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DISTRICT COURT, COUNTY OF LARIMER, COLORADO
Larimer County Justice Center
201 Laporte Avenue, Suite 100
Fort Collins, Colorado 80521-2762
(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 ▲

Case Number: 2020CV030580

Division: 4B

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PLAINTIFF'S RESPONSE TO DEFENDANT STREETMEDIAGROUP, LLC'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

Plaintiff City of Fort Collins, by and through its attorneys, Andrew D. Ringel, Esq., of Hall & Evans, L.L.C. and John R. Duval, Esq., Deputy City Attorney, and Claire Havelda, Esq., Assistant City Attorney, of the Fort Collins City Attorney's Office, hereby respectfully submits this Response to Defendant StreetMediaGroup, LLC's Motion to Dismiss Plaintiff's Complaint, as follows:

INTRODUCTION

Plaintiff City of Fort Collins, Colorado ("the City"), on August 25, 2020, filed its Complaint for Review Pursuant to C.R.C.P. 106(a)(4) for review by this Court of the July 28, 2020, Findings and Resolution Approving the Street Media Group Sign Appeal ("Findings and Resolution") of Defendant Board of County Commissioners of Larimer County, Colorado ("Board or "Larimer County") concerning a proposed billboard to be erected by Defendant StreetMediaGroup, LLC ("StreetMediaGroup") on property located at 4414 East Harmony Road ("the Property"). [*See* Complaint for Review Pursuant to C.R.C.P. 106(a)(4) ("Complaint")]. Larimer County filed its Answer on September 17, 2020. [*See* Defendant Board of County Commissioners' Answer ("Answer")].

Defendant StreetMediaGroup filed its Motion to Dismiss Plaintiff's Complaint ("Motion") on September 22, 2020. The City now respectfully responds to StreetMediaGroup's Motion.

No legitimate basis exists for this Court to dismiss Plaintiff's Complaint as a matter of law. Initially, the validity of StreetMediaGroup's arguments must be evaluated by this Court based on the reality that the Board - the actual governing body responsible for the decision subject to the City's Complaint - has not moved to dismiss or argued the City lacks standing or its Complaint

was untimely filed. Instead, StreetMediaGroup, named as a Defendant in this action, files the Motion.[1] Further, StreetMediaGroup's arguments in their Motion are without any legal merit.

First, the City has legal standing to challenge the Board's decision as an adjacent property owner. The City is the owner of the Arapaho Bend Natural Area immediately adjacent to the Property. [R. Vol. I, at 95].[2] Notably absent from StreetMediaGroup's analysis in its Motion is any discussion of the City's status as an adjacent property owner and the applicable precedent decided many years ago by the Colorado Supreme Court holding a home rule city, like Fort Collins, has standing as an adjacent property owner to challenge a county land-use decision.

Second, the City's Complaint was timely filed pursuant to C.R.C.P. 106(b). Until the Board issued its Findings and Resolution on July 28, 2020, with the necessary and required findings of fact and conclusions of law supporting its decision, the quasi-judicial process before the Board was not a "final decision" as contemplated in C.R.C.P. 106(b) and the 28-day time period for the City to file its Complaint had not yet started. StreetMediaGroup's argument the Board's vote at the conclusion of the June 1, 2020, hearing, to approve the appeal without the Board making any findings of fact or conclusions of law is inconsistent with two applicable decisions from the Colorado Court of Appeals. It is also inconsistent with applicable provisions

[1] StreetMediaGroup was named as a Defendant because under Colorado law it is a necessary party to these proceedings as the applicant in the proceeding before the Board. *See* ***Auxier v. McDonald,*** 363 P.3d 747, 753 (Colo. App.).

[2] This Court may take judicial notice of the contents of the Certified Record before this Court in considering the Motion to Dismiss pursuant to C.R.E. 201. *See* ***Doyle v. People,*** 2015 CO 10, ¶ 15 (describing court taking judicial notice of its own records under C.R.E. 201); ***Massey v. People,*** 649 P.2d 1070, 1073 (Colo. 1982); ***Hatch v. Wagner,*** 590 P.2d 973, 976 (Colo. App. 1978). This Court may take judicial notice of its file without converting StreetMediaGroup's Motion to Dismiss into one for summary judgment. ***Walker v. Van Laningham,*** 148 P.3d 391, 397-98 (Colo. App. 2006); ***Tal v. Hogan,*** 453 F.3d 1244, 1264 n. 24 (10th Cir. 2006).

of the Larimer County Land Use Code ("LCLUC"), inconsistent with the Board not raising this purported untimeliness in its Answer and inconsistent with the Board's approach in other C.R.C.P. 106(a)(4) reviews before this Court. Moreover, it is inconsistent with the need for this Court to have appropriate findings of fact and conclusions of law to review pursuant as contemplated in C.R.C.P. 106(a)(4)(IX).[3]

Third, StreetMediaGroup's claim the City's Complaint itself violates its First Amendment constitutional rights provides no basis to dismiss the City's Complaint and represents a potential issue for review by this Court, if applicable and appropriate, as part of this Court's judicial review of the actual decision by the Board, not now because the issue is not germane to the standing and untimeliness arguments raised by StreetMediaGroup in its Motion.

ARGUMENT

I. THE CITY HAS STANDING TO SEEK REVIEW OF THE BOARD'S QUASI-JUDICIAL APPROVAL OF STREETMEDIAGROUP'S APPEAL PURSUANT TO C.R.C.P. 106(a)(4)

Whether the City has standing is a determination of law for this Court. ***Barber v. Ritter,*** 196 P.3d 238, 245 (Colo. 2008). In determining whether standing has been established, this Court must accept as true all material allegations of fact in the City's Complaint. ***Reeves-Toney v. Sch. Dist. No. 1,*** 442 P.3d 81, 85 (Colo. 2019); ***State Bd. of Cmty. Colleges & Occupational Educ. v. Olson,*** 687 P.2d 429, 434 (Colo. 1984).

[3] C.R.C.P. 106(a)(4)(IX): "In the event the court determines that the governmental body, officer or judicial body has failed to make findings of fact or conclusions of law necessary for review of its action, the court may remand for the making of such findings of fact or conclusions of law."

For purposes of this Court's standing analysis, the City unambiguously pled in its Complaint: "The Property is also immediately adjacent to property owned by the City." [*See* Complaint, ¶ 22]. Larimer County has admitted this allegation. [*See* Answer, ¶ 22 ("The Board admits the Property directly abuts a parcel owned by Fort Collins.")]. The City also specifically pled in the Complaint and in the attached April 29, 2020, letter from City Manager Darin Atteberry to Larimer County Manager Linda Hoffman, the adverse impact on the City owned-property from the proposed billboard. [*See* Complaint, ¶ 38 & Exhibit D]. The City's ownership of adjacent property is dispositive of this Court's standing inquiry.

In ***Board of County Commissioners of the County of Adams v. City of Thornton,*** 629 P.2d 605 (Colo. 1981), nearly forty years ago, the Colorado Supreme Court addressed and decided the issue holding a Colorado home rule municipality may challenge a county zoning decision if it has adverse impact on adjacent municipally-owned property. Initially, the Colorado Supreme Court framed the issue as follows:

> We have held that an owner of property adjacent to rezoned land has standing to challenge rezoning which adversely affects his property. ***Dillon Companies v. City of Boulder,*** 183 Colo. 117, 515 P.2d 627 (1973); accord, ***Bedford v. Board of County Commissioners,*** 41 Colo. App. 125, 584 P2d 90 (1978); ***Snyder v. City Council,*** 35 Colo. App. 32, 531 P.2d 643 (1974). Implicit in these decisions is the conclusion that a complaining property owner, such as the City here, has a legally protected interest in insulating its property from adverse effects caused by legally deficient rezoning of adjacent property.
>
> Unless a different result is required because the City property is within the City limits, while the rezoning was accomplished by a separate governmental entity and is limited to property outside the City limits, the City should be recognized to have standing under ***Wimberly*** to challenge the County's actions. We now consider whether standing must be denied to the City because of an asserted disability of one governmental entity to challenge the zoning decision of another or because of an asserted principle that property owners in one jurisdiction lack the right to challenge zoning changes made by an adjoining jurisdiction.

Id. at 609. After analyzing all the county's arguments against standing, the Colorado Supreme Court held the City of Thornton as an adjoining property owner possessed standing to challenge Adams County's zoning decision. ***Id.*** at 609-11.

Subsequent decisions have followed both the analysis and conclusion in ***City of Thornton***. *See, e.g.,* ***Board of County Comm'rs v. Denver Bd. of Water Comm'rs,*** 718 P.2d 235, 236 & 240-42 (Colo. 1986) (Arapahoe County, Adams County and Jefferson County had standing to challenge to seek to compel the Denver Water Board to supply water to their residents); ***Wells v. Lodge Props., Inc.,*** 976 P.2d 321, 324 (Colo. App. 1998) ("A property owner has a legally protected interest in protecting its property from adverse effects caused by legally deficient rezoning of adjacent property, and has standing to challenge such rezoning. Hence, if an adjoining landowner's interest in the property is adversely affected by a rezoning decision, the landowner has a right to seek judicial relief."; citations including ***City of Thornton*** omitted); ***Greeley v. Bd. of County Comm'rs,*** 644 P.2d 76, 76 (municipalities in Weld County had standing to challenge county resolution transferring general fund money to the road and bridge fund).[4] Under these decisions, the City, a home-rule municipality like Thornton, possesses standing to challenge the Board's approval of StreetMediaGroup's billboard as an adjacent property owner.

Moreover, StreetMediaGroup's argument concerning the supposed inferiority of the City to Larimer County allegedly disabling the City from pursuing this challenge is also directly

[4] The Colorado Supreme Court's standing analysis in ***City of Thornton*** has been followed in other jurisdictions. *See, e.g.,* ***Moore v. City of Middleton,*** 975 N.E.2d 977, 987 (Ohio 2011); ***Town of Randolph v. Town of Stoughton,*** 1997 Mass. Super. LEXIS 410 at *16 (Mass. Sup. Ct. June 23, 1997);

foreclosed by ***City of Thornton***. [*See* Motion, at 9-10]. In pertinent part, the Colorado Supreme Court declared:

> We start with the fundamental fact that Thornton is a home-rule city. The Colorado Constitution imposes constraints on legislative action impinging on the interests of home-rule cities.
>
> Although the legislature has full power, within constitutional limits, to enact statutes dealing with matters of statewide concern, ***a home-rule city is not inferior to the General Assembly with respect to local and municipal matters***. ***City of Colorado Springs v. State of Colorado,*** *supra*, ***Denver Urban Renewal Authority v. Byrne,*** *supra*; ***Four-County Metropolitan Capital Improvement District v. Board of County Commissioners,*** 149 Colo. 284, 369 P.2d 67 (1962). A home-rule City's powers with respect to local and municipal matters have their source in our state constitution. Colo. Const. Art. XX, § 6. While planning and zoning for lands outside the boundaries of a home-rule city may be matters of statewide concern, the preservation of value of city property is a local and municipal matter. *See* Colo. Const. Art. XX, § 6. It is an incident of the City's express constitutional powers to hold and enjoy property. See Colo. Const. Art. XX, §§ 1, 6.
>
> Even though county planning and zoning regulations are of statewide concern, they may adversely affect matters of local and municipal concern. There is no dispute that such is the case here. Under such circumstances, we conclude that the Colorado Constitution mandates that a home-rule city be given the right to challenge the legality of the county's master plan and zoning ordinances in court. . . . (Emphasis added.)

City of Thornton, 629 P.2d at 609-10. As alleged in the Complaint, the City is a home rule municipality. [*See* Complaint, ¶ 6]. If the City is not inferior to the Colorado General Assembly in respect to local and municipal matters, as the Supreme Court holds in ***City of Thornton***, it is also not inferior to counties in such matters. The Supreme Court has recognized a home rule municipality's acquisition and ownership of open space and parks is a matter of local and municipal concern under the home rule amendments in Article XX of the Colorado Constitution. ***Town of Telluride v. San Miguel Valley Corporation***, 185 P.3d 161, 168 (Colo. 2008). Therefore, if the City is not inferior to the General Assembly with respect to its ownership of open space and

parks, like the Arapaho Bend Natural Area adjacent to the Property, it is certainly not inferior to the County in this matter.

Additionally, the City anticipates StreetMediaGroup may attempt to distinguish ***City of Thornton*** on the basis the City has not pled a diminution in economic value. However, the aesthetic injury to the City's adjacent property is sufficient to constitute a legally protected interest for standing purposes. ***Ainscough v. Owens,*** 90 P.3d 851, 855 (Colo. 2004); ***Rangeview, LLC v. City of Aurora,*** 381 P.3d 445, 449 (Colo. App. 2016). The City's interest in protecting wildlife in the Arapaho Bend Natural Area from light pollution was articulated to the Board and is a sufficient interest to establish standing under these cases. [*See* R. Vol. I, at 95-105].

In addition, the City has a protected interest for its standing in this action based on its "Intergovernmental Agreement (Regarding Cooperation on Managing Urban Development" dated June 24, 2008 with the County attached as Exhibit A to the Complaint ("the IGA"). As alleged in paragraph 16 of the Complaint, the IGA was entered into pursuant to C.R.S. § 29-20-105. Section 29-20-105(1) states:

> Local governments are authorized and encouraged to cooperate or contract with other units of government pursuant to part 2 of article 1 of this title for the purposes of planning or regulating the development of land including, but not limited to, the joint exercise of planning, zoning, subdivision, building, and related regulations.

C.R.S. § 29-20-105(1). Sections 29-20-105(2)(a) and (c) further provide that this may include local governments entering an intergovernmental agreement that adopts a comprehensive master plan for areas within their jurisdictions, although the application of any such master plan within their jurisdictions is discretionary unless otherwise provided by ordinance.

The IGA provides in Section 4 that the County will use the City's "Comprehensive Plan" as a guideline for development within the City's "Growth Management Area" located in certain

unincorporated areas of the County as identified in the IGA ("the GMA"). The Property is within the City's GMA. [R. Vol. I, at 95]. Section 4 of the IGA reads:

> Comprehensive Plans for the GMA. The County agrees to use the City's Comprehensive Plan as a guideline for development inside the GMA. The City's Comprehensive Plan includes any plans for land use, parks, transportation, drainage, natural resources or other elements deemed necessary by the City to act as a guideline for development inside the GMA. The City agrees to make its Comprehensive Plan specific enough to give clear guidance through maps and text to the County and property owners and developers as to the types, densities and intensities of land use acceptable to the City on any given parcel of land in the GMA.

[*See* IGA, § 4, Complaint, Exh. A]. As a result of Section 4 in the IGA, C.R.S. § 29-20-105(2)(g) is applicable in this matter, stating:

> Each governing body that is a party to an intergovernmental agreement adopting a comprehensive development plan shall have standing in district court to enforce the terms of the agreement and the plan, including specific performance and injunctive relief. The district court shall schedule all actions to enforce an intergovernmental agreement and comprehensive development plan for expedited hearing.

C.R.S. § 29-20-105(2)(g). The IGA therefore provides the City with an additional protected interest and standing to bring this action.

II. THE CITY'S COMPLAINT WAS TIMELY FILED PURSUANT TO C.R.C.P. 106(b)

StreetMediaGroup argues the City was required to file its Complaint within 28 days of the Board's oral approval of its appeal on June 1, 2020, not the Board's Findings and Resolution issued on July 28, 2020. [*See* Motion, at 12-18]. StreetMediaGroup is legally and factually wrong.

First, decisions from the Colorado Court of Appeals on two occasions have held for purposes of C.R.C.P. 106(b), the time period runs from when a written decision subsequent to an oral vote is issued. Initially, in ***Wilson v. Board of County Commissioners of Weld County,*** 992 P.2d 668 (Colo. App. 1999), the Court of Appeals held the time period for seeking judicial review

pursuant to C.R.C.P. 106(b) ran from the date the board of county commissioners issued its final resolution denying the plaintiff's application, reasoning as follows:

> Plaintiffs contend that the trial court erred in holding that the 30-day period for filing the action began to run on April 30, 1997. Specifically, plaintiffs argue that such period should be measured from the date the Board members signed the final revised resolution. We agree.
>
> . . . .
>
> Here, the Board adopted its resolution denying plaintiffs' required permit at a public hearing, and plaintiffs acknowledge that fact in their complaint. However, unlike in ***3 Bar J,*** *supra,* the Board then issued a written resolution that detailed its findings and conclusions. The Board's actions in entering this written resolution and later revising it demonstrate that at the time of the Board's vote at the hearing its action was not complete, "leaving nothing further" for it to decide.
>
> In addition, we are not persuaded by the Board's alternative argument that the revised resolution was merely clerical and that the 30-day time period should have commenced on the date the initial resolution was entered. Regardless of the nature of the revision, when a written resolution is revised, it is the date of adoption of the revised version that constitutes the point of administrative finality for purposes of C.R.C.P. 106(b).

Id. at 670. Sixteen years later, in ***1405 Hotel, Inc. v. Colorado Economic Development Commission,*** 370 P.3d 309 (Colo. App. 2015), the Court of Appeals reached the same conclusion, as follows:

> We find the division's conclusion in ***Wilson*** instructive. 992 P.2d at 670. There, Weld County's Board of County Commissioners adopted a resolution denying the plaintiff's requested accessory dwelling permit. ***Id.*** at 669. However, unlike in ***3 Bar J,*** the Board subsequently issued a written resolution detailing its findings and conclusion. ***Id.*** The division concluded that "[t]he Board's actions in entering [the] written resolution and later revising it demonstrate that at the time of the Board's [initial approval] its action was not complete, 'leaving nothing further' for it to decide." ***Id.*** at 670. Likewise, the CEDC's conduct in initially approving Aurora's application in May 2012 and later entering a final written resolution demonstrates that administrative proceedings were incomplete at the time of the initial approval.

Id. at 315.

Under ***Wilson*** and ***1405 Hotel***, the Board's written Findings and Resolution following its initial approval by vote at the conclusion of the hearing represents the final step in the Board's quasi-judicial proceeding. As such, the City's Complaint filed within 28 days of the July 28, 2020, Findings and Resolution was timely pursuant to C.R.C.P. 106(b).

Second, in the opening sentences of its argument that the City has not timely filed its Complaint under Rule 106(b), StreetMediaGroup states:

> 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.

[*See* Motion, at 12 (emphasis added)]. StreetMediaGroup's citation to LCLUC § 22.2.2.B.5.b. fails to acknowledge other sections in the LCLUC requiring the Board's decision in appeals, including sign appeals, to be in writing and such writing is considered the Board's ***final decision*** in the sign appeal process.

In LCLUC Section 12, titled "Common Procedures for Development Review,"[5] LCLUC § 12.2.7.A. provides the Board "will conduct a public hearing and make final decisions about . . . appeals of standards and requirements imposed by this code other than variances delegated to the board of adjustment." One of these appeals to be heard by the Board, and not by the County's board of adjustment, are appeals from the County's sign regulations in LCLUC Section 10, which

[5] "Development Review" is not defined in the LCLUC, but "development" is defined in LCLUC § 0.1.1 as including "the construction, reconstruction, conversion, structural alteration, relocation or enlargement of any structure" and "structure" is defined as including "Anything constructed or erected and that requires a permanent location on or in the ground or attachment to something having a permanent location on or in the ground." Under these definitions, an application for the erection of a billboard is "development" as contemplated in the LCLUC.

sets out the standards and requirements which StreetMediaGroup is seeking to be exempt or vary from for its proposed billboard.

The Board's role in this sign-appeal process is further contemplated in LCLUC § 22.2.5, which describes what the Board is required to do in considering a sign appeal stating: "To approve an appeal from the applicable requirements in section 10 of this code ***the county commissioners*** must consider the ***following*** review criteria and ***find*** *t*hat each criterion has been met or determined to be inapplicable: . . . . " (Emphases added.) This provision clearly requires the Board to make findings about the applicable review criteria, which is what the Board did in the Findings and Resolution dated June 28, 2020, and not at the June 1, 2020, hearing.

In describing how the Board will conduct its public hearings required under § 12.2.7.A., LCLUC § 12.2.7.C. states:

> ***Public hearings will be conducted in accordance with subsections 12.4.1, 12.4.2 and 12.4.3 of this Code.*** At the public hearing, the county commissioners will consider all information presented by the applicant and the county staff, any verbal or written testimony and the recommendation of the planning commission or the rural land use advisory board. The county commissioners will review the application with respect to the review criteria of this Code and all information and testimony to decide whether to approve, approve with conditions or deny the application. The county commissioners may announce their decision at the conclusion of the hearing. ***The county commissioners' official final decision will be in the form of a written resolution that states how the proposal meets or fails to meet the applicable review criteria of this Code.***

LCLUC § 12.2.7.C (emphases added). LCLUC 12.4.3.G. further adds, in setting out the order for proceedings of public hearings:

> *Decision of board or commission.* The board or commission makes its decision or recommendation to approve, approve with conditions or deny the application. ***The decision must be in writing.***

LCLUC § 12.4.3.G (emphasis added).

These LCLUC provisions eliminate any doubt the Board's adoption of the Findings and Resolution on July 28, 2020, was the Board's ***final decision*** and from which the 28-day appeal period under Rule 106(b) began to run. The City timely filed its Complaint.

Third, until the Board issued its Findings and Resolution, there was no ability for this Court to review the basis of the Board's quasi-judicial decision. The Colorado Supreme Court has determined a quasi-judicial action "generally involves a determination of the rights, duties, or obligations of specific individuals on the basis of the application of presently existing legal standards or policy considerations to past or present facts developed at a hearing conducted for the purpose of resolving the particular interests in question." ***Cherry Hills Resort Dev. Co. v. Cherry Hills Vill.,*** 757 P.2d 622, 625 (Colo. 1988). Quasi-judicial decisions require the application of the facts of a specific case to applicable criteria established by law. ***Jafay v. Bd. of County Comm'rs,*** 848 P.2d 892, 897 (Colo. 1993); ***Snyder v. Lakewood,*** 542 P.2d 371, 372 (Colo. 1975). Rule 106(a)(4) and applicable law require the Board to make adequate findings of fact and conclusions of law to allow this Court to review its quasi-judicial decision. C.R.C.P. 106(a)(4)(IX); ***Widder v. Durango Sch. Dist. No. 9-R,*** 85 P.3d 518, 528 (Colo. 2004); ***Bd. of County Comm'rs of Larimer County v. Conder,*** 927 P.2d 1339, 1350 (Colo. 1996). "The standard under C.R.C.P. 106 for reviewing a quasi-judicial decision is to ascertain whether the findings of fact are supported by competent evidence." ***Scott v. Englewood,*** 672 P.2d 225, 228 (Colo. App. 1983).

Here, the Board made no specific findings of fact or conclusions of law for this Court to review on June 1, 2020. Review of the comments from the three Commissioners at the conclusion of the hearing reveal no specific findings of fact or conclusions of law. [*See* R. Vol. II.A., at 69-81]. Similarly, the Minutes of the June 1, 2020, Board meeting also reveal no findings of fact and

conclusions of law. [*See* R. Vol. III.A., at 4-9]. More importantly, not only are there no findings of fact and conclusions of law made by the Board during the June 1, 2020, hearing, but the only comments made are individual comments by the three Commissioners. It is well-established a board of county commissioners under Colorado law may only act collectively. *See, e.g.*, ***Robbins v. County Comm'rs of Boulder,*** 115 P. 526, 528 (Colo. 1911) ("To bind the county, or to make their doings legal, they must act, not individually, or separately, but collectively as a board."); ***Nicholl v. E-470 Pub. Highway Auth.,*** 896 P.2d 859, 866 (Colo. 1995) ("Moreover, our rules of statutory construction require that '[a] grant of authority to three or more persons as a public body confers the authority upon the majority of the number of members,' § 2-4-110, 1B, C.R.S. (1980), and hence a board of county commissioners must act jointly through a majority of its members and not by individual members."). While the Board did collectively vote to approve the appeal on June 1, 2020, the Board never collectively made any findings of fact and conclusions of law, written or otherwise, on June 1, 2020. The explanations of the three County Commissioners concerning the basis of their respective votes at the conclusion of the June 1, 2020, are not and cannot be considered findings of fact and conclusions of law by the Board as a whole. It was not until the adoption of the Findings and Resolution on July 28, 2020, that the Board collectively made the necessary written findings of fact and conclusions of law permitting any meaningful review of its decision by this Court. As such, StreetMediaGroup's argument the July 28, 2020, Findings and Resolution were merely clerical and the substantive decision by the Board was made on June 1, 2020, is illusory.

Under StreetMediaGroup's approach, C.R.C.P. 106(a)(4) litigants would be required to file their complaint with this Court within 28 days after the Board merely votes at the conclusion of its

public hearing and before the Board articulates the actual factual and legal basis of its decision. Such an approach fundamentally ignores both the public need to understand and appreciate the actual basis of the Board's decision before deciding whether to challenge it pursuant to C.R.C.P. 106(a)(4) as well as this Court's need to review and evaluate the actual legal and factual basis of the Board's decision. Any review of the June 1, 2020, hearing transcript and the June 1, 2020, Minutes demonstrates this Court would have no basis to evaluate the Board's grant of the appeal based on the then-status of the record. It was not until the Board's July 28, 2020, Findings and Resolution that the Board's actual basis for its decision was identified permitting review by the public and this Court. Because this Court had no basis to review the Board's decision until the Findings and Resolution was issue, under the analysis of ***Wilson*** and ***1405 Hotel***, the Findings and Resolution necessarily represent the completion of the quasi-judicial proceedings before the Board thereby representing the triggering event for the 28-day time period for filing a complaint pursuant to C.R.C.P. 106(b).

Fourth, notably, the Board has not argued the City's Complaint was not timely filed and that the Findings and Resolution is not the triggering event for C.R.C.P. 106(b). The Board did not join in StreetMediaGroup's Motion to Dismiss. [*See* Motion, at 1 (noting Board takes no position respecting the Motion)]. The Board's Answer does not make this argument and timeliness is not one of the Board's affirmative defenses. [*See* Answer, at 7]. In fact, the Board specifically admitted in its Answer the Board's "Findings and Resolution is a ***final*** quasi-judicial decision subject to review under C.R.C.P. 106(a)(4)." [*See* Complaint, ¶ 12; Answer, ¶ 12 (emphasis added)]. The Board recognizes its Findings and Resolution represents the final quasi-judicial step and is consistent with the position the Board has taken in other cases before this Court. [*Compare*

City of Thornton v. Board of County Commissioners of the County of Larimer, Case No. 2019CV30339, at Thornton complaint, ¶¶ 56 & 59 (describing vote denying Thornton's application on February 11, 2019, followed by Board issuing its findings and resolution on March 19, 2019) and Board answer, ¶¶ 56 & 59 and generally (admitting allegations and not challenging timeliness of Thornton complaint filed on April 16, 2019), the Thornton complaint attached as **Exhibit A** and Board's answer attached as **Exhibit B** to this Motion; *and* ***Robert Havis and Peter Waack v. Board of County Commissioners of Larimer County et. al.,*** Case No. 2019CV30123, at Havis first amended complaint, ¶ 6 (describing findings and resolution of the Board as final action pursuant to C.R.C.P. 106(b) and filing complaint within 28 days thereafter) at Board answer, ¶ 6 (admitting same), Havis first amended complaint attached as **Exhibit C** and Board answer attached as **Exhibit D**]. Indeed, this Court has itself recognized the difference between when the Board holds its public hearings and votes on matters before it and when it later issues its findings and resolution and how the latter is the triggering event for review under C.R.C.P. 106(b). [*See* Order on Rule 106 Petition, at 1-2, ***PKR Farms, LLC v. Board of County Commissioners of the County of Larimer, et. al.,*** Case No. 15 CV 30044, attached as **Exhibit E**].[6]

Based on the Board's longstanding recognition that its findings and resolution represent the final step in the quasi-judicial process, the Board would be judicially estopped from arguing otherwise in this action. ***Arko v. People,*** 183 P.3d 555, 560 (Colo. 2008); ***Estate of Burford v. Burford,*** 935 P.2d 943, 948 (Colo. 1997). Effectively, the Board's position in this case and the

[6] Again, this Court can take judicial notice of these records in other cases before this Court without converting this Motion to a motion for summary judgment. ***Doyle,*** 2015 CO 10, ¶ 15; ***Hatch,*** 590 P.2d at 976; ***Walker,*** 148 P.3d at 397-98; ***Tal,*** 453 F.3d at 1264 n. 24.

prior cases cited above demonstrates the Board believes its findings and resolution on these types of matters represent the final step in the quasi-judicial process. Since this represents an interpretation by the Board concerning its own quasi-judicial process and its LCLUC, this Court should defer to the Board's interpretation. ***Colo. State Bd. of Pharm. v. Priem,*** 2012 COA 5, ¶ 16; ***Colo. Citizens for Ethics in Gov't v. Comm. for the Am. Dream,*** 187 P.3d 1207, 1214 (Colo. App. 2008). This Court should follow the Board's interpretation and StreetMediaGroup is bound by how the Board conducts itself. No other result makes any sense and is consistent with the Board's prior actions, Colorado law as found in ***Wilson*** and ***1405 Hotel*** and LCLUC §§ 12.2.7.A., 12.2.7.C. and 12.4.3.G.

None of the cases cited by StreetMediaGroup are to the contrary. The applicable precedent for this Court is ***Wilson*** and ***1405 Hotel***. StreetMediaGroup's assertion the Board's Findings and Resolution is simply an unrequired administrative step is belied by applicable provisions of the LCLUC and the actual record before this Court as well as the purposes of judicial review under C.R.C.P. 106(a)(4). Importantly, the Board does not share StreetMediaGroup's perspective that its Findings and Resolution are unnecessary. Fundamentally, StreetMediaGroup ignores applicable provisions of the LCLUC and the reality the written basis of the Board's decision was necessary for any meaningful judicial review to occur. Because the required findings of fact and conclusions of law were never articulated by the Board until the July 28, 2020, the Findings and Resolution, it make no sense whatsoever for this Court to accept StreetMediaGroup's argument based on the mistaken premise the City could have filed its Complaint within 28 days of the hearing of June 1, 2020, and this Court would have been able to review the Board's decision in any meaningful substantive manner at all.

III. STREETMEDIAGROUP'S PURPORTED CONSTITUTIONAL RIGHTS PROVIDE NO BASIS TO DISMISS THE CITY'S CLAIM SEEKING JUDICIAL REVIEW

StreetMediaGroup's final argument histrionically suggests the City's C.R.C.P. 106(a)(4) Complaint seeking judicial review of the Board's approval of its appeal violates StreetMediaGroup's First Amendment rights. First, StreetMediaGroup does not argue, let alone provide this Court with any supporting legal authority, that litigation brought under Rule 106(a)(4) is a "prior restraint" and "content-based censorship" in violation of the First Amendment.

StreetMediaGroup does cite ***Mahaney v. City of Englewood***, 226 P.3d 1214 (Colo. App. 2009), but reliance on ***Mahaney*** is misplaced because it addresses and decides whether the City of Englewood's special review process for sign permits was a prior restraint on protected speech in violation of the First Amendment because Englewood's City Code did not require its city manager to decide within a specified period to time whether to issue the permit. In holding Englewood's code on this procedural point to be unconstitutional, the Court of Appeals never addressed whether C.R.C.P. 106(a)(4) provides the needed "expeditious judicial review." This issue has, however, been directly addressed by the United States Supreme Court.

In ***City of Littleton v. Z.J. Gifts D-4, LLC***, 541 U.S. 774 (2004), the Supreme Court considered whether Colorado's judicial review under C.R.C.P. 106(a)(4) provides the required prompt judicial review if a First Amendment related permit is denied by a local government. In holding that it does, the Supreme Court stated:

> In our view, Colorado's ordinary judicial review procedures suffice as long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly. And whether the courts do so is a matter normally fit for case-by-case determination rather than a facial challenge.
>
> . . . .

> Colorado's rules provide for a flexible system of review in which judges can reach a decision promptly in the ordinary case, while using their judicial power to prevent significant harm to First Amendment interests where circumstances require. Of course, those denied licenses in the future remain free to raise special problems of undue delay in individual cases as [Littleton's] ordinance is applied.

Id. at 781-84. It is also significant in both ***City of Littleton*** and ***Mahaney*** the issue was whether a local government's regulatory process for issuing First Amendment related permit was an unconstitutional prior restraint of protected speech and not whether a ***different*** local government, acting in its capacity as a property owner and ***not*** in its government regulatory capacity, can petition the courts to protect its own property rights. StreetMediaGroup cites no legal authority that such a local government's actions to seek judicial relief constitutes a governmental action impinging upon First Amendment rights.

In fact, the United States Court of Appeals for the Tenth Circuit recently noted under the Petition Clause of the First Amendment, local governments have the same right as private citizens and entities to petition the courts for the redress of grievances. ***CSMN Investments, LLC v. Cordillera Metropolitan District***, 956 F.3d 1276, 1282 n. 8 (10th Cir. 2020) ("Because the First Amendment applies to state and local governments through the Fourteenth Amendment, the petition clause applies fully to municipal activities." (Citations and internal quotation marks omitted.)

Accordingly, the City has the right to file its Complaint seeking review of the Board's decision. Its exercising its prerogative under Colorado law is not and cannot be in and of itself a violation of StreetMediaGroup's constitutional rights. Otherwise, no litigant could challenge any allegedly First Amendment protected interest through any type of litigation. The vast number of

First Amendment related cases litigated every day throughout the United States demonstrates the fundamental fallacy of StreetMediaGroup's argument.

Finally, to the extent there is any merit to StreetMediaGroup's First Amendment analysis, which the City does not concede, this Court can address any applicable First Amendment issues as part of its review of the merits of the Board's decision under C.R.C.P. 106(a)(4). *Compare* ***Tri-State Generation & Transmission Co. v. Thornton,*** 647 P.2d 670, 676 n. 7 (Colo. 1982) (recognizing under some circumstances a constitutional claim may be raised as part of a C.R.C.P. 106(a)(4) proceeding); ***Nuttall v. Leffingwell,*** 563 P.2d 356, 358 (Colo. 1977) (addressing constitutional equal protection argument on appeal of a C.R.C.P. 106(a)(4) decision). Here, any validity to StreetMediaGroup's constitutional argument can await the parties' briefing on the merits and is not appropriate considered by this Court in reviewing StreetMediaGroup's Motion to Dismiss.

CONCLUSION

In conclusion, for all the foregoing reasons, Plaintiff City of Fort Collins respectfully requests this Court deny Defendant StreetMediaGroup, LLC's Motion to Dismiss Plaintiff's Complaint in its entirety, award the City its attorney's fees and costs incurred in responding to the Motion, and for all other and further relief as this Court deems just and appropriate.

Dated this 23rd day of October, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of October, 2020, a true and correct copy of the foregoing was filed with the Court and served via Colorado Courts E-Filing System to the following email addresses:

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