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August 30, 2022

DELIVERED VIA FIRST CLASS
AND EMAIL TO: byatabe@fcgov.com

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

RE: Fort Collins Draft Regulations pursuant to the Colorado Land Use Act; Areas and Activities of State Interest § 24-65.1-101 (herein the "Act")

Dear Mr. Yatabe,

This letter is written for the purpose of addressing two particular provisions of the draft 1041 regulations posted in July and August of 2022 on the City of Fort Collins website and explained by Ms. Kelly Smith, Senior Environmental Planner, at several recent water user meetings. I understand you are counsel in the lead on these regulations. We represent the Northern Integrated Supply Project Water Activity Enterprise and Northern Colorado Water Conservancy District.

The two regulations are 2-201 which provides that the City may enter into an Intergovernmental Agreement (IGA) as an alternative to a permit and, 3-201 (L) which purports to regulate "all jurisdictions receiving water diverted from within the City limits…"

In short, we disagree that the statute supports an IGA in lieu of a permit after adoption of regulations, and we disagree that the statute empowers regulation of water diversions as set forth in 3-201(L). Our reasons for each position are set out below.

I. The IGA provision is as follows:

2-201 Intergovernmental Agreements.
Upon the request of the State of Colorado or a political subdivision of the State, as defined by Section 29-1-202, C.R.S., proposing to engage in a designated activity of state interest

or development in a designated area of state interest, the requirements of these Regulations may be met by the approval of an intergovernmental agreement between the City and the State or political subdivision applicant. The City Council may, but shall be under no obligation to, approve such an intergovernmental agreement in lieu of requiring an approved permit pursuant to these Regulations and the approval of any intergovernmental agreement is a legislative act that must occur by ordinance. In the event such an agreement is approved by the City, no approved permit application shall be required, provided that all of the following conditions are met:

(A) The State or political subdivision applicant and the City must both be authorized by Article XIV, Section 18(2) of the Colorado Constitution and Section 29-1-201, et seq., to enter into the agreement.

(B) The purpose and intent of these Regulations must be satisfied by the terms of the agreement.

(C) Action on the proposed intergovernmental agreement by the governing body of the State or political subdivision applicant must be in the manner required of it by the Colorado Constitution and statutes.

(D) Exercise of the provisions of this Section by the State or political subdivision applicant will not prevent that entity from electing at any time to seek a permit pursuant to these regulations. Additionally, any entity which has previously proceeded under the permit provisions of these Regulations may at any time elect to proceed instead under this Section.

I. The Basis for our Disagreement

The Act limits the City's authority to conduct a permitting process consummated by denial or approval of a permit. It does not allow the City discretion to adopt an alternative procedure which obviates the need for a permit. This interpretation is supported by the text of the statute and case law.

Statutory text

Section 301 of the Act, entitled "Functions of local government," authorizes local governments to hold hearings on permit applications and then either grant or deny those applications:

(1) Pursuant to this article, it is the function of local government to:

. . . .

(b) Hold hearings on applications for permits for development in areas of state interest and for activities of state interest;

(c) Grant or deny applications for permits for development in areas of state interest and for activities of state interest;

. . . .

§ 24-65.1-301.

Section 501 similarly directs local governments to issue a permit before a matter of state interest may be conducted. Tellingly, that section is entitled, "Permit for development in areas of state interest or to conduct an activity of state interest *required*," and it provides in part that:

> The local government may approve an application for a permit to conduct an activity of state interest if the proposed activity complies with the local government's regulations and guidelines for conduct of such activity. If the proposed activity does not comply with the guidelines and regulations, the permit shall be denied.

§ 24-65.1-501(4).

This text is fairly be interpreted as not only authorizing, but also limiting, local government to the permitting process. Another provision of the Act also points toward this conclusion. Section 107 of the Act exempts matters of state interest that meet certain conditions. One such exemption grandfathers in developments approved by the local governmental authority as of the date the Act became effective. *See* § 24-65.1-107(1)(c)(III). By negative implication, an approval after the effective date would *not* be exempt from the permitting process. Such an approval could be interpreted to include an IGA from the governmental authority.

Case Law

No reported decision has directly addressed this issue. However, the Act's permit application and approval process is addressed in several opinions as mandatory:

- "Prospective developers *must apply to the local government for a permit* in order to develop in designated areas of state interest." *Colorado Mining Ass'n v. Bd. of County. Comm'rs of Summit County.*
- "Once such local government regulations have been adopted, any person desiring to conduct an activity of state interest *must file an application for a permit* with the local government where such activity is to take place." *Bd. of County. Comm'rs of Douglas County. v. Gartrell Inv. Co.*
- "The Act is detailed and specific in empowering local governments to adopt guidelines and regulations for areas and activities of state interest. It is replete with definitions, provides an exclusive list of those areas and activities a local government may designate as matters of state interest, *and mandates the permit application and approval process*." *City & County. of Denver v. Bd. of County. Comm'rs of Grand County.*

Tellingly, Larimer County in its 2021 1041 modifications, deleted the option of entering into an IGA rather than permitting under its regulations. To the extent this provision is maintained in the 1041 regulations, the NISP Enterprise and other Northern Water projects will decline to use it out of concern that it would be overturned in a subsequent legal challenge.

II. The second issue concerns 3-201 (L) which provides:

(L) All jurisdictions receiving water diverted from within City limits must demonstrate adopted policies, regulations and programs related to water conservation are sufficient to reduce lower per capita water use over time. Such policies, regulations and programs may include but not be limited to:

1. Green plumbing code.
2. Indoor efficiency standards.
3. Reuse of water.
4. Smart meters.
5. Submetering multifamily units.
6. Incentive and rebate programs to reduce water use.
7. Demand-based tap fees.
8. Xeriscape/turf limitations code requirements.
9. Irrigation efficiency code requirements.
10. Post-occupancy violations.

II. The Basis for our Disagreement

The Act does not provide for regulation by one local government (defined as a city or county CRS §24-65.1-102 (2)) to reach into another local government's water uses by regulation of water "diversions" even when the diversion is within the boundaries Fort Collins.

The Act provides regulation of "areas" and "activities" of state interest which are specifically defined in the Act. As is pertinent here, the regulated "activities" in 24-65.1 (203) are:

(a) Site selection and construction of major new domestic water and sewerage treatment systems and;

(b) major extensions of existing domestic water and sewage treatment systems.

These water and sewerage systems are defined in 24-65.1-104 by reference to CRS §25-9-102 (5) (6) and (7) and pipes, structures and facilities through which wastewater is collected for treatment.

Water diversions are not listed as a regulated activity in the statute at all. Additional areas and activities are included but are not the subject of this letter such as highways, airports, geothermal development etc. By negative implication water "diversions", and many other activities, are not listed and do not fall within the activities that may be regulated.

Further, a comprehensive water conservation program is administered by state law through the Office of Water Conservation and Drought Planning. See CRS §37-60-124. Municipalities and other water providers, particularly those who seek state funding, are required to submit conservation plans to the state including an implementation plan. See CRS §37-60-126. The statutory listing of measures to conserve water include water reuse systems, water efficient fixtures, low water use landscapes, distribution leak detection, customer water use audits and more. See CRS §37-60-126 (4) for a listing of water saving measures and programs. In the face of a state program, it makes little sense to consider a redundant local regulation particularly one that is outside the scope of the Act. Northern Water also has a robust water conservation program which includes grants for water conservation. Taken to an extreme, if other high mountain local governments were to adopt a water diversion regulation, those counties could assert authority over all the front range cities including Fort Collins, and that is not what was contemplated by the legislature. Conflicting regulations could be adopted by the hundreds of local governments in Colorado where water is diverted or rediverted.

The Act also has a specific provision to protect water rights. 37-65.1-106 (1) provides:

> "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."

The purported regulation of water conservation by the city is in direct conflict with the exclusive jurisdiction of the Colorado's water courts and administration systems including the water conservation statutes and the many water decrees that provide for diversion of water at a particular location and for a particular use.

Lastly, CRS §24-65.1-401 Designation of matters of state interest provides that:

> "After a public hearing, a local government may designate matters of state interest ***within its jurisdiction,.."*** taking into consideration an itemized list of concerns.

By limiting the local government to its jurisdiction, the Act underscores the reason for the Land Use Act initially which was that certain land uses within a local government's jurisdiction benefits areas outside the jurisdiction, such as airports and highways, and in those circumstances, for specified activities and in specified geographic areas only, a local government could regulate in certain ways enumerated within the Act. It was not a license to regulate more than what is enumerated and certainly not the use of water and water rights by other governments. The Act in numerous sections limits 1041 authority to a local government's jurisdiction. For Example:

- (1)(a) Mineral resource areas designated as areas of state interest shall be protected and administered in such a manner as to permit the extraction and exploration of minerals therefrom, unless extraction and exploration would cause significant danger to public health and safety. If ***the local government having jurisdiction,*** after weighing sufficient technical evidence finds…

- [with regard to mass transit] Activities shall be conducted with reasonable consideration, among other things, as to the character of the area and its peculiar suitability for particular uses and with a view to conserving the value of buildings and encouraging the most appropriate use of land ***throughout the jurisdiction of*** the applicable local government.

In closing, we note these aspects of the draft regulations would not survive a legal challenge and while we understand the city staff is in the early stages of seeking input to its draft, we seek to raise our concerns with these two fundamentally defective provisions at this early stage. We are available to meet with you at your convenience and discuss these concerns. I look forward to your response.

Sincerely,

Peggy E. Montaño
for
Trout Raley

cc: Town of Erie, Left Hand Water District, City of Fort Morgan, Weld County Water District, Town of Windsor, Fort Collins Loveland Water District, Town of Frederick, City of Fort Lupton, Town of Severance, City of Lafayette, Town of Eaton, City of Evans, Morgan County Quality Water District, City of Dacono

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September 16, 2022

Brad Yatabe
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Fort Collins, Co. 80521

Delivered via first class and email to: byatabe@fcgov.com

Re : Fort Collins Draft regulations Areas and Activities of State Interest § 24-65.1-101

Dear Mr. Yatabe,

This letter follows the letter sent to you on August 30, 2022. On September 1, 2022 the Colorado Court of Appeals issued its opinion in *City of Thornton v. Larimer County,* Court of Appeals No. 21CA0467. While the ultimate decision of the court upheld the denial of the permit sought by Thornton, the opinion also provided important rulings concerning the scope and authority of Local Governments in 1041regulation. Because Fort Collins is in the process of enacting such regulations, we feel it is important to reach out to you regarding this important ruling.

I. At pages 22 through 26 of the Opinion, the Court of Appeals found that Larimer County abused its discretion in permitting the siting and development of certain domestic water pipelines in four distinct ways:

(A) The County's requirement for analysis of "cumulative impacts of irrigated farmland turning to dryland" went beyond the County's jurisdiction to regulate "siting and development" of the pipeline as being limited to the land area being disturbed by the project.

(B) The County's consideration of farmland dry-up was an improper abrogation of water rights protected by CRS § 30-28-106(3)(a)(IV)(E). See also CRS §24-65.1-106 (1)(a).

(C) The County's consideration of Thornton's use of its powers of eminent domain as "disfavored by property owners" conflicts with the clear authority of municipalities under Colorado Constitution Article XVI, §7 to acquire lands through eminent domain to convey water for domestic purposes. section 24-65.1-106(1)(a) bars local governments from using 1041regulatory powers to diminish the rights of owners of property as provided by the state constitution. Read together, it is clear that the County could not consider Thornton's potential use of eminent domain during its 1041 review.

(D) The County's criticized Thornton for failing to present the "Shields Street" pipeline siting alternative, despite Thornton's belief that the alternative would degrade its water source by running it through Fort Collins before it could be collected, treated and transported. The Court concluded this criticism of the Thornton project exceeded the County's power to regulate the "siting and development" of domestic water pipelines.

II. Application of the Thornton ruling to the Fort Collins draft 1041 regulations.

The Review Standards in §2-401 (H) through (T) of the draft 1041 regulations touch on recreation opportunities, terrestrial and aquatic plant life, conservation easements, parks and trails as well as a large number of other enumerated items. These criteria reach far beyond the authority listed for areas in CRS §24-65.1-202 and for activities in CRS §24-65.1-204. In addition, these sub-sections apparently are intended to reach beyond the land on which the construction or activity occurs as emphasized by the Thornton opinion. *See* CRS 24-65.1-102 (1). These factors run afoul of the City's statutory authority in much the same way as the County's focus on agricultural land dry-up outside of the project's land area.

Sub-section (I) of the draft §3-201 Specific Review Standards for Major New Domestic Water or Sewage Treatment Systems or Major Extensions concerns itself with easement acquisition, which should not be a consideration under the Thornton opinion; the project proponent's method for acquiring rights in land are beyond the scope of local jurisdiction.

We recognize that the Court of Appeals' opinion in the Thornton case may not be final, and that a petition for rehearing or for certiorari may take place. We feel, however, that it is important to share our thoughts and concerns with you as counsel in the lead in development of these regulations. We are willing to meet with you to further discuss our concerns as your client's process unfolds.

Sincerely,

Peggy E. Montaño
For Trout Raley

Cc: Town of Erie, Left Hand Water District, City of Fort Morgan, Weld County Water District, Town of Windsor, Fort Collins Loveland Water District, Town of Frederick, City of Fort Lupton, Town of Severance, City Lafayette, Town of Eaton, City of Evans, Morgan County Quality Water District, City of Dacono