, powerful entities that have eminent domain powers.
- Because 1041 regulations must be followed in addition to all other City development codes, applicants may be incentivized to develop their project outside of geographic areas protected by 1041 regulations, in other words outside of City owned property and on private property owners' land.
- The specific purposes listed in the draft regulations, and below, are almost wholly gutted by limiting the regulations to geographic locations of City owned land, natural area or park, anticipated City building sites, buffer zones of natural habitats and historic resources. 1-102 (A)
    - (1) protect public health, safety, welfare, the environment and historic and wildlife resources;
    - (2) Implement the vision and polices of the City's Comprehensive Plan;
    - (3) Ensure that infrastructure growth and development in the City occur in a planned and coordinated manner;
    - (4) Protect natural, historic, and cultural resources; protect and enhance natural habitats and features of significant ecological value as defined in Section 5.6.1; protect air and water quality; reduce greenhouse gas emissions and enhance adaptation to climate change;
    - (5) Promote safe, efficient, and economic use of public resources in developing and providing community and regional infrastructure, facilities, and services;

    - (6) Regulate land use on the basis of environmental, social and financial, impacts of proposed development on the community and surrounding areas; and
    - (7) Ensure City participation in the review and approval of development plans that pass through and impact City residents, businesses, neighborhoods, property owners, resources and other assets.
- Geographic limitations creates confusion and uncertainty for applicants and residents and property owners. There are two different sets of regulations for land within and without proposed geographic limitations.

The draft regulations attempt to address disproportionately impacted (DI) communities. According to the draft regulations, DI community shall mean a community that is in a census block group where the proportion of households that are low income, that identify as minority, or that are housing cost-burdened is greater than 40% as such terms are defined in CRS § 24-4-109(2)(b)(II) and as amended. (Bold added by me).

I recommend using Colorado's EnviroScreen https://teeo-cdphe.shinyapps.io/COEnviroScreen_English/ to better characterize the Fort Collins community as to low income, minority or housing cost burdened greater than 40%. I think how DI communities will be addressed needs to be expanded in the regulations.

I appreciate that air quality, emissions and leak prevention are addressed in the regulations. I'm hoping air quality measures, including limiting GHG emissions, are in place and enforced for both the construction phase and operational phase of any development.

I agree the modification of standards, variances and appeal form administrative decisions to the land use review commission of the land development code should not be applicable to the 1041 regulations.

Thank you for your consideration.

Karen Artell

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MEMORANDUM

DATE: January 25, 2023

TO: Kirk Longstein, Senior Environmental Planner

FROM: Jason Graham, Director of Water Utilities

RE: Draft 1041 Regulations with Geographic Limitations Version 2

Thank you for this opportunity to provide comments and for all your efforts in engaging with Fort Collins Utilities' Water Utilities to provide clarifications and updates. Please see the following summary of comments from Water Utilities staff on Version 2 of the Draft 1041 Regulations. We have reviewed Draft 3 and all the comments except #9 have been addressed in some manner. Please let us know if you have any question or topics for further discussion.

---

1 **Comment:** It is our understanding that Draft Version 3 will be before Planning and Zoning Board on January 25th, 2023, and then a First Reading at City Council on February 7th, 2023. The turnaround time for review of the Draft Version 3 is not long enough to adequately provide proper analysis and comments for such a complicated and expansive regulation.

Ask: We ask that a reasonable timeframe be provided for all stakeholders to review the Draft Version 3 and provide comment on that draft language.

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2 **Comment:** Draft Version 2 would apply the proposed 1041 regulations to many City projects, specifically ones that are small pipe projects, repairs, and aging infrastructure replacements. It is our understanding that the proposed 1041 regulations are intended to encompass only larger projects. Using appropriate thresholds will set clear expectations for project planning and reduce the number of maintenance, repair, and replacement jobs from having to go through these additional and, at times, duplicitous regulatory processes.

Ask: Similar to other local 1041 regulations, we ask that the applicable projects be limited to larger projects by setting size thresholds and exclusions.

Recommend: Please consider the following thresholds.

- Site selection and development of new or extended domestic water or sewer transmission lines with a running length greater than 1,320 linear feet that meet one or more of the following:

- New transmission lines contained within, regardless of direction, a new permanent easement(s) 30-feet or greater in width.
- New transmission lines contained within a new permanent easement(s) 20-feet or greater in width that are situated within 20-feet of a related easement(s);

- This designation shall not include the maintenance, repair, adjustment, or removal of an existing pipeline or the relocation, replacement, or enlargement of an existing pipeline within the same easement or right-of-way, provided no additional permanent property acquisitions are required.
- The designation shall also not include the addition, replacement, expansion, or maintenance of appurtenant facilities on existing pipelines.
- This designation shall not include the emergency repairs as a matter of health and safety.
- This designation shall not include pipe infrastructure 12 inches and smaller in water distribution system.
- This designation shall not include pipe infrastructure 15 inches and smaller in wastewater collector system.

3 **Comment:** Draft Version 2 would apply the proposed 1041 regulations to many internal facility projects that we do not believe are intended to be captured. Clear thresholds and boundaries are needed to for existing facilities.

Ask: We ask that the definitions of "Major extension of an existing domestic water treatment system" and "Major extension of an existing sewage treatment system" be amended to not include changes and modifications that do not increase the facilities' capacity and stay within the existing permanent property.

Recommend: Please consider the following exclusions for "Major extension of an existing sewage treatment system" and "Major extension of an existing domestic water treatment system."

- Any facility or lift station within existing permanent property that does not increase the rated capacity from the Colorado Department of Public Health and Environment (CDPHE).
- Any facility, pump station, or storage tank within existing permanent property that does not increase the rated capacity from CDPHE.

4 **Comment:** The definition of Material Change in section 1-110 of Draft Version 2 is confusing and subjective in its applicability. Further, it also promotes a circular reference. The definition of Material Change is defined as a change (scale, magnitude, nature, or adverse impact) in an approved permit (or FONAI if applicable) or in absence of an approved permit (where and existing development) where one would have been applied. When looking at the applicability section of this regulation to find where one would have been applied you are directed to see if your project is a Major Extension. In defining Major Extension (either water or wastewater definitions) one must look at the definition of Material Change.

It appears that Section 2-304(A)(2) of Daft Version 2 covers the intent of any subsequent material changes (after the initial determination) potentially needing to go through the process again.

Ask: For clarity, we ask that the definition of Material Change be changed to avoid ambiguity and circular referencing by removing complex discussions as part of a separate section.

Recommend: Please consider the following definition of "Material Change."

- *Material Change* shall mean to make different or undergo a modification, either by scale, magnitude, or nature. Examples would include structural modifications, change of use, change of operation, change of user, or change of location.

5 **Comment:** The use of the term "ditch" in the definition of Domestic Water System in Draft Version 2 is vague and lacks clarity between raw drinking water sources and those used solely for irrigation and/or stormwater conveyance.

Ask: We ask the language is clarified as it pertains to ditches to ensure that this term does not pull in more projects than what is intended. We ask that this language more closely aligns with Larimer County as recommended below.

Recommend: Please consider adding an exemption or definition explicitly stating that ditches comprised entirely of irrigation, or stormwater, are not to be included in the definition ditches as it applies to domestic water. We suggest the following code language.

- This designation shall not include the maintenance and operation of irrigation; ditches, canals, or laterals, including those used to fill a water irrigation storage reservoir, nor shall this designation include the maintenance and operation of an existing water irrigation storage reservoir.
- This designation shall not include the maintenance and operation of ditches or canals used for stormwater purposes.

6 **Comment:** Applicability, Section 1-104(A) of Draft Version 2, requires projects that would be applicable under both the standard development review process and 1041 Regulations to be held to the 1041 Regulations. Exemptions, Section 1-401(C), explains any site specific residential/commercial/industrial/mixed use development plan that directly necessitates work that meets 1041 applicability is excluded from 1041 process. This is confusing.

Ask: Please review to see if there is a way clarify applicability for private development projects.

7 **Comment:** Including geographic limits within the definitions of "Major new domestic wastewater treatment sewage system", "Major new domestic water system" and "Site selection of arterial highways and interchanges and collector highways" are repetitive and add confusion to the definition.

Ask: Please pull these limits out of the definitions and place either in the applicability or exemptions areas to avoid confusion.

8 **Comment:** Section 3-201 of Draft Version 2 sets review standards that a facility must at or near operational capacity (for water distribution) and at a level requiring expansion (for sewage collection) before an upgrade. It also limits consideration of new facilities only if existing facilities cannot be upgraded. More than just operational capacity or ability to upgrade is considered when determining when new or expanded

systems are needed for the long term needs of the community and compliance with applicable regulations. Some of the other review criteria appear to be duplicative of itself and/or state requirements.

Ask: We ask that Domestic Water or Sewage Systems review criteria to be reduced to those that support the intent of the proposed 1041 regulations.

Recommend: Please consider keeping only the following review criteria.

- New domestic water and sewage treatment systems shall be constructed in areas which will result in the proper use of existing treatment plants and the orderly development of domestic water and sewage treatment systems within the City;
- Area and community development and population trends demonstrate clearly a need for such development;

9 **Comment:** Section 5-201 of Draft Version 2 relates to revoking or suspending this Permit. There should be clarification that revoking, or suspension of this Permit does not prevent the continued adherence and obligations of other Local, State or Federal regulations or permits (for example, the permit obligations under the USACE or CDPHE for wetland work, erosion control, and/or dewatering activities). Any revocation of this 1041 Permit should not interfere with compliance of another regulatory requirement.

Ask: We ask that the language be clarified to ensure continued compliance with other regulations and permits.

Recommend: Please consult legal to include something along the following.

- Suspension or revocation of a Permit under 5-201 will not interfere with compliance with all other applicable Federal, State, or Local regulations and permits.

10 **Comment:** It appears that any project within 200 feet of historic buildings to have to go through this process. A 200-foot boundary in old town would place the historic building including the sidewalk, street, and opposite sidewalk within the boundary allowing no area to work. There are many types of projects, such as replacement or repair of distribution or collection systems that are not expected to impact the historic building in old town but would be required to go through this process. We do not believe this is the intent of the 1041 regulations.

Ask: We ask that the code language be clarified to ensure only intended projects will be reviewed.

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