Goin’ Down the Road Feelin’ Bad: Are Tollways, Toll Lanes and HOT Lanes the Solution to Highway Blues?

8:45—10:15 a.m.
Friday, March 10, 2006
Sturm College of Law/Frank J. Ricketson Law Building

This moderated discussion explores how tolling changes the debate over highway construction and expansion, and how local governments and affected communities can play a role in the decision making process on tolling proposals.

Moderator: Lori Potter, Esq.
Partner
Kaplan Kirsch & Rockwell
Denver, Colorado

Panelists: Steve Hogan
Northwest Parkway Public Highway Authority
Broomfield, Colorado

Mike Bestor
City Manager
City of Golden, Colorado
Moderator’s Outline

Goin’ Down the Road Feelin’ Bad:
Are Tollways, Toll Lanes and HOT Lanes the Solution to the Highway Blues?

Moderator: Lori Potter, Kaplan Kirsch & Rockwell LLP, Denver
Speakers: Mike Bestor, City Manager, Golden, CO
Steve Hogan, Executive Director, Northwest Parkway Public Highway Authority,
Broomfield, CO

The session will explore current proposals to fund the construction of new or expanded highways with tolls. The discussion and controversy are national in scope, having been covered by NPR, the Washington Post, and a host of other media outlets in the last year. The speakers will use selected highways in the Denver metropolitan area as examples to give attendees insight into the complex issues raised by tolling projects:

- Environmental Impacts
- Financing
- Impacts on Local Communities
- Local Control
- Induced Growth and Development
- Privatization and the Public Interest

Index to Materials:

- Feds Push Toll Lanes for C470, Jeff Leib, Denver Post, Feb. 16, 2006
- States Across Nation Considering Toll Roads, Steve Hogan, Denver Post, March 27, 2005
- Letters to Editor responding to States Across Nation, April 10, 2005
- Toll Roads are Pricy Answer to Budget Ills, Denver Post editorial, October 17, 2005
- Letter to Editor responding to Toll Roads are Pricy, October 21, 2005
- CDOT Eyes Toll Lanes on Clogged Roads, Kevin Flynn, Rocky Mtn News, July 4, 2005
- Private or Public, Blog on www.unbossed.com Roads Scholars series, October 17, 2005
- Brief in support of motion for summary judgment by Douglas County, CO, in CDOT v. Douglas County, No. 2005CV1948 (Douglas County Dist. Ct.) (case by CDOT challenging County’s authority to require a 1041 permit for CDOT’s proposed toll-lane expansion of Hwy C470)
- Colorado Tolling Enterprise, Summary of Alternatives, Table 6-1 (Wilbur Smith, December 2004)
Feds push toll lanes for C-470

Obstacles loom along corridor

A $385 MILLION PLAN

The "preferred" option for the stretch from Kipling to I-25 is opposed by toll foes in Douglas County.

By Jeffrey Leib
Denver Post Staff Writer

Planners have decided that toll lanes in the median of C-470 should be added to the 15-mile project. At a meeting Thursday in Golden, state transportation officials also said that toll fees on the C-470 corridor could be increased to $2.40 a mile.

The Colorado Department of Transportation (CDOT) has been working on the C-470 project for several years, and it is expected to be completed by 2005. The project includes the addition of two toll lanes in each direction, which would cost approximately $385 million.

CDOT has proposed a variety of tolling options, including a per-mile fee and a per-vehicle fee. The $2.40 per-mile fee is the preferred option, according to CDOT officials.

The project is expected to reduce travel times and improve safety on the C-470 corridor. CDOT estimates that the project will reduce travel times by 25 minutes and improve safety by reducing the number of accidents.

Officials predict that population growth in Douglas County will lead to increased traffic on C-470. To address this, CDOT is proposing the addition of two toll lanes in each direction from Kipling to I-25.

Easing congestion

Toll lanes have been proposed for part of the C-470 median; one toll lane in each direction between Kipling Parkway and South Platte Canyon Road, and two toll lanes in each direction between South Platte Canyon and Interstate 25.

One toll lane in each direction

Two toll lanes in each direction

The Denver Post

One toll lane in each direction

Two toll lanes in each direction

The Denver Post

Hearing on April 4 and 5 on the tolling proposal.

Staff writer Jeffrey Leib can be reached at 303-820-1645 or jleib@denverpost.com.
States across nation considering toll roads

Wise use of taxpayer dollars

Why should Colorado build toll roads? Is it wise stewardship of tax dollars? We have greater needs for limited tax dollars than building more highways, particularly when there is an alternative funding mechanism. A successful program of building toll roads could help the entire state, all built without tax dollars.

Toll roads add transportation choices. What better total system could we have than one that allows an individual to choose to ride a bus, take light rail, drive on a freeway or pay a toll to get where he or she wants to go?

As might be expected, it's not quite that simple, so here's the flip side: Toll roads have to pay for themselves, so they present challenges in financing and construction that don't exist for traditional highways that we build or public works projects. Toll roads have to be built where traffic demand already exists, or in a phased way so that the revenues from a completed project can be used to support the construction of the next one.

How should we pay for toll roads? There are various options, most of which involve bonding. What makes the most sense is the use of revenue bonds, backed by toll proceeds.

The public highway authorities that run toll roads should have their primary obligation to their constituents and bondholders, not to officeholders, voters or taxpayers. This is accomplished by running an agency like a private business, paying attention to spending and protecting investors.

Dollars are put where we need them to maximize revenue and make a whole project work. For example on E-470, Parker and Douglas County don't want tolls collected at Pizza A, so they've developed Pizza A, which allows the brightest sections of the road to get the benefit from those tolls.

Our toll-road agencies need cooperation between the jurisdictions involved in them. There are local governments involved in E-470 and the Northwest Parkway. We have learned to get along to succeed.

The governor, the legislature and the Department of Transportation have said they want toll roads as part of an overall transportation solution. Such philosophical agreement is fine, but the devil is in the details. Arguments can start over environmental and permitting policies, participation of the private sector, contracting methods, financing methods, use of revenue and what should be done.

Building toll roads should be driven by financial and business considerations, not by public works considerations. To see toll roads as part of an overall transportation solution, a few things need to happen in Colorado:

Motorists pass through the toll plaza on E-470 between Interstate 25 and Parker Road in January 2004.

-立法者和其他人需要认识到，如果 toll 路不能被融资，就不可能被建造。如果需要的话，可以考虑增加额外的收入来为 toll 路提供资金，例如发行债券。发行债券并不意味着我们要融资，我们要融资是为了建造一条值得投入的 toll 路。我们必须遵守债券发行的规则，以便在债券到期时能够偿还欠款。

Not long ago, Thornton, Westminster and other northwestern governmental entities created an agreement sharing sales tax revenue. That working together is needed to fund toll road construction. If E-470 is tolled and clearly brings in excess toll revenue, why not agree to use that excess as backup credit to build a desired toll road in Colorado Springs? The revenue never leaves the corridor. It is merely reserved for a short period of time to allow another project to get up and going.

-Encourage private sector participation. The private sector knows how to build quality, on time and on budget. We are in private partnerships to build, operate and perhaps own Colorado toll roads. After all, toll roads are more like a private sector product than a public sector service.

Colorado was in the forefront of alternative road construction and creative financing 15 years ago. Colorado public highway authorities showed much of the nation how to get things going.

States across nation considering toll roads

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We now seem to be sliding backward because of needless controls and limitation of resources.

We have a chance to build a network of technologically smart, fiscally prudent toll roads throughout the state and to do it without using tax money. We have a chance to have each part of the state help the other. Will we grasp the opportunity? Can we come together as we did for I-25 and Front Range? To build a system that provides transportation alternatives?

If we do, tolls will simply fall further behind in trying to take care of the roads we have and meet the traffic demands of the future.

Steve Hogan is executive director of the Northwest Parkway Public Highway Authority.
Letters

The Denver Post

Sunday, April 10, 2005

The future of toll roads in Colorado

Re: "In a hurry? Pay to skip traffic," March 27 Perspective articles.

The only reason that toll roads are even being considered for Colorado is that our legislature has failed to require that new development pay its own way. I say this based on having spent six years studying regional transportation plans while serving on the board of the Denver Regional Council of Governments.

The fact is, existing residents already pay sufficient taxes for road maintenance and transit services, as well as for the capacity expansions needed to accommodate their future travel increases. But new development pays only a tiny fraction of the costs of building the additional capacity necessary to accommodate its transportation demands. The equitable solution is not to force existing citizens to pay more tolls or taxes, but to charge new development an impact fee to pay for road widenings and additional transit, just as developers now pay tap fees for new water supplies.

The legislature is heavily lobbied by development interests, and has never even considered requiring growth to pay its own way. Even in its fit of growth consciousness a few years ago, the legislature failed to provide local governments, or RTD for that matter, the power to use impact fees to fund regional highways or transit, much less require such fees. Since developers' profits are a function of what public costs they can avoid paying, lobbying against impact fees is their most valuable investment.

Stephen Pomerance, Boulder

...If the two opinion pieces by proponents of tolling seemed overly upbeat to your readers, it's because they were. We in the Douglas County Public Works Department have spent the last two years wrestling with a real-life tolling proposal for C-470, and we know that tolls are not the answer to every highway question. In particular, retrofitting an existing parkway such as C-470 by squeezing in new toll lanes creates more problems than it solves. Here are just some of the problems that we expect Douglas County residents to face if the proposal to add "express toll lanes" to C-470 were to go forward:

By filling up the existing right-of-way with four new lanes and shoulders, the Colorado Department of Transportation (CDOT) will preclude future use of that space for a transit corridor. It will also displace the C-470 bike path, a well-used recreational amenity that was part of the mitigation guaranteed back when the highway was originally proposed.

Seventy-five percent of Douglas County residents indicated in a survey that they were unlikely to use toll lanes for their regular commute at an average monthly cost of $64. The toll lanes will likely stay uncrowded, while the untolled lanes become ever more congested. Meanwhile, the cost of the tolled lanes and the congestion in the free lanes will drive more traffic off onto local streets.

Even with tolls, the new highway lanes can't pay for themselves, as CDOT studies show. Our residents will pay for their highways several times over: once with their gas taxes, again with their tolls, and again when state and federal money gets diverted from other road projects to make up the shortfall.

Adding new toll lanes in the C-470 median would destroy the attractive parkway nature of the road. It also creates safety problems for everyone as vehicles maneuver across four lanes of traffic to and from the outside access ramps to use the center, tolled lanes.

In the abstract, tolls may sound like an answer to highway needs. In reality, they raise troubling issues for our citizens, and responsible public officials need to look at a variety of innovative funding solutions for genuine answers that serve the public good.

Duane Fellhauer, Castle Rock

The writer is director of Public Works for Douglas County.

...While some are touting toll roads as the wave of the transportation future ("Slab is on hold; idea here to stay," March 27 Perspective), it is important that we don't automatically assume toll roads will solve all our transportation challenges.

One region of the metro area under study today is the Northwest Corridor - the region south of Broomfield, including Arvada, Wheat Ridge, Golden and Lakewood. Building a toll road to connect the Northwest Parkway and C-470 has become a politically popular idea because of the private development it would generate and financial help it would provide to the Northwest Parkway toll road. Yet every traffic study of the region to date has shown that a multi-lane, high-speed toll road through our region would not improve congestion or sufficiently meet future traffic needs.

Such a road - whether built through Golden, Arvada or Fairmount - would increase pollution, destroy the historic character and charm of our communities, and cut through some of the metro area's most attractive undeveloped areas. Worse still, the Colorado Department of Transportation's own studies show that such a road would cost nearly $1 billion to build and could not possibly support itself.

While toll roads may be appropriate in some areas, they are not the one-size-fits-all solution to Colorado's traffic needs. The state needs to take a careful look at the specific circumstances of each situation and then make its determinations on a case-by-case basis. The Northwest Corridor is a prime example where a toll road is not the solution.

Chuck Baroch, Mayor, Golden

...I'm not totally against a toll road going very close to my home, but I'd like some real facts to support the building of the road and displacing of many of my neighbors and a way of life we choose to live.

I drive E-470 many times a week, so I am familiar how it works. However, E-470 bypasses the worst of the Denver metro area, and I don't see any semi-trucks using it except for local construction-based trucks and gravel haulers.

What trucking companies, in times of tough competition and rising fuel costs, are going to pay to use this road enough to make it profitable? Give us names so we may contact them and ask them ourselves. If they won't pay to use E-470, who is going to pay to use the proposed Front Range Toll Road? I don't buy it. I do believe that a rail line in the same corridor makes sense - just not a road.

Until I get the word from the thousands of commercial truckers who proponents say would be lured from Interstate 25, I won't support this project.

Vern Kaufman, Elizabeth
Toll roads are pricey answer to budget ills

Toll roads should have a place in the state transportation system, but doing the math shows they can cost you 10 times as much per mile as freeways.

A new report underscores how expensive toll roads are for Colorado motorists. We hope it causes some of the state's anti-government crusaders to curb their enthusiasm for promoting such tollways at the expense of upgrading Colorado's public highways.

Two metro-area toll roads, the Northwest Parkway and I-470, now are the third and fourth most expensive urban-area tollways in the nation on a cost per mile basis, according to Wilbur Smith Associates, a Connecticut-based consulting firm. Tolls on the two expressways average about 21 cents per mile.

That's about 10 times as much as you pay in taxes to drive the "free" state highways. They aren't really free, of course, since they are funded by the state's 22 cents-per-gallon motor fuel tax, automobile registration fees, and some other charges. But if your car averages 22 miles per gallon, you pay just a penny per mile in fuel tax. Pro-rate your auto registration fees and you probably pay about 2 cents a mile to drive a state highway like C-470.

We're not against toll roads. Like Gov. Owens and his transportation chief, Tom Norton, we recognize that Colorado's transportation backlog is so great that toll roads should be part of our transportation solutions.

We also like adding toll lanes to existing expressways, thus providing fast travel for drivers willing and able to pay for it, while easing congestion on the remaining free lanes.

But Owens and Norton are also wisely fighting for a faster, cheaper and more effective fix for our transportation backlog: Referendums C and D on the Nov. 1 ballot.

Their passage will authorize $1.2 billion in highway bonds to finance 60 worthwhile projects throughout the state, paid for by surplus general fund revenues without tolls — and without a tax increase.

Opponents like former state Senate president John Andrews oppose the referendums and say they'd solve Colorado's transportation needs exclusively through toll roads. "The future is toll authorities, not the outdated gas tax," Andrews recently wrote. Well, that's the future if you want it to be. You can choose to pay 21 cents a mile, with all the attendant hassle, to drive toll roads instead of public highways. Or you say "yes" to C and D for a more convenient public highway network at far less cost.

Two cents a mile or 21 cents a mile. We wish all our choices were this easy.
CDOT eyes toll lanes on clogged roads

Local officials grill plan to give paying drivers quicker ride

By Kevin Flan

The Colorado Department of Transportation is planning a network of express toll lanes in metro Denver to provide a nonstop, high-speed commute for paying drivers that could include other metropolitan areas and up to two hours.

The 44 billion dollar plan calls for toll lanes by 510 to run the middle of the state’s traffic, straight across highways and components of the metro highway system with a new toll highway being a part of the plan.

"Toll lanes would bring a fundamental change to our transportation system," said John Salsbury, director of the Colorado Department of Transportation. "It’s an opportunity to build a new transportation system that is more efficient, more sustainable and more accessible to all Denver.

The plan is an enormous undertaking, funded through tolls and congestion fees. It would bring toll lanes into the Denver region in the next five years.

Toll lanes would be a major investment, only if adjacent free lanes remain unchanged. This is a key component of the plan, according to Salsbury. He said toll lanes need to be built to create a new market of drivers willing to pay tolls.

"We’re not talking about four or five years from now," Salsbury said. "We’re talking about the next 20 years. If everything goes according to plan, we’ll have a network of toll lanes in place by the middle of the decade."

Local officials have been supportive of the plan, which could include toll lanes on I-25, I-35, I-70, I-70 West, I-470, and I-25. However, some city officials have expressed concerns about the impact on their communities.

"I think it’s important to understand that toll lanes would be an asset to our community," said Denver Mayor Michael Hancock. "They would provide a new option for drivers, giving them the choice to pay a toll to get to their destinations faster."

The plan is expected to cost $44 billion over 20 years, with $22 billion of that coming from toll collections and $12 billion from state and federal funds.

"We’re talking about a very large project," said Salsbury. "But if we get it right, it could be the beginning of the end of traffic congestion in metro Denver."

The plan would involve the construction of 24 new toll lanes on existing highways, with 12 toll lanes on I-25 and I-70.

"The toll lanes would be constructed in phases," said Salsbury. "We’d start with the busiest areas first, and then work our way down to the less congested areas."

CDOT conducting studies

Local officials will be involved in any studies that are conducted to determine whether toll lanes are the best option. The agency has hired consultants to study the feasibility of toll lanes in various areas.

"We’re looking at all options," said Salsbury. "But toll lanes are one of the solutions that we’re considering."

The study will examine the potential benefits and drawbacks of toll lanes, including traffic congestion, air quality, and the impact on land use.

"We need to make sure that any toll lanes we build are the right ones," said Salsbury. "We don’t want to build toll lanes in areas where there isn’t much traffic."

However, the benefits of toll lanes must be weighed against the potential drawbacks, such as increased costs for drivers and environmental impacts.

"We need to make sure that toll lanes are a cost-effective solution," said Salsbury. "But if we can’t come up with a plan that works, we’ll have to look at other options."
Monday, October 17, 2005

Private or Public? Public-Private? Part II: The Argument for Private

In a March 27, 2005 Denver Post editorial, *Wise use of taxpayer dollars*, Steve Hogan, executive director of the Northwest Parkway Public Highway Authority, argued that toll roads should be treated like private sector entities. And he also argued that they need special support from government, but they should not have government oversight, because this will lower private investor’s return.

*So which is it? Public or private? What is the difference? Why does it matter?*

Hogan said that “toll roads are more like a private sector product than a public sector service.” He did not explain what he meant by this.

Perhaps Hogan has not given any thought to what makes a service or product private or public.

To clarify the differences, here are some features that make private entities special and that show us that an entity is truly private.

Something is private if it is in the market. Being in the market means means that it competes with other companies and that customers “vote with their dollars” for the best company. A competitive market is one in which the buyer’s choices result in goods that are sold as cheaply as possible and at the largest quantity desired.

Markets mean winners and losers. A bad company - one whose products cost more and are of lower quality - will lose customers and go out of business. With markets there are risks. It is the risks that make markets work.

In other words, the point of private provision is to impose accountability through the market. Take away the market and remove vigorous competition, and there is no accountability. There are robber barons.

Privatization proponents argue that we can rely on the market to provide all necessary oversight. The problem is that they often speak as though having services provided by a private company automatically creates a market. Often they ignore the fact that if there is no competition, there is no market.

Again, if there is no market, there can be no benefits from a market, and there is no accountability. All we are left with is a faith-based, almost magical idea that the market is perfect under all circumstances. But when there is no market - and also no legal accountability - there is nothing to protect the public.

Where a service or product has been privatized, there is a special danger, especially when no market competition exists. In these cases, the private provider is stepping into the role of government. The danger comes about when there is no market and the provider wants the power of government but no oversight to ensure it fulfills its obligations to the public.

That is the dilemma facing toll roads as an example, but it applies to all privatized services or products.

In his op-ed, Steve Hogan takes all sides of this argument. He says that that toll roads should get public subsidies and he says they should be free of regulation so they can make money for their private investors. He says that the system provides competition from buses, rail, and other roads, and yet he was
involved in creating the noncompete agreements that made it impossible for other roads to compete with Denver’s E-470 toll road. [For the full story, see the unbossed Roads Scholars series.]
http://www.unbossed.com/index.UBRoadsScholars.php/ These included forced lowering of speeds and the placement of unneeded traffic lights on nearby Tower Road and an agreement by local cities and counties not to improve roads to get rid of competitors.

Here is how Steve Hogan puts it:

Toll roads add to transportation choices. What better total system could we have than one that allows an individual to choose to ride a bus, take light rail, drive on a freeway or pay a toll to get where he or she wants to go? As might be expected, it’s not quite that simple, so here’s the flip side: Toll roads have to pay for themselves, so they present challenges in financing and construction that don’t exist for traditional highways that are built as public works projects. Toll roads have to be built where traffic demand already exists, or in a phased way so that the revenues from a completed project can temporarily be used to support the construction of the next one.

To use toll roads as part of an overall transportation solution, a few things need to change in Colorado: Legislators and others need to recognize is that if a toll road can’t be financed, it can’t be built. And if bureaucratic permitting rules and strangling oversight get in the way, a toll road will never be financed.

Hogan and those who think like him want to have it all ways. Hogan wants government assistance through the exercise of eminent domain on the toll road’s behalf, government financial support for construction, and government assistance in getting rid of the “competing” roads that were where he wanted to build the toll road.

Once he had all this he demanded no government oversight to protect the public investment.

Hogan and those who think like him see all that protects the public as red tape. Hogan comes clean when he says:

The public highway authorities that run toll roads should have their primary obligation to their customers and to bondholders, not to officeholders, voters or taxpayers. This is accomplished by running an authority like a private business, paying attention to spending and protecting investors.

And taking the public’s money and support and running off without even a thank you.

Hogan wants toll roads to be freed from bureaucratic regulations. But regulations that Hogan might think of as red tape might not be universally regarded as expendable, in particular, regulations designed to prevent cronyism and corruption.

The next post will look at public sector methods of accountability.

- privatization
- public-private-partnerships
- e470

Posted by shirah at 01:17:00. Filed under: business/economics
Comments

[1]
This quote by Steve Hogan:
"The public highway authorities that run toll roads should have their primary obligation to
their customers and to bondholders, not to officeholders, voters or taxpayers."
is truly amazing.

Hogan is the director of the Northwest Parkway PUBLIC Highway Authority (emphasis
added).

Look at their website: http://www.northwestparkway...

The Public Highway Authority is comprised of "three member jurisdictions, the City and
County of Broomfield, City of Lafayette, and Weld County".

If that isn't public, what would be?

Posted by Bob in Loveland at Monday, October 17, 2005 07:04:17

[2]
Good job, you guys!
This is the same Steve Hogan who pronounced the Northwest Parkway in good health in a
letter to the Editor of the Rocky Mountain News September 28
(http://www.rockymountainnews...), saying about my suggestion otherwise "we will not
stand still for those who are misinformed and use information out of context when publicly
discussing the Northwest Parkway." Less than a week later, Fitch Ratings publicly warned
that the Northwest Parkway was in serious trouble, that its traffic is running close to half of
projections, and that its bonds are in danger of being downgraded to "junk" status
http://www.rockymountainnew...

I wonder if Hogan thinks Fitch is misinformed too! The sheer arrogance of these guys
sometimes amazes even a cynic like me.

In 2003, Jefferson County and the City of Arvada created a private non-profit corporation
called "Jefferson Parkway", in which they planned to push forward with extending the
Northwest Parkway South through Golden to C-470. They pointedly invited area developers
to join as directors (for a nice fee), but to the best of my knowledge, none have. Guess who
they retained as their staff director? Yep - Steve Hogan. Hogan agreed to work on a quid-
pro-quo basis: if he later got the job with a new public highway authority, fine. Mo charge.
Otherwise he would back-bill them for his time.

Hogan soon had to report the unwelcome news that the Federal Highway Administration
would require an EIS under NEPA regulations for this stretch of road. In all of his previous
work on E-470 and the Northwest Parkway, Hogan had successfully avoided the EIS
process. The good news was that CDOT would get to run the EIS and would do much of the
engineering and toll studies, relieving the Jefferson Parkway Corporation of millions in
costs. Good staff director that he was, Hogan wrote a "Memorandum of Understanding"
with CDOT, specifying scope and timing requirements for the EIS. The "public-private
partnership" gets deeper in the smoke-filled room of government. This "private
government" now waits in the wings for CDOT to finish up the EIS and let them get on with design and construction.

I call it "private government" because of the limited accountability these quasi-public entities enjoy. Founder (and Arvada Mayor) Ken Fellman, at an organizing meeting for the Jefferson Parkway Corporation, was completely open about the fact that, although the by-laws would call for meetings open to the public, as a private corporation, they were perfectly free to meet behind closed doors any time they wanted. So much for Sunshine in Colorado!

Back to toll roads, The poor performance of the Northwest Parkway is a state-wide issue for two reasons: 1) it demonstrates the inability to project traffic on future toll roads with any confidence at all; and 2) the forecasts are used as inputs to justify the next segment of road. Standard & Poors has found that traffic on toll roads is notoriously over-estimated, by an average of about 20% nation-wide. But here, we're looking at more like 50%. Before the Colorado Tolling Enterprise goes off on a planning spree, we ought to ask them to demonstrate their ability to accurately forecast traffic, and therefore the need for these things. The last I checked, the forecast models for toll roads (or freeways for that matter) didn't even account for the increasing price of gasoline.

For more on the beltway issue, see http://www.GoTheBetterWay.com

Keep up the good work!

Posted by Tom A at Monday, October 17, 2005 21:17:29

[3]
Tom, thanks for a post full of important information. E-470's revenues have never met projections. You can find the E470 finance information at http://www.e-470.com/portal..

It has links to E470 annual reports and financial information.

The 2004 annual report is a masterpiece of evasation. It avoids talking about how revenues are doing. Instead it substitutes levels of use. While it is possible that rates of use may equal revenues, that is not necessarily so. Toll rates may be raised or lowered, and in fact that has been the case.

You have to read every word these folks say with great care.

My favorite part of the 2004 annual report is this quote:
http://www.e-470.com/portal..
"Favorable word of mouth and *increasingly difficult traffic conditions on alternate routes* helped pave the way for the sizeable increase in traffic."

Hmmm, now just what made that traffic on alternate routes increasingly difficult?

Could it be . . . the noncompete agreements E470 executed with neighboring cities and counties that lowered the speed, imposed unneeded traffic lights, and barred improvements?
[4]
And for more on predictions of toll road performance - this time by Moody's in its advice to potential investors. I wonder how many invested in E470 based on this advice?

http://www.innovativefinance...
Moody's Assigns Baa3 Rating to E-470 $321 Million Issue offering will finance the 12.5 mile Segment IV

While actual operations to date have lagged the 1995 projections the financial implications are not deemed significant to the road's credit position. As with most start-up toll roads that Moody's has evaluated, the rating incorporates the expectations that the actual usage patterns will probably be more conservative than the projections, particularly during the ramp-up period. In Moody's opinion the availability of actual traffic data and the recalibration of the model makes evaluating the robustness of the current projections a more critical analytic component than evaluating the accuracy of the historical projections. Since its full opening in May 1999 the traffic along E-470 has continued to grow with average weekday toll transactions almost tripling during 1999. Actual gross toll revenues for 1999 are projected to come in at 43% below the original projections. However, the original projections preliminarily assumed a January 1999 toll increase which was not in fact implemented until July of that year. When adjusting the revenues for this factor the actual difference was only 22%.


Given the recalibrated model, the ramp up growth over the next three years will be critical for the long term financial success of the project. Nevertheless Moody's believes that even under stressed conditions of traffic and revenues 25% below forecast levels, these assumptions appear reasonable. Weekday toll transactions need to grow by roughly 23% per year over the next three years until 2003 when Segment IV is opened. This translates roughly to a 14% growth per annum in the number of users, a number that does not appear unreasonable given the robust nature of the Denver area economy and the continued growth along the corridor. Given the current usage of the road, the average amount of user growth needed through 2003 is equal to 8.6% annually. In 2004, the first year of operation after opening the new segment, a 20% increase in weekly transactions and 12% in the number of users is projected.

[5]
Steve Hogan has provided almost as many great quotes as CDOT Director Tom Norton. Here's another Hogan quote, this one from TollRoadsNews.com, May 2004, about traffic on the Northwest Parkway: "so little on Sundays you could rollerscate on it safely."

Posted by Tom A at Wednesday, October 19, 2005 16:03:24

Add Comment

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DEPARTMENT OF TRANSPORTATION, STATE OF COLORADO,

Plaintiff,

v.

BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY,

Defendant.

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DEFENDANT’S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
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STATEMENT OF UNDISPUTED FACTS

Acting under the power granted to it by the Areas and Activities of State Interest Act, C.R.S. §§ 24-65.1-101 et seq., the Board of Commissioners of Douglas County (Douglas County) passed a resolution on October 12, 2005, amending the County’s existing regulations implementing the Act in Douglas County. Ex. 1. The legislature enacted the Act in 1974. Introduced as H.B. 1041, the Act is most commonly known simply as “1041” and the regulations promulgated by local governments to implement the Act as “1041 regulations.”

The County’s 1041 regulations address several types of development, but those at issue in this case concern the site selection of certain major highways and interchanges. After passage of the regulations, the County Public Works Director wrote a letter to the Colorado Department of Transportation (CDOT) dated November 8, 2005, informing CDOT of the enactment and advising that it was required to obtain a permit for its proposed expansion of a segment of highway C470 within Douglas County. Ex. 2. CDOT is currently studying various alternatives for the C470 project and has an environmental assessment underway. By letter of November 15, 2005, CDOT responded, saying that “CDOT does not intend to comply with the amended 1041 Regulations,” and “the Attorney General has drafted a complaint for declaratory judgment.” Ex. 3. CDOT then filed this case challenging the regulations on December 9, 2005.

SUMMARY OF ARGUMENT

CDOT alleges that the County’s 1041 regulations “are, on their face, expressly preempted by state law, impliedly preempted by state law, and in operational conflict with state law.” Comp., ¶ 12. CDOT’s complaint nowhere mentions the County’s explicit statutory authority under 1041, despite the fact that the Act’s plain language applies to state agencies and to highway site selection on interstate highways, which are managed solely by CDOT. The complaint wrongly suggests that this
case should be resolved by examining the County’s implied powers or inherent authority to regulate state highways and interchanges. Indeed, CDOT’s argument would nullify much of 1041.

Where an express statutory provision authorizes local governments to regulate a specific activity, the alleged conflict is resolved by applying traditional principles of statutory construction. See Board of County Commissioners of Douglas County v. Bainbridge, 929 P.2d 691, 698 (Colo. 1996).

Applied to this case, the specific authorization in 1041 of local governments to regulate site selection of certain major highways and interchanges prevails over the general authorization to CDOT in the transportation statutes to carry out transportation programs and set policy. This construction of the statutory provisions will accomplish the legislature’s reasonable and intended result in enacting 1041 of putting a limited number of specified major development activities under close scrutiny by local government.

CDOT’s preemption analysis has no applicability to this case, given that the legislature has spoken directly and specifically to a local government’s authority to regulate the site selection of highways and interchanges in 1041. Even assuming that preemption analysis were appropriate, however, the transportation statutes neither expressly nor impliedly indicate any legislative intent to have CDOT supersede local regulation under 1041 or local participation in transportation planning, construction and funding in general. To the contrary, the transportation statutes preserve a strong local role in these fields. Finally, there is no demonstrable operational conflict between the County’s 1041 regulations on their face and CDOT’s authorizing statutes. The County drafted its regulations to harmonize with state interests, and CDOT has not applied for or been denied a permit thereunder.
ARGUMENT

I. THE COUNTY ADOPTED ITS 1041 REGULATIONS PURSUANT TO A CLEAR AND UNAMBIGUOUS GRANT OF AUTHORITY BY THE LEGISLATURE TO REGULATE HIGHWAYS AND INTERCHANGES

CDOT bases its complaint on the allegedly preemptive effect of the various compiled transportation statutes in Title 43, Colorado Revised Statutes. But where an express statutory provision authorizes local governments to act in an area where another general statutory scheme also applies, the alleged conflict is correctly resolved not through preemption analysis but by applying traditional principles of statutory construction. See Board of County Commissioners of Douglas County v Bainbridge, 929 P.2d at 698 (using statutory construction principles to find that a specific statutory authorization prevailed over general or implied powers, but that no preemption occurred).

A. Basic Principles of Statutory Construction Require that the Specific 1041 Statute Prevail over General CDOT Authorizations in the Transportation Statutes

The specific statute prevails over the general statutes. Id; C.R.S. § 2-4-205. Applied to this case, the specific authorization in 1041 of local governments to regulate site selection of certain major highways and interchanges prevails over the general authorization to CDOT in the transportation statutes to carry out transportation programs.

In construing the allegedly competing statutory provisions, the court must seek to accomplish the legislature's intended result. 929 P.2d at 698. The language, structure and legislative history of 1041, summarized below, compel the conclusion that the legislature intended to give local governments such as the County the authority to regulate a specific activity – the site selection of highways and interchanges – and that it did so with full awareness that such highways and interchanges are under CDOT's general jurisdiction and that CDOT would be obliged to apply to the County for a 1041 permit for proposals to select the sites of such structures.
B. The Legislature's Intent and State Policy Can Only Be Realized by Interpreting 1041 to Mean What It Says – That State Agencies Such as CDOT Are Subject to 1041

The legislature enacted 1041 in 1974 as part of a wider trend toward control of development:

[The Colorado legislature adopted [1041] in response to the 'rapid growth and development of the state and the resulting demands on its land resources.' The Act ... is designed to protect Colorado's land resources and allocate those resources among competing uses. To accomplish these goals the Act identifies a list of activities of state interest and allows local governments to address local land use concerns by regulating activities which are represented on the list.

City and County of Denver v Bd. of County Commrs of Grand County, 782 P.2d 753, 755 (Colo. 1989) (citations omitted).


As originally introduced, H.B. 74-1041, like the Model Code, proposed to shift land use planning powers to a state agency to designate areas and activities of critical state concern and to promulgate state regulations in those areas. Id.; Ex. 4. As enacted after an amendment, however, 1041 vested the power to designate the areas and activities of state concern in local governments. See Dischinger at 80; see generally §§ 24-65.1-101 et seq. The evolution of the bill explains why 1041 uses the seemingly inapt phrasing regarding areas and activities "of state interest" yet clearly puts local governments in control of adopting and implementing regulations, jurisdiction by jurisdiction, to address the particular areas and activities deemed significant by a local government.

The legislative history of 1041's enactment underscores that the legislature made a deliberate choice to vest regulatory authority over certain types of development in local government and to
encourage the exercise of that authority. The statute’s legislative declaration backs this up, stating that 1041’s two-part intent is for the general assembly first to “describe areas which may be of state interest and activities which may be of state interest.” Second, “[l]ocal governments shall be encouraged to designate areas and activities of state interest and, after such designation, shall administer such areas and activities … and promulgate guidelines for the administration thereof.” § 24-65.1-101(2)(a) and (b). Notably, the statute relegates state agencies to a secondary role: “Appropriate state agencies shall assist local governments to identify, designate, and adopt guidelines for administration of matters of state interest.” Id. -101(2)(c).

Consistent with the legislative declaration of purpose, 1041 sets forth nine activities of state interest, for example, site selection of airports, efficient utilization of municipal and industrial water projects, and site selection of certain solid waste disposal sites. Id. -203(1). The site selection of arterial highways, collector highways and interchanges is one of the nine activities that local governments are authorized to designate as an activity of state interest. Id. -203(1)(c).

Similarly following the legislative declaration of purpose, 1041 sets forth four areas of state interest: mineral resource areas, natural hazard areas, specified natural resource areas, and areas around certain key facilities. § 24-65.1-201. The definition of “key facilities” includes “interchanges involving arterial highways.” -104(7)(c).

Exercise of the 1041 power by a local government is a regulatory function quite unlike ordinary land use control. The authority to regulate under 1041 arises not from the local government’s inherent or implied powers. It is not a type of zoning. When a local government acts to designate areas or activities of concern, as has Douglas County with respect to highways and interchanges, it is acting under a specific statutory authorization and encouragement to regulate the impact of specified major development activities.
Once a local government designates an area or activity of state interest under 1041, any person desiring to conduct a covered activity must first obtain a permit. § 24-65.1-501(1)(a). 1041 broadly defines “person” as “any individual, limited liability company, partnership, corporation, association, company, or other public or corporate body, including the federal government, and includes any political subdivision, agency, instrumentality, or corporation of the state.” Id. at § 24-65.1-102(6) (emphasis added).

As a state agency created by Colorado Constitution art. IV, § 22, and § 24-1-128.7, CDOT is a covered “person” under 1041. 1041 contemplates that CDOT will apply for a permit when it proposes the site selection of “arterial highways and interchanges and collector highways.” Under 1041, highways are covered when they are “part of the federal aid interstate system” or constructed “under the supervision of” or “under guidelines and standards established by” CDOT. § 24-65.1-104 (3) & (4) (defining “arterial highway” and “collector highway”). CDOT is the agency with authority to construct and maintain the roads in the state highway system, and it alone manages the interstates as part of the state system. § 43-2-102. It is not plausible that the legislature found that site selection of arterial highways, collector highways and interchanges was significant enough to list as one of the nine enumerated activities of state interest, but nevertheless exempted this activity from regulation if it was conducted by CDOT, the very entity most likely to engage in it.

Nowhere do the general transportation statutes give CDOT a superior right to engage in site selection of highways and interchanges, free from the 1041 process. In fact, the transportation statutes establish joint state-local participation in many of the most fundamental activities in the realm of transportation planning, construction and finance. Section 43-1-105, one of the provisions

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1 The legislature defined “arterial highway” to include “any limited-access highway which is part of the federal-aid interstate system or any limited-access highway constructed under the supervision of the department of transportation.” § 24-65.1-104(3). The inclusion of interstate highways illustrates how broadly the legislature intended a local government’s 1041 authority to reach.
cited in CDOT’s complaint (¶ 15) as the source of its supposedly “exclusive” authority, actually tells the Executive Director of CDOT to “plan, develop, construct, coordinate, and promote an integrated transportation system in cooperation with federal, regional, local, and other state agencies and private individuals and organizations …” (emphasis added). Likewise, § 43-1-1101, cited by CDOT to similar effect, actually provides in part that “[t]he general assembly hereby finds and declares that local government involvement in transportation planning is critical to the overall statewide transportation planning process.”

In sum, the County’s specific authority under 1041 prevails over CDOT’s general claim to a superseding power under the transportation statutes. The legislature’s goal of encouraging local regulation of certain kinds of development is fulfilled by harmonizing the two types of statutes in this way. In construing the statutes in this manner, the court should remain mindful of the fact that CDOT has not applied for or been denied a permit under Douglas County’s 1041 regulations. This raw facial challenge to the regulatory scheme should fail, for all of the reasons stated above.

II. **EVEN IF PREEMPTION ANALYSIS WERE APPROPRIATE, THE LEGISLATURE HAS NOT EXPRESSLY OR IMPLIEDLY INDICATED ITS INTENT TO DISPLACE THE COUNTY’S AUTHORITY TO REGULATE SITE SELECTION OF HIGHWAYS AND INTERCHANGES**

For the reasons above, preemption analysis has no place in the resolution of CDOT’s challenge. Even assuming that it did, however, the court should find that the County’s authority is not preempted here.

There are three basic ways by which state statute can preempt a county regulation: the express language of a statute may indicate state preemption of all local authority over the subject matter; preemption may be inferred if a state statute impliedly evinces legislative intent to completely occupy a given field by reason of a dominant state interest; and local law may be partially preempted.

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2 Part II.A of this brief examines in greater detail the transportation statutes CDOT relies upon for its contention of superior authority over site selection.
where its operational effect would conflict with application of a state statute. *Board of County Commrs of LaPlata County v Bowen Edwards,* 830 P.2d 1045, 1056-57 (Colo. 1992) (citations omitted). None of these exist in this case.

A. The Transportation Statutes, Title 43 of Colorado Revised Statutes, Do Not Expressly Preempt the County’s Authority Under 1041

In its complaint, CDOT contends that the transportation statutes, C.R.S. §§ 43-1-101 et seq., expressly preempt the County’s 1041 regulations. To prevail on this contention, CDOT must be able to point to “express language of a statute” by which the legislature has taken away local authority over highway and interchange matters or reserved such authority exclusively to CDOT. This CDOT cannot do, because nowhere do the transportation statutes contain language of this nature. To the contrary, those statutes contemplate an active role for local government in transportation issues. Moreover, 1041 itself creates a special role for local government in regulating site selection of highways and interchanges.

1. 1041 Authorizes Local Governments to Regulate Site Selection of State Highways and Interchanges

CDOT’s complaint contends that “no statute or constitutional provision has expressly or impliedly given Douglas County power to regulate the state’s transportation system or to require that CDOT submit to its permitting process.” Comp. ¶ 20. This assertion ignores 1041, which authorizes “local government” (defined as a municipality or a county, § 24-65.1-102(5)) to “grant or deny permits for development in areas of state interest and for activities of state interest.” -301(c).

Government entities have been universally unsuccessful in arguing that they are exempt from local regulation promulgated under 1041 by virtue of their special status. Even constitutional status does not protect entities from 1041 regulation. *Regents of University of Colorado v Board of Commissioners of Boulder County,* Case No. 2001CV1896 (Bldr. County Dist. Ct., Oct. 5, 2004) (holding that the constitutional status of the University of Colorado does not exempt it from county 1041
regulations); *City and County of Denver v. Board of County Comrs.*, 782 P. 2d at 762-3 (holding that home rule status does not exempt a covered entity from 1041); *City of Colorado Springs v. the Board of County Commissioners of the County of Eagle*, 895 P.2d 1105, 1116-7 (Colo. App. 1994) (rejecting the home rule argument). CDOT enjoys no greater claim to exemption than these entities and, like them, is subject to 1041.

2. **The Transportation Statutes Make Local Governments Active Participants in Highway Matters in Colorado**

CDOT bases its complaint and its claim of preemption on §§ 43-1-101 et seq., which it terms "the transportation statutes." Comp., ¶ 13. Contrary to CDOT’s assertions, Title 43 actually supports a strong local role and authority in transportation matters.

Section 43-1-105 tells the Executive Director of CDOT to "plan, develop, construct, coordinate, and promote an integrated transportation system in cooperation with federal, regional, local, and other state agencies and private individuals and organizations ..." (emphasis added). The Transportation Commission promotes "intergovernmental agreements with local governmental entities in order to encourage cooperation between the department and local governments," -106(14).

CDOT’s complaint specifically asserts that § 43-1-1101 makes CDOT the "proper body" for developing the state transportation plan, comp. ¶ 16, which is an accurate but partial quote. CDOT omits that the same statute begins by recognizing that "local government involvement in transportation planning is critical to the overall statewide transportation planning process."3 In fact,

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3 Section 43-1-1101 provides, in full:

**Legislative declaration.** The general assembly hereby finds and declares that local government involvement in transportation planning is critical to the overall statewide transportation planning process. The general assembly recognizes that regional planning commissions and transportation planning regions are the proper forum for transportation planning and that the county hearing process is the proper forum for local government input into the five-year program of projects. However, the general assembly also recognizes that state involvement in transportation planning, through the department of transportation, is equally critical to overall statewide planning, and the general assembly recognizes the department of transportation as the proper body, in
the legislature has divided the responsibility for transportation planning among regional planning commissions, transportation planning regions, local governments and the state, -1101, and directed CDOT to integrate the various levels of planning into a comprehensive whole with “an emphasis on coordination with county and municipal land use planning.” -1103(5)(b). By regulation, statewide transportation planning will be developed in cooperation with local governments. 2 Colo. Code. Reg. 604-1.

Indeed, when CDOT proposes to build or expand a highway, the proposal is subject to review by the applicable transportation planning entity, which may disapprove the proposal. § 43-1-1103; 2 Colo. Code Reg. 604-1; 23 C.F.R. § 450.312. Proposals by CDOT to build highways in Douglas County must be approved or disapproved by the Denver Regional Council of Governments (DRCOG). See Colo. Rev. Stat. § 30-28-110(1)(a) (2005); see also Denver Reg’l Council of Gov’ts – Transportation Planning Process http://www.drcog.org/index.cfm?page=PlanningProcess.

Far from writing local government out of the transportation business, the legislature has taken steps to create an even more active role for it. In 1987, the legislature passed the Public Highway Authority Law, C.R.S. §§ 43-4-501 et seq., which authorizes counties and municipalities to combine to form public highway authorities. The legislature intended that a public authority be empowered to “finance, construct, operate or maintain all or a portion of a beltway or other transportation improvements.” -502(1)(c). In so doing, the legislature recognized that the state lacks the funds to carry out the financing and construction of highways on its own, necessitating a mechanism for local government to do so. Id., -502(a).

Similarly, in 1997 and 2005, the legislature enacted and amended the Regional Transportation Authority Law, C.R.S. §§ 43-4-601 et seq., to authorize counties and municipalities to cooperate with regional planning commissions and local government officials, for developing and maintaining the state transportation planning process and the state transportation plan.
combine to form regional transportation authorities (RTA’s). RTA’s may engage in the “planning, designing, engineering, acquisition, installation, construction, or reconstruction of regional transportation systems.” -605(1)(f); -602(5). An RTA has the power to transfer a regional transportation system to the federal, state or other government, -610(e), or to designate it as part of the municipal, county, state or federal highway system, with the consent of the accepting jurisdiction. -610(f).

The transportation statutes further provide a mechanism by which local governments take the lead in obtaining funding for transportation projects and for CDOT to support those local efforts. Local governments routinely lobby for and occasionally obtain special appropriations of federal funds, called “earmarks,” for major transportation projects within their local jurisdictions. Section 43-1-110(3) authorizes CDOT to “accept, on behalf of the state, any federal moneys made available for highway, railway, mass transit, and other public transportation purposes for which no regional or local subdivision of the state has operating authority.” See also § 43-2-116 (authorizing counties to use highway users tax funds to match federal funds by arrangement with CDOT).

As stated by the Colorado Supreme Court, “there is a presumption that all laws are passed with the knowledge of those already existing and that the legislative body does not intend to repeal a statute without so declaring.” City & County of Denver v Rinker, 366 P.2d 548, 550 (Colo. 1961). The legislature has amended the transportation statutes several times in the 32 years since it enacted 1041 in 1974. Thus, the legislature has had the opportunity to codify the position that CDOT espouses in its complaint, and has not done so. The legislature simply has not given CDOT an exemption from 1041.

Examining the highway statutes as a whole, there is no express language stripping local government of its authority in the field of site selection of highways and interchanges. Nor is there language depriving local government of an active role in transportation design, planning or
construction, or appointing CDOT as the sole source of authority on these subjects. To the contrary, the legislature has preserved in the transportation statutes an important role for local government in transportation matters. Therefore, CDOT fails on its claim that the legislature intended or implemented express preemption of the County's 1041 authority to regulate site selection of highways and interchanges.

3. Rules of statutory construction require that Douglas County's more specific authority under 1041 prevails over, and must be harmonized with, CDOT's general authority under the transportation statutes.

The plain text of 1041 indicates that local governments are charged with authority to designate activities of state interest, and that after such designation, the local governments have authority to implement such regulations. §§ 24-65.1-101 et seq. Courts must give effect, wherever possible, to every clause and word of a statute, rather than nullify any carefully designed provision. Chisum v. People, 80 P.3d 293, 295 (Colo. 2003). As a result, although Title 43 provides concurrent statutory authority over certain highway matters, the two statutes must be construed together and reconciled.

Insofar as CDOT alleges that the statutory authority under Article 43 conflicts with the County's authority under 1041, 1041 will prevail as the specific exception to the general rule. Colorado Springs, 895 P.2d at 118 (1041 specifically addresses water projects as activities of state interest and prevails over general statutory pronouncements on water development).

Thus, CDOT cannot show that the legislature intended to preempt local regulation of highways and interchanges pursuant to 1041.

B. The Legislature Did Not Intend to Occupy the Field of Site Selection of Highways and Interchanges. 1041 Elevates the Local Regulatory Interest in Those Matters and Shows that There is No Dominant State Interest on This Issue.

In its complaint, CDOT claims that the legislature intended to create a comprehensive legislative scheme and to occupy the entire field of state highway matters, thus impliedly preempting
the County's 1041 regulations addressing site selection for highways and interchanges. Comp. ¶ 14. The Colorado Supreme Court has stated that the theory of implied preemption relies on a finding that the state interest is comprehensive or "dominant." *Bowen Edwards*, 830 P.2d at 1058. As the discussion above of express statutory authority shows, the state interest in site selection of highways and interchanges is neither. The statutory scheme in Title 43 reserves a strong role in highway matters not only for local government but for regional transportation organizations such as DRCOG. Moreover, in 1041 itself the legislature has created local regulatory authority over site selection of highways and interchanges, a specific pronouncement that prevails over the general, implied authority on which CDOT bases this argument.

CDOT has conceded in the past that local governments may regulate site selection of state highways and interchanges. Through its predecessor, the Department of Highways, CDOT participated prominently in the drafting of the Model Regulations implementing 1041. Colorado Land Use Commission, "H.B. 1041 Model Land Use Regulations" (Sept. 1976), Ex. 5. Immediately after the enactment of 1041, the Land Use Commission compiled model regulations for its implementation. The Department of Highways authored two of the seven technical documents relied on by the Land Use Commission in drafting the Model Regulations.\(^4\) The Department of Highways thus impliedly conceded that it was subject to regulation under 1041. Having previously taken the position in the rule-making (through the Department of Highways) that it is subject to

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\(^5\) These documents are the "Guidelines for Local Government Decision-Making Relating to Highway Matters of State Interest As Presented to the Land Use Commission" (October 1974) and the "Action Plan" (March, 1974). See Ex. 5, Colorado Land Use Commission, "H.B. 1041 Model Land Use Regulations" (Sept. 1976) at 19-I (identifying the documents relied on in drafting the Model Regulations).
1041, CDOT’s change of position while in litigation deserves no deference. *S. Utah Wilderness Alliance v. Dabney*, 222 F.3d 819, 828 (10th Cir. 2000).

In *Board of County Comm’rs of LaPlata County v. Bowen Edwards*, the Colorado Supreme Court refused to find implied preemption of County regulation of oil and gas development under more general zoning powers, notwithstanding “the state’s interest in uniform regulation” or in “efficient and equitable development and production of oil and gas resources within the state.” 830 P.2d at 1058. Instead, the Court was solicitous of “a county’s interest in land use control” and the “prospect for a harmonious application of both regulatory schemes.” *Id.* The case against implied preemption is markedly stronger in the context of highway regulation, where the legislature has specifically encouraged local regulation in 1041. As the Court noted in rejecting implied preemption in *Bowen Edwards*, the statute – here, 1041 – must be interpreted in a manner that gives effect to legislative purpose. 830 P.2d at 1059.

Finally, the Supreme Court counsels that implied preemption requires a review of the statutory scheme as a whole. *Id.* at 1058. Numerous provisions of the transportation statutes, reviewed above, recognize a local role in highway regulation. The statutory scheme of 1041 recognizes that the dominant role in the designation and implementation of the 1041 authority rests with local governments. In at least two places, the legislature assigned state agencies a supporting role in this arena. In the legislative declaration, it provided that “appropriate state agencies shall assist local governments to identify, designate and adopt guidelines for administration of matters of state interest.” §101(1)(c). As noted, CDOT’s predecessor, the Department of Highways, rendered technical assistance in drafting Model Rules for implementing 1041 and recognized that highway and

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6 1041 reduces local authority over designating oil and gas development as an activity of state interest by precluding local designation thereof under certain circumstances “unless the state oil and gas conservation commission identifies such area for designation.” § 24-65.1-202(1)(d). No such limitation applies to local designation of highways and interchanges.
interchange regulation comes under 1041. Under “functions of other state agencies,” the legislature provided that state agencies would provide technical assistance to local governments concerning matters of state interest. -302(1)(b). Six state agencies have specific duties to provide technical assistance. Had the legislature intended CDOT to have a comprehensive or “dominant” role in highway regulation under 1041, it could have so provided in § 302(1)(b), or it could have exempted CDOT altogether. This court must respect the legislative decision not to do so.

C. Douglas County’s 1041 Regulations Were Drafted to Harmonize State and Local Interests. CDOT Has Filed No Application and Can Show No Operational Conflict With the County.

Finally, CDOT alleges that the County’s regulations are in operational conflict with state laws concerning transportation. Comp. ¶ 12. An operational conflict exists when local regulations “conflict with the achievement of the state interest.” 830 P.2d at 1059. Douglas County’s regulations strive to harmonize local interests with the interests of any proposed development, and specifically seek consistency with applicable state plans. County Reg. § 404.01.2 (Ex. 1).

1. CDOT Has Filed No Application. Therefore, Any Contention of Operational Conflict is Unsupported by the Record and Unripe for Decision.

CDOT’s contention of operational conflict is premature, and cannot be adjudicated until CDOT submits an application and receives a decision by the County. The County may approve the application, or approve it with conditions, thus rendering CDOT’s contention moot. “Any determination that there exists an operational conflict between the county regulations and the state statute or regulatory scheme, however, must be resolved on an ad-hoc basis under a fully developed evidentiary record.” Bowen Edwards, 830 P.2d at 1060. Having brought a facial challenge to the County’s regulations, CDOT cannot obtain the declaratory judgment it seeks under a legal theory that requires development of the facts.

7 The state forest service, the division of minerals and geology, and the oil and gas conservation commission, the water conservation board, the geological survey, and the division of wildlife have specific primary responsibilities under 1041. § 24-65.1-302(b).
2. **No Operational Conflict Exists Because the Legislature Defined the State Interest in Site Selection of Highways and Interchanges as Fulfilled by Local Regulation Under 1041**

The Supreme Court held in *Bowen Edmonds* that state preemption by operational conflict can arise where effectuation of a local interest would “materially impede or destroy the state interest.” 830 P.2d at 1059. In 1041, the legislature has spoken directly to the state interest in site selection of highways and interchanges. With respect to highway and interchange site selection, the statute mandates that the state interest is fulfilled when these are located so that community traffic needs are met, desirable community patterns are not disrupted, and direct conflicts with adopted local, regional and state master plans are avoided. § 24-65.1-301(5). With respect to interchanges involving arterial highways, a particular type of key facility under 1041 and the County regulations, the statute mandates that the state interest is fulfilled by administering the area around such interchanges so as to encourage the smooth flow of traffic and preserve desirable existing community patterns. -202(5)(c).

The Douglas County regulations were drafted to meet the statutory criteria and state interests set forth in 1041 and described above. See e.g. County Reg. § 1001.01-.06; § 1101.01-07 (to ensure that community traffic needs are met; to encourage the smooth flow of traffic; to preserve desirable community patterns, etc.). CDOT has made no application for a permit. It has no basis for arguing that the County’s regulations will do anything other than effectuate the state interests articulated in the statute. There has been no permit denial, and there are no permit conditions — nothing to even arguably conflict with CDOT’s interests.

Finally, 1041 provides that local governments may adopt more stringent regulations than the requirements in the Act for statutorily authorized areas or activities of state interest. § 24-65.1-402(3); *Colorado Springs*, 895 P.2d at 1112. In so doing, the legislature indicated that 1041 regulations predominate when local governments regulate in the specified areas of interest.
Thus, consistent with the statutory scheme, Douglas County’s 1041 regulations are not in operational conflict with the transportation statutes or CDOT’s interests, as yet unspecified in any application. CDOT’s operational conflict claim is not ripe for adjudication, and this Court should grant summary judgment dismissing it.

Conclusion

For all of the reasons stated herein, the Court should issue summary judgment in favor of Douglas County and against CDOT and dismiss CDOT’s complaint.

Respectfully submitted this ___ day of February, 2006.

By: [Signature]

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ATTORNEYS FOR BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY
Table 6-1
Summary of All Alternatives Evaluated

<table>
<thead>
<tr>
<th>Project</th>
<th>Total 2010 Project Cost with COI</th>
<th>Senior Lien Proceeds Par Amount</th>
<th>Federal</th>
<th>Shortfall/Excess</th>
<th>% of Project Cost</th>
<th>State &amp; Local</th>
<th>Annual Transfers</th>
<th>Gross Transfers</th>
<th>Net Transfers</th>
</tr>
</thead>
<tbody>
<tr>
<td>I-70E Toll Lanes Scenario 2</td>
<td>253,790,027</td>
<td>265,033,007</td>
<td>0.00%</td>
<td>-</td>
<td>-</td>
<td>100.00%</td>
<td>0.00%</td>
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<td>-</td>
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<tr>
<td>I-70 Mountain Corridor - Scenario 3</td>
<td>1,097,606,741</td>
<td>1,079,609,009</td>
<td>0.00%</td>
<td>-</td>
<td>-</td>
<td>100.00%</td>
<td>0.00%</td>
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<tr>
<td>I-70 Toll Lanes Scenario 1</td>
<td>822,002,110</td>
<td>822,002,110</td>
<td>0.00%</td>
<td>-</td>
<td>-</td>
<td>100.00%</td>
<td>0.00%</td>
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</tr>
<tr>
<td>I-70 Mountain Corridor - Scenario 3A</td>
<td>1,071,684,739</td>
<td>883,258,993</td>
<td>0.00%</td>
<td>-</td>
<td>-</td>
<td>82.40%</td>
<td>0.00%</td>
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<tr>
<td>I-25 Toll Lanes</td>
<td>230,149,773</td>
<td>237,013,245</td>
<td>0.00%</td>
<td>-</td>
<td>-</td>
<td>81.68%</td>
<td>0.00%</td>
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<tr>
<td>Powers Toll Road Scenario 2</td>
<td>953,255,599</td>
<td>747,788,444</td>
<td>0.00%</td>
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<td>-</td>
<td>90.12%</td>
<td>0.00%</td>
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<tr>
<td>Powers Toll Road Scenario 3</td>
<td>1,210,713,055</td>
<td>875,441,582</td>
<td>0.00%</td>
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<td>72.64%</td>
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<tr>
<td>I-70 Toll Lanes</td>
<td>332,000,226</td>
<td>245,726,249</td>
<td>0.00%</td>
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<td>71.50%</td>
<td>0.00%</td>
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<td>C-470 Toll Lanes Scenario 1A</td>
<td>522,569,134</td>
<td>364,844,570</td>
<td>0.22%</td>
<td>943,015</td>
<td>156,771,749</td>
<td>70.00%</td>
<td>0.00%</td>
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<td>C-470 Toll Lanes Scenario 2A</td>
<td>625,946,395</td>
<td>578,340,411</td>
<td>2.58%</td>
<td>150,030,357</td>
<td>225,916,303</td>
<td>70.00%</td>
<td>0.00%</td>
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<tr>
<td>Powers Toll Road Scenario 4</td>
<td>354,169,028</td>
<td>243,542,868</td>
<td>10.01%</td>
<td>32,865,222</td>
<td>118,201,518</td>
<td>70.00%</td>
<td>0.00%</td>
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<tr>
<td>I-25 Toll Lanes Scenario 1</td>
<td>379,744,624</td>
<td>210,101,717</td>
<td>15.00%</td>
<td>46,724,218</td>
<td>113,918,689</td>
<td>70.00%</td>
<td>0.00%</td>
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<tr>
<td>Northwest Corridor Scenario 2</td>
<td>526,611,749</td>
<td>237,181,523</td>
<td>18.52%</td>
<td>71,547,792</td>
<td>157,977,244</td>
<td>70.00%</td>
<td>0.00%</td>
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<td>-</td>
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<tr>
<td>I-70 Mountain Corridor - Scenario 3B</td>
<td>1,054,471,523</td>
<td>563,874,304</td>
<td>10.68%</td>
<td>144,274,552</td>
<td>318,322,667</td>
<td>70.00%</td>
<td>0.00%</td>
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<td>Denver Area Projects Scenario 2</td>
<td>300,882,982</td>
<td>168,314,504</td>
<td>14.58%</td>
<td>42,582,735</td>
<td>90,265,743</td>
<td>70.00%</td>
<td>-</td>
<td>-</td>
<td>-</td>
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<td>FDOT Regional Area Projects Selected for Cashflow</td>
<td>4,772,150,014</td>
<td>2,881,986,481</td>
<td>19.38%</td>
<td>758,623,843</td>
<td>1,431,536,290</td>
<td>70.00%</td>
<td>0.00%</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

- Denver Regional Area Projects Selected for Cashflow
  (1) Upfront transfers include federal moneys available in the form of a one-time, upfront payment
  (2) Gross transfers include the total annual state and local contributions over the life of the program
  (3) Net transfers are the present value at 5.00% of the gross transfers to the year 2010
Goin’ Down the Road Feelin’ Bad: Are Tollways, Toll Lanes and HOT Lanes the Solution to Highway Blues? –

In a nutshell, NO!!!!!!!!!!

16th Annual RMLUI Land Use Conference
Steve Hogan,
Executive Director

Are toll roads and toll lanes a part of the problem, or part of the solution?

- Building out of congestion?
- Highway financing system broken
- Toll roads/lanes a partial solution
- Different ways to build toll roads

Bloggers, Editorials, Letter Writers

- Too Pricey
- Need Congestion To Work
- Public Subsidies
- Free of Regulation
- Need Government Support
- No Public Oversight
- Avoiding Environmental Reviews
- Impacts on local jurisdictions

If true, there would be no toll roads in the United States, or the rest of the world, today – but there are, and especially in Europe and China

Choice – An Alternative in meeting 21st century transportation needs

- Environmentally compatible
- Fiscally prudent
- Pays for itself – sustained value of system and its maintenance
- Non-competitive with other tax supported alternatives
- Planning, not responding
- Respects local control

Some Road, or No Road?

- Price of congestion?
- Who wants what?
- Available Funds?
- Do roads and mass transit compete for the same dollars?
- Are toll roads different?
- Why does it matter?
E-470 Toll Road
- Growth dependent funding
- 150,000 transactions/day
- $100,000,000 toll revenue
- Tolls & Fees
- Desired by locals
- $750,000,000 Cost
- Impacts on other projects?

I-25 HOT Lanes
- Ease congestion
- Value pricing?
- Mandatory transponder compatibility
- No cash
- Easy demo project?

C-470 “Free” Road/Tolled Lanes
- Travel alternatives
- Financing alternatives
- Proposal - Just getting worse more slowly?
- Litigation
- Irony of Douglas County
- Boulder Turnpike

Private Toll Facilities
- Super slab – wrong idea?
- Texas – 1000 mile corridors
- Chicago - $1.3 billion
- Indiana - $1.8 billion
- Washington, D.C. – family owned
- Australia – middle of Melbourne
- Europe – government concessions
- The rest of the World – building like there is no tomorrow

Northwest Corridor/Jefferson Parkway
- Part of beltway?
- $15 million already
- EIS v. ?
- Validity of prior studies
- Local construction issues
- Drawing traffic or moving traffic?
- CDOT – Study results and no money?

The Northwest Parkway
Northwest Parkway
- IGA’s & local control
- Planned non-development
- No tax dollars
- Full environmental analysis
- Open space dollars
- Local road improvement
- Trails and wetlands
- Built to accommodate mass transit

Environmental Requirements
- EA or EIS
- EIS, or Something Else
- Cost
- Wetlands
- Noise
- Raptors
- Endangered Species
- Air Quality

Financing & Public Interest
- Tax Dollars & Competition
- Bonds/Credit Enhancement
- Full Faith & Credit
- Whose Financing Rules?
- What do ratings mean?
- Taxpayers or bondholders?

In transportation, who pays for what?
- Highways
- Local streets
- Toll roads
- Mass transit

Which Can Pay For Itself?
- Toll Roads
- Hot Lanes
- Toll Lanes

Northwest Parkway Model
- Public Ownership
- Environment Impacts
- Local Impacts
- Local Control
- No Induced Growth
- Public/Private Partnership
- Public Scrutiny
- Private Financing

What’s Next for Tolling?
- Project by project
- Full system
- Tax supported bonding
- Private supported bonding
- Private long term leases
Are Toll Facilities the Answer?

- A partial solution
- Meet community criteria and environmental demands
- Different financing
- Local control
- Local Interests

Final thoughts

We can't build our way out of congestion, but there are costs to congestion we can mitigate. We can't afford to continue to subsidize transportation like we did, but we need all the alternatives, including those subsidized. Do we find a way to take advantage of all the alternatives, or do we simply give up, give in and quit trying?
What I believe:

- There is a serious transportation infrastructure problem in the USA
- Governments at all levels would be remiss if we were not talking about the problem and searching for solutions
- The allure of “new roads without taxes” is counterproductive to finding real solutions

When Toll Roads Make Sense

- Dense urban corridors that feed city centers
- Existing congestion for longer trips
- Local acceptance of tolling
- Provide significant benefits to users that they will pay for

i.e. Toll roads work when built to solve a traffic problem but not when they are built to spur development.

Congestion – the necessary ingredient

- “Free alternatives mean lower revenues.”
  - Texas Department of Transportation
- “In some cases, where free roads are designed to take people to and from the same points as a toll road, they would use the free road to avoid the toll.”
  - Tom Norton, Executive Director CDOT

- Is gridlock by design good public policy?

Non-Compete Agreements

- “Nearly all new toll road projects, in order to sell bonds to investors, must offer some degree of protection from unlimited tax-funded competition from competing free highways.”

  - Robert Poole, The Reason Foundation
Standard and Poor’s

- Competition Protection
  - In the past, governments have elected to:
    - Implement traffic-calming measures
    - Close or degrade capacity
    - Impose truck bans
    - Narrow competing streets
  - “These assurances, however, have the capacity to enhance forecast confidence.”

E-470 Competition Protection

- Participating jurisdictions agreed to
  - Lower speed limit on Tower Road
  - Add stop lights
  - Reduce maintenance

J P Morgan

- “Start-up Toll Roads: Separating Winners from Losers”
  - May 2002
  - Municipal Credit Monitor
  - Studied 24 recent US toll roads opened since 1989
    - 1st year median actual toll revenue < 50% of forecast
    - 3rd year median actual toll revenue < 55% of forecast

Standard and Poor’s

- Traffic Risk in Start-up Toll Facilities
  - September 2002
  - 32 toll roads world wide

  - Studies commissioned by project sponsors had twice the error rate of studies commissioned by banks.

Standard and Poor’s 2003 Update

- Studied 68 toll roads
- “Variability ... is greater than earlier indications suggested.”
- Optimism bias remains a consistent feature of toll road forecasting.

Standard and Poor’s continued

Key miscalculations:

- User’s willingness to pay
- Recession / economic downturn
- Future land use
- Actual time savings lower than predicted
- Improvements to competitive free routes
- Considerably lower usage for trucks
- Lower off-peak traffic
Standard and Poor’s continued

Traffic Risk Index: High risk factors
- Long-term forecasts required
- Ring-roads / beltways around urban area
- Non-congested corridor
- Many alternate routes
- Tolls higher than the norm
- ‘Peaky’ demand profile
- Greenfield site

Toll road financing strategies
- Increased liquidity [borrow money to make front end debt service]
- Very long term debt [like a 40 year, interest-only home mortgage]
- Equity participation [as much as 50%]
  - Government
  - Private sector
- Unlimited ability to raise the toll rates

Is this good public policy?
- Toll roads cost more to build
- Very high financing costs
- Cost of collection [10-15% of revenues]
- Tolls at $0.21 / mile
- State gas tax @ $0.22 / gallon
  - Assume 20 mpg = $0.01 per mile

CDOT EIS on C470 toll lanes
- Cost to build Toll lanes = 51% more than general purpose lanes [GPL]
- Average Delays in 2025:[Eastbound AM peak]
  - No Build = 20 – 21 minutes
  - New GPL = 1 - 2 minutes
  - Toll lanes = 1 - 2 minutes on the toll lane
  - = 17 – 18 minutes on the remaining general purpose lanes

Are these policies in the public interest?
- The privatization of highways
- The fragmentation of the highway system
- Inducing congestion for the very long term on roads that must be used by people who cannot pay the tolls.
- “roads for the rich” – Al Lewis, Denver Post

Conclusion
- Toll road forecasting is seriously flawed
- Public will only pay extra when they perceive a real value
- Toll roads benefit through traffic at considerable expense to local residents
- Public officials are not leading us through rigorous decision-making
Leadership

- *Leit*
- “Go forth and die”
- Not a funding issue but a leadership issue