ADVANCE SHEET HEADNOTE
October 16, 2023

2023 CO 54

No. 22SC242, *Weld v. Ryan*—Jurisdictional Standing—Political Subdivision—Rule of *Martin*.

The supreme court holds that Weld County does not have standing because it cannot demonstrate an injury to a legally protected interest. We granted certiorari review of this case and a companion case, *Colorado State Board of Education v. Adams County School District 14*, 2023 CO 52, __ P.3d __, to review the viability of a specialized political subdivision test used by the court of appeals to conclude Weld County did not have standing to pursue its claims. In *State Board of Education*, we abandon that political subdivision test because it has generated unnecessary confusion. Instead, we explain, a political subdivision, just like any other plaintiff, must satisfy only the standing test developed in *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977). After applying that holding here, we conclude Weld County lacks standing to pursue the claims raised here. We thus affirm the division's judgment, albeit on different grounds.

The Supreme Court of the State of Colorado
2 East 14th Avenue • Denver, Colorado 80203

2023 CO 54

Supreme Court Case No. 22SC242
Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 20CA1445

Petitioner:

Weld County Colorado Board of County Commissioners,

v.

Respondents:

Jill Hunsaker Ryan, in her official capacity as the Executive Director of the Department of Public Health and Environment for the State of Colorado; Colorado Department of Public Health and Environment; and Colorado Air Quality Control Commission, an agency of the State of Colorado.

Judgment Affirmed
en banc
October 16, 2023

Attorneys for Petitioner:
Polsinelli PC
Colin C. Deihl
Bennett L. Cohen
Gina L. Tincher
Denver, Colorado

Attorneys for Respondents:
Philip J. Weiser, Attorney General
Michael C. Landis, Assistant Attorney General
Robyn L. Wille, Second Assistant Attorney General

Denver, Colorado

Attorneys for Amicus Curiae Colorado Counties, Inc.:
Hall & Evans, L.L.C.
Andrew D. Ringel
Denver, Colorado

Attorneys for Amici Curiae Colorado Department of Human Services and Colorado Department of Early Childhood:
Philip J. Weiser, Attorney General
Matthew J. Worthington, Assistant Attorney General
Denver, Colorado

JUSTICE HART delivered the Opinion of the Court, in which **CHIEF JUSTICE BOATRIGHT**, **JUSTICE MÁRQUEZ**, **JUSTICE HOOD, JUSTICE GABRIEL, JUSTICE SAMOUR,** and **JUSTICE BERKENKOTTER** joined.

JUSTICE HART delivered the Opinion of the Court.

¶1 The Weld County Colorado Board of County Commissioners ("Weld County") seeks judicial review of rules adopted by the Colorado Air Quality Control Commission (the "Commission") to minimize emissions of certain pollutants from oil and gas wells. A division of our court of appeals applied a specialized political subdivision standing test and concluded that Weld County did not have standing to pursue its claims under that test. We granted certiorari review of this case and a companion case, *Colorado State Board of Education v. Adams County School District 14*, 2023 CO 52, __ P.3d __, to review the viability of that political subdivision test.[1] In *State Board of Education*, we abandon the political subdivision test because it has generated unnecessary confusion. Instead, we

[1] We granted certiorari to review the following issues:

1. Whether the division erred when applying the "Rule of *Martin*" to dismiss Weld County's action for judicial review of a rule promulgated by the Air Quality Control Commission ("Commission"), by holding that Weld County is (1) subordinate to the Commission in the context of air quality control and (2) that the Colorado General Assembly has not granted Weld County an express statutory right to seek judicial review of the Commission's rulemaking.
2. [REFRAMED] Whether this Court should review and clarify *Martin v. District Court*, 550 P.2d 864 (Colo. 1976).

explain, a political subdivision, just like any other plaintiff, must satisfy only the standing test developed in *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (Colo. 1977).

¶2 Applying that holding here, we examine whether Weld County has suffered (1) an injury in fact (2) to a legally protected interest. We conclude that, although Weld County has a legally protected interest, it cannot demonstrate an injury to that interest. Accordingly, Weld County lacks standing to pursue the claims raised here. We thus affirm the division's judgment, albeit on different grounds.

Facts and Procedural History

¶3 The General Assembly passed Senate Bill 19-181 to regulate the oil and gas industry's impacts on air quality. Ch. 120, sec. 3, § 25-7-109, 2019 Colo. Sess. Laws 502, 502–03. That bill directed the Commission to revise or adopt rules to reduce emissions of certain air pollutants. *Id.* Responding to that directive, the Air Pollution Control Division (the "Division") proposed changes to Regulation 7, Dep't of Pub. Health & Env't, 5 Colo. Code Regs. 1001-9 (2023). As relevant here, those changes included more frequent leak-detection-and-repair inspections at certain well production facilities and natural gas compressor stations, as well as increased emission controls for storage tanks.

¶4 The Commission initiated a rulemaking process for these changes, and included a notice-and-comment period and a hearing so that interested stakeholders could give input into the Division's proposal. Weld County, the

largest oil and gas producing county in the state, participated in the process by submitting pre-hearing comments and appearing at the hearing. It opposed the proposed changes, providing expert testimony that the increased cost of compliance could ultimately shutter up to 35% of the oil and gas wells located in Weld County. Over these objections, the Commission adopted revisions to Regulation 7 that were largely consistent with the Division's recommendations.

¶5 Weld County filed the instant action to challenge these revisions, bringing four claims. Its first and fourth claims for relief relate to a section of the Colorado Air Pollution Prevention and Control Act (the "Air Act"), §§ 25-7-101 to -1309, C.R.S. (2023), that provides:

> The commission shall give priority to and take expeditious action upon consideration of . . . [a] request by a unit of local government that the commission consider local concerns respecting environmental and economic effects in the context of a proceeding where the state is targeting a source for imposition of additional air pollution controls.

§ 25-7-105(16)(c), C.R.S. (2023). Weld County alleged that the Commission failed to "give priority" to its concerns about the economic impacts of the revisions, because it allotted the County only ten minutes to testify during the hearing.

¶6 In its second and third claims, Weld County alleged that the defendants violated the State Administrative Procedure Act (the "APA"), §§ 24-4-101 to -104, C.R.S. (2023), in two ways. It first asserted that the Division relied on flawed economic-impact and cost-benefit analyses and thereby failed to adequately

consider the economic impacts of the Regulation 7 revisions on Weld County. Weld County also contended that the Commission violated the APA, the Air Act, and its own procedural rules when it accepted a late-filed proposal and adopted portions of that proposal.

¶7 The trial court dismissed the action, concluding that Weld County lacked standing both under Colorado's generally applicable standing test and under the additional political subdivision test. A division of our court of appeals affirmed the dismissal but focused its opinion exclusively on the political subdivision test. *Weld Cnty. Colo. Bd. of Cnty. Comm'rs v. Ryan*, 2022 COA 26, ¶ 46, 511 P.3d 663, 671. Weld County filed a petition for certiorari, which we granted.

Analysis

¶8 In resolving the issue of standing, we review the court of appeals' conclusion de novo, *State v. Hill*, 2023 CO 31, ¶ 8, 530 P.3d 632, 634, and accept as true all allegations set forth in the complaint, *Dunlap v. Colo. Springs Cablevision, Inc.*, 829 P.2d 1286, 1289 (Colo. 1992).

¶9 To bring a claim, any party must plead facts that satisfy the so-called *Wimberly* test for standing—that is, the plaintiff suffered (1) an injury in fact (2) to a legally protected interest. *Wimberly*, 570 P.2d at 539.

¶10 The first prong of this analysis derives from separation-of-powers principles. Colo. Const. art. III; *Ainscough v. Owens*, 90 P.3d 851, 855–56 (Colo.

2004). Because this requirement guarantees "concrete adverseness" it prevents courts from encroaching on the legislative power to make prospective laws. *Ainscough*, 90 P.3d at 856–57 (quoting *City of Greenwood Vill. v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 437 (Colo. 2000)). Thus, a claimed injury which is a "remote possibility of a future injury" or "'indirect and incidental'" cannot confer standing. *Id.* at 856 (quoting *Brotman v. E. Lake Creek Ranch, L.L.P.*, 31 P.3d 886, 890–91 (Colo. 2001)).

¶11 The second prong, regarding injury to a legally protected interest, "reflects prudential considerations of judicial self-restraint." *Maurer v. Young Life*, 779 P.2d 1317, 1323–24 (Colo. 1989) (quoting *Colo. Gen. Assembly v. Lamm*, 700 P.2d 508, 516 (Colo. 1985)). To be legally protected, an interest must derive from "the constitution, the common law, a statute, or a rule or regulation." *Hill*, at ¶ 10, 530 P.3d at 634 (quoting *Ainscough*, 90 P.3d at 856).

¶12 Applying this well-settled law, we must determine whether Weld County has satisfied the *Wimberly* test. We ultimately conclude that, although Weld County does have a legally protected interest—thus satisfying the second prong of the test—the County has not shown an injury in fact and therefore does not have standing to pursue these claims.

A. Weld County's Interest Is Legally Protected

¶13 We review issues of statutory interpretation, including whether a statute creates a legally protected interest, de novo. *See Est. of Brookoff v. Clark*, 2018 CO 80, ¶ 5, 429 P.3d 835, 837. In so doing, we aim to effectuate the legislature's intent, looking first to the language of the statute to ascertain its meaning. *Arvada Vill. Gardens LP v. Garate*, 2023 CO 24, ¶ 9, 529 P.3d 105, 107. If the language is clear and unambiguous, we apply it as written. *Delta Air Lines, Inc. v. Scholle*, 2021 CO 20, ¶ 13, 484 P.3d 695, 699.

¶14 Under the APA, "any person adversely affected or aggrieved by any agency action may commence an action for judicial review in the district court." § 24-4-106(4), C.R.S. (2023). The General Assembly has determined that, for purposes of the APA, a county is a person. § 24-4-102(12), C.R.S. (2023) (defining "[p]erson" as including "an individual, limited liability company, partnership, corporation, association, county, and public or private organization of any character other than an agency.").

¶15 Of course, the APA does not confer standing in and of itself, because it "does not create substantive legal rights on which a claim for relief can be based." *Romer v. Bd. of Cnty. Comm'rs*, 956 P.2d 566, 576 (Colo. 1998). That means some other law must give rise to a cause of action under the APA. *Id.*

¶16 And the Air Act does just that: it specifically incorporates the APA. Section 25-7-120(1), C.R.S. (2023), of the Air Act, entitled "Judicial Review," provides that "[a]ny final order or determination by the division or the commission shall be subject to judicial review in accordance with the provisions of this article and the provisions of article 4 of title 24, C.R.S." — which is the APA. *See* §§ 24-4-101 to -104, C.R.S. (2023). In this way, the General Assembly meant for parties, including counties, to be able to bring an APA challenge to any "final order or determination by the division or the commission," such as the one raised here. § 25-7-120(1).

¶17 Accordingly, Weld County's claims are legally protected. We now turn to the question of whether the County suffered an injury in fact.

B. Weld County Has Not Suffered an Injury in Fact

¶18 In its complaint, Weld County alleged three types of injuries: to its tax base, its procedural rights, and its land use authority. None of these constitutes an injury in fact.[2]

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[2] Weld County also raises, for the first time, two other theories of injury in fact: that it is a landowner with rights impacted by the revisions at issue here and that it has associational standing on behalf of small well operators within Weld County. We decline to consider these theories. *See, e.g.*, *Am. Fam. Mut. Ins. Co. v. Allen*, 102 P.3d 333, 340 n.10 (Colo. 2004) ("Arguments not raised before the trial court may not be raised for the first time on appeal."). As to the first, it was not pled in the complaint or otherwise raised in the trial court. And as to the second, although the complaint contained an allegation that the Air Act generally grants "counties a unique standing to represent the interests of their constituents," it contained no other factual allegations that support associational standing or even

1. Injury to Tax Base

¶19 First, Weld County alleged in its complaint that "[t]he revisions will significantly increase the costs of regulatory compliance for oil and gas operators in Weld County, which will result in a large percentage of Weld County's wells being shut-in, thereby reducing the County's tax revenue streams." Accepting Weld County's allegations as true, it still claims only an "[i]ndirect and incidental pecuniary injury." *Wimberly*, 570 P.2d at 539. The supposed harm to Weld County's tax base flows from speculation about future business decisions that third-party oil and gas operators might make in response to an increased regulatory burden and is therefore "insufficient to confer standing." *Id.* (holding that bail bondsmen's claim that a pre-trial release program would negatively impact their business was too indirect because any injury would be based on third parties' decisions); *see also Brotman*, 31 P.3d at 890–91 (finding rancher's injury too indirect when it required speculation about whether his new neighbor would condemn an easement).

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an allegation that Weld County has associational standing here. And Weld County failed to raise an associational-standing theory in its response to defendants' motion to dismiss for lack of standing at the trial court, in briefing to the court of appeals, or in its opening or reply briefs here. It raised this argument for the first time during oral argument and in supplemental briefing that we requested on the issue of injury in fact.

¶20 A speculative injury to Weld County's tax revenues is insufficient to confer standing.

2. Injury to Procedural Rights

¶21 Next, Weld County raises two supposed injuries arising from the rule-making process itself.

¶22 Weld County first claims that the Commission failed to give adequate priority to its concerns as a local government raising questions about the economic impact of the proposed rules, thus violating section 25-7-105(16)(c). Specifically, it alleges "the Commission allotted Weld County, the single largest oil and gas producing county in the State of Colorado, only ten minutes of time to testify during the rulemaking hearing" and ultimately adopted revisions which were contrary to Weld County's arguments. But the complaint lacks any factual allegation that Weld County's evidence was excluded, or that its arguments were otherwise ignored. The statutory mandate that the Commission "give priority" to Weld County's concerns cannot dictate a particular allocation of time during a hearing or mean that Weld County will always get its way.

¶23 Alternatively, Weld County alleges that the Commission's methodology was flawed and that it impermissibly accepted and adopted portions of a late-filed revision to one party's proposal in the final version of Regulation 7. In particular, the proposed revisions originally required more frequent leak-detection-and-

repair inspections for storage and production facilities within a thousand feet of any "Building Unit," which was a defined term that included residential and certain commercial buildings. But—after the deadline for filing proposals but before the rulemaking hearing itself—a group called Local Community Organizations ("LCO") filed, and the Commission adopted, a revised proposal that replaced the term "Building Unit" with a different defined term, "Occupied Areas." The proposed revision expanded the associated definition to specifically include mobile homes, indoor or outdoor school spaces, and outdoor recreation areas. Weld County alleges that permitting LCO to file this proposal after the deadline for submitting proposals had passed did not give other parties sufficient time to react and was a violation of the Commission's procedural rules and therefore of the APA.

¶24 Assuming these allegations are true, Weld County has nonetheless failed to demonstrate an injury in fact. Its complaint "contains little more than [a] contention that the [Commission] acted improperly" and does not state how the Commission's allegedly unlawful action injured Weld County beyond reducing the time it had to respond to the proposal. *State, Dep't of Pers. v. Colo. State Pers. Bd.*, 722 P.2d 1012, 1017 (Colo. 1986). In *State, Department of Personnel*, we explained that a party seeking to establish standing to challenge an agency action must demonstrate that they were "adversely affected or aggrieved" by the agency

action. *Id.* Weld County has not made that showing here. The County has claimed that the Commission accepted the revision outside of established timelines and that the County did not have as much time as it otherwise would have to respond to the proposed revision. Without more, these allegations do not satisfy the injury-in-fact requirement. *Id.* The County has not identified how these procedural anomalies adversely affected it.

3. Injury to Land Use Authority

¶25 Finally, Weld County claims that the revisions infringe on its land use authority because counties retain "certain powers including the right to enact a land use scheme, which includes the right to protect the environment, to regulate land use based on impacts to the community, and to regulate certain oil and gas development activities." Weld County appears to argue that the new definition of "occupied areas" described above interferes with its zoning authority because it imposes additional burdens on—and may ultimately extinguish—uses that are permitted by Weld County's zoning plan.

¶26 But the revisions at issue here have no bearing on the use of the land. Oil and gas producers can still operate anywhere; those operations are merely subject to increased inspections and emissions requirements. These requirements are quite different from the actual restriction on land use that was at issue in the cases that Weld County seeks to rely on to support this claim. For example, in *Douglas*

County Board of Commissioners v. Public Utilities Commission, 829 P.2d 1303 (Colo. 1992), the court confronted a challenge to the Public Utilities Commission's ("PUC") approval of a transmission-line upgrade which directly contravened the county's land use plan. Indeed, the Public Service Company of Colorado ("PSCo") first sought zoning approval from Douglas County to upgrade transmission lines across property in the county. *Id.* at 1305. When Douglas County refused zoning modifications, PSCo went through the PUC, asking the PUC to effectively override the county's zoning decision. *Id.* Here, by contrast, Weld County is arguing only that land users might not take advantage of the County's zoning choices because of additional state regulation. This allegation cannot establish an injury in fact.

Conclusion

¶27 Because Weld County has not suffered an injury in fact, it lacks standing to pursue its claims. We therefore affirm the division's judgment, though on different grounds.