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## EXHIBIT F

July 6, 2020

Larimer County Board of County Commissioners  
Steve Johnson, Chairman  
John Kefalas, Chair Pro Tem  
Tom Donnelly, Commissioner  
P.O. Box 1190  
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Dear Commissioners Johnson, Donnelly and Kefalas:

On June 1, 2020, the Board of County Commissioners conducted a hearing to consider an appeal under the County's Land Use Code (LUC) brought by the Street Media Group (Street Media). Street Media asked in its appeal that it not be required to strictly comply with several provisions in LUC Section 10, the County's sign regulations, so it can erect a large, off-premises, electronic billboard on a property within the City's Growth Management Area.

While we know you gave much thought and consideration in initially approving Street Media's appeal, we ask you to please reconsider that decision before the Board adopts a resolution finalizing its approval.

It is our understanding Street Media's attorney, Todd Messenger, argued in the hearing that LUC Section 10.5.E., the County's regulation prohibiting off-premises billboards, is unconstitutional. He cited a 2015 United States Supreme Court decision, *Reed v. Town of Gilbert*,<sup>1</sup> and a 2019 Sixth Circuit Court of Appeals decision, *Thomas v. Bright*,<sup>2</sup> to support his argument. Mr. Messenger also testified he had met with each of you previously about this constitutional issue.

We want to offer an alternative analysis of this constitutional issue and of other points Mr. Messenger argued and to encourage you to follow your Staff's recommendation to deny Street Media's appeal.

As you know, the following review criteria in LUC Section 22.2.5. must be met for Street Media's appeal to be approved:

- A. Approval of the appeal is consistent with the purpose and intent of the LUC;

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<sup>1</sup> 135 S. Ct. 2218 (2015).

<sup>2</sup> 937 F.3d 721 (6<sup>th</sup> Cir. 2019).



- B. There are extraordinary or exceptional conditions on the site which would result in a peculiar or undue hardship on the property owner if LUC Section 10 is strictly enforced; and
- C. Approval of the appeal would not result in an economic or marketing advantage over other businesses which have signs which comply with LUC Section 10.

Street Media must therefore show that *each* of these criteria is satisfied for *each* of the following provisions from which it is seeking to deviate for its proposed electronic billboard: (1) LUC Section 10.5.B (prohibiting message changes not more frequently than once every minute); (2) Section 10.5.E (prohibiting off-premises billboards); and (3) Section 10.11 (limitations on billboard setback, height and sign-face size).

We will address first the constitutionality issue and then the application of the three review criteria to Street Media's appeal.

### **County's Prohibition of Off-Premises Billboards is Constitutional**

Mr. Messenger spent much of his presentation arguing LUC Section 10.5.E, which prohibits off-premises billboards, is unconstitutional. He argued it is unconstitutional because of the Supreme Court's *Reed* decision and the Sixth Circuit's *Thomas v. Bright* decision.

*Reed* specifically restricts government's ability to regulate the content of *non-commercial speech*. *Reed* does not address *commercial speech*, but involved a regulation that prohibited a church's temporary, off-premises signs stating the date and location of upcoming church services, while allowing other temporary off-premises signs. *Thomas v. Bright* also involved the regulation of a sign depicting *non-commercial speech*, not *commercial speech*. It was a billboard supporting the 2012 U. S. Summer Olympics Team.

Here, Street Media clearly intends to use its proposed electronic billboard for *commercial speech*.

In both decisions cited by Mr. Messenger, the laws regulating these signs were determined to be unconstitutional because they were *content-based* restrictions of *non-commercial speech* (meaning, based on the content of the sign's message), rather than *content-neutral* restrictions (meaning, based on content-neutral elements of the sign, such as size, height or location). In determining whether a *content-based* restriction of *non-commercial speech* is constitutional, *Reed* requires the courts to apply a test of strict scrutiny rather than the lesser standard of intermediate scrutiny, the standard applied to laws regulating *commercial speech*. So, while *Reed* could limit the County's ability to regulate signs depicting *non-commercial speech*, the same is not true for *commercial speech*.



To further support his constitutionality argument, Mr. Messenger stated he had cited in Street Media’s materials presented to the Board fourteen judicial opinions, and said concerning them, “No contravening legal authority here.” In addition, he specifically cited and quoted from *L.D. Mgmt. Co. v. Thomas*, an April 24, 2020, federal district court decision from the Western District of Kentucky, which is attached.

In *L.D. Mgmt. Co.*, an adult store posted a billboard on the side of a semi-truck trailer parked on property next to an interstate highway and off-premises from the store. The billboard gave directions to the store, so its message was commercial speech. Kentucky law prohibited the billboard for several reasons, including that it was an off-premises sign. In striking down Kentucky’s prohibition on off-premises signs, the court in *L.D. Mgmt. Co.* did *not* do so because this prohibition was content-based and, therefore, violated *Reed* and *Thomas*, but *because the State of Kentucky admitted that it had presented no evidence in the case concerning its asserted governmental interests, aesthetics and safety, to support the constitutionality of its challenged law.* The court also noted that Kentucky was selectively enforcing its sign laws against this adult store while allowing other billboards on semi-truck trailers to remain.

What Mr. Messenger did not cite to the Board is the attached April 7, 2020, decision from the federal district court in the Western District of Wisconsin: *Adams Outdoor Advertising Limited Partnership v. City of Madison*. In this case, an outdoor billboard company challenged Madison’s ordinance prohibiting off-premises billboards arguing the ordinance was content-based, and thus unconstitutional under *Reed*. Unlike the Kentucky federal district court’s decision, this Wisconsin federal district court *does* address whether a law prohibiting off-premises billboards is content-based and, therefore, subject to *Reed*’s strict scrutiny analysis, or content-neutral, subject to the lesser standard of intermediate scrutiny.

In a detailed and thorough analysis, this Wisconsin federal district court concludes the distinction between on-premises and off-premises signs is a content-neutral distinction subject to only intermediate scrutiny. In fact, the court observes: “for the most part, courts considering the constitutionality of on-premises versus off-premises distinctions since *Reed* have concluded that such distinctions remain subject to intermediate scrutiny . . . .” The court then applies the intermediate scrutiny standard to Madison’s ordinance and concludes it is constitutional and enforceable by Madison.

Clearly, the state of the law concerning laws prohibiting off-premises signs is not as cut and dry as represented by Mr. Messenger.

We also believe Mr. Messenger is not correct that the courts will strike down as unconstitutional on its face *all* applications of the County’s off-premises prohibition because LUC Section 10.5.E. does not distinguish between commercial and non-commercial speech. The Colorado Supreme Court has held laws affecting speech rights under the First Amendment to be facially unconstitutional *only* if there are no set of circumstances under which the law can be



applied constitutionally.<sup>3</sup> Here, Section 10.5.E. can be applied constitutionally to off-premises billboards expressing commercial speech.

Taking a slightly different approach, the U. S. Supreme Court considers a law affecting speech rights under the First Amendment to be facially unconstitutional, or overbroad in its application, only if the law “prohibits a *substantial* amount of protected speech,” and it makes this determination by balancing the “competing social costs” of not deterring people from engaging in constitutionally protected speech and “invalidating a law that in some of its applications is perfectly constitutional” and beneficial to the public good.<sup>4</sup> The Court has also said: “In order to maintain an appropriate balance, we have vigorously enforced the requirement that a statute’s overbreadth be *substantial*, not only in an absolute sense, but also relative to the statute’s plainly legitimate sweep,” and that holding a law to be facially invalid is “strong medicine that is not to be casually employed.”<sup>5</sup>

More recently, the Supreme Court has said that it may impose a limiting construction on a law if is readily susceptible to such a construction.<sup>6</sup> Here, it is easy for a court to conclude after *Reed* that already existing laws prohibiting off-premises signs should be interpreted to apply only to signs depicting commercial speech.

We therefore disagree with Mr. Messenger’s prediction that the courts in Colorado would strike-down as unconstitutional the County’s ban on off-premises billboards in LUC Section 10.5.E. Instead, the courts may well decide, as the federal district court did in the *Adams Outdoor Advertising Limited Partnership v. City of Madison* case, that the on-premises and off-premises distinction is content-neutral and, therefore, not subject to *Reed*. Or, they may decide the County’s ban on off-premises billboards can be interpreted to apply only to signs depicting commercial speech, like Street Media’s proposed billboard, but not to off-premises billboards depicting non-commercial speech.

In light of this, if your decision to approve Street Media’s appeal was influenced by the constitutional arguments advanced by Mr. Messenger, we encourage you to reconsider your decision in light of a fuller and more representative overview of how the courts are addressing this First Amendment issue.

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<sup>3</sup> *Woldt v. People*, 64 P.3d 256, 266 (Colo. 2003); *People v. Montour*, 157 P.3d 489, 499 (Colo. 2007).

<sup>4</sup> *U.S. v. Williams*, 553 U.S. 285, 292 (2008).

<sup>5</sup> *Id.* at 292-93.

<sup>6</sup> *U.S. v. Stephens*, 559 U.S. 460, 481 (2010).



**Application of LUC § 22.2.5. Review Criteria**

**A. Approval is Not Consistent with Purpose & Intent of LUC**

In addressing the first review criterion in LUC Section 22.2.5.A., your Staff correctly stated in its report to the Board, that the purpose of the sign regulations in LUC Section 10 is to, among other things, protect the public safety, avoid clutter, and protect and maintain the visual appearance of commercial and industrial areas in the County.<sup>7</sup>

In commenting on this purpose, your Staff wrote in its report and similarly advised the Board at the hearing:

“The intent of the regulations within Section 10 of the Land Use Code is to not allow off-premises signs, to provide consistent regulations for the allotment of commercial signage, and to have sign regulations consistent with the regulations adopted by the City of Fort Collins and the City of Loveland.

Larimer County’s sign regulations were deliberately written to be consistent with the regulations adopted by the City of Fort Collins and the City of Loveland to reduce the potential for nonconformities should signs permitted in unincorporated Larimer County be annexed to one of those cities.”

This intent is reflected in Section 3 of the 2008 Intergovernmental Agreement (IGA) the City and County entered into to cooperatively manage future urban development in the City’s Growth Management Area (GMA). Section 3 states: “The County agrees to use the City’s Comprehensive Plan as a guideline for the development inside the GMA. The City’s Comprehensive Plan includes any plans for land use . . . and other elements deemed necessary by the City to act as a guideline for development inside the GMA.”

The Board was advised at the hearing by your Staff and in its report, that the City’s current sign regulations would not allow Street Media’s proposed billboard to be erected in the City. The Board was also advised that the City was finalizing an update to its Harmony Corridor Plan (HC Plan), which has since been adopted. Street Media’s site for its proposed billboard is within the area governed by the HC Plan. The HC Plan is part of the City’s Comprehensive Plan and does not allow off-premises electronic billboards.

Thus, approving Street Media’s electronic billboard is not only inconsistent with the purpose and intent of the County’s sign regulations, but also with the spirit of the IGA. Allowing Street Media’s electronic billboard on a parcel in the City’s HC Plan area will jeopardize the outcomes sought by the County and the City through the IGA and will interfere with absorption

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<sup>7</sup> LUC § 10.1.



of this important quadrant of this major interchange into the City as contemplated and intended in and through the IGA.

It is also disappointing Mr. Messenger obscured these shared purposes and intentions, instead arguing to the Board that the “IGA doesn’t give Fort Collins any semblance of land use control outside the city’s boundaries” and “the City has no authority under the IGA to make comments.” While it is obviously true the City does not have any kind of legal veto over the Board’s decision in this appeal, it is a stretch to say the City has no authority to comment under the IGA. The IGA certainly contemplates the County will consider the City’s wishes concerning County land use decisions involving properties in the GMA. And, as a separate and equally compelling basis for the City’s interest in this decision, since the City is the owner of a natural area adjacent to the site of the proposed billboard, its concerns about the billboard should be considered by the Board.<sup>8</sup>

Another concern the City raised in its comments to the County, was the potential effect of light coming from the billboard on wildlife in the City’s adjacent natural area. Mr. Messenger responded to this concern, stating: “It’s not serious to say that lighting is a concern on this site.” Mr. Messenger then said this was due in part to the nearby presence of the big-box and warehouse retailers, an obvious reference to the Walmart and Costco on the eastside of the interchange, which Mr. Messenger made a big point of saying were developments “approved by the City of Fort Collins.” As you know, Walmart and Costco are in Timnath’s town limits and not within Fort Collins, so Fort Collins did not approve these developments.

Perhaps when considered in isolation, Mr. Messenger’s arguments and testimony related to this criterion have some superficial appeal. However, when considered together and in context, they distort, discount and disregard the reasonable positions the City and your Staff have taken in opposition to Street Media’s billboard under this criterion. The Board should reconsider whether the proposed billboard is consistent with the purpose and intent of the County’s LUC.

*B. No Extraordinary or Exceptional Conditions Result in Peculiar or Undue Hardship*

The second criterion in LUC Section 22.2.5.B. requires Street Media to show that the parcel on which the billboard is to be installed has extraordinary or exceptional conditions that result in a peculiar or undue hardship on the parcel’s owner if the County’s sign regulations being appealed are strictly enforced. The sign regulations in LUC Section 10 being appealed and the requested change for each are:

- (i) Section 10.11.B.2. limits height of billboard to 18 feet above grade, but 30 feet above grade is requested;

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<sup>8</sup> A home rule city, like Fort Collins, has legal standing to question county land use decisions affecting the city’s nearby property. *Board of Commissioners v. City of Thornton*, 629 P.2d 605 (Colo. 1981).



- (ii) Section 10.11.B.2. limits the size of billboard's two sign faces to 90 square feet each, but 240 square feet per sign face is requested;
- (iii) Section 10.11.B.2. requires the sign to be setback from the right-of-way by at least 36 feet, but a 30-foot setback is requested; and
- (iv) Section 10.5.B. limits electronic signs changing message to no more frequently than once every minute, but a 6-second change time is requested.

As an initial matter in addressing how this second criterion applies to the particular sign regulations, it is important to note that Street Media is not the owner of the parcel – the land is owned by Colorado's State Land Board, which will be leasing a small part of the parcel to Street Media for the electronic billboard. Despite this, it is Street Media that has brought this appeal and the evidence it presented was focused on the hardship these sign regulations will have on *its* placement and operation of the billboard. While it was noted that the State Land Board would not receive the revenue it seeks to receive from its lease to Street Media if this appeal is denied and Street Media chooses not to proceed with a billboard that complies with the County LUC, there was no evidence presented at the hearing of actual "peculiar and undue hardship" the State Land Board will suffer as a result of the County's strict enforcement of its sign regulations.

The parcel's "extraordinary or exceptional conditions" Street Media identified in its materials and presentation were: (1) adjacent Harmony Road is approximately 150 feet wide with four lanes of high-volume traffic and acceleration and deceleration lanes; (2) westbound traffic on Harmony comes from a higher elevation as it crosses the interchange; (3) Harmony has a speed limit of 45 miles per hour; and (4) the elevation of the parcel is about 14 feet below the grade of adjacent Harmony Road. Of these conditions, only the fourth one can even said to be a condition of the parcel itself. And, the other three conditions are experienced by all other properties located adjacent to Harmony Road and near the interchange.

The conditions of a property typically considered extraordinary or exceptional conditions that cause a hardship for the property owner are physical conditions like an odd-shaped lot, unusual topography or other physical condition unique to the property and not a conditions generally shared by other properties. For example, in LUC Section 4.6.3.A.1.(ii), the County's Board of Adjustment can grant a zoning variance for an "exceptional physical condition of the property such as narrowness, shallowness, topography or location of the property, or other extraordinary and exceptional situation unique to the property provided the difficulty or hardship is not caused by the act or omission of the applicant." Therefore, the key elements the Board should consider in evaluating whether to require Street Media to strictly comply with each of these appealed sign regulations, is whether the parcel has a physical condition that is unique to it (i.e., not shared by other property owners) that justifies granting the appeal for that regulation.



In essence, Street Media’s argument is premised on the notion that the features of this site are not desirable for the use it seeks to make of it – not a matter of hardship, but rather one of site selection for Street Media.

Request for 30-Foot Height Instead of 18-Foot Height

Addressing first the appeal to allow the billboard to be 30 feet high instead of the required 18 feet, we agree this does address a legitimate extraordinary or exceptional condition of the parcel due to the low elevation of the parcel, since it is an actual physical condition of the parcel. However, as Mr. Messenger admitted in his testimony, he failed to address in Street Media’s materials the appeal from the height limitation in LUC Section 10.11.B.2.

Request for 240 Square Foot Sign Faces Instead of 90 Square Foot Sign Faces

Concerning the appeal to increase the size of the sign faces from 90 square feet to 240 square feet, the parcel has no unique extraordinary or exceptional condition that justifies this. The conditions Street Media relies on in its materials for this appeal are the 150-foot width and the common traffic conditions of Harmony Road. None of these are actual physical conditions of the property and they are conditions experienced by many properties in this area along Harmony Road. They are therefore not “extraordinary or exceptional conditions.” Under Street Media’s reasoning, all properties along this area of east Harmony Road (or any other roadway of a similar size) should be allowed to have sign faces of 240 square feet.

Request for Setback of 30 Feet Instead of 36 Feet

In its appeal to change the sign setback from 36 feet to 30 feet, Street Media’s materials cite Harmony Road’s 150-foot width and its westbound traffic coming from a higher elevation as it crosses the interchange. Again, these are not physical conditions of the parcel and they are shared by all other properties in this area of Harmony Road. However, Street Media also argues that not allowing this lesser setback “creates an additional peculiar and undue hardship that compounds” the other hardships identified in its materials. Street Media argues this compounding hardship is that there is no setback standard in LUC Section 10.11.B.2 for signs having a sign face of more than 90 square feet, *so the billboard’s proposed 240 square feet sign faces creates more hardship for Street Media.* It does not seem appropriate that appeals should be granted for self-imposed hardships.

What is more likely the reason Street Media needs a 30-foot instead of a 36-foot setback is shown on the aerial photo on page 67 of the Board’s hearing materials. It shows the proposed location of the billboard as being just south of an area that the existing business on the parcel is apparently using for semi-truck parking. If the 36-foot setback is enforced, the billboard would be in this parking area. This problem was not noted by Street Media in its presentation.



Request for Reduction in Dwell Time to Six Seconds Instead of One Minute

In appealing the one-minute message frequency limitation in LUC Section 10.5.B., which Street Media calls “dwell time,” the parcel’s extraordinary or exceptional conditions cited by Street Media are the location of the parcel at an interchange, the width of Harmony Road, Harmony’s high-volume traffic and its speed limit of 45 miles per hour. Again, these are not physical conditions of the parcel and they are shared by other properties in this Harmony Road area and in similar areas of the County, such as near the I-25 interchanges on Highway 14 and East Prospect Road. There is nothing unique nor extraordinary or exceptional about these conditions to justify Street Media’s requested 6-second dwell time. Rather, Street Media has apparently selected a site that does not have the conditions it desires for its billboard. The facts presented do not constitute “extraordinary or exceptional conditions” either as that term is generally applied in a regulatory context or as it is used in common speech.

*C. Approval Results in an Economic and Marketing Advantage Over Other Businesses with Signs*

In applying this third review criterion from LUC Section 22.2.5.C., your Staff concluded the proposed billboard will “provide an economic and marketing advantage over businesses that comply with Section 10 of the Land Use Code by allowing the following: increased sign height, increased sign and copy size, presence of electronic message display, reduced copy hold time, and placement within an area where off-premises signs are otherwise prohibited.” Because this would be the first off-premises electronic billboard of its kind in Larimer County and since it will generate for Street Media a paid commercial ad about every six seconds, 24 hours a day, seven days a week and year round, with the State Land Board receiving \$1 million in lease payments, there is little or no question your Staff is right.

Street Media nevertheless argues allowing it to provide off-premises outdoor advertising, in a way *no other business* in the County can, allows other businesses with a poor outdoor sign location or with no outdoor sign location to utilize Street Media’s billboard and this will “level the playing field.” However, this review criterion calls not for a determination as to whether the proposed billboard will help other businesses to use outdoor advertising, but rather requires to the Board to consider whether other businesses with signs that do strictly comply with the County sign regulations will suffer an economic or marketing disadvantage if Street Media is allowed to erect and operate this billboard.

Other outdoor sign companies with off-premises signs in Larimer County will certainly be at an economic and marketing disadvantage if Street Media is allowed its billboard. How lucrative these exceptions will be is illustrated by Street Media’s willingness to offer the County in this appeal to remove its five traditional off-premises billboards in return for this single electronic billboard. We urge you to consider the likely effect of such an approval on other outdoor advertising companies which, being placed in a position of economic and marketing disadvantage,

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are likely to themselves seek similar exceptions for new off-premises electronic billboards in return for removing their traditional off-premises billboards.

### **Conclusion**

In sum, the review criteria that must be satisfied to approve sign regulation exceptions through the appeal process have not been met in this instance. And, one-sided arguments that the County's sign regulations are not constitutional do not provide a sound basis for deviating from the County's LUC and its requirements.

We know you are committed to protecting the interests of County and Fort Collins residents, and with respect to the billboards have shown this through the enactment of reasonable sign regulations. We urge you to reconsider your decision approving Street Media's appeal and encourage you to maintain your commitment to fairly and appropriately enforcing the County sign regulations as written, as well as your commitments in the IGA regarding the City's GMA.

Thank you very much for considering our concerns about your initial approval of Street Media's billboard. We hope you share our continuing commitment to work together and consider each other's positions to ensure that future urban development within the City's GMA happens in way beneficial to our residents and citizens. We believe in this matter this is best achieved by the Board reconsidering and reversing its approval of Street Media's billboard.

Sincerely,

Darin Atteberry  
City Manager

Carrie M. Daggett  
City Attorney

### Attachments

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