

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

Andrew D. Ringel #24762
Hall & Evans, L.L.C.
1001 17th Street, Suite 300
Denver, CO 80202
303-628-3300
Fax: 303-628-3368
ringela@hallevans.com

John R. Duval #10185
Deputy City Attorney
Claire Havelda #36831
Assistant City Attorney
City Attorney's Office
300 Laporte Avenue
P.O. Box 500
Fort Collins, Colorado 80522
970-221-6652
Fax: 970-221-6327
jduval@fcgov.com
chavelda@fcgov.com

Attorneys for Plaintiff

DATE FILED: January 22, 2021 2:34 PM
FILING ID: 6A1799E1CDD58
CASE NUMBER: 2020CV30580

▲ COURT USE ONLY ▲

Case Number: 2020CV030580

Division: 4B

PLAINTIFF'S OPENING BRIEF

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 Opening Brief, as follows:

INTRODUCTION

This Court must reverse the Board of County Commissioners of Larimer County's ("Board") July 28, 2020, Findings and Resolution Approving the Street Media Group Sign Appeal ("Findings and Resolution"). The Board exceeded its jurisdiction and abused its discretion in approving the appeal for the proposed electronic sign ("Billboard") in multiple ways. The Board failed to properly interpret and apply the Larimer County Land Use Code (the "LUC"). The Board did not follow the detailed findings and recommendation of the Larimer County Development Services Team, the staff charged by the Board with interpreting and applying the LUC ("County Staff"). The Board also failed to provide any alternative analysis, rationale, or legitimate grounds supported by competent evidence in the record before the Board ("Record") contradicting the comprehensive analysis, findings, and rationale of County Staff. The Board's interpretation and application of the LUC are inconsistent with the clear language of the LUC and are not supported by competent evidence in the Record. Review by this Court of the Board's Findings and Resolution against the Record before the Board and now before this Court demonstrates the Board's decision to grant the appeal must be reversed.¹

¹ The City believes the entirety of the Board's decision should be reversed by this Court. However, because the Board in granting the appeal allowed the Billboard to be an off-premises sign and to be taller, have larger sign faces, have a lesser setback, and a more frequent change of the Billboard's electronic messages than the LUC allows, this Court could alternatively reverse any one or more of these four aspects of the Board's decision.

APPLICABLE PROVISIONS OF THE LARIMER COUNTY LAND USE CODE

Section 10 of the LUC imposes regulations on all signs, including billboards, located in any of Larimer County’s zoning districts. In pertinent part, the applicable provisions of the LUC are set forth below. The entirety of the LUC is part of the record before this Court. [See R. Vol. V].

The LUC outlines the purpose of Section 10 as follows:

The purpose of this section is to protect the health, safety and welfare of the public; to provide the public and property owners with an opportunity for safe and effective identification of uses and locations within the county; and to avoid clutter and protect and maintain the visual appearance and property values of the agricultural, residential, business, commercial and industrial areas of the county.

[See LUC, § 10.1, R. Vol. V]. Section 10.5 provides the following regarding prohibited signs in any zoning district:

The following signs are not allowed in any zoning district.

. . . .

B. Signs that contain any flashing, rotating, animated or otherwise moving features. The appearance of electronic or changeable message signs cannot change more frequently than once every minute.

. . . .

E. Billboards, off-premises signs, except that a home occupation and an accessory rural occupation may have a temporary, off-premises directional sign as described in section 10.6.K.

[See LUC, § 10.5, R. Vol. V]. Section 10.11 provides the standards for all signs in nonresidential districts. The applicable standards for freestanding signs in nonresidential districts allow a maximum sign-area size of 90 feet per side, a maximum height of 18 feet above grade, and a setback measured from the right-of-way of at least 36 feet. [See LUC §§ 10.11.B.2 and 10.11.B.3, R. Vol. V].

Section 22 of the LUC governs proposals deviating “from a standard or requirement imposed by [the LUC]” and are submitted and considered by the Board. [See LUC, § 22.2.1.A.3, R. Vol. V]. The LUC has a specific provision governing the Board’s consideration of an appeal from the sign regulations in LUC § 10. In its entirety, this provision provides:

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 that each criterion has been met or determined to be inapplicable:

- A. Approval of the appeal is consistent with the purpose and intent of this code;
- B. There are *extraordinary or exceptional circumstances* on the site which would result in a *peculiar or undue hardship* on the *property owner* if section 10 of this code is strictly enforced;
- C. Approval of the appeal would not result in an economic or marketing advantage *over other businesses which have signs which comply with section 10 of this code.*

[See LUC § 22.2.5, R. Vol. V (emphases added)].

The Larimer County planning director has the authority to interpret the LUC subject to an appeal to the Board. [See LUC, § 3.5, R. Vol. V]. Before the Board, “[t]he appeal will be granted only if the applicant shows by a preponderance of the evidence that granting the appeal is consistent with the intent and purpose of this code.” [See LUC, § 22.2.2.B.6., R. Vol. V].

PROCEEDINGS BEFORE THE BOARD OF COUNTY COMMISSIONERS

1. StreetMediaGroup, LLC (“StreetMediaGroup”) proposed erecting a billboard on property located at 4414 East Harmony Road (“the Property”). [R. Vol. 1, at 18].

2. The Property is a 6.46-acre parcel of land owned by the State Land Board of Commissioners (the “State Land Board”) and StreetMediaGroup entered into a lease with the State Land Board on September 4, 2018, to lease 400 square feet of land and 1,000 square feet of aerial

space on the Property for the purpose of placing an outdoor advertising structure or billboard. [R. Vol. 1, at 21-22].

3. The Property is located in the Fort Collins Growth Management Area (the “GMA”). [R. Vol. 1, at 9].

4. The Property is also immediately adjacent to property owned by the City. [R. Vol. 1, at 9].

5. The Property is zoned C—Commercial under the LUC. [R. Vol. 1, at 9].

6. The Property is therefore located in a nonresidential zoning district. [R. Vol. 1, at 9].

7. On March 24, 2020, StreetMediaGroup filed an Appeal Request Form for an off-premises electronic billboard to be located on the Property seeking not to have to follow several aspects of the LUC’s sign regulations. [R. Vol. 1, at 16-80].²

8. On April 29, 2020, City Manager Darin Atteberry wrote Larimer County Manager Linda Hoffman a letter concerning StreetMediaGroup’s proposal, which letter was submitted to the Board by County Staff. Mr. Atteberry’s letter to Ms. Hoffman stated:

Larimer County and the City of Fort Collins have long partnered to plan the area surrounding Fort Collins in a coordinated, strategic way. Our shared focus on separating urban development within the growth management area from more rural county development through subarea planning, community separators, transfer of unit development programs, and more, has significantly contributed to the quality of life and sense of place that Fort Collins residents enjoy.

As we continue to foster and strength our partnership, I would like to again request your help in responding to some City Council concerns related to electronic signage. As you know, the City has a history of high standards for commercial signage. Regulation of signage is of critical importance to our residents, as signage

² The Board previously denied an earlier appeal filed by StreetMediaGroup for a different billboard on April 30, 2019. [R. Vol. I, at 20].

directly impacts the community's image and character, and can play a significant role in defining how Fort Collins is perceived at its entryways.

Larimer County recently received a proposal for a digital billboard near Harmony Road and I-25, within the City of Fort Collins Growth Management Area (GMA) and adjacent to City-owned natural areas. The property is almost completely surrounded by land within the City's jurisdiction and lies within the Harmony 'Gateway Area' which has been subject to an 18-month public process to define a future vision for how the area will develop over time. In March 2019, the County received an application similar to the current digital billboard proposal in the same location. At that time, the City submitted concerns regarding impacts within the City of Fort Collins GMA. These same concerns apply to the current proposal. Attached to this letter are details of these concerns and conflicts with the City sign regulations, relationship to the Arapaho Bend and Eagle View Natural Areas and proposed Harmony Corridor Plan Amendments for the Gateway Area, including design standards, which are pending a 2nd reading with City Council. We encourage the County to consider the City's Harmony Gateway Plan when reviewing the current proposal to support our shared community goals.

[R. Vol. 1, at 95].

9. Mr. Atteberry's letter also provided a comparison between the City's and the County's standards for off-premises billboards and an assessment of StreetMediaGroup's proposal. [R. Vol. 1, at 96].

10. Mr. Atteberry's letter enclosed a draft of the City's Harmony Corridor Standards and Guidelines for the Harmony Gateway Area which specifically includes the following criteria regarding signs:

Commercial Signs. Signs should be designed and oriented to reduce visual clutter along I-25 and Harmony Road. (o)

Wall signs should be designed as an integral element of the architecture, with the sign shape and materials complementing the architectural style and features. (o)

Internally illuminated signs should not create glare that would distract motorists or pedestrians, nor should the degree of illumination contribute to night sky light pollution. (o)

Two types of signs are prohibited within the Harmony Gateway:

1. Off-premises advertising (billboards); and
2. Electronic Message Center (EMC) signs (+)

[R. Vol. 1, at 103].

11. Finally, Mr. Atteberry's letter enclosed a discussion concerning the detrimental impact of the electronic billboard on the City's natural areas, summarizing the City's concerns as follows:

The City of Fort Collins strongly urges Larimer County to require the appeal for an e-billboard at the intersection of Harmony Rd. and I-25 to adhere to standards for setback from natural areas and other places with documented presence of sensitive wildlife species. We further encourage the County to reference and consider application of best management practices detailed in the International Dark-Skies Association Guidance for Electronic Messaging Centers. Specifically, BMP-2. Sensitive Area Setback that recommends electronic messaging centers should not be placed within or adjacent to sensitive areas. These may include, but are not limited to: natural areas, beaches, wetlands, state and national parks, wildlife refuges, residential areas, observatories, and military training grounds. Setbacks in excess of 1 mile (1600 meters) from sensitive areas may be warranted. Given the proposed project location (.25 of a mile) in relation to Arapahoe Bend Natural Area and from Eagle View Natural Area (~1 mile), this e-billboard will impact wildlife populations on both sites. Wildlife impacts include potential disruptions to wildlife species of interest, including those designated as Greatest Conservation Need by Colorado Parks and Wildlife and/or species on the Colorado Natural Heritage Program's watchlist.

[R. Vol. 1, at 104].

12. County Staff reviewed the appeal and concluded StreetMediaGroup's proposal for its billboard did not meet the required criteria under LUC § 22.2.5. [R. Vol. 1, at 13].

13. With respect to LUC § 22.2.5.A, County Staff concluded the proposal did not meet this criterion, stating:

According to Section 10.1 of the Land Use Code, the purposes of the sign regulations is to "protect the health, safety and welfare of the public; to provide the public and property owners with an opportunity for safe and effective identification of uses and locations within the county; and to avoid clutter and protect and

maintain the visual appearance and property values of the agricultural, residential, business, commercial and industrial areas of the county.”

The intent of the regulations within Section 10 of the Land Use Code is to not allow off-premises signs, to provide consistent regulation for the allotment of commercial signage, and to have sign regulations consistent with the regulations adopted by the City of Fort Collins and the City of Loveland.

Larimer County’s sign regulations were deliberately written to be consistent with the regulations adopted by the City of Fort Collins and the City of Loveland to reduce the potential for nonconformities should signs permitted in unincorporated Larimer County by annexed to one of those cities.

Approval of the appeal would allow this property to have a billboard when new billboards have been prohibited since June 15, 1992 and would allow the billboard to be 30 feet tall when the maximum height of a freestanding sign is 18 feet (1.7 times taller than allowed) with 240 square feet per sign face when a maximum size is 90 square feet per sign face (2.7 times larger than allowed).

In the applicants’ project description, it is noted that removal of the five billboards from other locations in the Fort Collins area will reduce visual clutter. Staff notes that as nonconforming signs, the intent is for the five billboards to be removed over time as their physical condition deteriorates. This would ultimately result in the removal of the five signs without being replaced by a permanent electronic message sign.

The City of Fort Collins provided comments (including in attachment G) that indicate the proposal appeals conflict with their current sign regulations. Their regulations do not allow new off-premises signage, allow one message per minute on electronic sign displays, do not allow electronic message center displays on pole signs, and limit pole signs to 18 feet in height and 80 square feet per sign face.

The property is within the Harmony Gateway Area which is a subarea of the Harmony Corridor Plan. According to the City’s comments, an amendment to the City’s Harmony Corridor Plan is pending a second reading with the Fort Collins City Council. The proposed amendment would prohibit billboards and would also prohibit electronic message center signs on properties within the Harmony Gateway.

The City of Fort Collins Natural Areas Department provided comments expressing concern about the impact of light from the proper billboard on wildlife in the adjacent Arapahoe Bend Natural Area and nearby Eagle View Natural Area.

The Development Services Team's assessment is that approval of the appeal would not be consistent with the intent and purpose of the Land Use Code.

The proposal does not comply with this criterion.

[R. Vol. 1, at 10-12].

14. With respect to LUC § 22.2.5.B, County Staff concluded the proposal did not meet this criterion, stating:

No sign permits have previously issued for a freestanding sign on the property. There have been five permits issued for walls signs which cumulatively are well under the overall sign allotment for the property.

If Section 10 of the Land Use Code is strictly enforced, the owners of businesses located on the property would have the ability to obtain permits for a freestanding sign along the property's Harmony Road frontage, a freestanding sign along the property's I-25 frontage, and permits could be obtained for additional wall signage. Each of the two freestanding signs could be 18 feet tall with two 90-square foot sign faces.

The strict enforcement of Section 10 would not allow for the construction of a new billboard of any size, would not allow for a freestanding sign (on-premises or off-premises) taller than 18 feet tall or larger than 90 square feet per sign face and would not allow for an electronic sign with a hold time between messages of less than 60 seconds.

Staff has not reviewed compelling evidence that there are extraordinary or exceptional conditions on the site that would result in a peculiar or undue hardship on the property owner if Section 10 of the Land Use Code is strictly enforced.

Staff finds that the proposal does not comply with this criterion.

[R. Vol. 1, at 12].

15. With respect to LUC § 22.2.5.C, County Staff concluded the proposal did not meet this criterion, stating:

Approval of the appeal would allow this property to have a billboard when new billboards are no longer permitted and would allow the billboard to be 30 feet tall when the maximum height of a freestanding sign is 18 feet (1.7 times taller than allowed) with 240 square feet per sign face when a maximum size of a freestanding

sign face is 90 square feet (2.7 times larger than allowed). The sign elevation at sidewalk level is approximately 16 feet, however the Larimer County Land Use Code does not contain provisions for elevation-related compensation. It would also allow the sign at a lesser setback than required by the Code for smaller signs and would also a hold time of 6 second between messages when a 60 second hold time is required. The Colorado Department of Transportation's minimum hold time between messages is 4 seconds.

Approval of the appeal would provide an economic and marketing advantage over businesses that comply with Section 10 of the Land Use Code by allowing the following: increased sign height, increased sign and copy size, presence of electronic message display, reduced copy hold time, and placement within an area where off-premises signs are otherwise prohibited.

Staff finds that the proposal does not comply with this criterion.

[R. Vol. 1, at 12].

16. County Staff made the following findings summarizing its conclusions about the proposal:

The Development Services Team finds that approval of the proposed appeal is not consistent with the purpose and intent of the Land Use Code, that there are not extraordinary circumstances on the site which would result in an undue hardship on the property owner if Section 10 were strictly enforced, and approval of the appeal would result in an economic or marketing advantage over other businesses which have signs which comply with Section 10 of the Land Use Code.

[R. Vol. 1, at 13].

17. Based on its analysis of the LUC and its findings, County Staff recommended the Board deny StreetMediaGroup's appeal. [R. Vol. 1, at 13].

18. The Board considered StreetMediaGroup's appeal in a noticed public hearing it conducted on June 1, 2020. [R. Vol. III.A., at 1-13; Vol. II.A, at 1-82].

19. County Staff's analysis, findings and recommendation were provided to the Board as part of the June 1, 2020, hearing. [R. Vol. 1, at 7-13].

20. County Staff reiterated through testimony its recommendation to deny the appeal at the hearing. [R. Vol. II.A., at 12-13].

21. County Staff noted new off-premises signs have been prohibited in unincorporated Larimer County since June 15, 1992. [R. Vol. II.A, at 4].

22. In analyzing the purpose of the sign regulations at the hearing under the first appeal criterion, County Staff explained:

So, according to Section 10.1 of the Land Use Code, the purpose of the sign regulations “is to protect the health, safety and welfare of the public; to provide the public and property owners with an opportunity for safe and effective identification of uses and locations within the county; to avoid clutter and protect and maintain the visual appearance and property values of the agricultural, residential, business, commercial and industrial areas of the county.”

The intent of the Regulations is to not allow off-premises signs. That’s been something that’s been explicit in the Code.

To provide consistent Regulations for the allotment of commercial signage, hence the Regulations on 10.11 that say, okay, if you’re a certain distance back, you get to be a certain height and a certain size. But we cap it at 18-feet tall and 90 square feet in size.

And then, also to have Regulations that are consistent but not necessarily identical to the Regulations adopted by the City of Fort Collins or the City of Loveland; the idea behind that is these—most of these commercial-signage situations are in the Growth Management Areas.

As you saw, this is an enclave. This, you know, will likely be annexed to the City of Fort Collins at some point. And the idea is not to create a nonconformity at some point. And the idea is to not create a nonconformity that the City, then, has to administer or doesn’t want in the first place.

So, approval of this appeal would allow the property to have a billboard, when new billboards have been prohibited since June 15th of 1992. It would allow the billboard to be 30-feet tall, where the maximum height is 18 feet. It would allow the sign faces to be 240 square feet per sign [face], where the maximum is 90 square feet.

. . . .

So the City of Fort Collins did provide comments that indicated that the proposed appeals conflict with their current Sign Regulations. Their Regulations do not allow new off-premises signs.

They allow one message per minute on electronic message displays. They don't allow electronic message displays on pole signs. So only allow—they're only allowed on monument or on wall signs. And they limit pole signs to 18 feet in height and 80 square feet per sign face.

This area's also part of the Harmony Corridor Plan and a subsection of that is the Harmony Gateway Area. The City of Fort Collins has indicated that there's an amendment to the Corridor Plan that's pending second reading of the City Council. And the proposed Amendment would prohibit billboards and also prohibit electronic message centers in the Harmony Gateway, which, again, this property is a part of. So, the City of Fort Collins has indicated that this is both inconsistent with their current Regulations and their long-term plan for the Corridor.

Again, the City of Fort Collins' Natural Area Department provided comments expressing concerns about the impact of wildlife adjacent to—because this property is adjacent to Arapahoe Bend Natural Area and also Eagle View Natural Area, which is a natural area that's not yet opened to the public, but it is proposed along Strauss Cabin Road and Ketcher, so about a mile south of this property. So, the Development Services Team assessment is that approval of the appeal would not be consistent with the intended purpose of the Land Use Code.

[R. Vol. II.A, at 7-9].

23. As to the second appeal criterion, County Staff informed the Board “Staff has not reviewed compelling evidence that there are extraordinary or exceptional circumstances on the site that would result in a particular or undue hardship on the Property Owner if Section 10 of the Land Use Code is strictly enforced.” [R. Vol. II.A., at 11]. County Staff explained this conclusion as follows:

So there are signs on the property right now. There are a number of wall signs. There have been five Sign Permits that have been issued over the years. I don't know how many are still there.

But if Section 10 of the Land Use Code was strictly enforced, Businessowners would have the opportunity to have another additional—an additional freestanding sign adjacent to the I-25 right-of-way.

They would have the additional ability to provide a second freestanding sign adjacent to Harmony Road. Those signs would be limited to 18-feet tall and 90 square feet, assuming they're at least 36-feet back.

And it would allow, because of the size of the building, additional wall signage. So there are plenty of opportunities for additional signage on this site in compliance with the current Regulations.

[R. Vol. II.A., at 10].

24. Concerning the third appeal criterion, County Staff concluded this was also not met, explaining:

So, approval of this appeal would provide an economic and marketing advantage over businesses that comply with Section 10 of the Land Use Code by allowing an increased sign height, increased sign and copy size, placement in an area where off-premises signs are otherwise prohibited, and a reduced hold time. So, Staff finds that the proposal does not comply with that criteria either.

[R. Vol. II.A., at 12; *see also* R. Vol. II.A., at 20].

25. During the hearing, the following colloquy occurred between a Commissioner and County Staff concerning the Intergovernmental Agreement between the City and the County and the Growth Management Areas:

CHAIR PRO TEM KEFALAS: Thank you Michael. In terms of the relationship between the County and the City of Fort Collins, obviously we have an IGA, Intergovernmental Agreement, that pertains to these Growth Management Areas.

And I think there's supposed to be a level of cooperation and coordination in terms of design standards and development standards. What are the implications there? I don't know if that's something you can speak to, Michael.

MR. WHITLEY: Well, we do like to cooperate with the City of Fort Collins. And if they make a specific request, we like to accommodate that as much as possible, especially if the request is not compliant with our Regulations.

So if they had a standard that was less stringent than ours, but we allowed something, then we would continue to allow it. However, if there's a request to deviate from a standard and the City of Fort Collins weighs in on that, that is not binding on either Staff or the Board of County Commissioners. But that's something we weigh heavily in our recommendation.

Now, if the City of Fort Collins had recommended approval of this, you know, for whatever reason, I can't guarantee what our recommendation would be. But it's much more likely that we would have recommended approval had the City of Fort Collins said, okay, this is consistent with our Regulations and we do not object.

[R. Vol. II.A., at 16-17].

26. Finally, County Staff informed the Board at the hearing that if the Board decides to approve the appeal, County Staff would propose the following two conditions as part of the approval:

However, if the Board of County Commissioners does wish to propose—or excuse me—approve the appeal, we would propose two conditions. One, the electronic message board sign be designed and operated to meet the guidance for electronic message centers issued by the International Dark Sky Association as found in Attachment G; and also that a Permit from the Colorado Department of Transportation be required.

[See R. Vol. II.A., at 12-13].

27. At the conclusion of the June 1, 2020, public hearing, the Board voted to approve StreetMediaGroup's proposal, but did not issue a written decision at that time. [R. Vol. 11.A at 81].

28. On July 28, 2020, the Board issued its Findings and Resolution approving in all respects StreetMediaGroup's appeal. [R. Vol. IV, at 1-6].

29. The Board's Findings and Resolution made the following findings and reached the following conclusions related to how the appeal met the three criteria of LUC 22.2.5:

13. The review criteria for appeals, found in Larimer County Land Use Code Section 22.2.5, have been satisfied as follows:

a. Approval of the appeal will not subvert the purpose of the standard or requirement.

According to Section 10.1 of the Land Use Code, the purpose of the sign regulations is to “protect the health, safety and welfare of the public; to provide the public and property owners with an opportunity for safe and effective indication of uses and locations within the county; and to avoid clutter and protect and maintain the visual appearance and property values of the agricultural, residential, business, commercial and industrial areas of the county.”

The appeal is consistent with the purposes and standards because it will remove clutter and protects and maintains the visual appearance and property values of the area. Specifically, the sign is located in an area with significant background lighting, and the sign will not significantly affect that background lighting. The sign is also located at an intersection of two high speed roadways, which diminished concerns relating to the dwell time. The appeal is consistent with implementation of the sign code because it removes clutter including removal of approximately eight other signs which have been present for approximately forty years. It will beautify roadways and give small businesses an opportunity to communicate with customers. Further, the SITELINE technology employed by the sign allows for directional distribution of light so as to minimize interference and mitigate impacts of a lighted sign.

b. There are extraordinary or exceptional conditions on the site which would result in a peculiar or undue hardship on the property owner if Section 10 of this Code is strictly enforced.

The Property is located at an elevation below the adjacent roadways, making placement and view of a sign more difficult. Further, the adjacent roadways are high-speed major roadways. The topography of the site creates a hardship that can be mitigated by the placement of the sign and the implementation of strategies of directional lighting and dwell time as indicated in the application. The placement of the sign as indicated in the appeal will increase its viewability and make it safer for motorists to view. Additionally, the recent economic downturn has created a hardship for many small businesses and non-profit organizations, which can be mitigated in part by the advertising opportunities on this sign.

c. Approval of the appeal would not result in an economic or marketing advantage over other businesses which have signs which comply with Section 10 of this Code. The appeal will not result in an unfair business advantage

as the sign will permit a variety of non-profit and business advertisement in a location that is highly visible to the travelling public.

14. The Board of County Commissioners finds that approval of the proposed appeal is consistent with the purpose and intent of the Land Use Code, that there are extraordinary circumstances on the site which would result in an undue hardship on the property owner if Section 10 were strictly enforced, and that approval of the appeal would not result in an economic or marketing advantage over other businesses which have signs which comply with Section 10 of the Land Use Code.

[R. Vol. IV, at 3-4].

30. There is no evidence in the Record the State Land Board or any of its representatives participated in the June 1, 2020, public hearing or that anything in writing from the State Land Board was presented to the Board at the hearing.

STANDARD OF REVIEW

The standard of review in a C.R.C.P. 106(a)(4) proceeding determines whether the governmental body has exceeded its jurisdiction or abused its discretion. *Delong v. Trujillo*, 25 P.3d 1194, 1197 (Colo. 2001). A misconstruing or misapplication of applicable law can be an abuse of discretion. *Board of Cnty. Comm'rs v. Conder*, 927 P.2d 1339, 1343-44 (Colo. 1996); *Van Sickle v. Boyes*, 797 P.2d 1267, 1274 (Colo. 1990). “A governmental entity abuses its discretion when it applies an erroneous legal standard.” *Langer v. Bd. of Comm'rs*, 2020 CO 31, ¶ 13. A reviewing court also considers whether the decision under review is reasonably supported by any competent evidence in the record. *Yakutat Land Corp. v. Langer*, 465 P.3d 65, 70 (Colo. 2020). No competent evidence exists when “the ultimate decision of the [lower] body is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.” *Van Sickle*, 797 P.2d at 1272; *Ross v. Fire & Police Pension Ass'n*, 713 P.2d 1304, 1309 (Colo. 1986). “Thus, we will reverse the Board’s decision if we determine that it erroneously

interpreted the law or made a decision that is unsupported by the record.” *Hayej v. Bd. of Cty. Comm’rs for Boulder Cty.*, 2020 COA 28, ¶ 7.

Importantly, this Court may review the correctness of the Board’s construction and application of its Land Use Code. *Langer*, 2020 CO 30, ¶ 21; *Roybal v. City & Cty. of Denver*, 2019 COA 8, ¶¶ 17-23. “The court may defer to the agency’s construction of a code, ordinance, or statutory provisions that govern its actions, but it is not bound by the agency’s construction because the court’s review of the applicable law is de novo. In reviewing the agency’s construction, we rely on the basic rules of statutory construction, affording the language of the provisions at issue their ordinary and common sense meaning.” *City of Commerce City v. Enclave West, Inc.*, 185 P.3d 174, 178 (Colo. 2008) (citations omitted). “When construing an ordinance, we give effect to every word and, if possible, harmonize potentially conflicting provisions.” *Id.* “While interpretation of a city code is reviewed de novo, interpretations of the code by the governmental entity charged with administering it deserve deference if they are consistent with the drafters’ overall intent.” *Whitelaw v. Denver City Council*, 2017 COA 47, ¶ 8.

ARGUMENT

I. THE BOARD OF COUNTY COMMISSIONERS MISINTERPRETED AND MISAPPLIED THE LARIMER COUNTY LAND USE CODE AND THEREFORE ABUSED ITS DISCRETION

The Board’s task in considering StreetMediaGroup’s appeal was to interpret and apply the three criteria found at LUC § 22.2.5³ based on the facts contained in the Record before the Board.

³(A) “Approval of the appeal is consistent with the purpose and intent of this code”; (B) “There are extraordinary or exceptional circumstances on the site which would result in a peculiar or undue hardship on the property owner if section 10 of this code is strictly enforced”; and (C) “Approval of the appeal would not result in an economic or marketing

Examination of the Board's Findings and Resolution demonstrates the Board misinterpreted and misapplied the three applicable criteria.

A. LUC § 22.2.5.A:

First, LUC § 22.2.5.A requires the Board to evaluate whether approval of the appeal is consistent with the purpose and intent of the LUC. [See LUC, § 1.5, R. Vol. V]. As set forth above, the entirety of the Board's Findings and Resolution on this criterion consists of the following:

The appeal is consistent with the purposes and standards because it will remove clutter and protects and maintains the visual appearance and property values of the area. Specifically, the sign is located in an area with significant background lighting, and the sign will not significantly affect that background lighting. The sign is also located at an intersection of two high speed roadways, which diminished concerns relating to the dwell time. The appeal is consistent with implementation of the sign code because it removes clutter including removal of approximately eight other signs which have been present for approximately forty years. It will beautify roadways and give small businesses an opportunity to communicate with customers. Further, the SITELINE technology employed by the sign allows for directional distribution of light so as to minimize interference and mitigate impacts of a lighted sign.

[¶ 29].⁴ Initially, the Board made no finding and offered no description of its interpretation of what constitutes the purposes and standards of the LUC related to signs in its Findings and Resolution. [¶ 29]. As a result, the only statement contained in the Record concerning the purposes and standards of the LUC to apply this criterion is what County Staff provided as the intent and purpose of Larimer County's sign regulations. In their written review provided to the Board, County Staff stated:

The intent of the regulations within Section 10 of the Land Use Code is to not allow off-premises signs, to provide consistent regulation for the allotment of commercial

advantage over other businesses which have signs which comply with section 10 of this code.”

⁴ Whenever possible, factual references in this Argument section are made to the paragraph numbers in the above Proceedings Before the Board of County Commissioners section.

signage, and to have sign regulations consistent with the regulations adopted by the City of Fort Collins and the City of Loveland.

Larimer County's sign regulations were deliberately written to be consistent with the regulations adopted by the City of Fort Collins and the City of Loveland to reduce the potential for nonconformities should signs permitted in unincorporated Larimer County be annexed to one of those cities.

Approval of the appeal would allow this property to have a billboard when new billboards have been prohibited since June 15, 1992 and would the billboard to be 30 feet tall when the maximum height of a freestanding sign is 18 feet (1.7 times taller than allowed) with 240 square feet per sign face when a maximum size is 90 square feet per sign face (2.7 times larger than allowed).

[¶ 13]. County Staff's presentation before the Board at the hearing reiterated these identical points concerning the intent and purpose of the LUC's sign regulations. [¶ 22]. Notably absent from the Board's Findings and Resolution is any effort to make any findings as to why this billboard appeal should be approved when no new off-premises signs have been allowed since June 15, 1992. The absence of any findings by the Board on this central issue is dispositive of the Board's failure to faithfully interpret and apply the actual intent of the LUC's sign regulations.

Instead of addressing the fact the appeal would allow an off-premises billboard in a manner not permitted by the LUC for the past 38 years, the Board's Findings and Resolution on this criteria presents and discusses two issues irrelevant to compliance with the intent of the LUC's sign regulations. Initially, the Findings and Resolution discuss how well this electronic Billboard and the light it emits fits at its proposed location. [¶ 29]. The Board grounds this conclusion based on an assessment allowing the Billboard will protect and maintain the visual appearance and property values of the area. [¶ 29]. Importantly, however, nothing in the Board's Findings and Resolution offers *at all* how the existence of an off-premises billboard, given the LUC's prohibition on them since 1992, is consistent with the intent and purpose of the LUC. Additionally, the Board discusses

StreetMediaGroup’s proposal to remove other billboards at other locations. [¶ 25]. Critically, while the Findings and Resolution suggest the applicants have proposed to remove these other billboards, nothing in the Board’s Resolution actually requires their removal or provides any specific time frame for this to be accomplished.⁵ Rather, the Resolution approves the appeal without imposing the removal of the other billboards as a condition of the approval. [R. Vol. IV, at 1-6]. More troubling is the reality neither the Board nor County Staff nor anyone else at the hearing discussed or provided the legal basis under the LUC for the Board to consider such an issue in evaluating whether the Billboard subject to the appeal is consistent or inconsistent with the intent and purpose of the LUC’s sign regulations. One can imagine a land use code being written to allow the removal of the other billboards to be considered, but nothing in the LUC does so and nothing in the Record or the Findings and Resolution explains the LUC basis for doing so here either.

Fundamentally, the Board’s Findings and Resolution on this criterion are inconsistent with the only evidence contained in the Record about the intent and purpose of the LUC’s sign regulations provided by County Staff. The Board was allowed to grant the appeal “only if the applicant shows by a preponderance of the evidence that granting the appeal is consistent with the intent and purpose of this code.” [See LUC, § 22.2.2.B.6., R. Vol. X]. The Board failed to hold StreetMediaGroup to this standard and therefore misinterpreted and misapplied this criterion.

B. LUC § 22.2.5.B:

⁵ Further, some of the billboards are located in the boundaries of the City and not within the jurisdiction of Larimer County.

Second, LUC § 22.2.5.B mandates the Board evaluate whether there are *extraordinary or exceptional conditions on the site* which would result in a peculiar or undue hardship to the *property owner* if LUC § 10 is strictly enforced. As outlined above, the totality of the Board’s Findings and Resolution on this criterion consisted of the following:

The Property is located at an elevation below the adjacent roadways, making placement and view of a sign more difficult. Further, the adjacent roadways are high-speed major roadways. The topography of the site creates a hardship that can be mitigated by the placement of the sign and the implementation of strategies of directional lighting and dwell time as indicated in the application. The placement of the sign as indicated in the appeal will increase its viewability and make it safer for motorists to view. Additionally, the recent economic downturn has created a hardship for many small businesses and non-profit organizations, which can be mitigated in part by the advertising opportunities on this sign.

[¶ 29]. Initially, the focus of this criterion is *the property owner*. Nothing contained in the Board’s Findings and Resolution mentions the property owner let alone explains how not allowing the Billboard detrimentally impacts the property owner. There is no evidence in the Record of the State Land Board, as the property owner, providing any evidence of the hardship it will suffer if the Billboard is allowed as proposed in the appeal. [¶ 30]. Implicit in the Board’s Findings and Resolution is the assumption the relevant analysis is the impact on the ability of StreetMediaGroup as the lessee in whether it can effectively have a Billboard at this site. However, the actual language of LUC § 22.2.5.B demonstrates this misfocus is fundamentally inappropriate. Not only does the Board make no findings related to any impact on the property owner, but any evidence in the Record related to the impact on the property owner is at best speculative.

Moreover, the Board’s Findings and Resolution neither cite nor make any findings based on the actual specific components of the criterion. LUC § 22.2.5.B requires the Board to find “extraordinary or exceptional conditions” on the site resulting in a “peculiar or undue hardship”

on the property owner. No discussion of any of these components appears in the Board's Findings and Resolution. No reasonable question exists the words "extraordinary," "exceptional," "peculiar," and "undue" are words that limit the applicability of this criterion. The conditions for the property owner must be "extraordinary and exceptional" not simply the prevailing conditions of all area properties. The hardship on the property owner must be "peculiar or undue" not just an economic hardship. The Board's failure to address these limitations of this criterion is fatal to its effort.

In its presentation, StreetMediaGroup attempted to justify the increase in the sign face size from 90 square feet to 240 square feet based on the 150-foot width and traffic conditions of Harmony Road. [R. Vol. I, at 24-50]. Similarly, StreetMediaGroup offered Harmony Road's 150-foot width and its westbound traffic coming from a higher elevation as it crosses the interchange to warrant decreasing the setback from 36 feet to 30 feet. [R. Vol. I, at 24-50]. And StreetMediaGroup argued changing the one-minute message frequency to only six seconds as needed by the location at an interchange, the width of Harmony Road, Harmony Road's high-volume traffic and its speed limit of 45 miles per hour. [R. Vol. I, at 24-50]. None of these issues, however, are physical conditions of the Property. Instead, they are conditions of the surrounding infrastructure in the area shared by all other properties in this particular area of Harmony Road or other properties located at other interchanges in the area such as those located at the I-25 interchanges on Highway 14 and East Prospect Road.

Last, the Board's Finding and Resolution concerning the need for small businesses and non-profit organizations to advertise on the Billboard due to the recent economic downturn is ungrounded in any evidence contained in the Record. Nothing presented to the Board offered any

specific data or information on this particular issue. Further, there is no linkage between this perceived public benefit and any alleged condition on the Property for the property owner, the State Land Board, making it irrelevant to this criterion. And nothing in the Findings and Resolution requires StreetMediaGroup to do anything to encourage the use of the Billboard by Larimer County small business and non-profits. [R. Vol. I, at 1-6].

The Board's application of this criterion stands in sharp contrast to the analysis and conclusion of County Staff. Both in its submission to the Board prior to the hearing and during the hearing itself, County Staff specifically and unequivocally stated its conclusion there were no extraordinary or exception circumstances on the Property which resulted in a peculiar or undue hardship on the property owner and backed up the conclusion with specific analysis. [¶¶ 14 & 23]. The Board's Findings and Resolution offered no basis to depart from the reasoned and supported County Staff decision based on an actual application of the relevant standard.

C. LUC § 22.2.5.C:

Third, LUC § 22.2.5.C necessitated the Board determine approval of the appeal would not result in an economic or marketing advantage over other businesses which have signs which comply with LUC § 10. Again, as quoted above, the totality of the Board's Findings and Resolution concerning this criterion was the following:

The appeal will not result in an unfair business advantage as the sign will permit a variety of non-profit and business advertisement in a location that is highly visible to the travelling public.

[¶ 29]. The Board's Findings and Resolution on this criterion are essentially a non-sequitur. The criterion does not call for a determination whether the Billboard will help other business who use outdoor advertising, but rather actually requires the Board to consider whether other business with

signs strictly complying with Larimer County’s sign regulations, LUC § 10, will suffer an economic or marketing disadvantage if the Billboard is allowed. Not only as discussed above is there no actual factual support anywhere in the Record for the Board’s proposition, but the language and structure of LUC § 22.2.5.C demonstrates the Board simply did not apply this criterion correctly.

In its written submission to the Board, County Staff actually analyzed the criteria as follows:

Approval of the appeal would allow this property to have a billboard when new billboards are no longer permitted and would allow the billboard to be 30 feet tall when the maximum height of a freestanding sign is 18 feet (1.7 times taller than allowed) with 240 square feet per sign face when a maximum size of a freestanding sign face is 90 square feet (2.7 times larger than allowed). The sign elevation at sidewalk level is approximately 16 feet, however the Larimer County Land Use Code does not contain provisions for elevation-related compensation. It would also allow the sign at a lesser setback than required by the Code for smaller signs and would also a hold time of 6 second between messages when a 60 second hold time is required. The Colorado Department of Transportation’s minimum hold time between messages is 4 seconds.

Approval of the appeal would provide an economic and marketing advantage over businesses that comply with Section 10 of the Land Use Code by allowing the following: increased sign height, increased sign and copy size, presence of electronic message display, reduced copy hold time, and placement within an area where off-premises signs are otherwise prohibited.

Staff finds that the proposal does not comply with this criterion.

[¶ 15]. Similarly, during the hearing, County Staff also specifically addressed how this criterion was not met, as follows:

So, approval of this appeal would provide an economic and marketing advantage over businesses that comply with Section 10 of the Land Use Code by allowing an increased sign height, increased sign and copy size, placement in an area where off-premises signs are otherwise prohibited, and a reduced hold time. So, Staff finds that the proposal does not comply with that criteria either.

[¶ 24]. Any comparison between the Board's Findings and Resolution and County Staff's analysis establishes the Board analyzed the wrong issue and supported its conclusion with no evidence at all.

Indeed, the Record is devoid of anything at all establishing other businesses with billboards complying with the LUC's sign regulations will not suffer an economic or marketing disadvantage if StreetMediaGroup is allowed to erect and operate its Billboard. Thus, even if the Board had appropriately applied the third criterion, there is simply no evidence in the Record supporting any finding the criterion has been met here. Indeed, under the Board's rationale in the Findings and Resolution for this criterion, one is hard pressed to conceive how the Board could reject any future appeal for a billboard if this same rationale is applied to all future circumstances. Furthermore, the result essentially gives the Billboard monopoly-type power given the long-standing preclusion on off-premises signs and the lack of competition from other electronic billboards in the area.

II. THE BOARD OF COUNTY COMMISSIONERS' GRANT OF THE APPEAL IS NOT SUPPORTED BY COMPETENT EVIDENCE IN THE RECORD

As outlined in Section I above, the Board's fundamental error in granting the appeal was its misinterpretation and misapplication of the three criteria found in LUC § 22.2.5. In addition, however, the Board also failed to support a variety of its factual findings underlying its Findings and Resolution with competent evidence in the Record.

First, respecting both the second and third criteria, the Board's Findings and Resolution references a recent economic downturn and its perceived hardship on small businesses and non-profit organizations and suggests the existence of the Billboard will be economically beneficial to those type of entities. Setting aside how ungrounded this finding is from any of the criteria actually to be applied by the Board as argued above, this finding is unsupported by competent evidence in

the Record. The genesis of this Finding and Resolution is based on the following closing comments of one of the County Commissioners at the conclusion of the hearing:

I think I said this—I hope I said this the last time we saw this appeal. And so—but I will reiterate it for the benefit of my colleagues at this time.

I know a guy who's a small businessman here in Fort Collins. And every year, at Christmastime, he buys a billboard to advertise his safe sales business. He sells safes where you can keep documents and guns, and all, like, valuables and things like that in your home.

Well, every big box store in Larimer County sells the exact same thing. His is maybe better quality. But every single big box store, whether it's a Walmart or a sporting goods store, sells some version of the safe.

And so, they certainly are limited and they are limited, but certainly not limited by the way that the County's Sign Code limits their ability to put out signage, nor their ability to advertise.

And so, what I'm always mindful of when we hear these cases is the fact that these play a significant role in allowing our small local businesses to be able to reach customers that they normally have no opportunity to do.

And it's even more stark when you think about this being right across the street from a Walmart. It gives a small shop, a small business that's here in our community the opportunity to at least let potential customers know that they're in the marketplace. And so, for me, I think that that's something that we frequently overlook.

[R. Vol. III.A, at 69-70]. No doubt the public interest articulated by the Commissioner is a legitimate one. However, his comments are not supported by anything actually in the Record before the Board. No evidence exists as to the positive impact of the Billboard on local small businesses. And, more importantly, as discussed above, the actual LUC criterion simply does not allow this as an appropriate consideration for the appeal.

Second, respecting the third criterion, there is no evidence in the Record supporting any conclusion other businesses complying with the LUC's sign regulations would not suffer a

competitive disadvantage from the Billboard. Absent such evidence it is simply impossible for the third criterion to be met. As argued above, the Board's analysis of the third criterion is entirely inapposite to the actual criterion. The lack of competent evidence for the third criterion in and of itself warrants this Court reversing the Board's decision. LUC § 22.2.5 is clear the Board must consider all three of the criteria "and find that each criterion has been met or determined to be inapplicable" before the Board may "approve an appeal from the applicable requirements in section 10 of this code." [See LUC § 22.2.5, R. Vol. V].

At bottom, County Staff provided the Board with a thorough and comprehensive interpretation and application of the three relevant criteria for the Board's decision on the appeal. County Staff did so in writing before the hearing and during the hearing itself. Larimer County's Land Use Code allows the Board to review and disagree with County Staff on decisions like StreetMediaGroup's appeal. However, if the Board decides to do so, its decision must be grounded in the correct criteria and supported by competent evidence. Here, the Board's decision is supported by neither and therefore must be reversed by this Court.

III. THE BOARD NEVER ADDRESSED NOR BASED ITS DECISION ON THE FIRST AMENDMENT ARGUMENTS RAISED BY STREETMEDIAGROUP

In the proceedings before the Board, StreetMediaGroup spent considerable time arguing its position Larimer County's sign regulations were unconstitutional under the First Amendment. [R. Vol. I, at 16-50]. None of the Commissioners referenced any First Amendment issue in their comments at the conclusion of the hearing. [R. Vol. II.A., at 69-81]. The Board's Findings and Resolution do not refer to the First Amendment or StreetMediaGroup's constitutionality arguments and nothing in the Findings and Resolution of the Board bases its decision on a First Amendment ground. [R. Vol. IV, at 1-6]. This Court's task in reviewing the Board's Findings and Resolution

is to determine whether the Findings and Resolution correctly interpreted and applied LUC § 22.2.5, the applicable standard governing the appeal, and any factual findings relied upon by the Board were supported by competent evidence contained in the Record. Because the Board never addressed nor ruled on any First Amendment issue, while StreetMediaGroup undoubtedly feels strongly about its position, the First Amendment issue is irrelevant to this Court's review under C.R.C.P. 106(a)(4).

CONCLUSION

In conclusion, for all the foregoing reasons, Plaintiff City of Fort Collins respectfully requests this Court find and declare the Board of County Commissioners of Larimer County, Colorado exceeded its jurisdiction and abused its discretion in its Findings and Resolution approving the proposed Billboard, find and declare the Board's Findings and Resolution approving the proposed Billboard are not supported by competent evidence contained in the Record before the Board, find and declare the Board's interpretation and application of the Larimer County Land Use Code in the Findings and Resolution constitute the Board exceeding its jurisdiction and abusing its discretion, or in the alternative reverse any aspect of the Board's Findings and Resolution this Court determines appropriate under the applicable legal standard (i.e., off-premises sign, Billboard height, sign face size, setback and timing of electronic messages), award the City its attorney's fees and costs, and all other and further relief as this Court deems just and appropriate.

Dated this 22nd day of January, 2021.

Respectfully submitted,

/s/ Andrew D. Ringel

Andrew D. Ringel #24762
Hall & Evans, L.L.C.
1001 17th Street, Suite 300
Denver, CO 80202
303-628-3300
Fax: 303-628-3368
ringela@hallevans.com

and

John R. Duval #10185
Deputy City Attorney
Claire Havelda #36831
Assistant City Attorney
City Attorney's Office
300 Laporte Avenue
P.O. Box 500
Fort Collins, Colorado 80522
970-221-6652
Fax: 970-221-6327
jduval@fcgov.com
chavelda@fcgov.com

**ATTORNEYS FOR PLAINTIFF
THE CITY OF FORT COLLINS
COLORADO**

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of January, 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:

Todd G. Messenger, Esq.
tmessenger@fwlaw.com

Andrew J. Helm, Esq.
ahelm@fwlaw.com

Jeannine S. Haag, Esq.
haagjs@co.larimer.co.us

William G. Ressue, Esq.
wressue@larimer.org

Frank N. Haug, Esq.
haugfn@co.larimer.co.us

/s/ Nicole Marion _____
Nicole Marion
of HALL & EVANS, L.L.C.,