

Mr. Dale Case
Director of Land Use
Boulder County Land Use Department
2045 13th Street Boulder, CO 80302

Boulder County Commissioners
P.O. Box 471
Boulder, CO 80306

October 30, 2018

Re: Request for Reconsideration and Stay of the Appeal of the Director of Land Use Determination of Zoned Land Exemption to Boulder County's Land Use Code, Article 8 - Location and Extent, Areas and Activities of State Interest for Denver Water's Moffat Collection System Project

Dear Mr. Case and Boulder County Board of Commissioners,

On October 12, 2018, Denver Water sent a letter to the Director of Land Use ("Director") requesting a determination of the applicability of Article 8 of the Land Use Code to Denver Water's expansion of Gross Dam (the "Project"). Boulder County's Director of Land Use ("Director") denied the exemption request in a letter dated October 22, 2018. Pursuant to Article 8-406, Denver water has ten days to appeal the Director's determination. Denver Water is requesting reconsideration and stay of the appeal based on the information below. Should the Director deny this request, this letter will serve as Denver Water's appeal of the Director's October 22nd determination. If the Director accepts this request for reconsideration and stay, Denver Water requests that the determination on the request for reconsideration be made within 30 days from the date of this letter, after which Denver Water would have 10 days to appeal the reconsidered determination.

Denver Water's October 12th letter to the Director explains why the Project is exempt from the requirements of Article 8 of the Land Use Code under the statutory exemption in C.R.S. §24-65.1-101, et seq. ("H.B. 1041"), known as the "zoned land exemption." Under the exemption, the expansion of Gross dam was an authorized use under the zoning laws in effect prior to the effective date of H.B. 1041 (May 17, 1974), because as of that date the Flood Regulatory Area zoning permitted, by right, "utility facilities such as dams." Denver Water's analysis relies on the 1969 Amendments to Boulder County's Zoning Resolution, which incorporated the new Section XX Definitions and Section 18.5 Flood Plain regulations.

The Director's October 22nd determination did not address the fact that the Flood Regulatory Area authorized dams prior to the effective date of H.B. 1041. Rather, the Director's conclusion states that:

For the exemption to apply to the Gross Reservoir expansion, the County, as of May 17, 1974, would have had to have zoned the property in the area of the proposed expansion for use as a reservoir. The County did not have such zoning in place and, therefore, the zoned land exemption is inapplicable to the proposed reservoir expansion.

Thus, Denver Water is seeking a stay of the appeal process for the Director to reconsider the applicability of the zoned land exemption based on the applicability of the Flood Regulatory Area zoning, as set forth in our original request. Although the construction and use of dams within the Flood Regulatory Area zoning "shall be permitted," the Director explains "the County did not permit reservoirs as a use by right within the flood regulatory area at that time." The Director's decision draws a distinction between a dam and a reservoir that would undermine the express language of the Flood Regulatory Area zoning provision.

The zoned land exemption under C.R.S. §24-65.1-107(1)(c)(II) is explicit, stating that H.B. 1041 "shall not apply to any **development** in an area of state interest or any **activity** of state interest which meets any one of the following conditions as of May 17, 1974: . . . (b) The **development or activity** is to be on land . . . (II) Which has been zoned by the appropriate local government for the use contemplated by such **development or activity**." (emphasis added). "Development" is defined as "any construction or activity which changes the basic character or the use of the land on which the construction activity occurs." C.R.S. §24-65.1-102(1). In the case of Denver Water's Project, the construction or activity is the expansion of the existing dam. The permitted use for a dam within the 100-year flood plain necessarily results in an impoundment of water.¹

As of May 17, 1974, Gross Dam was within the Flood Regulatory Area, as it is defined in the 1969 flood zone regulations. The Flood Regulatory Area was defined as "that portion of the flood plain subject to inundation by the 100-year flood. Its width is

¹ The Bureau of Reclamation defines a dam as "a barrier built across a watercourse to impound or divert water. A barrier that obstructs, directs, retards, or stores the flow of water. Usually built across a stream. A structure built to hold back a flow of water." See <https://www.usbr.gov/library/glossary/#D>. A reservoir is defined as "a body of water impounded by a dam and in which water can be stored. Artificially impounded body of water. Any natural or artificial holding area used to store, regulate, or control water. Body of water, such as a natural or constructed lake, in which water is collected and stored for use. Dam design and reservoir operation utilize **reservoir capacity** and **water surface elevation** data. *Id.*

determined by the 100-year flood. Its length or reach is determined by natural bounds. This equals the intermediate regional flood as defined by the Corps of Engineers.” Section XX (20.35). Gross Dam is within the 100 year-flood area, and the benefit of Gross Dam to the flood plain below is documented in the report dated August 1969, “Flood Plain Information, Boulder Creek and South Boulder Creek, Volume II” report prepared by the U.S. Army Corps of Engineers for the Denver Regional Council of Governments (through the Colorado Water Conservation Board), at 3 (stating, “Gross Reservoir is located about 7 miles upstream of Eldorado Springs. This reservoir, with a storage capacity of 43,060 acre-feet, became effective in 1955 for reducing peak flood flows on South Boulder Creek.”).

The Director’s determination ignores Section 18.5 (3.4) of the Flood Regulatory Area, providing that dams “shall be permitted within the Flood Regulatory Area to the extent they are not prohibited in a particular area by any underlying zoning category.” Instead, the Director states “the land on which the Reservoir is located was zoned Forestry.... Although a portion of Gross Reservoir is within the 100-year floodplain under current County regulations and mapping, the property was not within a Flood Regulatory Area on May 17, 1974.” Based on the history of floodplain mapping in Boulder County, the 1969 zoning regulations went into effect in 1972.² Thus, the regulations were effective in 1972, and the location of the dam falls within the zoning code’s definition of the Flood Regulatory Area.

The Director states that what would have been required within the Flood Regulatory Area would be a “Planning Commission review and approval prior to such development” if there would be a reservoir with the dam. This is not what the Flood Regulatory Area zoning regulations provide. Instead, the only potential limitations on the listed uses by right in the Flood Regulatory Area are the Special Provisions of Section 3.3 and the prohibition of such use by the underlying zoning. In this case, the underlying Forestry zone does not prohibit the use. *See* Sections 3.3 and 2.4. Section 3.3 Special

² “In 1965, Boulder County first suggested managing development in floodplains to improve the safety of residents and their property. In 1968, FEMA introduced federal regulations to manage development in floodplains nationwide. Boulder County adopted floodplain regulations for the first time in 1969 even though they were not incorporated into the Land Use Code until 1972. Most of the county’s current FEMA floodplain maps are based on studies from the early 1980s.” *See* <https://www.bouldercounty.org/transportation/floodplain-mapping/frequently-asked-questions/#floodplain>

Provisions “apply to all uses within the Flood Regulatory Area notwithstanding that such uses may be specifically permitted under the terms of this resolution.” The Special Provisions, limiting structures that affect flood protection elevation heights or the efficiency of the capacity of the channel, are not applicable to the dam expansion. The Director’s determination that this use would require a “Planning Commission review and approval” is not found in the relevant zoning regulation.

Last, it is relevant and important to understand the history of the dam construction and that the use of the land contemplated at the time the land was purchased by Denver Water is the very same use now contemplated. The zoned land exemption itself avoids the unfairness of retroactive application of laws by recognizing the authorizations and permitted uses prior to the enactment of H.B. 1041. The use now contemplated for the Project (the expanded dam) was planned at the time of design, purchase of property, acquisition of water rights, construction and authorization by the Federal Energy Regulatory Commission (“FERC,” formerly the Federal Power Commission). Prior to constructing the dam in the late 1940s, Denver Water purchased the amount of private land necessary to build the dam to its full height. It acquired the necessary approval from FERC, recognizing that the dam would be built in two phases. These efforts were completed in conformity with and reliance upon Boulder County’s zoning ordinance, which allowed, by right, “water reservoirs” in the Forestry zoning district at that time. Zoning Resolution of Boulder County, Colorado Section III(1) (1944). By the time H.B. 1041 went into effect, Denver Water had made substantial expenditures and completed substantial construction.

Please let us know if additional information is needed for reconsideration by the Director or prior to the public hearing if the appeal is not stayed.

Sincerely,



Anne E. Sibree