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DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO Larimer County Justice Center 201 Laporte Avenue, Suite 100 Fort Collins, CO 80521-2762 Telephone: (970) 498-6100	
Plaintiff: THE CITY OF FORT COLLINS, COLORADO, a municipal corporation, v. **Defendants:** BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY, COLORADO; STREETMEDIAGROUP, LLC	**▲ COURT USE ONLY ▲**
Attorneys for Defendant, StreetMediaGroup, LLC: Todd G. Messenger, Reg. No. 38783 Andrew J. Helm, Reg. No. 47548 FAIRFIELD AND WOODS, P.C. 1801 California Street, Suite 2600 Denver, CO 80202 Telephone: (303) 830-2400 Facsimile: (303) 830-1033 E-Mail: tmessenger@fwlaw.com; ahelm@fwlaw.com	Case Number: 2020CV030580 Division: 4B
DEFENDANT STREETMEDIAGROUP, LLC'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT	

Defendant StreetMediaGroup, LLC ("StreetMedia"), through its undersigned counsel, Fairfield and Woods, P.C., and pursuant to C.R.C.P. 12(b)(1), hereby submits this Motion to Dismiss Plaintiff's Complaint and states as follows:

CERTIFICATE OF CONFERRAL

Defendant's counsel has conferred with Plaintiff's counsel and counsel for the Board of County Commissioners of Larimer County concerning this Motion. The Board of County Commissioners takes no position. Plaintiff opposes the relief requested.

INTRODUCTION AND BACKGROUND

At the center of this case is a sign that was approved by Larimer County's Board of County Commissioners ("BOCC") on June 1, 2020 for installation at 4414 East Harmony Road (in unincorporated Larimer County) ("Subject Property"). The Subject Property is near Fort Collins ("City"), but it is not located within the city limits. The Subject Property is owned by the State Land Board, which leased a small area to Defendant StreetMedia for construction and display of the sign, in order to further the State Land Board's core mission of generating funds for Colorado's public schools. Over the lease term, the sign will generate approximately one million dollars for education in Colorado.

The nature of the June 1, 2020 BOCC decision on the sign was the granting of StreetMedia's "appeal" ("Sign Approval")[1] under the Larimer County Land Use Code ("LCLUC") by unanimous vote. The LCLUC's appeal process allows for variations from the strict application of the LCLUC upon demonstration at a quasi-judicial hearing of the BOCC that certain qualitative standards are met. StreetMedia's application, supporting materials, and presentation provided extensive facts and analysis showing compliance with each and every applicable approval standard. Although the City submitted some written materials into the record prior to the hearing, it did not appear or offer testimony at the hearing.

On July 6, 2020, the City wrote a letter to the County, asking it to re-open the hearing. By that point, there had been an intervening BOCC meeting, and a motion for reconsideration was time-barred under Robert's Rules of Order. In any event, the County appropriately refused the City's untimely and inappropriate request for reconsideration.

[1] To avoid confusion with the City's CRCP 106 appeal, StreetMedia's appeal to the BOCC under the LCLUC is herein referred to as "Sign Approval."

On July 28, 2020, nearly two months after StreetMedia's appeal was granted by the BOCC, a resolution entitled "Findings and Resolution Approving the Street Media Group Sign Appeal" ("Findings") was approved with other administrative matters on the consent agenda of that day's regular BOCC "administrative matters meeting." The County's web site describes the "administrative matters meeting" as a meeting "to handle routine administrative items or to discuss operational issues with staff."[2] At the outset of the meeting, there is also an opportunity for "public comment from any citizen who wishes to address the Board," but those comments are not considered for the purposes of quasi-judicial proceeding.[3] As is customary in similar cases in Larimer County, the approval of the Findings was an administrative matter that did not involve further hearing or deliberation. The Findings did not modify or revise the Board's June 1, 2020 final decision on the StreetMedia appeal.

During general public comment at the administrative matters meeting, a representative of the City re-hashed the City's objections and requested that the BOCC remove the Sign Approval from the consent agenda for reconsideration. Commissioner Donnelly briefly questioned the representative, asking pointedly, "certainly you understand that after the hearing is completed, the hearing is completed, don't you? . . . you do understand that the hearing has already taken place and the Board has already ruled? . . . this is just the approval of findings and resolutions, essentially like the minutes of what occurred during the meeting?" The City representative responded, "Yeah, I understand that."[4] The BOCC did not take any specific action on the City's

[2] https://www.larimer.org/bocc/commissioners-meetings/internet-broadcasts-commissioners-meetings#/uws/ (Screenshot attached as Exhibit 1).
[3] *Id.*
[4] https://www.larimer.org/bocc/commissioners-meetings/internet-broadcasts-commissioners-meetings#/am/ (specific time-marked video at https://youtu.be/NuS5ePldlcg?t=1041)

request. Instead, after the informal exchange between County Commissioners and the City representative, the BOCC unanimously approved the consent agenda, including the Findings.

On August 25, 2020, the City filed this action under C.R.C.P. 106, seeking judicial review of the Sign Approval. In its Complaint, the City alleges that the BOCC did not follow the recommendations of the Larimer County Development Services Team, and did not provide any alternative analysis, rationale, or grounds for its decision.[5] What the City does not, and cannot, allege is that the BOCC violated any legally protected interest of the City. As such, the City cannot carry the burden of establishing standing (because the City plainly lacks standing), and its Complaint must be dismissed.

For standing, the City appears to rely on the LCLUC and an Intergovernmental Agreement ("IGA") between the City and the County. *See* Complaint, Exhibit A. The City does not cite specific provisions in either to support its standing. Instead, it invites this honorable Court to engage in a "snipe hunt" to find them.

As a matter of law, the City lacks standing to pursue judicial review of a discrete land use decision of the BOCC on property that is not within the City's jurisdiction. Further, "appeals" like the one at issue in this case, are entirely outside the scope of the IGA. Therefore, they are squarely (and entirely) within the County's discretion.[6] While (like anybody else) the City can provide documents and testimony, it is not legally enabled to attack the end result of the

[5] Of course, the BOCC is not legally obligated to follow a Staff recommendation where, as here, there is contrary competent and substantial evidence and argument in the record. The City's suggestion that Staff reports and City complaints are the only evidence the BOCC may consider is entirely without merit.

[6] Even if the IGA were implicated, it specifically provides that final authority for all development proposals on land within the geographic scope of the IGA rests with the County. But the IGA is not implicated because appeals, such as the Sign Approval at issue in this case, are not within the definition of "development proposals" that are affected by the IGA.

County's final decisions on individual "appeal" applications in court.

In addition to the City's lack of standing, the City's petition is untimely by more than eight weeks. Therefore this Court is without jurisdiction. This action comes 57 days after the expiration of the time limits under C.R.C.P. 106(b). The final decision on the Sign Approval was made on June 1, 2020, and, as the BOCC reminded the City several times, the Findings were approved as an administrative or ministerial function (not a quasi-judicial one), as Commissioner Donnelly put it, "essentially like the minutes." As such, the Findings do not restart the long-expired C.R.C.P. 106(b) clock.

Given the circumstances of this case, the untimeliness of the City's petition is egregious. The 28 days for appeal expired, and then a length of time more than twice that also passed, before the City filed its complaint. Worse, the City's untimely and unwarranted attack is on a Sign Approval that involves StreetMedia's First Amendment right to free speech. *See Mahaney v. City of Englewood*, 226 P.3d 1214, 1219 (Colo. App. 2009). *Mahaney* requires that, as a matter of constitutional significance, decisions affecting signs must be made "within a brief, specified time period during which the *status quo* is maintained, and there must be the possibility of prompt judicial review in the event the permit is erroneously denied." *Id.* at 1220.

In compliance with *Mahaney's* strict rule, LCLUC § 22.2.2.B.3., provides that the BOCC hears appeals within 60 days after they are filed. The BOCC makes a final decision at the end of the hearing. LCLUC § 22.2.2.B.5.b. ("At the conclusion of the hearing, the county commissioners will approve, approve with conditions or deny the appeal."). There is no time specified in the LCLUC between the final decision at the end of an appeal hearing and the routine ministerial process of memorializing that decision in writing with a findings and resolution document. In this case it took nearly two months for the County to take the ministerial

step.

It is well-established that "if a statute is capable of alternative constructions, one of which is constitutional, then the constitutional interpretation must be adopted." *People v. Iannicelli*, 454 P.3d 314, 319 (Colo. App. 2017). Under *Mahaney*, StreetMedia has a constitutional right to finality at the conclusion of the hearing at which the decision is made—June 1, 2020. The period for "prompt judicial review" expired, as a matter of constitutional law and Colorado civil procedure, 28 days later, on June 29, 2020.

StreetMedia is entitled to timeliness and certainty with regard to decisions that affect its First Amendment rights. This is not a close case. The City's Complaint is manifestly untimely.

Because the City lacks standing to sue the County as to an individual land use decision that is committed to the County's authority, and because the City's complaint is time-barred, StreetMedia respectfully requests that this Court dismiss the Complaint with prejudice.

STANDARD OF REVIEW

A. Standing

The doctrine of standing is a preliminary inquiry to ensure that judicial power is properly exercised. *Colorado General Assembly v. Lamm*, 700 P.2d 508, 515-16 (Colo. 1985). Standing is a component of subject matter jurisdiction, and is a constitutional prerequisite for maintaining a lawsuit. *Hansen v. Barron's Oilfield Serv.*, 2018 COA 132, ¶ 7 (quoting *Sandstrom v. Solen*, 2016 COA 29, ¶ 14). A party cannot waive or consent to subject matter jurisdiction—a court either has the jurisdiction to hear a particular case or it does not. *L.B. v. Blumberg*, 2017 COA 5, ¶ 13.

To establish standing, it is the plaintiff's burden to demonstrate: (1) he or she has suffered an injury-in-fact; and (2) that injury was to a legally protected right. *Grossman v. Dean*,

80 P.3d 952, 958 (Colo. App. 2003). Injury-in-fact may be proved through showing that the action complained of actually caused or threatened to cause injury. *Id.* The second prong of standing, a legally protected right, "may be tangible or economic such as . . . arising out of contract." *Ainscough v. Owens*, 90 P.3d 851, 856 (Colo. 2004).

When the jurisdiction of the court is questioned under C.R.C.P. 12(b)(1), the plaintiff bears the burden of proving the court has jurisdiction over the matter, and decisions of the trial court are granted high deference by courts of appeal. *Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993). Unlike motions to dismiss for failure to state a claim under C.R.C.P. 12(b)(5), the trial court is not required to take a plaintiff's allegations as true, nor is it required to give a plaintiff the benefit of inferences in its favor. *Id.* (citing as persuasive federal decisions, *e.g.*, *Boyle v. Governor's Veterans Outreach & Assistance Center*, 925 F.2d 71, 74 (3d Cir. 1991) ("Under Rule 12(b)(1), the court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.")).

B. C.R.C.P. 106

1. Standing under C.R.C.P. 106

Standing to appear and present at quasi-judicial public hearings is broader than standing to seek judicial review of those proceedings under C.R.C.P. 106. *Woda v. Colorado Springs*, 40 Colo. App. 173, 174 (1977). At public hearings, any "party in interest" may participate and give comment at the hearing. *Id.* This right to participate in a quasi-judicial public hearing does not automatically spawn an additional right to participate as a party in judicial proceedings under C.R.C.P. 106. *Kornfeld v. Perl Mack Liquors, Inc.*, 193 Colo. 442, 444 (1977). Only direct parties to the quasi-judicial action upon which review is sought, or a person substantially aggrieved by the result of that action, have standing to seek review under C.R.C.P. 106(a)(4). *Id.*

(citing *Miller v. Clark*, 144 Colo. 431, 432 (1960) ("Appeals are not allowed for the mere purpose of delay, or to present purely abstract legal questions, however important or interesting, but to correct errors injuriously affecting the rights of some party to the litigation.")).

2. Timing of a C.R.C.P. 106 action

A failure to bring an action within the timeframe prescribed by C.R.C.P. 106(b) divests a court of jurisdiction. *Sullivan v. Board of County Comm'rs*, 692 P.2d 1106, 1109 (Colo. 1984) (citing *Tri-State Generation & Transmission Co. v. City of Thornton*, 647 P.2d 670 (Colo. 1982); *Gold Star Sausage Co. v. Kempf*, 653 P.2d 397 (Colo. 1982)). Under C.R.C.P. 106(b), a complaint seeking review of a governmental body's quasi-judicial action must be filed in district court not later than 28 days after the final decision of that body.

An act is considered quasi-judicial—and therefore subject to C.R.C.P. 106(a)(4) review—if the act involves the exercise of discretion in the adjudication of individual determinations, such that due process requires notice and hearing. *Englewood v. Daily*, 158 Colo. 356, 361 (1965). Acts that do not involve notice and hearing, and that do not require an act of discretion, are considered administrative or ministerial and not subject to review under C.R.C.P. 106(a)(4). *Chellsen v. Pena*, 857 P.2d 472, 475 (Colo. App. 1992); *Snyder v. Lakewood*, 189 Colo. 421, 425 (1975) (identifying the factors for determining whether an action is quasi-judicial as: (1) a state or local law requires adequate notice to the public before acting; (2) a state or local law requires a public hearing in which members of the public may testify and present evidence; and (3) a state or local law requires a determination by applying the facts of a specific case to certain criteria established by law), overruled in part on other grounds by *Margolis v. District Court of County of Arapahoe*, 638 P.2d 297 (Colo. 1981).

ARGUMENT

A. The City lacks standing as a matter of law

Subordinate political subdivisions in Colorado lack standing to challenge decisions of superior political subdivisions, absent some statutory or constitutional provisions conferring such a right. *City of Greenwood Village v. Petitioners for the Proposed City of Centennial*, 3 P.3d 427, 438 (Colo. 2000) (citing *Martin v. District Court*, 191 Colo. 107 (1976)).[7] Absent a statutory basis for standing, disputes between subordinate and superior state agencies must be resolved by the executive branch and not the courts. *Romer v. Board of County Comm'rs*, 956 P.2d 566, 574 (Colo. 1998). Even if a statutory right is available, a municipal plaintiff must still satisfy the traditional tests for standing—actual injury to a protected legal right. *Id.* (citing *Wimberly v. Ettenberg*, 194 Colo. 163, 168 (1977).

Here, the City (a municipal corporation) is subordinate to the County (a direct division of the State under Art. XIV, COLO. CONST.). *Johnson v. Jefferson County Bd. Of Health*, 662 P.2d 463, 471 (Colo. 1983) ("A county is not an independent governmental entity existing by reason of any inherent sovereign authority of its residents; rather, it is a political subdivision of the state, . . . created to carry out the will of the state . . . ." (internal citation omitted)). The County's land use authority within its unincorporated jurisdiction stems from a direct delegation of state authority under C.R.S. § 30-38-101, *et seq.* Under C.R.S. § 30-28-102, the County has exclusive jurisdiction to control land use within its unincorporated boundaries.

There are no statutory provisions permitting the City to challenge a land use decision by

[7] There is an exception to this rule, however, when a state statute impacts a home-rule city's interests in the administration of its local affairs. *Denver Urban Renewal Auth. v. Byrne*, 618 P.2d 1374, 1380-81 (Colo. 1980). As discussed herein, such is not the case here, and the IGA specifically divests the City of such an argument.

the County. Indeed, as the Colorado Supreme Court observed in *Board of County Comm'rs v. Thornton*, 629 P.2d 605, 609-10 (Colo. 1981), while home-rule cities might have standing to challenge a county's master plan and zoning ordinances in court, this standing does not extend to permitting "home-rule cit[ies] to second-guess land use decisions properly within the purview of [a] [c]ounty's discretion."

What the City seeks to do in this case is legally out of line. The City has no legal right to second-guess—or to ask this Court to second-guess—a singular land use decision that is squarely and solely committed to the County. Consequently, this Court should dismiss the City's Complaint.

Worse, even if the City had some legal basis to challenge the County in this case, the City lacks standing to seek C.R.C.P. 106(a)(4) judicial review in this case under *Kornfeld*, because the City has no legally protected interest at stake. *Kornfeld*, 193 Colo. at 444. The City responded to a County invitation to submit comments on StreetMedia's application. Such invitations are routinely sent to the City and other "referral agencies" to ask for their take on applications under review at the County. A routine referral does not create a special interest in the case that would support standing.[8] The land that the County's decision concerns is not within the City's boundaries, and no legally protected interest of the City is substantially affected by the County's decision.

In sum, the City lacks standing to seek judicial review as a matter of law. First, the City

[8] The referral here was merely a courtesy. This is not a case where a referral is legally required under C.R.S. § 30-28-136 because there was no "preliminary plan" at issue. But even the statutory process is only about obtaining comments and recommendations, and it does not create special rights for the referral agency or continuing obligations for the County. *See Save Park County v. Board of County Comm'rs*, 990 P.2d 35, 39 (Colo. 1999).

is a subordinate political subdivision to the County, and no express statutory provision grants it the right to challenge the County's decision (a discrete land use decision squarely within the County's discretion). Second, the City can show no injury to any legally protected interest (because it has none). Either circumstance, standing alone, is fatal to the City's standing. Accordingly, this Court should dismiss the City's Complaint with prejudice.

B. The IGA Does Not Support Standing

The City attached the IGA to its Complaint, but it cannot bootstrap standing with that document. In fact, the IGA does not address or relate in any way to appeals like the Sign Approval, and is therefore inapposite. Specifically, an "appeal" under the LCLUC is not a "development proposal" under the IGA, and therefore the Sign Approval does not come within its reach.

Section 6.A. of the IGA provides that the IGA applies to "development application[s], as defined in Section 4.2.1(B), [LCLUC]." LCLUC § 4.2.1 covers development applications for "rezoning, special review, minor land division, planned land division and rural land plan."[9] In Larimer County, signs are not considered "land uses." A "development application" as contemplated by the IGA is not required to obtain approval for a sign. Signs are simply improvements that are allowed pursuant to the standards in LCLUC § 10.0.

Similarly, appeals from provisions of LCLUC § 10.0, taken pursuant to LCLUC § 22.0, are entirely outside the scope of the IGA. The IGA provides no basis for standing. The City

[9] The IGA was executed 20 years ago. It appears that in the intervening two decades, LCLUC § 4.2.1 was amended and the types of applications that are covered are now listed in subsection (D). Either that or the IGA contained a typographical error and referred to subsection (B) instead of subsection (D). In either case, it is clear that the development proposal types that are covered in the current version of LCLUC § 4.2.1(D) are the only applications that are subject to the terms of the IGA.

cannot argue in good faith that the unambiguous language of the IGA is not pertinent to its reach. *Ad Two, Inc. v. City & County of Denver*, 9 P.3d 373, 376 (Colo. 2000) ("Written contracts that are complete and free from ambiguity will be found to express the intention of the parties and will be enforced according to their plain language.").

Even if the City honestly believes that the County failed to follow specific provisions of the IGA (and assuming that the City could point out a provision of the IGA that is relevant to the Sign Approval), the IGA itself provides the remedies. IGA § 5. Those remedies do not include a C.R.C.P. 106 petition on an individual County decision under LCLUC § 22.0. The IGA remedies are limited to: (1) terminate the IGA with 60 days' notice; (2) refuse to annex lands or specific parcels of land; (3) cease to maintain public infrastructure improvements; (4) cease to enforce or attempt to enforce reimbursement agreements; or (5) cease to collect and remit funds for county-wide/regional improvements, including regional impact fees. IGA § 5. This Court should decline the City's apparent invitation to rewrite the IGA. *Colorado Intergovernmental Risk Sharing Agency v. Northfield Ins. Co.*, 207 P.3d 839, 842 (Colo. App. 2008) ("'well-settled principles of law' prevent courts from rewriting contracts for the parties." (internal citation omitted)).

C. The Complaint is Untimely Under C.R.C.P. 106(b)

1. In General

The City's C.R.C.P. 106 Complaint is untimely by more than eight weeks. LCLUC § 22.2.2.B.5.b. provides, "at the conclusion of the [appeal] hearing the county commissioners will approve, approve with conditions or deny the appeal." As such, the LCLUC provides that the action of the BOCC is complete on the date the hearing concludes. After that, there is no substantive decision left to make. It is undisputed that the BOCC voted to approve

StreetMedia's appeal on June 1, 2020 upon the conclusion of a quasi-judicial hearing. Complaint ¶ 49. That decision was final.

The jurisdictional rule in Colorado is that the "time period under C.R.C.P. 106(b) begins to run at the point of 'administrative finality,' which occurs when the 'action complained of is complete, leaving nothing further for the agency to decide.'" *Wilson v. Board of County Comm'rs*, 992 P.2d 668, 670 (Colo. App. 1999), quoting *3 Bar J Homeowners Ass'n v. McMurray*, 967 P.2d 633, 634 (Colo. App. 1998). Administrative finality is context-dependent. *Citizens for Responsible Growth v. RCI Dev. Ptnrs., a Colo. Corp.*, 252 P.3d 1104, 1107 (Colo. 2011). For the purposes of administrative finality, the applicable code controls, provided that it is within constitutional boundaries. Here, whatever the phrase 'official final decision' may mean to Larimer County, there was "nothing further for the agency to decide" after the quasi-judicial hearing closed and the vote of the BOCC was taken. *Wilson*, 992 P.2d at 668. In this case, administrative finality occurred with the BOCC vote on June 1, 2020.

3 Bar J is a comparable case. In *3 Bar J*, a homeowners association ("HOA") challenged the Chaffee County Commission approval of two subdivisions at the close of a quasi-judicial hearing on March 4, 1997. *3 Bar J*, 967 P.2d at 634. The County regulations did not require written approval, but did provide that the "final plat may not be offered or accepted for recording 'until approved in writing' by the county." *Id*. at 635. That administrative step was completed by April 29, 1997 (56 days later). *Id*. at 634.

On May 28, 1997 (85 days after the hearing), the HOA filed a C.R.C.P. 106 complaint objecting to the approvals. *Id*. The HOA argued that its complaint was timely because it was

filed within 30 days[10] after the date the approvals were signed and recorded. *Id.*

The Court of Appeals rejected the HOA's argument, holding that for purposes of administrative finality under C.R.C.P. 106(b), the County's approval occurs "when the Board of County Commissioners votes at a public meeting . . . even though such approval may be subject to certain conditions"—and even though those conditions include a subsequent "approval in writing." *Id.* at 635 (relying on *Snyder*, 189 Colo. 421). The Court was "persuaded that certainty is required in the application of C.R.C.P. 106(b) and that the date of the public vote by the Board triggered the . . . time limit." *Id.* at 635.

The Court reasoned that starting the C.R.C.P. 106 clock on the date a plat is formally "approved in writing" (which is at an indeterminate time after the public hearing) "would lead to uncertainty" because it places parties in "the precarious position of not knowing exactly when finality had occurred for purposes of judicial review." *Id.* The court cautioned that, "if approval . . . could be challenged 30 days after all conditions were fulfilled, developers would be required to expend substantial sums to comply with a county's conditions before learning whether the subdivision approval would be set aside on judicial review." *Id.*

Larimer County has a practice (but not a requirement) of administratively memorializing appeals with a findings and resolution document that is approved on the consent agenda of an administrative meeting of the BOCC at some point after a quasi-judicial hearing where the matter is decided. The administrative meeting could occur at any time after the BOCC hearing, and in this case, like *3 Bar J*, nearly two months elapsed between the quasi-judicial hearing and the administrative meeting. But here, unlike *3 Bar J*, it was not just StreetMedia's financial

[10] C.R.C.P. 106(b) has since been amended, and the time for filing a petition was reduced to 28 days.

investment that was at stake, but also its right to free speech under the First Amendment. *Mahaney*, 226 P.2d at 1219. StreetMedia's free speech rights were already subject to the "prior restraint" of the County's sign code from the time it filed its application until that application was decided on June 1, 2020. If the City is allowed to invoke the jurisdiction of this Court, as it is attempting to do, *85 days after the County's decision was made*, then StreetMedia's free speech rights will essentially be indefinitely "frozen" and therefore fundamentally violated. *CBS v. Davis*, 510 U.S. 1315, 1317 (1994) ("each passing day [of a prior restraint] may constitute a separate and cognizable infringement of the First Amendment.").

Colorado courts have held that, in narrow circumstances, "administrative finality" may occur at some point after a quasi-judicial vote. None of those circumstances exist in this case. For example, in *Wilson v. Board of County Comm'rs*, 992 P.2d 668 (Colo. App. 1998), the Weld County Commission held a quasi-judicial hearing and adopted a resolution denying an application for an accessory dwelling unit. *Id*. at 670. After the hearing, the Board signed a written version of the resolution and mailed it to the plaintiff (whose permit had been denied). *Id.* at 669. The Board then revised the resolution and sent the revised copy to the plaintiff. *Id.*

Under the specific circumstances of that case, it appeared that the County had changed its mind with respect to the reasoning of the underlying decision, and the Court was not persuaded that the Board's revisions to the resolution were "merely clerical." *Id*. As such, the Court was convinced that the Board had something further to decide. *Id*. Citing *3 Bar J* for the applicable law, the *Wilson* Court held that "the point of administrative finality" occurred on the date of the revised resolution. *Id*.

In Larimer County, LCLUC § 22.2.2.A.5.c requires a decision at the close of the quasi-judicial appeal hearing. The Findings did not provide any new information or reasoning, and did

not change the decision in any way. Since they were approved administratively, the Findings have not been revised. Consequently, like the applicant in *3 Bar J*, StreetMedia is entitled to the certainty that finality occurred at the close of the hearing on June 1, 2020.

Colorado courts are sensitive to the constitutional dimensions of C.R.C.P. 106(b) when they are called upon to decide the point of administrative finality. In *Citizens for Responsible Growth*, the Elbert County Commission considered three related applications for a large development over the course of a two-day quasi-judicial hearing held January 3 and 4, 2007. *Citizens for Responsible Growth*, 252 P.3d at 1106. At the close of the hearing, the County Commission approved each of applications by oral vote. *Id*. However, the County regulations explicitly required "a written ruling to finalize the Board's quasi-judicial action." *Id*. at 1105. The written ruling was issued and recorded on January 17, 2007 (13 days later). *Id*. at 1106. Plaintiff filed a C.R.C.P. 106 complaint within 30 days after that. *Id*.

The Colorado Supreme Court considered the timeliness arguments. It reasoned that "while there may be nothing inherent in the notion of a final judgment or decision requiring that it take any particular form, we have long accepted that finality in any particular context is subject to the dictates of statute, court rule, or regulation." *Id*. at 1107. In Elbert County, the applicable regulations explicitly required a written final decision, the regulations specifically anticipated that the C.R.C.P. 106 clock would start upon issuance of that written final decision. *Id*. at 1107-08.

The *Citizens for Responsible Growth* Court recognized the constitutional dimension of the application of the C.R.C.P. 106(b) deadline as well, observing that, "quite apart from the existence or non-existence of any express requirement in statute, rule, or regulation, we have held that due process entitles one involved in judicial or quasi-judicial proceedings to timely

notice of decisions that have adjudicated his property interests, in relation to available appellate remedies." *Id*. at 1107. In other words, the Court considered the Fourteenth Amendment as it determined how to apply C.R.C.P. 106(b), and opted not to apply the rule in a way that would violate constitutional rights.

In *Citizens for Responsible Growth*, the constitutional rights that were at stake were due process rights involving fair notice. Unlike the plaintiff in that case, here the City had plenty of notice that the BOCC actually decided the Sign Approval on June 1, 2020. It submitted comments and materials before that hearing. Even though the City knew the date, time, and location of the hearing—which was held at the County Administration Building, two blocks away from Fort Collins City Hall, with appropriate COVID-19 precautions in place—not a soul from the City showed up to advance the City's purported interests.

Weeks later, on July 6, 2020 (a week after the June 29, 2020 C.R.C.P. 106(b) deadline passed) the City tried to get a second bite at the apple. It sent a letter to the County, asking the BOCC reopen the hearing so it could rehash the arguments that the BOCC had previously rejected. The BOCC refused its request by letter, and explained that its process had ended on June 1, 2020. Weeks after that, the City tried to get a third bite at the apple. It attempted to pry open the proceedings during the open public comment agenda item at the administrative meeting of the BOCC. When advised by a County Commissioner that the Findings were "like the minutes of what occurred during the meeting," the representative from the City conceded, "Yeah, I understand that."

The City had its chance to be heard on June 1, 2020, it knew about the BOCC's final decision when it occurred, and it could easily have timely filed a C.R.C.P. 106 petition. Instead it failed to appear on June 1, 2020, and then tried to take a second and third bite at the apple.

The City is time-barred from taking this fourth bite. No further process is due, and StreetMedia is entitled to finality under the circumstances of this case.

2. The City Asks this Court to Violate StreetMedia's Constitutional Rights.

Here, the face of the City's complaint should shock the conscience of the Court. On the face of the pleading, the City forcefully alleges that it does not want StreetMedia to be able to display "off-premises" messages on its sign. Complaint ¶¶ 29, 42, 44, 71, and 77. The City is attempting to solicit the considerable power of this honorable Court to strip StreetMedia of its First Amendment rights; first, by indefinitely extending a period of prior restraint; and second, by requesting that the Court compel the County to censor StreetMedia's speech based on its content.

Prior restraint and the content-based censorship are palpably unconstitutional. *See generally Reed v. Town of Gilbert*, 576 U.S. 155 (2015); *Thomas v. Bright*, 937 F.3d 721 (6th Cir. 2019); *L.D. Mgmt. Co. v. Thomas*, 2020 U.S. Dist. LEXIS 72593 (W.D. Ky. 2020) ("In many countries, censorship is routine. But not in America. The First Amendment generally precludes the government from suppressing speech 'because of its message, its ideas, its subject matter, or its content.'"). Indeed, free speech must be protected "not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960); *see* also *Citizens United v. FEC*, 558 U.S. 310, 361 (2010) ("it is our law and our tradition that more speech, not less, is the governing rule.").

The City's C.R.C.P. 106 Complaint, in its own right, filed months after the Sign Approval, is at a minimum "subtle governmental interference," but perhaps more accurately a "heavy-handed frontal attack" on StreetMedia's free speech rights. It cannot be allowed to proceed. Delay is not a proper use of C.R.C.P. 106 in any event, *Miller v. Clark*, 144 Colo. 431,

432 (1960), let alone when its purpose is to "freeze" free speech. *Davis*, 510 U.S. at 1317. In this context, the City's Complaint is a naked attempt to convince this Court to assist its censorial scheme. It is not hyperbole to say that every day this case continues is an affront to the First Amendment. *Id*.

By contrast to the stakes for StreetMedia's free speech rights, the City has no protected or protectable rights to advance in this proceeding. This Court must construe the LCLUC to avoid constitutional infirmity. *People v. Iannicelli*, 454 P.3d 314, 319 (Colo. App. 2017) ("if a statute is capable of alternative constructions, one of which is constitutional, then the constitutional interpretation must be adopted.").

Mahaney stands for the principle that regulations affecting signs are a "prior restraint" on free speech—and that such regulations are only permissible if final decisions are made "within a brief, specified time period during which the *status quo* is maintained." *Id*. at 1220. Additionally, there must be "the possibility of prompt judicial review in the event the permit is erroneously denied." *Id.* LCLUC § 22.2.2.B.3., specifically provides that appeals will be heard within 60 days after they are filed. LCLUC § 22.2.2.B.5.b. provides, "At the conclusion of the hearing, the county commissioners will approve, approve with conditions or deny the appeal."

Under *Mahaney*, LCLUC § 22.2.2 as applied to StreetMedia's application is only constitutional if the decision at the conclusion of the hearing is the "final decision" for the purposes of judicial review. If the Findings document starts the C.R.C.P. 106(b) clock (which is the only way the Complaint would be timely), then the timing provisions of the LCLUC are unconstitutional as-applied to StreetMedia because they are an unchecked prior restraint. As such, this Court is obligated to reject the City's untenable position on timeliness and dismiss the Complaint with prejudice.

There is no specified time period between the BOCC's final decision at the close of the quasi-judicial hearing under LCLUC § 22.2 and the subsequent approval of a findings and resolution document on the consent agenda of an administrative meeting of the BOCC. In this case that ministerial step took nearly two months. The issues surrounding that delay are not just about fairness, like in *3 Bar J*, but they also have a significant constitutional dimension.

The City's premise is exactly what countless Courts have addressed when they rejected laws that unreasonably delay the exercise of free speech rights. *See, e.g.*, *Mahaney*, 226 P.3d at 1219; *City of Colorado Springs v. 2354 Inc.*, 896 P.2d 272, 279 (Colo. 1995); *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 223-24 (1990); *Freedman v. Maryland*, 380 U.S. 51, 56-58 (1965). Here, it is not outside the realm of possibility that a rogue County staff member who is responsible for drafting findings and resolutions, but who opposes a particular BOCC decision, could hold that decision open indefinitely for attack by a hostile party. In the absence of a codified hard deadline for the findings and resolutions, all the staff member would have to do is dawdle.

In sum, StreetMedia has a right under the LCLUC and a constitutional right to finality at the conclusion of the appeal hearing at which the BOCC decision was made—June 1, 2020. The period for "prompt judicial review" expired, as a matter of County Code, constitutional law and Colorado civil procedure, 28 days later, on June 29, 2020. The City's Complaint is untimely and must be dismissed with prejudice.

CONCLUSION

The City is not a proper party under law to seek judicial review of the Sign Approval, because it fails to show (and it cannot show) injury to a legally protected interest. The IGA is a red herring that provides no basis for City standing because it does not cover the approval at issue in this case, and because even if it did, an attack on an individual decision is not a specified

remedy under the IGA. Finally, even if the City had standing to challenge the Board's action, it filed this action well after the jurisdictional window closed for judicial review. StreetMedia respectfully submits that this honorable Court should reject the City's call to use the levers of this Court's power for a censorial purpose.

Based on the foregoing, this Court should dismiss the Complaint with prejudice.

DATED this 22nd day of September, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2020, I filed the foregoing with the Clerk of the Court using Colorado Courts E-Filing. I further certify that a copy of the foregoing was sent via Colorado Courts E-Filing to the following:

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