District Court, Larimer County, State of Colorado Larimer County Justice Center 201 LaPorte Avenue, Suite 100 Fort Collins, Colorado 80521-2761 (970) 494-3500	DATE FILED: November 29, 2020 4:04 PM CASE NUMBER: 2020CV30580
Plaintiff: THE CITY OF FORT COLLINS, COLORADO, a municipal corporation, v. **Defendants: BOARD OF COMMISSIONERS OF LARIMER COUNTY, COLORADO AND STREETMEDIAGROUP, LLC.**	**COURT USE ONLY** Case No: **2020CV30580** Courtroom: **4B**

ORDER DENYING DEFENDANT STREETMEDIAGROUP, LLC'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

THIS MATTER comes before the Court on Defendant StreetMediaGroup, LLC's Motion to Dismiss Plaintiff's Complaint ("Motion") filed September 22, 2020. Plaintiff City of Fort Collins responded on October 23, 2020, and StreetMediaGroup replied on October 30, 2020. Defendant Board of Commissioners of Larimer County takes no position on this motion. Having reviewed the filings, the Court's file, and applicable law; and being otherwise fully informed in the premises, the Court hereby DENIES Defendant's Motion.

I. Background

Plaintiff's complaint was filed August 25, 2020 and seeks review of a decision by the Board of Commissioners of Larimer County to allow a certain billboard on State-owned property adjacent to Fort Collins city limits. The complaint alleges that the Board of Commissioners "exceeded its jurisdiction and abused its discretion in approving the

proposed billboard in multiple ways" including in its interpretation and application of the County's Land Use Code and its alleged failure to support its factual findings with competent evidence. Defendant StreetMediaGroup seeks to dismiss Plaintiff's complaint on the grounds that Plaintiff lacks standing, that the City's complaint is untimely, and that Plaintiff's complaint seeks content-based censorship and the extension of an unconstitutional prior restraint.

II. Relevant Law

C.R.C.P. 12(b)(1) allows a Court to dismiss a case for "lack of jurisdiction over the subject matter." *See, e.g., Trinity Broadcasting of Denver, Inc. v. City of Westminster*, 848 P.2d 916 (Colo. 1993). Under Rule 12(b)(1) "the plaintiff has the burden to prove jurisdiction." *Id.,* 848 P.2d at 925. Unlike some motions under 12(b)(1), in a motion asserting a lack of standing the court must "accept as true all material allegations of fact in the complaint." *Reeves-Toney v. School Dist. No. 1 in City and County of Denver,* 442 P.3d 81 (Colo. 2019).

StreetMediaGroup's Motion largely argues that Plaintiff, the City of Fort Collins, lacks standing to bring this suit. "Standing is a component of subject matter jurisdiction and is a constitutional prerequisite to bringing a lawsuit." *Hansen v. Barron's Oilfield Service, Inc.*, 429 P.3d 101, 103 (Colo. App. 2018) (standing under the Wrongful Death Act) (quoting *Sandstrom v. Solen*, 370 P.2d 669, 672 (Colo. App. 2016) (standing for a suit to quiet title). "Parties in Colorado 'benefit from a relatively broad definition of standing.'" *Maralex Resources, Inc. v. Chamberlain*, 320 P.3d 399 (Colo. App. 2014) (quoting *Ainscough v. Owens*, 90 P.3d 851, 855 (Colo. 2004). Standing in Colorado requires an injury-in-fact to a legally

protected interest. *Ainscough*, 90 P.3d at 856. "Although necessary, the test in Colorado has traditionally been relatively easy to satisfy." *Id.*

An injury-in-fact may not be a "remote possibility of future injury" nor an "injury that is overly indirect and incidental" to the defendant's action. *Id*. (citation and internal quotation marks omitted). While standing may be based on a tangible injury, it can also be based on intangible injuries such as harm to aesthetic interests or the deprivation of civil liberties. *Id.*; *see also, e.g., Sierra Club v. Morton*, 405 U.S. 727 (1972).

While StreetMediaGroup's motion also alleges First Amendment violations, the Court agrees with Defendant that these concerns are more properly addressed after briefing on the merits. *See Nuttall v. Leffingwell*, 563 P.2d 356, 358 (Colo. 1977) (addressing constitutional arguments as a merits question on C.R.C.P. 106 review). StreetMediaGroup does not provide, and the Court has not found, authority justifying dismissal on these facts based on these Constitutional arguments.

III. Application

StreetMediaGroup argues that Fort Collins cannot, as a matter of law, challenge the County's "discrete land use decision" and that Plaintiff "can show no injury to any legally protected interest." Motion at 11. StreetMediaGroup further alleges that the complaint in this matter is untimely, depriving the Court of jurisdiction. Taking Plaintiff's material allegations as true, the Court disagrees.

a. Fort Collins, as a home-rule city, is not legally barred from challenging the County's decision to allow the billboard

StreetMediaGroup argues that Fort Collins, as a "subordinate political subdivision," lacks standing to challenge decisions made by superior political subdivisions absent a constitutional or statutory provision creating such a right, and that Fort Collins has failed to allege any violation of a legally protected interest. Both StreetMediaGroup and Fort Collins cite *Board of County Comm'rs v. Thornton*, 629 P.2d 605 (Colo. 1981) and the Court finds *Thornton* applicable here.

In *Thornton* the eponymous home-rule city sought to challenge a decision by the Adams County Board of Commissioners to re-zone an area adjacent to the City of Thornton in order to allow a "research and development type employment park." *Thornton*, 629 P.2d at 607. In holding that the home-rule city had standing to challenge the zoning decision, the Colorado Supreme Court stated that "[w]hile planning and zoning for lands outside the boundaries of a home-rule city may be matters of statewide concern, the preservation of the value of city property is a local and municipal matter." *Id.* at 609 – 10. The *Thornton* opinion quotes at length the California Supreme Court's opinion in *Scott v. Indian Wells*:

> Certainly it is clear that the development of a parcel on the city's edge will substantially affect the value and usability of an adjacent parcel on the other side of the municipal line.
>
> To hold, under these circumstances, that defendant city may zone the land within its border without any concern for adjacent landowners would indeed 'make a fetish out of invisible municipal boundary lines and a

> mockery of the principles of zoning.' '(C)ommon sense and wise public policy ... require an opportunity for property owners to be heard before ordinances which substantially affect their property rights are adopted ....' (Citation omitted.) Indeed, the due process clause of the Fourteenth Amendment requires 'at a minimum ... that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing.

492 P.2d 1137, 1141 (as quoted in *Thornton*).

While the City of Thornton alleged diminution in property value due to the re-zoning, Fort Collins's complaint alleges that "the [P]roperty [where the sign is planned] is [] immediately adjacent to property owned by [Fort Collins]" and that light from the proposed billboard would harm wildlife in the nearby Arapahoe Bend Natural Area. Complaint ¶ 38, Letter from Darren Atteberry attached as Ex. D to Complaint at pp. 10 – 11. These injuries, while not "tangible" like the economic loss in *Thornton*, nonetheless satisfy the requirement of an "injury-in-fact." *Sierra Club*. Because there is no per-se bar to a home-rule city challenging zoning decisions of a county that affect adjacent city property, and because Fort Collins has alleged an injury-in-fact to a legally protected interest, Fort Collins has standing here.

b. Fort Collins's Rule 106 Complaint was Timely Filed

C.R.C.P. 106(b) provides that a complaint for judicial review of a quasi-judicial decision made by an administrative body must be "filed in the district court not later than 28 days after the final decision of the body or officer"(unless a statute provides a different time frame). The complaint in this matter was filed August 25, 2020. StreetMediaGroup argues that the "final decision of the body," in this case the Board of Commissioners of

Larimer County, was made on June 1, 2020, when the appeal hearing (the hearing at which the Board of Commissioners approved the billboard) was held. Motion at 13. Plaintiff responds that the "final decision" was not made until July 28, when the Board of Commissioners entered its written Findings and Resolution. Response at 11.

The parties cite a trio of Colorado cases for their arguments: *3 Bar J Homeowners Association. v. McMurray*, 967 P.2d 633 (Colo. App. 1998), *Wilson v. Board of County Commissioners*, 992 P.2d 668 (Colo. App. 1999), and *1405 Hotel, Inc. v. Colorado Economic Development Commission*, 370 P.3d 309 (Colo. App. 2015).

The rule in Colorado, as set forth by these cases, is that a "final decision" for purposes of Rule 106(a)(4) is the "point of administrative finality" when "the action complained of is complete, leaving nothing further for the agency to decide." *3 Bar J*, 967 P.2d 633 (citations and internal quotation marks omitted). A final decision is one which "ends the particular action in which is entered, leaving nothing further to be done to completely determine the rights of the parties." *1405 Hotel*, 370 P.3d at 313. Finality "depends upon the scope and nature of the proceeding and rights at issue." *Id.* With this for guidance, the Court must look to the facts and holdings of *3 Bar J*, *Wilson*, and *1405 Hotel* and attempt to apply the rule as established by the appellate courts.

3 Bar J concerned the "approval of the final two plats of two proposed subdivisions." *3 Bar J*, 967 P.2d at 634. The appellate court held that the "final decision in the subdivision approval process [took] place when the Board of County Commissioners vote[d] at a public meeting to approve the subdivisions at issue, even though such

approval may be subject to certain conditions." *Id.* at 635. This construction was required as it would give objectors a clear date for knowing when finality had occurred and when they must file to seek review, and to avoid the possibility that "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.*

Wilson concerns an application for an accessory dwelling permit which was denied by oral resolution at a hearing on April 30, 2017. A signed resolution was mailed to Plaintiffs the next week, however an error was then discovered and a revised resolution was sent out on May 16, 1997. The complaint was filed on June 16, 1997.[1] In distinguishing *3 Bar J*, and holding the complaint timely filed, the appellate court reasoned that "[t]he 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[.]" *Wilson*, 992 P.2d at 670.

1405 Hotel evaluated whether a complaint filed by eleven hotels against the Colorado Economic Development Commission and the City of Aurora was timely filed when administrative finality occurred either 1) when the Economic Development Commission conditionally approved a project on May 18, 2012 or 2) on August 15, 2013 when the Attorney General denied a petition for reconsideration. The Colorado Court of Appeals disagreed with both, finding that final agency action occurred in October, 2013

[1] The prior version of C.R.C.P. 104(a)(4) allowed plaintiffs 30 days to seek judicial review. Because June 16, 1997 was a Monday, if the date of administrative finality was on or after May 15, 1997, the complaint was timely filed.

when the Economic Development Commission adopted a resolution memorializing the terms of the award (to the hotels per the Regional Tourism Act, an act designed to incentivize projects which would bring tourist money into Colorado).

The court of appeals reached this conclusion because 1) the Economic Development Commission was required by statute to pass a resolution memorializing the terms of any award issued under the statute, 2) the May 2012 preliminary approval contained conditions which Aurora had 120 days to fulfill—and which may not have occurred. "Such an approval, by its nature, contemplates further agency action to determine whether the conditions have been satisfied," and 3) judicial economy supports delaying administrative finality until the parties know whether all conditions have been completed. *Id.*, 370 P.3d at 314.

In so holding, the *1405 Hotels* court painstakingly avoids overruling *3 Bar J*, but in doing so appears to limit the *3 Bar J* holding. "The majority [in *3 Bar J*] concluded that the Board's decision became final upon the public vote and approval—and not the private signing and recording—even though the preliminary decision had placed conditions on the approval. The majority reasoned that finality must be easily discernable and expressed concern in adopting a position that finality could occur privately. The *3 Bar J* division's concern that finality could occur privately is not present here because the RTA requires the [Economic Development Commission] to adopt a final resolution[.]" *Id.*

The Court finds that the issuance of the written Findings and Resolution was the "final decision" for purposes of C.R.C.P. 106(a)(4) review. The Court finds that, to the

extent *3 Bar J* has continued applicability after *Wilson* and *1405 Hotels*, the present matter falls outside its scope. In coming to this conclusion the Court relies on the fact that the Larimer County Board of Commissioners requires final decisions in the sign appeal process to be "in the form of a written resolution[.]" Larimer County Land Use Code § 12.2.7.C.

c. The Court will not consider the constitutionality of this construction of administrative finality as it relates to sign permitting at this time

In *City of Littleton v. Z.J. Gifts D-4, LLC*, 541 U.S. 774 (2004) the Supreme Court found that Colorado's judicial review process under C.R.C.P. 106(a)(4) provided sufficient safeguards for constitutionally-protected speech in the context of a Littleton business selling adult books in an area not zoned for adult businesses. At this stage the Court does not find reason to dismiss this case based on the risk of delay posed by finding the date of administrative finality to be the date the Board of Commissioners issues its written ruling.

SO ORDERED: November 29, 2020

BY THE COURT:

Daniel McDonald
District Court Judge