2003 WL 25508721 (Colo.App.) (Appellate Brief)
Colorado Court of Appeals.

The Board of County Commissioners of the County of LA Plata, COLORADO; the Board of County Commissioners of the County of Archuleta, Colorado; the Board of County Commissioners of the County of Las Animas, Colorado; the Board of County Commissioners of the County of Routt, Colorado; and the Board of County Commissioners of the County of San Miguel, Colorado, Appellant(s),

v.

COLORADO OIL and Gas Conservation Commission, Appellee(s).

No. 02 CA 1879.
February 4, 2003.

2nd Judicial District Court, Denver, Colorado Frank Martinez, Judge, Case No.: 01 CV 5458 Appeal from District Court's Review of Colorado Oil and Gas Conservation Commission's Rulemaking

Combined Amicus Curiae Brief of the Colorado Municipal League and Colorado Counties, Inc. in Support of the Appellant Boards of County Commissioners

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The League and CCI adopt and incorporate by reference the statement of the issues as stated in the Appellants' Opening Brief.

II. STATEMENT OF THE CASE

The League and CCI adopt and incorporate by reference the statement of the case as stated in the Appellants' Opening Brief.

III. SUMMARY OF ARGUMENT

The Appellant counties (the "Counties") filed this action under the Colorado Administrative Procedure Act (C.R.S. Section 24-4-101 *et seq.*) and Colorado Civil Procedure Rule 57 to challenge the adoption by the Colorado Oil and Gas Conservation Commission ("COGCC") of an amendment to its Rule 303(a). As is more fully discussed in the Counties' Opening Brief, by adopting the amended Rule 303(a), the COGCC infringed upon the land use authority granted to Colorado counties and municipalities by attempting to alter the "operational conflict" rule established by the Colorado Supreme Court in *Board of County Commissioners, La Plata County v. Bowen/Edwards Associates, Inc.,* 830 P.2d 1045 (Colo. 1992).

Despite the fact that several of the Counties appeared at the COGCC hearing on the rule amendment or filed written comment objecting to it as violating the Counties' land use authority, the District Court, acting *sua sponte,* dismissed this action finding that the Counties lacked standing to bring it. To support its decision, the District Court found ***2** that because an actual conflict between the Counties' land use regulations and amended Rule 303(a) had not yet arisen in the context of a specific fact setting, it was only "hypothetical." The type of actual conflict the trial court was looking for was an allegation that "Rule 303 has abridged the plaintiffs' land use regulatory authority." By requiring an actual conflict as a condition for review, the District Court applied the wrong standard for standing in the context of a county's challenge to a state agency rule-making proceeding.

Here the Counties were "person[s] adversely affected or aggrieved by" the COGCC action and such persons are entitled to judicial review under the APA and C.R.C.P. 57. Even beyond that ground for standing, the Colorado APA expressly gives the board of county commissioners of any county the right to commence an action for judicial review of any agency action "which involves any duty or function" of such county. This statute does not say, as it is apparently read by the trial court, that a county

may commence an action for judicial review of an agency action which "has abridged" that county's governmental duty or function. The revised Rule 303(a) "involves [the] duty or function" of land use and planning regulatory powers of the Counties. The Counties may therefore commence an action for judicial review of revised Rule 303(a) under the APA.

If the rule for standing applied by the District Court is allowed to stand, local governmental entities, including both counties and municipalities will be deprived of the opportunity to participate in any meaningful way in state agency rule making and will be forced to protect their powers in such areas as land use regulations by multiple, ***3** duplicative actions. This clearly defeats the purposes of the Administrative Procedure Act and C.R.C.P. Rule 57.

IV. ARGUMENT

A. *The Legitimate, Protected Interests of Colorado Counties and Municipalities Are Impaired by the Adoption of Amended Rule 303(a).*

The right of local governments to adopt land use regulations has long been recognized as an appropriate exercise of the police power. *Village of Euclid v. Amber Realty Co.,* 272 U.S. 365 (1926). In Colorado this authority has been expanded by statute. C.R.S. Section 31-23-301 *et seq.* grants zoning authority to municipalities. Municipalities are granted authority to adopt master plans and to regulate subdivisions by C.R.S. Section 31-23-201 *et seq*. County authority to adopt master plans, zoning regulations and subdivision regulations is granted by C.R.S. Section 30-28-101 *et seq.* These basic grants of authority are buttressed by the Local Government Land Use Control Enabling Act of 1974, C.R.S. Section 29-20-101 *et seq.* and by C.R.S. Section 24-65.1-101 *et seq.* commonly referred to as the 1041 Powers Act.

The issue of preemption of local land use regulations by state law or state agency regulation was addressed on a number of judicial occasions. For the purposes of this discussion, the most important case is *Board of County Commissioners, La Plata County v. Bowen/Edwards Associates, Inc.,* 830 P.2d 1045 (Colo. 1992), discussed in more detail in the Appellants' Opening Brief. The "operational conflicts" rule established in *Bowen/Edwards* recognized the authority of local governments to apply their land use regulations to oil and gas drilling operations so long as those regulations do not conflict operationally with the regulations of the COGCC. The amended Rule 303(a) at issue ***4** here attempts to eliminate the operational conflicts rule and replace it with a rule that essentially says that any conflict between COGCC rules and local land use rules results in the invalidation of the local rules. The COGCC has argued that this is the result of the amended Rule 303(a) in this case. (*See* Answer Brief, pages 9 and 10, Record, pages 344 and 345). If local governments are not permitted to protect their land use authority from such attacks under the Administrative Procedure Act and C.R.C.P. Rule 57, how can the interests of local communities be effectively protected? Further, administrative agency rules may not impede land use authority delegated to local government by legislative enactments. However, by precluding any local government challenge to agency rule making, the District Court prevents local government from securing any effective review of the proper scope of such rules.

B. *The Counties Had Standing to Bring the Instant Action under the Properly Applicable Standard and the District Court Applied the Wrong Test to Determine the Issue.*

The trial court cited no authority for its ruling on standing that dismissed the Counties' action for judicial review. The court cited authority that standing is jurisdictional and may be raised by the court *sua sponte. See Public Service_Co. v. Trigen-Nations Energy Co.,* 982 P.2d 316 (Colo. 1999); *Bethesda Found. v. Colorado Dept. of Public Servs.,* 877 P.2d 860 (Colo. 1994). These principles are not disputed. However, nowhere in the trial court order was any case or any statute or any rule cited that supports the proposition a county may not commence an action for judicial review of a state agency rule absent an allegation that such rule "has abridged," or "has occasioned actual impairment of," or is in "actual conflict" with the county's governmental authority. The League and CCI submit that there is no such authority and the trial court applied the ***5** incorrect standard for determining

the standing of the Counties to challenge the rule of the COGCC under the APA and C.R.C.P. 57. Under the proper standard for standing, the Counties' action should not have been dismissed.

The League and CCI state first that they agree with the argument and statement of legal authority in the Opening Brief of Appellants and adopt it herein by reference. The proper legal standards for determining standing to challenge the validity of an agency rule making are clearly set forth there.

This *Amicus Curiae* Brief sets forth additional authority to support the standing of the Counties in this action, as follows.

The State APA specifically and expressly addresses the commencement of actions for judicial review of agency action by boards of county commissioners, over and above their qualification as "aggrieved" persons, as explained in the Appellants' Opening Brief. The statute says that

> Subject to the limitation set forth in section 39-8-108 (2), C.R.S. [relating to appeals from the State Board of Assessment Appeals], the board of county commissioners of any county of this state may commence an action in the Denver district court within the time limit set forth in subsection (4) of this section for *judicial review of any agency action* which is directed to any official, board, or employee of such county or *which involves any duty or function of any official, board, or employee of such county* with the consent of said official, board, or employee, and to the extent that said official, board, or employee could maintain an action under subsection (4) of this section.

C.R.S. Section 24-4-106 (4.5) (emphasis added). Rather than narrowing access to judicial review as the trial court ruled by requiring that a county's authority be already "abridged" or "impaired" before entering the courtroom, this statute provides broad authority for a board of county commissioners to review agency action which "involves" any duty or function of the county. The General Assembly used the word "involves," not ***6** "abridges" or "actually impairs" or "actually conflicts with." The revised Rule 303(a) provides:

> The permit-to-drill shall be binding with respect to any conflicting local governmental permit or land use approval process.

Rule 303(a) on its face "involves" the duty or function of the Counties relating to local governmental permits and land use approval processes. The Counties' authority over such duties and functions is unquestioned. *See, e.g.,* C.R.S. § 30-28-101 *et seq.;* C.R.S. § 29-20-101 *et seq.;* C.R.S. § 24-65.1-101 *et seq.*

C.R.S. § 24-4-106(4.5) was added in 1979 by S.B. 374 at the same time that the APA definition of "person" was amended to include counties. It has been noted that in the "legislative hearings on Senate Bill 374 ... the General Assembly specifically noted the necessity to provide legislatively for county boards of commissioners to have standing to challenge state agency actions that have aggrieved their counties beyond the narrow issues of the state agency itself." *Board of County Commissioners v. Romer,* 931 P.2d 50, 510 (Colo. App. 1996), *rev'd Romer v. Board of County Commissioners,* 956 P.2d 566 (Colo. 1998). The legislative history provided in part

> In an effort to continue to try to find some way that local governments may address themselves for what they believe to be unlawful actions of the state of Colorado and, in my own judgment, are unlawful actions from time to time ... we are introducing in the senate a bill which would permit counties to appeal from decisions of administrative agencies which aggrieved them. Hearings on S.B. 374 before the Subcommittee of the Senate Judiciary Committee, 52nd General Assembly, First Session (Feb. 21, 1979).

Id. S.B. 374 was a direct and express legislative grant of standing for counties to challenge agency action.

***7** This is not to say that a board of county commissioners may seek review on speculation or hypothesis alone. As explained by the Appellants in the Opening Brief, "[t]he proper inquiry on standing is whether the plaintiff has suffered injury in fact to a legally protected interest as contemplated by statutory or constitutional provisions." *Wimberly v. Ettenberg,* 570 P.2d 535 (Colo. 1977). In the context of judicial review of administrative actions, the "injury-in-fact" element of standing does not require that a party undergo actual injury, as long as the party can demonstrate that the administrative action "threatens to cause" an injury-in-fact. *O'Bryant v. Public Util. Comm'n,* 778 P.2d 648, 653 (Colo. 1989); *see also Bowen/Edwards,* 830 P.2d at 1053. The "legally protected interest" element is met by an allegation of a threatened injury to a local government's interest in carrying out its land use regulatory authority. *See Douglas County Bd. of Comm'rs v. Public Util. Comm'n,* 829 P.2d 1303 (Colo. 1992). *See also* C.R.S. § 24-4-102(3.5)("Aggrieved" is defined as "having suffered actual loss or injury or *being exposed to potential loss or injury to legitimate interests, including, ...* governmental ... interests.") (emphasis added).

The injury in fact prong has been held to be satisfied by allegations of "harm to a governmental body's institutional interests through a usurpation of authority by another governmental entity" and "interference by a reviewing agency with the authority of another agency to carry out its enforcement and policymaking functions." *Maurer v. Young Life,* 779 P.2d 1317, 1325 (Colo. 1989) (citations omitted). That is the type of injury in fact present in this case and, we believe, presumed in C.R.S. § 24-4-106(4.5): if the agency action "involves [the] duty or function" of the county, then there exists a potential threat to the legitimate governmental interests of the county and the county has the right to ***8** commence an action for judicial review. It is the agency's involvement in and interference with the county's authority, or as the cases recognize, the threat thereof, that creates the conflict and the standing.

Furthermore, in this case it should be clear by the long standing history of tension between local land use authority and COGCC regulation of oil and gas development that such a real controversy exists. *See e.g., Board of County Comm'rs v. Bowen/Edwards Assoc., Inc.,* 830 P.2d 1045 (Colo. 1992); *Voss v. Lundvall Bros., Inc.,* 830 P.2d 1061 (Colo. 1992); *Town of Frederick v. North American Resources Co.,* No. 01 CA 0893, 2002 WL 1766027 (Colo. Ct. App. Aug. 1, 2002), *cert. denied,* No. 02 SC 600 (Colo. Jan. 6, 2003). The adoption of Rule 303(a) by the COGCC creates a real and not a hypothetical controversy--it provides that COGCC permits shall be binding over conflicting local government permits. County building permits, road permits, special use and conditional use permits, subdivision approvals, special and conditional use permits on adjacent properties, there is no limitation in Rule 303(a)--all these may and probably will conflict with a permit-to-drill. The conflict here is not speculative or hypothetical and the Counties have a right to protect their legitimate interest in and authority over land use and planning. It is for such reasons that the APA provision affords the counties specific jurisdictional recognition in the course of outlining the ability of boards of commissioners to become involved in judicial review of agency rule making activity.

V. CONCLUSION

For the above reasons and those stated in the Opening Brief of the Appellants, the Appellant Counties have standing to commence judicial review of the COGCC's revised ***9** Rule 303(a) in the Denver District Court. Therefore the Order of the Denver District Court dismissing such action should be reversed. Because, as demonstrated in Appellants' Opening Brief, the substantive issues are matters of law, this Court should also enter an order declaring amended Rule 303(a) invalid because it contradicts applicable law and exceeds the COGCC's authority or otherwise setting aside the COGCC's rule making because it violated APA procedures.

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