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 REPLY IN SUPPORT OF 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 Reply in Support of its Motion to Dismiss Plaintiff's Complaint and states as follows:

INTRODUCTION

Fully aware of the provisions of the Larimer County Land Use Code ("LCLUC"), StreetMedia identified a site in unincorporated Larimer County ("Subject Property") to construct a new sign. StreetMedia negotiated and executed a sign lease with the owner of the Subject Property (the State Land Board, which will use the proceeds to fund education in Colorado), and applied for an "appeal" from several of the sign standards set forth in LCLUC § 10.0.

The "appeal" was needed in order to allow for a handful of adjustments to the general standards in LCLUC § 10.0. The appeal was processed using specific adopted criteria that are designed to allow for such adjustments. Based on an extensive record and detailed presentation by the applicant, the Larimer County Board of County Commissioners ("BOCC") granted the appeal ("Decision Below") by unanimous vote on June 1, 2020 ("Hearing Date").

Months later, the City of Fort Collins ("City") filed a C.R.C.P. 106 Complaint. In that Complaint, the City failed to establish standing with even the most basic of allegations. Moreover, the City cannot overcome the fact that its Complaint is extremely untimely.

Standing is a threshold issue for this Court. The City cites the appropriate legal proposition for this stage—"in determining whether standing has been established, this Court must accept as true all material allegations of fact in the City's Complaint." City Response at 4. Since the Court must give the complaint the full "benefit of the doubt," any admissions or denials in an answer are not part of the inquiry. As such, all of the City's narrative that suggests that the County's Answer somehow offers support for the City's standing is a smoke screen, exposed by the very case law the City cites.

Board of County Commissioners of the County of Adams v. City of Thornton, 629 P.2d 605 (Colo. 1981), is the seminal Colorado case regarding whether a home rule municipality has standing to challenge rezoning decisions by a county that might adversely affect adjacent, municipally-owned property. *Thornton*, however, does not mean what the City thinks it means. *Thornton* is a sharp sword positioned against the City's standing—ironically, the City's standing argument falls upon it. The City lacks standing under *Thornton*.

While the City of Thornton was ultimately allowed to sue Adams County about a *rezoning* (a wholesale change to the rules affecting property in the County), the Court expressly

limited its holding, presumably in order to preserve the rule that, in general, cities cannot sue counties over discrete land use decisions:

> Recognition of standing in the City to prove its claims in this case will not permit this home-rule city to second-guess land use decisions properly within the purview of the County's discretion.

Id. at 610. The Decision Below did not change the zoning of the Subject Property. It was simply a land use decision "properly within the purview of the County's discretion"—full stop.

In this case, *Thornton* is a bar to the City's standing that it cannot overcome. The City does not have the same rights as private-sector neighbors. *See Williams v. Baltimore*, 289 U.S. 36, 40 (1933) ("A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator."). *Thornton* drives that point home.

Indeed, in Colorado, a city has very narrow opportunities to bite the hand that created it, and there is no opportunity where, as here, the state committed the county's decision to "the purview of the County's discretion." As such, as a matter of law, the City cannot come to this Court and, in the words of *Thornton*, "second guess" the County. Because the City is barred from suit in this matter by *Thornton*, the Court need not even reach the issue that the City has also failed to meet its basic obligation to plead standing by alleging an injury-in-fact to a legally protected constitutional or statutory right. *See Wimberly v. Ettenbuerg*, 194 Colo. 163, 168 (1977).

The City discusses the Intergovernmental Agreement ("IGA") at length, but the IGA does not solve the City's standing problem. There are no rights set forth in or reliant on the IGA that are implicated by the Decision Below. The IGA, by its own terms, does not apply to the appeals process that gave rise to this matter.

Regarding timeliness, there is no legal requirement that a final quasi-judicial decision be reduced to writing before the clock starts under C.R.C.P. 106. *3 Bar J Homeowners Ass'n v. McMurry*, 967 P.2d 633 (Colo. App. 1998) is good law and directly on-point. The *3 Bar J* Court considered—*and specifically rejected*—the argument that a requirement for an "approval in writing" at some point after the hearing should postpone the start of the C.R.C.P. 106 clock:

> We are 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 thirty-day limit.

Id. at 635. The *3 Bar J* court reasoned that there is a need for certainty, and the economic risk to the applicant of an unspecified start date for the Rule 106 clock was unacceptable.

In the instant case, not only is the applicant put at economic risk, but also, the applicant's constitutionally protected free speech rights are at stake. LCLUC § 22.2.2.B.5.b specifically provides that a BOCC decision on an appeal is final upon the vote of the BOCC. StreetMedia is entitled to that finality.

It is stunning that the City argues that this Court is incapable of reviewing a record, including written comments and testimony transcripts, and determining if that record supported a particular decision. *See* Response at 13-15. Such an argument flies directly in the face of the *3 Bar J* decision, which is controlling law. The City's Complaint is untimely and must be dismissed.

Finally, the City's transmogrifies StreetMedia's presentation of *Mahaney v. City of Englewood*, 226 P.3d 1214 (Colo. App. 2009), into a straw man. To be clear, StreetMedia is not attempting to use *Mahaney* to argue that sign cases are entirely insulated from litigation or C.R.C.P. 106 review. That is not at all what *Mahaney* says.

What *Mahaney* provides is that applicants have a right to a specified and reasonable time

for the processing of their sign permits. It follows that if the June 1, 2020 decision starts the Rule 106 clock, then *Mahaney* is satisfied because LCLUC § 22.2.2.B.3. requires sign appeals to be decided within 60 days after receipt of the application, and the Hearing Date complied with that requirement. However, if the proceeding is left open indefinitely until County staff gets around to producing a findings and resolution document for the BOCC to approve on an administrative consent agenda, then the process is patently unconstitutional under *Mahaney* because the timing for the decision is neither brief nor specified. This Court is obligated to apply the constitutional construction. Under the only constitutionally permissible construction of the LCLUC, the City's complaint is untimely.

Accordingly, and for the reasons discussed in StreetMedia's Motion to Dismiss and this Reply, dismissal of the City's C.R.C.P. 106(a)(4) Complaint is proper and required.

ARGUMENT

A. The City lacks standing to challenge a discrete permitting decision of the County.

In *Thornton*, the Colorado Supreme Court examined a home rule city's right to challenge the adoption of an amendment to a county's comprehensive plan and a large-scale rezoning of unincorporated property. *Thornton*, 629 P.2d at 607. The decisions resulted in permission for the construction of a large-scale planned unit development on land once designated only for mineral conservation, which was adjacent to land owned by the plaintiff city. *Id.* The Colorado Supreme Court, noting that *Thornton* was "not a case in which the [c]ity wishes to challenge the [c]ounty's discretionary land use decisions," held that changes in a county's master plan and zoning map sufficiently impacted interests of the City that were significant enough so as to lend a right to the city to challenge those decisions. *Id.* at 610. Essentially, the Court held, in the context of a rezoning decision (as opposed to a discrete land use decision that authorizes actual

construction under a single building permit), the City's local concern about the value of property that it owned was sufficient to allow the City standing to be heard against a superior unit of government. But the *Thornton* Court specifically advised that standing would not be available to a home rule city to "second-guess land use decisions properly within the purview of the County's discretion." *Id.* at 610.

The challenge at hand here falls exactly into the *Thornton* court's specific exception: the City seeks to challenge a discrete decision by the County to issue a single permit for the construction of a sign. The County has made no changes to its master plan, and there is no rezoning of the property at issue. In other words, the County did not change the rules in this case, it is simply applied existing rules to a specific property. Consequently, the City has no standing to bring its case.

Indeed, signs were already allowed on the subject property when the Decision Below was made. The Decision Below simply allowed for permissible variations from a handful of physical and functional requirements that apply to permitted signs, based on articulated standards in LCLUC § 22.0. Accordingly, the City's reliance on its status as a home rule municipality and adjacent property owner are legally insufficient under *Thornton* to establish the City's standing to sue the County in this case.

All of the other cases cited by the City in its *Thornton* discussion are inapposite to the points raised by StreetMedia in its Motion to Dismiss. The cases involving governments suing each other are not helpful.[1] The other cases are not pertinent because the City is not a private

[1] Perhaps to add weight to its argument, the City cites several cases as following *Thornton*, but the cases are entirely irrelevant (and therefore, so to speak, "dead weight"). *Board of County Comm'rs v. Denver Bd. of Water Comm'rs*, 718 P.2d 235 (Colo. 1986) involved several *counties* suing Denver Water in its capacity as a public utility (and not a city suing a superior unit of

individual and does not have a right of redress against the state in a manner that is commensurate with private individuals. *Baltimore*, 289 U.S. at 40. Indeed, the City's standing is constrained by the *Thornton* case, which recognizes the significant limitations on the standing of local governments to sue the state and its counties.

B. The City failed to allege its standing in its Complaint.

While the pleading standards discussed in *Warne v. Hall*, 2016 CO 50 (2016) are most often presented in relation to motions to dismiss for failure to state a claim, the plausibility requirement in *Warne* applies equally to a standing analysis. The City is required to sufficiently plead facts alleging that it has standing. *See Warth v. Seldin*, 422 U.S. 490, 508 (1975) (denying standing because plaintiffs failed to allege any injury to their protected interests resulting from an ordinance, observing, "pleadings must be something more than an ingenious academic exercise in the conceivable"). The Complaint fails to allege any injury-in-fact to a legally protected right.

In fact, the one paragraph cited by the City in its Response, Complaint ¶ 38 (and its attached exhibit), does not mention an adverse impact at all. It merely cites "concerns" related to electronic signage, with no description or explanation as to what those concerns are, how they may or may not apply to the StreetMedia sign, nor how the sign in any way particularly adversely impacts the City. An in-depth review of the City's Complaint reveals only a thorough recounting of the facts and history of the StreetMedia permit, followed by a request for judicial review. Not once does the Complaint identify any injury suffered by the City as a result of the

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government about a discrete land use decision). *Greeley v. Bd. of County Comm'rs*, 644 P.2d 76 (Colo. App. 1981), included an adjudication of standing, but the opinion offers no insight on the issue, and, like the Denver Water case, the *Greeley* case did not involve a land use decision. Put simply, neither of these cases diminish *Thornton's* rule that a home rule city cannot "second-guess land use decisions properly within the purview of the County's discretion."

Decision Below, nor how that approval harms any legally protected right of the City.

It is a plaintiff's burden to establish the suffering of an injury-in-fact, and that the suffered injury was to a legally protected right. *Grossman v. Dean*, 80 P.3d 952, 958 (Colo. App. 2003). Even if all allegations were true, the City's Complaint neither establishes nor even alleges these elements. Accordingly, the City's Complaint is deficient in establishing standing as a matter of law, and must be dismissed.

C. There is no judicial estoppel in questions of subject matter jurisdiction.

The question of whether a court has subject matter jurisdiction over a controversy, of which standing is an essential component, is not one in which a defending party can consent or waive in an answer or other response to a complaint. *L.B. v. Blumberg*, 2017 COA 5, ¶ 13. A court either has jurisdiction to decide a controversy or it does not. *Id.* Despite the City's contentions otherwise, the County cannot create or suffer judicial estoppel simply as a result of its admissions or denials in its Answer (or even its conduct in prior cases). *See Pegrem v. Herdrich*, 530 U.S. 211, 227 n.8 (2000), *as applied by Linzinmeir v. Kalyk*, 2014 Colo. Dist. LEXIS 2255, ¶ 6 (7th JD, January 26, 2014) (finding no effect of judicial estoppel over a state court's subject matter jurisdiction).

The City's standing is not a decision for the County to make. Standing is a determination exclusively reserved to this Court. *See Davidson Chevrolet, Inc. v. Denver*, 138 Colo. at 174 ("Every court has judicial power to hear and decide the question of its own jurisdiction. Courts ought, as an incident of their general powers to administer justice, to have authority to consider their own right to hear a cause, but their assumption of authority to proceed in a cause does not confer jurisdiction where it does not exist.").

D. The IGA is a red herring.

The City's struggle to make the IGA relevant is easy to spot, and it is to no avail. The IGA is a classic red herring.

The City lays out the statutory authority to enter into an IGA (authority that is neither relevant nor contested). City Response at 8. The City says the IGA includes an agreement that the County will use the City's Comprehensive Plan as a "guideline for development," but that the City "agrees to make its Comprehensive Plan specific enough to give clear guidance . . . as to the types, densities and intensities of land use acceptable to the City on any given parcel of land." City Response at 8-9. It even describes statutory remedies (not sought here) for alleged defaults under an IGA. City Response at 9. But the City's argument suddenly drops off there. *Id*. It cannot complete the link from the IGA to the Decision Below because appeals under LCLUC § 22.0 are specifically not subject to the IGA.

IGA § 6.A 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." In Larimer County, signs are not considered land uses, but are simply improvements that are allowed pursuant to the standards in LCLUC § 10.0. Those standards can be modified in individual cases according to specific criteria set out in LCLUC § 22.2.5, according to procedures set out under LCLUC § 22.0.

StreetMedia concedes that the IGA applies if (and only if) a sign appeal under LCLUC § 22.0 was a "Development Application" under IGA § 6.A. In that case, the City would potentially have an argument that the IGA supports its standing. In this case, the City does not have that argument.

An appeal from the strict requirements of LCLUC § 10.0, processed under LCLUC §

22.0, is not one of the specific "Development Applications" referenced in the IGA, so the Decision Below does not even implicate the IGA. On its face, the IGA applies only to the "big" land use decisions that have actual functional consequences for comprehensive plan implementation—decisions like rezonings, subdivision approvals, and the establishment of new land uses that require processing under the County's "special review" procedures. *See* IGA § 6A and LCLUC § 4.2.1 (referenced in IGA § 6A).

Of course, the City and County certainly could have written sign appeals into the scope of the IGA, as they did for the other approvals that are referenced in IGA § 6A. Sign appeals are not new. They were incorporated into the LCLUC § 22.2.5 more than two years before the IGA was executed.[2]

StreetMedia submits that those who negotiated the IGA wisely decided that it should not provide a basis for the City to squabble with the County about minor land use decisions—including sign appeals. More than a dozen years after the IGA was executed, this Court cannot rewrite its terms to add to the list of "development applications" that it covers. *See Radiology Professional Corp. v. Trinidad Area Health Ass'n, Inc.*, 195 Colo. 253, 257 (1978) ("Courts possess no authority to rewrite contracts and must enforce unambiguous contracts in accordance with their terms."). Such an action would fundamentally alter the balance of interests that was deliberately struck in the IGA.

Since sign appeals under LCLUC § 22.0 are not within the scope of the IGA, the Decision Below is not subject to the IGA. As such, the IGA is a red herring. It necessarily

[2] *See* https://library.municode.com/co/larimer_county/codes/code_of_ordinances?nodeId=PTIILAUSCO_22.0AP_22.2APCOCO_22.2.5APSE10SI

follows that the City cannot cite the IGA as a basis for standing to challenge the Decision Below.

E. The City's Complaint is not just untimely, it is woefully late.

It is an elementary principle of statutory construction that specific statutory provisions control conflicting general provisions. *Mason v. General Machinery & Supply Co.*, 91 Colo. 69, 71 (1932). While LCLUC § 12.0 provides the general procedures for public hearings before the BOCC, it is LCLUC § 22.0 that provides the specific procedures for appeals, including the Decision Below. Whereas LCLUC § 12.2.7.C requires the BOCC to issue a final decision "in the form of a written resolution that states how the proposal meets or fails to meet the applicable review criteria of [the] Code," LCLUC § 22.0 requires no such written resolution for appeals. 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." There is no other permissible decision or potential for delay. 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. The specific provisions of LCLUC § 22.0 for appeals override the otherwise generally applicable provisions of LCLUC § 12.0 in this case.

It may be convenient to have a written decision, but there is no requirement for a quasi-judicial decision to be reduced to writing before it is final or ripe for judicial review. There is only the principle of administrative finality; that is, a determination that there is nothing left for a governing body to decide. This is born out in *3 Bar J*.

In *3 Bar J*, the approval of two subdivisions was held to be administratively final upon the Board of County Commissioners' vote at public hearing, despite a code requirement for the later execution and recording of a written approval and written plats evidencing the approval of the subdivisions. *See* 967 P.2d at 634-35. Based on a need to provide certainty for the developer,

whose economic interests were at risk, the Court held:

> We are 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 thirty-day limit.

Id. at 635. *3 Bar J* is directly on-point with the instant case—except that here, not only is there economic risk to the applicant, but more significantly, the applicant's constitutionally protected free speech rights are also at stake.[3]

The City's arguments that there is nothing for a court to review without final written findings is specious. It fails to acknowledge that LCLUC § 22.2.2.B.5.b. specifically provides that the BOCC decision after the public hearing concludes is "final." It also fails to recognize that *3 Bar J* is controlling law.

Given that the fact that the record on the Hearing Date consisted of written and oral (recorded) testimony regarding the subject matter, there was more than sufficient information available for this court to review the Decision Below without the subsequent findings and resolutions document. All the court would have to do is verify whether the record contained *any* competent evidence that supported the conclusion that the appeal met the applicable criteria in LCLUC § 22.2.5. *See Langer v. Bd. of Comm'rs*, 2020 CO 31, *P13. StreetMedia submits that this type of review is not as daunting a task as the City would suggest, as the Court cannot reevaluate or reweigh the evidence. *See Huspeni v. El Paso County Sheriff's Dep't (In re Freedom Colo. Info., Inc.)*, 196 P.3d 892, 900 (Colo. 2008).

Still, the City goes on for nearly three pages of its Response, arguing that this Court is not capable of reviewing a record without the crutch of written findings. *See* Response at 13-15.

[3] *3 Bar J* is discussed extensively in the Motion to Dismiss, and StreetMedia will not repeat that argument here.

StreetMedia submits that the City underestimates the capabilities of this Court and fails to offer the credit that is due. *3 Bar J* controls this case.

As in *3 Bar J*, to require a written decision before the matter is ripe for review under C.R.C.P. 106 would create an unnecessary (and unfair) uncertainty around administrative finality, which adversely affects the rights of parties relying on swift resolution of matters such as sign approvals. It would also require an unconstitutional construction of the LCLUC.

F. The Court cannot apply an unconstitutional interpretation of the LCLUC just to create an opportunity for the City to squabble with the County about StreetMedia's sign.

Regulations affecting signs are, *per se*, prior restraints on the fundamental constitutional right of free speech. *Mahaney*, 226 P.3d at 1220. To overcome the presumption of unconstitutionality that otherwise applies to prior restraints, sign regulations must articulate a brief, specified time for decision-making that allows for the applicant to seek prompt judicial review of a wrongful decision. *Id.* at 1219. LCLUC §§ 22.2.2.B.3. and 22.2.2.B.5.b. specify the time frame: the BOCC decision is final upon a vote at the conclusion of hearing that must occur within 60 days after the application is filed.

If the City is right that the Rule 106 clock starts after the findings and resolutions document is administratively approved by the Board of County Commissioners, then the County's appeals process is facially unconstitutional. While the time between application and the hearing (and decision at the hearing) is specified in the LCLUC, but the time between the hearing and the administrative hearing on the findings and resolutions document is not.[4]

That was exactly the problem in *Mahaney*. Englewood's code provided for a special sign

[4] In the instant case, that process took nearly two months.

review procedure that involved a Planning Commission recommendation to the City Manager within 45 days after an application was filed. *See id*. at 1220. After the recommendation issued, there was no specified time for the City Manager to make the final decision. *See id.* Consequently, the court struck the special review procedure down on its face and as-applied to Mahaney. *See id*.

It necessarily follows that if the administrative hearing is the "final decision" for the purposes of Rule 106, then the process itself fails under *Mahaney* because there is no brief, specified time in the LCLUC between the application and the final decision. Moreover, if the administrative hearing generates the "final decision" for the purposes of Rule 106, then there is no possibility of "prompt judicial review" for the applicant (as required by *Mahaney*), because in the event of an adverse decision, the County could stall the issuance of the findings and resolution, essentially indefinitely.

The City invites this court to interpret the County's code in a manner that leaves StreetMedia's free speech rights unprotected and twisting in a chilling wind for a time to be determined at the whim of governmental officials. This court must decline the City's invitation, because the court is obligated to interpret the LCLUC as constitutional if such a construction is possible. *See Huber v. Colo. Mining Ass'n*, 264 P.3d 884, 889 (Colo. 2011) ("if two constructions are possible—one constitutional, the other unconstitutional—we choose the construction that avoids reaching the constitutional issue."). Under *Mahaney*, the only permissible construction of the County's process is that the Board's decision at the hearing on the appeal (here, June 1, 2020) is final for the purposes of judicial review.

The City cannot be allowed to create a constitutional problem for the County in order to create space to attack StreetMedia's First Amendment rights. The City's Complaint is untimely

and must be dismissed.

CONCLUSION

The Court must dismiss the City's Complaint for lack of standing and for untimeliness. Both of these issues are jurisdictional. First, even under the cases cited by the City, the City lacks standing to challenge the County's decision. Indeed, *Thornton* specifically excepts from the standing analysis challenges to discrete land use decisions by neighboring counties. Additionally, the Complaint fails to even allege the basic elements of standing: injury-in-fact to a legally protected right.

The City's other arguments are likewise fatally flawed. There can be no judicial estoppel in questions of subject matter jurisdiction, as there can be no waiver on whether a court has jurisdiction. The City has no standing under *Thornton*. In this case, the County's authority is limited only by its own code and constitutional constraints, and is not fettered by the City in any way (including the IGA).

Finally, regardless of the City's standing or lack of standing in this matter, its C.R.C.P. 106 Complaint comes months late. The County's decision in this matter, under the County code provisions for appeals, was final upon the vote of the Board at the close of the appeal hearing on June 1, 2020. StreetMedia has a right under the LCLUC, a recognized interest under *3 Bar J*, and a constitutional right under *Mahaney* to the finality of the County Commission's decision on June 1, 2020 and the commencement of the Rule 106 clock on that date.

WHEREFORE, Defendant StreetMediaGroup LLC respectfully requests that this Court dismiss Plaintiff City of Fort Collins' Complaint, award StreetMedia its attorneys' fees and costs incurred in the preparation of its Motion and Reply, and for such other relief as the Court deems just and proper.

DATED this 30th day of October, 2020.

FAIRFIELD AND WOODS, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of October, 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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