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| DISTRICT COURT, COUNTY OF LARIMER,<br>STATE OF COLORADO<br>Larimer County Justice Center<br>201 Laporte Avenue, Suite 100<br>Fort Collins, CO 80521-2762<br>Telephone: (970) 494-3500 | |
| **Plaintiff:**<br><br>**THE CITY OF FORT COLLINS, COLORADO, a municipal corporation,**<br><br>**v.**<br><br>**Defendants:**<br><br>**BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY, COLORADO; STREETMEDIAGROUP, LLC** | Court Use Only |
| Attorneys for Defendant Board of County Commissioners<br>Frank N. Haug, Reg. No. 41427<br>Jeannine Haag, Reg. No<br>Larimer County Attorney's Office<br>Post Office Box 1606<br>Fort Collins, Colorado 80522<br>Telephone (970) 498-7450<br>fhaug@larimer.org<br>jeanninehaag@larimer.org | Case No. 2020 CV 30580<br><br>Courtroom: 4B |
| **DEFENDANT BOARD OF COUNTY COMMISSIONERS' MOTION TO DISMISS CROSSCLAIM** | |

Defendants Board of County Commissioners of Larimer County ("BCC"), by and through the Larimer County Attorney's Office, move this Court to Dismiss the Crossclaim filed by StreetMediaGroup, LLC ("StreetMedia") pursuant to Colorado Rules of Civil Procedure ("C.R.C.P.") 12(b)(1) an 12(b)(5), and as grounds therefore state as follows:

## I. CONFERRAL

Defendants' counsel conferred with counsel for Crossclaimant StreetMedia about this Motion to Dismiss pursuant to C.R.C.P. 121 §1-15. Crossclaimants oppose the relief requested.

## II. INTRODUCTION

In March of 2020, StreetMedia appealed various provisions of the Larimer County Land Use Code ("LUC") relating to signage. (Crossclaim "CC" ¶ 4). StreetMedia desired to construct an advertising sign at the northwest corner of I-25 and Harmony Road. (Certified Record, Vol. I, pp 1-52). StreetMedia is in the business of selling advertising space on signs. (CC ¶ 36). On June 1, 2020, the BCC issued its oral approval of the sign following a public hearing. (CC ¶ 6 and 7, Complaint ¶ 47 and 49). On July 28, 2020, the BCC issued a written Findings and Resolution. (CC ¶ 8 and Comp. ¶ 51, and Certified Record, Vol. I, pp 1-6). The sign that StreetMedia requested and the BCC approved, has been constructed and is operational. (CC ¶ 11 and 12). The City of Fort Collins ("City") filed an appeal of the decision of the BCC through a C.R.C.P. 106(a)(4) challenge on August 25, 2020. (Complaint). StreetMedia filed a motion to dismiss the City's Complaint on September 22, 2020, which was denied by the Court on November 29, 2020.

Despite the existence and approval of its sign, StreetMedia, through its Crossclaim, continues to allege that its constitutional rights have been, or may someday be, violated. Through actions for declaratory and injunctive relief, StreetMedia seeks to establish that the BCC has somehow committed an as-applied error in allowing it to construct the sign. Alternatively, StreetMedia seeks this Court adjudge the Sign Code as a whole is facially invalid, presumably to prevent some unspecified and potential future violation. Given that the sign in this case has already been installed with BCC approval, the Crossclaim is more plainly viewed as an attempt to use the

court system to force a legislative change to the Sign Code. The request by StreetMedia to invalidate the entire Sign Code would likely benefit it by resulting in the ability to potentially construct signs without any governmental oversight at all. StreetMedia is accurate in asserting that First Amendment rights must be carefully considered when regulating signage. However, this does not result in the complete inability of a local government to apply non content-based regulations relating to signage and does not justify the relief requested in this case. For the reasons enumerated below, the Crossclaim should be dismissed.

## III. STANDARD OF REVIEW

Plaintiffs (in this instance Crossclaimant StreetMedia) have the burden to establish the trial court's jurisdiction. *Development Recovery Company, LLC v. Public Service Company of Colorado*, 410 P.3d 1264 (Colo.App 2017). A trial court determines subject matter jurisdiction by examining the substance of the claim based on the facts alleged and the relief requested. *City of Aspen v. Kinder Morgan, Inc.* 143 P.3d 1076, 1078 (Colo.App 2006). The plaintiff has the burden of proving subject matter jurisdiction, and evidence outside the pleadings may be considered to resolve a jurisdictional challenge. *Id*.

The purpose of a motion to dismiss a complaint for failure to state a claim upon which relief can be granted under C.R.C.P. 12(b)(5) is to test the formal sufficiency of the complaint. *Dorman v. Petrol Aspen, Inc*., 914 P.2d 909, 911 (Colo. 1996). Colorado adopted the plausibility standard for complaints in 2016. *Warne v. Hall*, 373 P.3d 588 (Colo. 2016). Under the plausibility standard, "to survive a motion to dismiss for failure to state a claim, a plaintiff must allege a plausible claim for relief." *N.M. v. Trujillo*, 397 P.3d 370, 373 (Colo. 2017). "The plausibility standard emphasizes that facts pleaded as legal conclusions, (i.e. conclusory statements) are not entitled to the assumption that

they are true." *See Scott v. Scott*, 428 P.3d 626, 632 (Colo.App 2018). It is the plaintiff's burden to prove that a court has subject matter jurisdiction to hear the case. *Pfenninger v. Exempla, Inc.*, 12 P.3d 830, 833 (Colo. App. 2000); *Medina v. State*, 35 P.3d 443 (Colo. 2001). "Subject matter jurisdiction relates to the power or authority of the court to deal with a particular case[;] it either exists or it does not." *Sanchez v. Straight Creek Constructors*, 580 P.2d 827, 829 (Colo. App. 1978). *Lopez v. Trujillo*, 397 P.3d 370, 373 (Colo. 2017). Where the factual allegations in a complaint cannot, as a matter of law, support the claim for relief, dismissal pursuant to C.R.C.P. 12(b)(5) is proper. *Bewley v. Semler*, 432 P.3d 582, 586 (Colo. 2018).

## IV. ARGUMENT

StreetMedia's Crossclaim should be dismissed. The declaratory judgment claim is an attempt to rewrite local legislative policy through the courts. The declaration will not resolve the current issue and in this matter--the relief sought has already been granted to StreetMedia, because it has already built the sign. Injunctive relief is inappropriate because the BCC has not attempted to stop StreetMedia from doing what it wants. A decision in favor of StreetMedia based on either of its claims will not resolve any pending issue and will not prevent any real or immediate harm.

StreetMedia lacks standing to assert the claims it has made because it has not suffered an injury in fact. Further, the claims fail because they are either not yet ripe or are already moot. StreetMedia's Crossclaim ask the Court to strike down an entire regulatory framework to prevent a speculative and hypothetical future application and thus are not ripe. Simultaneously, StreetMedia requests the Court enjoin the BCC from enforcing the regulations that it used to allow StreetMedia to build its sign. This claim is moot. Either way, there is no appropriate remedy that the Court can grant.

This case was initiated by the City bringing a C.R.C.P. 106(a)(4) claim against both StreetMedia and the BCC, seeking to undo the BCC's approval of the sign. In its own pleadings, StreetMedia has argued alternatively that the City had no standing to bring the case, that the BCC appropriately approved the sign, that the City's claims are barred, that there is no appropriate remedy for the Court to grant, and that the City's claims are moot. StreetMedia has further stated in its own pleadings that the Court should affirm the decision of the BCC. *(See Answer and Crossclaim, specifically, Affirmative Defenses).* StreetMedia now argues that the regulation which the BCC used to approve its sign is wholly invalid, and the BCC should not have been allowed to approve or disapprove the sign in the first place. StreetMedia also argues that it was not governed by Section 12 of the LUC, but that the decision and result of the appeal to allow the sign was appropriate, and further that the application of Section 12 to StreetMedia is unconstitutional. (CC ¶ 21-25, 46).

Aside from the inherent contradictions present in its Crossclaim, Answer, and Motion to Dismiss, StreetMedia has failed to plead sufficient facts to justify the claims moving forward. The Crossclaim does not articulate any allegations of any damage caused, any evidence that its right to free speech was frustrated in this instance, or that it has any specific intention of seeking any other expression of its First Amendment rights which has been or is likely to be hindered by the BCC. The status quo is that the sign exists and Streetmedia has not articulated in any manner the way in which Section 10 has injured it, or prevented it from pursuing its goals, or cost it money. Instead, it has simply made broad conclusory allegations; precisely the kind that a motion to dismiss is intended to halt.

## A. STANDING

StreetMedia has not articulated that it has suffered an injury-in-fact in this case. It is again worth recalling that the posture of the case is that the County approved the sign, and it is only the City's 106(a)(4) action that caused this matter to come to the Court. StreetMedia's own motion to dismiss highlights the importance of 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)."

As previously noted by this Court, 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. "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 in Colorado requires an injury-in-fact to a legally protected interest. *Ainscough v. Owens,* 90 P.3d 851, 856 (Colo. 2004). *Ainscough* highlights that standing is a doctrine developed to ensure the separation of powers, and that it is an exercise of judicial restraint, specifically designed to ensure that the courts do not "encroach on the power of the legislature to make prospective laws." *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.*

The constitutional prong of the standing requirement limits the court's inquiry to the resolution of actual controversies, whereas the prudential prong reflects considerations of judicial self-restraint. *C.W.B., Jr. v. A.S.,* 410 P.3d 438, 443 (Colo. 2018). The question of standing must be determined prior to a decision on the merits because standing involves the matter of whether a

plaintiff has asserted a legal basis on which a claim for relief can be predicated, and if a court determines that standing does not exist, then it must dismiss the case. *Hickenlooper v. Freedom from Religion Foundation, Inc.,* 338 P.3d 1002, 1006 (Colo. 2014).

The "injury-in-fact" element of standing for an action for declaratory judgment deciding the validity of a regulatory scheme is established when allegations of the complaint, along with any other evidence submitted on issue of standing, establishes that the regulatory scheme threatens to cause injury to plaintiff's present or imminent activities. *Board of County Com'rs, La Plata County v. Bowen/Edwards Associates, Inc*., 830 P.2d 1045, 1053 (Colo. 1992). It is axiomatic that constitutional questions must be presented in sharp focus by parties whose interests are actually affected by the questioned statutory provision. *Flank Oil Co. v. Tennessee Gas Transmission Co.,* 349 P.2d 1005, 1009 (Colo. 1960) It is fundamental that legislation is entitled to a presumption of constitutionality and that the burden is on the person alleging invalidity to prove it beyond a reasonable doubt. *See People ex rel. Rogers v. Letford*, 79 P.2d 274 (Colo. 1938). When a statute is attacked on the ground of unconstitutionality, every presumption will be indulged in favor of the legislation, and only clear and demonstrable usurpation of power will authorize judicial interference with legislative action. *Id,* at 290.

The case cited by StreetMedia, *Aptive Environmental, LLC v. Town of Castle Rock,* 959 F.3d 961 (10th Cir. 2020) highlights the importance of the standing issue.

> A plaintiff must demonstrate standing by establishing "(1) an 'injury-in-fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, (2014) "Put simply, a plaintiff must establish three elements: an injury-in-fact, causation, and redressability." *Bronson v. Swensen,* 500 F.3d 1099, 1106 (10th Cir. 2007).

at 973.

Here, StreetMedia has not alleged that it intends to engage in any particular activity other than generally being in the business of erecting signs. (CC ¶ 36, 37). Further, it has not alleged any credible threat of prosecution. Instead, the facts make clear that there is no credible threat of prosecution, because when StreetMedia asked for a sign, it was permitted to build it.

Instead, the redress that StreetMedia seeks is obliteration of the entire Sign Code and any regulatory impediment to its business. StreetMedia does not point to any case law that holds signs cannot be regulated at all. Instead, the law demonstrates that while First Amendment concerns are of utmost important in the sign context, they are not all consuming. Even assuming that parts of the LUC Sign Code are unconstitutional, this does not warrant invalidation of the entire Sign Code, nor the invalidation of the permit that was issued to StreetMedia in this case.

The mere presence on the statute books of an unconstitutional statute, in the absence of enforcement or credible threat of enforcement, does not entitle anyone to sue, even if they allege an inhibiting effect on constitutionally protected conduct prohibited by the statute. *Winsness v. Yocom*, 433 F.3d 727, 732 (10th Cir. 2006), citing *D.L.S. v. Utah*, 374 F.3d 971, 975 (10th Cir. 2004). This does not necessarily mean that a statute must be enforced against the plaintiff before he can sue. *Ward v. Utah*, 321 F.3d 1263, 1267 (10th Cir.2003). When he can show a "credible threat of prosecution," a plaintiff can sue for prospective relief against enforcement. *Id.* In other words, [to articulate standing] plaintiff's expressive activities must be inhibited by "an objectively justified fear of real consequences, which can be satisfied by showing a credible threat of prosecution or other consequences following from the statute's enforcement." *D.L.S.*, 374 F.3d at 975 (citing Ward, 321 F.3d at 1267). *See also Wilson v. Stocker*, 819 F.2d 943, 946 (10th Cir.1987) (plaintiff has standing where he suffers "an ongoing injury resulting from the statute's chilling effect on his desire to

exercise his First Amendment rights"). In this case, StreetMedia has not, and cannot, articulate a reasonable threat of prosecution. StreetMedia has not articulated in its Crossclaim any specific, non-speculative, and non-conclusory basis to believe it would be threatened with prosecution (i.e., denied the ability to erect a sign) by the BCC in the future.

In the separation of powers design of Colorado government, courts limit their exercise of judicial power through jurisprudential doctrines that include standing, mootness, and ripeness, to establish parameters for the principled exercise of judicial authority. *See Stell v. Boulder County Dep't of Soc. Servs*., 92 P.3d 910, 914 (Colo. 2004). Standing has constitutional and prudential prongs that function to limit who may bring causes of action to the courts. *City of Greenwood Vill. v. Petitioners for the Proposed City of Centennial*, 3 P.3d 427, 436–37 (Colo. 2000). Mootness instructs courts not to grant relief that would have no practical effect upon an actual and existing controversy. *Stell*, 92 P.3d at 914. Ripeness tests whether the issue is real, immediate, and fit for adjudication. *Beauprez v. Avalos*, 42 P.3d 642, 648 (Colo. 2002). Courts should refuse to consider uncertain or contingent future matters that suppose speculative injury that may never occur. *Stell*, 92 P.3d at 914.

As recently as January 14, 2021, the 10th Circuit has held that an individual cannot attack the entirety of a sign code because he believes it could potentially be applied unconstitutionally, or that one of its provisions may be unconstitutional. In *Clark v. City of Williamsburg, Kansas, No. 19-3237 (D.C. No. 2:17-CV-02002-HLT) (D. Kan.),* an individual claimed his First Amendment rights were violated where a code compliance officer attempted to enforce a particular provision of a local sign code. In that case, the plaintiff alleged that the whole sign code was invalid and unconstitutional. In rejecting this argument, noting that there had been no unlawful enforcement

nor evidence of any actual injury, the court cited to the *Wisness* case stating that the plaintiff lacked standing. StreetMedia attempts a similar attack in this case. However, similarly StreetMedia has not alleged any actual harm, nor that there is a legitimate reason to invalidate the entirety of the code. StreetMedia was given permission to build its sign and has failed to allege any real or pending injury. The conclusory statements in paragraphs 49-51 of the Crossclaim are conclusory and insufficient to establish standing and the claims should be dismissed.

**B. RIPENESS**

The doctrine of ripeness recognizes that courts will not consider uncertain or contingent future matters because the injury is speculative and may never occur. *Save Cheyenne v. City of Colorado Springs,* 425 P.3d 1174 (Colo. App. 2018). An issue is "ripe" when it is real, immediate, and appropriate for adjudication. *Timm v. Prudential Ins. Co. of America,* 259 P.3d 521, 529 (Colo. App. 2011). A statute is not ripe for adjudication of its constitutionality unless there is an actual application of the law pending or a reasonable possibility or threat of enforcement of the law. *Developmental Pathways v. Ritter,* 178 P.3d 524 (Colo. 2008). Power vested in the judicial branch of Colorado government flows primarily from Article VI, Section 1, of the Colorado Constitution. In its exercise, courts limit their inquiry to the resolution of actual controversies based on real facts. *Davidson v. Comm. for Gail Schoettler, Inc.*, 24 P.3d 621, 623 (Colo.2001). The mere possibility of a future claim is not an appropriate predicate for the exercise of judicial power. *Bd. of County Comm'rs of County of Park v. Park County Sportsmen's Ranch, LLP,* 45 P.3d 693, 698 (Colo.2002).

StreetMedia's position that because First Amendment claims are at issue, it is not required to demonstrate more than the potential for a future claim, is not accurate. StreetMedia still must

demonstrate that there is a realistic likelihood of some actual controversy between it and the County. The fact that it may in the future continue to try to construct other signs is the precise type of speculative future activity that the doctrine of ripeness is intended to keep out of the court system. None of the allegations in the Crossclaim meet the actual controversy requirement and the claims should be dismissed.

### C. MOOTNESS

An issue is moot when the relief sought, if granted, would have no practical effect on an existing controversy. Under those circumstances, any opinion would be advisory only, and a court must avoid issuing advisory opinions. *Stor-N-Lock Partners # 15, LLC v. City of Thornton,* 2018 WL 2054320 (Colo. App. 2018); *Save Cheyenne v. City of Colorado Springs,* 425 P.3d 1174 (Colo. App. 2018). In assessing whether a case is moot, the court assumes that the appealing party is entitled to the "relief sought," and then the court determines whether obtaining the relief would have any effect. If not, the case is moot. *Stor-N-Lock* at *6. An issue becomes "moot" when the relief granted by the court would not have a practical effect upon an existing controversy. *Anderson v. Applewood Water Association, Inc.,* 409 P.3d 611, 618 (Colo. App. 2016).

Here, the sign is already built and operating. Asking this Court to determine whether the Sign Code is constitutional is of no consequence at this juncture. As such, there is no relief that the Court can grant. Even assuming that the Court were to grant the relief requested, it would not resolve the matter in this case. The only result would be to provide StreetMedia with the dual victory of extinguishing the City's ability to bring a 106(a)(4) challenge while freeing StreetMedia from any future governmental regulation of its business. The desire of StreetMedia to invalidate the entire Sign Code is not based on any realistic threat of rights being denied and is too speculative to

be sustained. The cursory and conclusory statements in paragraphs 37, and 48-50 of the Crossclaim that this case is ripe because StreetMedia has other leases for properties that do not yet have signs se is ripe, is insufficient to sustain a constitutional challenge to the Sign Code.

**D. TIMING OF DECISION**

StreetMedia alleges in paragraphs 21, 45 and 46 of its Crossclaim that the need for a written resolution from the BCC is unconstitutional because there is no requirement that the resolution be issued in a "brief, specified time period." The fact that the decision of the BCC was not issued until sometime after the public hearing does not constitute a deprivation of StreetMedia's rights. StreetMedia has failed to allege any facts regarding how its interests were harmed. It is StreetMedia's burden to plead plausible claims, and again in this matter, there is no redress the court can grant based on the claims as written. Further, the case law regarding requiring a specified time period for decisions relating to speech is meant to ensure a fair procedure and structure so that if rights are denied, there is a consistent and rational process to understand the denial. Here, there was no denial, and there is a regulatory framework that exists. Further, the United States Supreme Court has already ruled that Colorado's C.R.C.P. 16(a)(4) process provides sufficient process to protect first amendment rights.

*The City of Littleton, Colo. v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004) is a case that involved Littleton's adult business licensing ordinance. In Justice Breyer's opinion, he wrote that Colorado judicial officers are capable of wisely exercising their discretion with regard to first amendment issues. *Id.* at 782. Unlike a regulatory scheme which is designed specifically to provide discretion to officials to censor certain types of content, regulations intended to apply reasonable and non-discretionary criteria as part of a broader licensing structure do not result in the "grave

dangers of a censorship system" as seems to be argued by StreetMedia. Justice Breyer specifically cites to C.R.C.P. 106(a)(4) as a procedural protection that provides "reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm." *Id.* at 782.

This same rationale was approved by the Colorado Supreme Court in *City of Colorado Springs v. 2354 Inc.*, 896 P.2d 272 (Colo. 1995). The *2354* case involved an ordinance regulating sexually-oriented businesses. The Colorado Supreme Court mirrored the U.S. Supreme Court by stating that a regulatory scheme at a local level, coupled with the protections provided by C.R.C.P. 106(a)(4), effectively provide procedural safeguards that limit any improper restriction on speech and allow such matters to be quickly addressed. *See id.* Further, in Colorado, a permit process intended to ensure only that signs comply with a Sign Code's *valid* regulations is not unconstitutional. *See, Veterans of Foreign Wars v. City of Steamboat Springs*, 575 P.2d 835 (Colo. 1978).

The Appeal StreetMedia presented to the BCC for decision addressed four separate parts of the LUC (1) 10.5.E relating to off-premise signs, (2) 10.11.B.2 relating to 30 foot setbacks, (3) 10.11.B.2 relating to the 240 foot sign area and (4) 10.5.B which deals with how long the flashing sign can present a message. It had nothing to do with section 10.6 cited by StreetMedia in its Crossclaim. Here, the record and the entirety of the permit process make clear the County's review was intended to ensure that land use regulations such as setbacks, distances from roads, and sighting concerns for motorists were complied with. All of these concerns are clearly within the authority of a local government's land use code. The process of approval of the sign only took approximately five months, from application for appeal to written decision. StreetMedia has not alleged that this process or timeframe caused it any particular harm.

While a court is not bound to [a local land use decision] if there is no competent evidence or if there is a misapplication, the interpretation of a zoning ordinance by an administrator or zoning body is entitled to deference. *See Whatley v. Summit County Bd. of County Com'rs,* 77 P.3d 793, 801 (Colo.App 2003). StreetMedia's desire to erase the land use discretion of a local governmental body through the judiciary is especially puzzling in this matter, when its sign was approved by the government and is already in use. The result of a finding of unconstitutionality of the timing of the written decision would, however, result in the ability of StreetMedia to resurrect its argument that the City's Complaint is untimely. The Court has already ruled on that matter, and the complete invalidation of the sign code in order to re-introduce that argument is inappropriate.

**E. CONSTITUTIONAL RIGHTS**

StreetMedia seeks to invalidate the entire Sign Code in the LUC because it relates in some manner to freedom of speech. However, it is incorrect to state that the First Amendment rights of StreetMedia supersede any ability of a local government to regulate the placement and operation of signs. Even assuming that some provision(s) of the LUC Sign Code is unconstitutional, this would not justify the invalidation of the entire regulatory scheme.

Laws are presumed to be constitutional, and the party attacking the validity of the law must prove it is unconstitutional beyond a reasonable doubt. *Kruse v. Town of Castle Rock,* 192 P.3d 591, 597-598 (Colo. App. 2008); *Board of County Com'rs of Jefferson County v. Simmons,* 494 P.2d 85, 87 (Colo. 1972); *Dolan v. Fire and Police Pension Association,* 413 P.3d 279, 286 (Colo. App. 2017).

The party challenging the facial validity of a law must prove beyond a reasonable doubt that there are "no conceivable set of circumstances" under which the law may be applied in a

constitutionally permissible manner. *People v. Perez-Hernandez,* 348 P.3d 451, 456 (Colo. App. 2013) (*quoting People v. Montour,* 157 P.3d 489, 499 (Colo. 2007)). Administrative rules and regulations are presumed to comport with constitutional standards and an attacking party must prove their invalidity beyond a reasonable doubt. *Dolan*, *supra* at 286. If a law can be constitutionally applied under any set of circumstances, a challenge to its facial validity must fail. *People v. Perez-Hernandez,* 348 P.3d 451, 456 (Colo. App. 2013) (quoting *People v. Montour*, 157 P.3d 489, 499 (Colo. 2007)).

As-applied constitutional challenges "concern the governmental body's quasi-judicial action" and therefore the reviewing Court's jurisdiction is pursuant to C.R.C.P. 106(a)(4), not C.R.C.P. 57. *Kruse v. Town of Castle Rock,* 192 P.3d 591, 600 (Colo. App. 2008). By contrast, a facial constitutional challenge "concerns a general rule or policy applicable to an open class of individuals and/as such, is generally a legislative act subject to review under C.R.C.P. 57 rather than C.R.C.P. 106(a)(4)…" *Id.* at 598

In this case, there is no constitutional harm that has been caused. Further, StreetMedia has not alleged any manner in which the County attempted to make a decision based on the content of its signs. Instead, what the record demonstrates is that the question dealt with zoning matters such as line of sight, topography, traffic safety, and aesthetic considerations. These are all legitimate and constitutional applications of the LUC and its Sign Code. The relief that StreetMedia seeks under C.R.C.P. 57 is based on speculation, and as a result, the claims should be dismissed.

### F. DECLARATORY RELIEF IS NOT APPROPRIATE

A declaratory judgment may not be used to circumvent the appellate process or as a substitute for that process. *Trinen v. City and County of Denve*r, 725 P.2d 65 (Colo.App. 1986).

Pursuant to C.R.S. 13-51-110, a Court may "refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding." Here, there is no meaningful decision that the Court can render regarding the alleged unconstitutionality of the legislation. This is because the sign is already built and operational and has already been approved. The only uncertainty that the Court could attempt to resolve, would be based on some hypothetical future potential application of the law. Such a determination is improper. Determination of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function through a declaratory judgment. *Sullivan v. Board of County Com'rs of Arapahoe County,* 692 P.2d 1106, 1110 (Colo. 1984). Proceeding for declaratory judgment must be based upon actual controversy and not be merely a request for an advisory opinion. *Beacom In and For Seventeenth Judicial Dist., Adams County v. Board of County Com'rs of Adams County,* 1983, 657 P.2d 440, 447 (Colo. 1983).

In exercising its discretion to determine whether to allow an anticipatory declaratory judgment action to proceed, the trial court applies a three-part test: (1) there must be an actual, justiciable controversy, not the mere possibility of a future controversy; (2) the declaratory judgment must fully and finally resolve the uncertainty and controversy as to all parties to the dispute; and (3) the declaratory action must be independent of and separable from the underlying action. *Grange Ins. Ass'n v. Hoehne,* 56 P.3d 111, 112 (Colo.App 2002). The party seeking declaratory relief must demonstrate that the challenged statute or ordinance will likely cause tangible detriment to conduct or activities that are presently occurring or are likely to occur in near future. *Mt. Emmons Min. Co. v. Town of Crested Butte,* 690 P.2d 231, 240 (Colo. 1984).

In *Moss v. Board of County Commissioners for Boulder County,* 411 P.3d 918 (Colo.App 2015), the Colorado Court of Appeals addressed an issue where, similar to this case, a court was asked to issue declaratory relief and injunctive relief based on a county resolution. In that case, the resolution had to do with whether certain kinds of shooting would be allowed in certain areas of the county. The Court in *Moss* did allow the declaratory judgment question to move forward. However, that case is distinguishable because it involved an exceptionally limited and directly applicable interpretation of a particular definition, and because there was an issue at hand. Namely, whether people could continue to shoot bows and arrows in a particular geographic location. Here, there is no such issue, and there is no such allegation that there is a present issue, only conclusory allegations that StreetMedia may in the future try to put up other signs, and the BCC may at that point unconstitutionally restrict its speech.

"The primary purpose of the declaratory judgment procedure is to provide a speedy, inexpensive, and readily accessible means of determining actual controversies which depend on validity or interpretation of some written instrument or law." *Toncray v. Dolan*, 593 P.2d 956, 597 (Colo. 1979). Declaratory relief is not available for speculative injury, and a trial court only has jurisdiction when the case contains an actual existing legal controversy rather than the mere possibility of a future claim. *Board of County Com'rs of County of San Miguel v. Roberts*, 159 P.3d 800, 810 (Colo. App. 2006). The essential requirement in a declaratory judgment action "is that all relevant events have occurred so that the court is addressing a present dispute." *Villa Sierra Condo. Ass'n v. Field Corp.*, 878 P.2d 161, 165 (Colo. App. 1994). Rule 12(b)(5) allows a challenge to the legal sufficiency of a pleading, which purports to set up a claim for relief and its function is solely to obtain the termination of "claims" for which there is no remedy based upon the facts as pleaded.

*Hannon Law Firm, LLC v. Melat, Pressman & Higbie, LLP*, 293 P.3d 55 (Colo. App. 2011). Here, there is no remedy available and the Complaint should be dismissed in its entirety.

In *Taylor v. Tinsley*, 330 P.2d 954, 956 (Colo. 1958), the Colorado Supreme Court outlined the impropriety of using a declaratory action when other adequate remedies exist. In doing so, the Court cited the rationale of the Supreme Court of Indiana as follows: "This court has held that the only new remedy afforded by the Declaratory Judgment Law is to provide an adequate remedy in cases where no cause of action has arisen authorizing an executory judgment, and where no relief is or could be claimed. Relief under this statute cannot be had where another established remedy is available. It is not intended to abolish the well-known causes of action, nor does it afford an additional remedy where an adequate one existed before. It should not be resorted to where there is no necessity for a declaratory judgment." *Taylor v. Tinsley*, 138 Colo. 182, 185–86, 330 P.2d 954, 956 (1958) (quoting *Hinkle v. Howard*, 73 N.E.2d 674, 675 (1947)).

Here, StreetMedia seeks the Court to declare that the LUC Sign Code is facially unconstitutional. This is improper because there was no unconstitutional application against StreetMedia, and it calls for a judicial overreach as outlined in several cases. "Facial invalidation of [a statute] was nevertheless improvident…two of the cardinal rules governing the…courts: " '[o]ne, never to anticipate a question of constitutional law in advance of the necessity of deciding it; the other never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *United States v. Raines*,362 U.S. 17, 21, 80 S.Ct. 519, 522, 4 L.Ed.2d 524 (1960), quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S.Ct. 352, 355, 28 L.Ed. 899 (1885). Citing a long line of cases, *Raines* also held that "[k]indred to these rules is the rule that one to whom application of

a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." These guideposts are at the bottom of the "elementary principle that the same statute may be in part constitutional and in part unconstitutional, and that if the parts are wholly independent of each other, that which is constitutional may stand while that which is unconstitutional will be rejected." *Allen v. Louisiana,* 103 U.S. 80, 83–84, 13 Otto 80, 26 L.Ed. 318 (1881). Nor does the First Amendment involvement in this case render inapplicable the rule that a federal court should not extend its invalidation of a statute further than necessary to dispose of the case before it. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 502 (1985). 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).

In paragraphs 48, 49, and 50, of StreetMedia's Crossclaim, StreetMedia provides conclusory statements that it is in the business of selling advertising space on signs, and that the Court can help resolve this matter by making a declaration that the LUC Sign Code is unconstitutional. However, this assertion is too speculative and insufficient to survive a motion to dismiss. Even assuming that the Court were to find that some aspect of the LUC Sign Code is unconstitutional, the appropriate remedy is the invalidation of that particular provision, not the entirety of the regulation.

### G. INJUNCTIVE RELIEF IS NOT AVAILABLE OR APPROPRIATE

In order to obtain a preliminary injunction, the moving party must satisfy six criteria: (1) a reasonable probability of success on the merits; (2) a danger of real, immediate and irreparable injury which may be prevented by injunctive relief; (3) lack of a plain, speedy and adequate remedy

at law; (4) no disservice to the public interest; (5) balance of equities in favor of the injunction; and (6) the injunction will preserve the status quo pending a trial on the merits. *Tesmer v. Colorado High School Activities Ass'n,* 140 P.3d 249, 252 (Colo. App. 2006), *City of Golden v. Simpson,* 83 P.3d 87, 96 (Colo. 2004). A preliminary injunction is designed to preserve the status quo or protect rights pending the final determination of a cause, its purpose is to prevent irreparable harm prior to a decision on the merits of a case. *City of Golden* at 96. The requirements for a permanent injunction are essentially the same; however, the applicant must show actual success on the merits rather than merely a reasonable probability. *Langlois v. Board of County Com'rs of County of El Paso,* 78 P.3d 1154, 1157 (Colo.App. 2003). StreetMedia fails to satisfy each of these criteria.

StreetMedia does not have a likelihood of success on its merits because it has already obtained the permits it needs to construct its sign. Further, it is essentially arguing against itself in that it is seeking to invalidate the code and decision-making process that is being collaterally attacked by the City. The billboard is already constructed and in use. The status quo is that the billboard exists and operates with approval from the County. Therefore, there is no threat of any real, immediate or irreparable injury. StreetMedia has not even attempted to allege any harms that have or may befall it beyond conclusory statements.

The entire process of approving the billboard took place in previously noticed public meetings of which both Plaintiff and StreetMedia had the opportunity to participate. No party has sought to prevent the construction of the billboard. Plaintiffs were aware of the granting of the permit prior to construction and did not seek an injunction at that time. No formal attempt was made to stay the construction, and no bond has been posted. There were and are other available and appropriate remedies at law, such as the C.R.C.P. 106(a)(4) claim that has already been made.

StreetMedia now attempts to add in constitutional claims regarding its First Amendment rights, for a sign that has received approval from the government.

There is a public interest in the existence of a code-regulated signage, for legitimate government interests such as land use planning, maintenance of aesthetic value, as well as traffic safety. The balance of the equities does not weigh in favor of allowing StreetMedia to attempt to judicially overturn a legislative scheme in order to further its own interests. Particularly when it was allowed to build the sign in this case. Plaintiffs only justification for the injunction is a conclusory statement in paragraph 55 that it will suffer damages as a result of enforcement of the unconstitutional sections of the Sign Code. This is not sufficient and the claim for injunction should be dismissed.

## V. CONCLUSION

StreetMedia's Crossclaim asks the Court to declare its rights, in a situation where its rights have not been limited and there is no legitimate threat that they will be limited. The claims further seek to enjoin the County from improperly enforcing its code--the same code which the BCC used to approve the sign that StreetMedia is currently using for advertising. The contradictory and competing arguments employed by StreetMedia indicate its desire to clear any regulatory hurdles by not only prohibiting the City's ability to assert a claim under C.R.C.P. 106(a)(4), but also by removing any and all regulatory oversight to its activities in the County. StreetMedia's argument that its First Amendment rights in building and selling advertising space supersedes and eliminates all other considerations is inaccurate. Here, the BCC approved the sign. To the extent that the City and StreetMedia have a disagreement over the sign, its placement, or its style, the appropriate

mechanism to resolve that dispute is not through claims that BCC has violated StreetMedia's constitutional rights.

WHEREFORE, the Defendants request this Court dismiss StreetMedia's Crossclaim in its entirety.

Dated: January 15, 2021

LARIMER COUNTY ATTORNEY'S OFFICE.

By: s/Frank N. Haug
Frank N. Haug, Reg. No. 41427
Senior Assistant County Attorney

**CERTIFICATE OF SERVICE**

The undersigned certifies that a true and correct copy of the foregoing Defendant's DEFENDANT BOARD OF COUNTY COMMISSIONERS' MOTION TO DISMISS CROSSCLAIM was served on the parties herein by depositing same in the U.S. mail, first class, postage prepaid or by personal service this 15th day of January, 2021, addressed to:

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