



# WORK SESSION AGENDA ITEM SUMMARY

City Council

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## STAFF

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## SUBJECT FOR DISCUSSION

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**1041 Regulations Project Update.**

## EXECUTIVE SUMMARY

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The purpose of this work session is to: 1) seek direction on the proposed timeline options; and 2) update Council of the version-two draft 1041 Regulations scope changes.

## GENERAL DIRECTION SOUGHT AND SPECIFIC QUESTIONS TO BE ANSWERED

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1. Do Councilmembers support extending the length of the moratorium to allow for final refinements to the code and additional outreach?
2. Do Councilmembers have feedback on the proposed scope to shift focus to greatest areas of impacts rather than major projects?
3. Do Councilmembers support exempting projects previously approved through Site Plan Advisory Review (SPAR), while still requiring 1041 permitting for projects not approved through SPAR?

## BACKGROUND / DISCUSSION

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Based on Council's discussion at the June 28 work session and continued public engagement, staff has updated the draft 1041 Regulations to incorporate additional feedback. The Regulations have been significantly revised since the initial draft was released in June 2022. Staff recognizes that Councilmembers still have questions about the current scope of the Regulations and the options presented, so this work session seeks additional Council guidance ahead of first reading.

### What are 1041 Regulations?

1041 powers allow local governments to identify, designate, and regulate areas and activities of state interest through a local permitting process. The general intention of these powers is to allow for local governments to maintain their control over particular development projects even where the development project has statewide impacts. Areas and activities of state interest are specifically prescribed within HB74-1041.

## **Project History and Moratorium Scope**

During a regular Council meeting held on May 4, 2021, Councilmembers adopted Resolution 2021-055, which directed staff to evaluate whether 1041 Regulations would help the City achieve its policy goals and to research the feasibility of adopting 1041 Regulations.

At a July 27, 2021 Council work session, staff presented lessons learned from communities that have adopted 1041 Regulations and entities with experience in applying for 1041 permits in other jurisdictions. Staff also presented a list of public projects recently administered through the Site Plan Advisory Review Process (SPAR) that could be considered “activities of statewide interest.” Through this initial research and engagement, staff concluded that adopting 1041 Regulations could offer the City greater authority over large public infrastructure projects currently subject to the SPAR process. Additionally, it would help the City achieve several City Plan policy objectives, including:

- Direct development in a way that ensures compatibility between adjacent land uses;
- Minimize infrastructure and resource needs; and
- Protect historic and natural resources.

At the September 21, 2021 regular Council meeting, staff presented options that focused on development pressure the City may face in the mid-term (within 10 years). Council conducted a public hearing that designated the activities and imposed a moratorium on such activities with the caveat that prior to the second reading staff would perform additional engagement to identify which specific development projects could be impacted by a moratorium. Councilmembers also requested more detail around the procedural requirements for an exemption request to the moratorium.

At the October 19, 2021 regular Council meeting, staff returned for second reading on the designation ordinance and provided additional information on specific projects that could be impacted by a moratorium, and the procedural requirements for an exemption request to the moratorium. The designation ordinance was adopted on second reading and a moratorium imposed on development projects falling under the designated activities until December 31, 2022.

The scope of the Moratorium includes:

- Water and Sewer Systems that consist of pipelines designed for transmission of treated or untreated water or sewage that are contained within new permanent easements greater than 30 feet in width, or within new permanent easements greater than 20 feet in width that are adjacent to existing easements, or will use two or more parallel lines that are within 120 square inches of each other when viewed in cross-section
- Projects to upgrade existing water and sewer facilities, including repairing and/or replacing old or outdated equipment, or installing new equipment
- Interchanges associated with arterial highways located within City Natural Areas or parks

At the June 28, 2022 work session, staff presented an overview of key components of the version-one Draft 1041 Regulations, the outreach and research performed to date, next steps in the engagement process, and schedule for full adoption. The Regulations were developed with assistance from legal and community engagement consultants. Councilmember feedback included:

- Request to establish a time period for holding a pre-application process to align with the legislative intent of the 90-day period.
- Some concern over the term “significant” as being arbitrary and potentially too high of a bar.

- Support for a tiered review process and the overall permitting timeline as long as the Regulations are done right.
- Request to closely evaluate exemptions to make sure they do not result in loopholes.
- Request for responses to comments on the draft Regulations from Save the Poudre.
- Request for a balanced engagement process to ensure entities being regulated are not carrying more influence than those potentially affected by projects.

### Timeline Considerations

In references to the memo circulated to Councilmember October 13, 2022, staff is prepared to make modifications to the version-two draft 1041 Regulations and extend the moratorium based on Council's direction. If first reading of the Ordinance is delayed as recommended, or if, on first reading, significant changes to the draft Regulations warrant additional public engagement or legal review, staff is prepared to present to Council an Ordinance during the November 15 regular session to extend the length of the moratorium by 3 months. The following options represent two timeline scenarios that may be appropriate based on Council direction:

Timing for Council Consideration	
Scenario 1	<ul style="list-style-type: none"> <li>• Work Session – November 7</li> <li>• First Reading – December 6</li> <li>• Second Reading – December 20</li> <li>• Moratorium expires December 31</li> </ul>
Scenario 2	<ul style="list-style-type: none"> <li>• Work Session – November 7</li> <li>• Ordinance extending length of moratorium for 3 months – November 15</li> <li>• First Reading – December or January</li> <li>• Second Reading – January or February</li> </ul>

### Proposed Scope of Regulations

For easier reference by Councilmembers, staff has prepared a summary document that provides a snapshot of the major revisions between version one and version two of the draft 1041 Regulations. (See Policy Comparison)

Per Council's direction, staff has proposed the following scope changes to the Fort Collins 1041 permitting program. The organization and numbering align with the Land Development Code standards adopted by Council on first reading on October 18, 2022.

**Version One** of the draft Regulations included the types of projects described in the designation ordinance, and would apply to projects throughout the City (edge to edge and not in specific geographic locations):

1. New arterial highways, interchanges, and collector highways.
2. Expanded arterial highways, or collector highways that would result in either:
  - a. An increase in road capacity by at least one vehicle lane; or
  - b. Expansion or modification of an existing interchange or bridge.
3. New wastewater treatment plants.
4. New or extensions to major domestic water and sewage treatment systems.

**Version Two** includes the same activities of interest (as designated previously and noted above) but is limited to a narrower geographic scope, slightly modified from the scope of the moratorium, as follows:

1. Projects otherwise within the scope of the Regulations that either:
  - a. Are located on (or cross through) an existing or planned future City Natural Area or park, whether developed or undeveloped; or
  - b. Are located on (or cross through) City building sites or other non-right-of-way property owned by the City, whether developed or undeveloped.

For Council discussion, this version also includes within its scope projects that:

- c. Are located within an existing or potential future Natural Habitat Buffer Zone, as defined in the Land Use Code; or
- d. Have potential to adversely impact historic resources.

### **Natural Habitat Buffer Zones**

Development standards related to the protection of natural habitats and features are included within Section 3.4.1 of the current Land Use Code (Section 5.6.1 of the NEW Land Development Code). The standards apply if any portion of a development site is within five hundred (500) feet of a natural habitat or feature identified on the City's Natural Habitats and Features Inventory Map, or if any natural habitats or features with significant ecological value are discovered during site evaluation associated with the development review process. The Code prescribes protective buffers around specific features in addition to a list of performance standards that must be met by the development project.

The inclusion of natural habitat buffer zones within the scope of the 1041 regulations follows a similar methodology prescribed by the Land Use Code since 1997. For example, if a project is covered by a 1041 regulatory designation and is located within 500-feet of a natural habitat feature identified by the inventory map, the applicant must provide an Ecological Characterization Study (and any additional environmental impact analysis) during the 1041 pre-application review. If a feature is not included on the natural habitat inventory map, and a third-party ecological characterization study finds a previously unidentified feature, staff would consider these newly identified features within its 1041 pre-application review.

Staff recommends using the Natural Habitats and Features Inventory Map: 1.) It narrows the scope of the 1041 permitting process to protect high value habitat previously identified through a focused natural resources inventory; and 2.) provides more predictability for 1041 applicants through the initial pre-application FONAI process; and 3.) assists staff and applicants in the identification of alternative locations with diminished adverse impact.

The *Natural Habitats and Features Inventory Map* was last updated in the year 2000 and does not fully capture existing natural resources throughout the City. If Council supports including Natural Habitat Buffer Zones in the scope of the 1041 Regulations, an update to the map would be required as part of the implementation of the Regulations. A supplemental appropriation may be necessary to fund this work.

### **Consideration for Local Historic Resources**

The proposed scope changes within version two of the draft 1041 Regulations also aligns with the Historic and Cultural Resources Development Standards in Section 3.4.7 of the current Land Use Code (Section 5.8 of the NEW Land Development Code). Inclusion of these standards within 1041 Regulations mirrors the City's existing requirements for private developers to 1041 designated project types that are typically reviewed via the Site Plan Advisory Review (SPAR) process.

Since the draft 1041 Regulations were designed to apply largely to water, utility and transportation projects, a key reason for inclusion of historic resources in these Regulations is that water and utility projects are likely to effect areas of high concern either for archaeological resources or places of cultural significance to indigenous peoples, such as water projects along or near the Poudre River or stream corridors identified by the Natural Habitats and Features Inventory Map. The presence of archaeological resources is difficult to predict, both because these resources are below the ground and because access to locations of already-identified archaeological sites is protected under federal law. Under the existing federal process for cultural resource protections, professional archaeologists are hired to clear a site before construction and are on-site as monitors during excavation. At present, for developments that require City permits, the City uses a 200 foot buffer from waterways as a metric for archaeological monitoring for other permitted excavation types, such as small cell wireless facility installation.

Since archaeological resources are the main historic resource of concern for 1041 review it is important to note that, in most cases, projects can still proceed if they discover archaeological resources in their project areas. Typical practice (established in federal permitting) is to avoid archaeological resources if possible, or if not possible, pause construction to excavate those identified archaeological sites, all at the project sponsor's expense.

For infrastructure projects that have a federal nexus (i.e., federally-funded CDOT highway projects, Army Corps permitting for improvements along the Poudre River, etc.), a similar cultural resource review is already required under the National Historic Preservation Act along with other federal and state laws/regulations. These laws typically do not require consideration of properties determined historically significant by the municipality (the standard for consideration is generally eligibility for the National Register of Historic Places). The main benefit of adding this type of process at the local level is to ensure that City Landmarks and Landmark-eligible properties, not just those that qualify for federal historic designation, are considered in infrastructure project reviews within city limits. Existing federal and state laws and project review processes do not require protection for locally-designated City Landmarks.

### **Threshold Size for Infrastructure Subject to 1041 Regulations**

The version two draft of the 1041 regulation scope includes a reference to service lines and distribution lines that fall within the definitions of designated activities. However, project size (e.g., pipe diameter) is not the best proxy for environmental impacts. Version two replaces project size thresholds with impacts to City properties, natural habitat features and historic resources – locations where adverse impacts are most likely to occur.

For example, gravity-fed wastewater pipes could be laid fairly deep but not be of a "large" diameter. The depth of the pipe dictates the impact because the project would require deeper trenches, likely have more spoil piles of excavated material, widened easements for work, larger machinery, etc. Using water projects as an example, the system can be pressurized, so a transmission line could be reduced in diameter through pumps. Based on public feedback, the revised scope of the Regulations intends to focus on impacts to specific resources, rather than project design attributes like pipe size or easement width.

### **Site Plan Advisory Review (SPAR) and 1041 Regulations**

The Site Plan Advisory Review (SPAR) process requires the submittal and approval of a site development plan that describes the location, character and extent of improvements to parcels owned or operated by public entities. In addition, with respect to public and charter schools, the review also has as its purpose, as far as is feasible, that the proposed school facility conforms to the [City's Comprehensive Plan](#). The SPAR review criteria are more general than the Land Use Code standards for private projects, and a degree of interpretation is necessary in reviewing a given project. SPAR is often referred to as a "Location, Character, and Extent" review. Once reviewed, staff provide a recommendation and the Planning and Zoning Board consider a SPAR approval or disapproval of an application in a public hearing held within sixty (60) days after receipt of the application under Section 31-23-209, C.R.S. If disapproved, the SPAR decision may be overturned by the governing body of the public agency (by a 2/3 majority vote).

The main difference between 1041 Regulations and SPAR is the City's advisory versus regulatory role. Additionally, SPAR projects are not evaluated for compliance with Land Use Code standards per se, as in other types of development, and it should be noted that 1041 review standards require more rigorous documentation and analysis than the materials required through a SPAR process.

Based on public feedback, staff presents the following options for Council to consider:

- Option 1 – Exempt all projects previously reviewed through the SPAR process.
- Option 2 - Exempt projects previously approved through the SPAR process.
- Option 3 – No exemptions for previously reviewed SPAR projects.

## **NEXT STEPS**

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- Recalibrate timelines for adoption based on Council feedback, including an extension to the moratorium if necessary.
- Seek additional public input on version two of the draft 1041 Regulations, as necessary.
- Schedule first reading of the 1041 Regulations.

## **ATTACHMENTS**

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1. Summary of Draft 1041 Regulations – Comparison of Versions
2. Public Engagement Summary
3. Natural Habitats and Features Inventory Map
4. Natural Areas Map
5. Designation Ordinance
6. Public Comment – NISP and Northern Water
7. Public Comment - Greeley
8. Presentation