

<b>DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO</b> Larimer County Justice Center 201 Laporte Avenue, Suite 100 Fort Collins, CO 80521-2762 Telephone: (970) 498-6100	DATE FILED: February 5, 2021 3:31 PM FILING ID: 85704251EA75D CASE NUMBER: 2020CV30580
<b>Plaintiff:</b> THE CITY OF FORT COLLINS, COLORADO, a municipal corporation,  v.  <b>Defendants:</b> BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY, COLORADO; STREETMEDIAGROUP, LLC	<b>▲ COURT USE ONLY ▲</b>
<b>Attorneys for Defendant, StreetMediaGroup, LLC:</b> Todd G. Messenger, Reg. No. 38783 Andrew J. Helm, Reg. No. 47548 FAIRFIELD AND WOODS, P.C. 1801 California Street, Suite 2600 Denver, CO 80202 Telephone: (303) 830-2400 Facsimile: (303) 830-1033 E-Mail: tmessenger@fwlaw.com; ahelm@fwlaw.com	Case Number: 2020CV030580  Division: 4B
<b>DEFENDANT STREETMEDIAGROUP, LLC’S RESPONSE TO DEFENDANT  BOARD OF COUNTY COMMISSIONERS’ MOTION TO DISMISS CROSSCLAIM</b>	

Defendant StreetMediaGroup, LLC (“StreetMedia”), through its undersigned counsel, Fairfield and Woods, P.C., submits the following as its Response to Defendant Board of County Commissioners’ Motion to Dismiss Crossclaim (“County Motion”).

**I.  
Introduction**

StreetMedia’s cross claims are key to the complete resolution of the issues presented by the *Complaint for Review Pursuant to C.R.C.P. 106(a)(4)* (“Rule 106 Complaint”) brought by the City of Fort Collins (“City”). The cross claims live and die with the Rule 106 Complaint. As such, the cross claims cannot be dismissed unless the Rule 106 Complaint is also dismissed.

A cross claim is proper when a cross claimant alleges that if a Plaintiff's complaint succeeds, a cross-defendant is liable to the cross-claimant. *See CLPF-Parkridge One, L.P. v. Harwell Investments, Inc.*, 105 P.3d 658, 660 (Colo. 2005); C.R.C.P. 13(g). That is the case here. This Court has already acknowledged the presence of constitutional issues in this case, finding just two months ago that, "While StreetMediaGroup's motion also alleges First Amendment violations, . . . these concerns are more properly addressed after briefing on the merits." *Order Denying Defendant StreetMediaGroup, LLC's Motion to Dismiss Plaintiff's Complaint*, Case No. 2020CV30580 (Nov. 29, 2020) ("November Order") at 3.

This Court has jurisdiction to hear and decide a constitutional challenge to the provisions of the Larimer County ("County") Land Use Code ("LUC") that are pertinent to this case. *See Espinoza v. O'Dell*, 633 P.2d 455, 466 (Colo. 1981) (recognizing that state courts have jurisdiction over claims brought under 42 U.S.C. § 1983, and observing, "a court should be wary of dismissing the case on pleadings which involve an alleged violation of constitutional rights."). StreetMedia's cross claims invoke the necessary jurisdiction for the Court to consider the First Amendment issues that are central to adjudication of the Rule 106 Complaint. *See Defendant StreetMediaGroup, LLC's Answer and Cross Claim*, Case No. 2020 CV30580 (Dec. 12, 2020) ("Cross Claims") at 8, 12-13 (citing statutes and rules that confer jurisdiction).

The C.R.C.P. 106(a)(4) proceeding brought by the City is "limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer." C.R.C.P. 106(a)(4)(I). StreetMedia submits that the procedural posture of this case requires that the constitutional issues be raised in cross claims that broaden the scope of the Court's jurisdiction beyond the record of the decision

below. The cross claims allow for the evidence and testimony to be taken on foundational constitutional questions that are essential to the complete adjudication of this case.

The cross claims are ripe because they are raised in a C.R.C.P. 106 proceeding before this Court involving the application of laws to StreetMedia that StreetMedia alleges are unconstitutional. That makes them, as the County put it, “real, immediate, and fit for adjudication.” (County Motion at 9). StreetMedia has standing to bring the cross claims because it is a Defendant in this litigation, the City demands that this Court enforce the challenged County regulations against StreetMedia, and the resolution of the cross claims is necessary to the complete resolution of the issues that the Rule 106 Complaint presents. As such, the injury-in-fact and redressability components of standing are present.

## **II.** **Standard of Review**

In ruling on a motion to dismiss for failure to state a claim for relief, the court must accept all well-pleaded facts as true, and the allegations of the complaint must be viewed in the light most favorable to the plaintiff.

*Western Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008).

## **III.** **Argument**

A. *The Cross-Claims Present Essential Threshold Questions that Must Be Addressed for the Complete Resolution of the Issues in this Case.*

It is bedrock constitutional law that “[a]n unconstitutional law is void, and is as no law.” *LaFleur v. Pyfer*, 2021 CO 3 at \*9 (2021) (multiple citations dating back to *Marbury v. Madison*, 5 U.S. 137, 138 (1803) omitted). The cross claims properly present the threshold question of whether LUC provisions that are at issue in this case can be applied at all. That is a question that must be answered before the Court can consider whether there is record evidence to support the

conclusion that LUC was correctly applied. In other words, if the Court finds LUC provisions are unconstitutional, then the inquiry as to those provisions abruptly ends. The Court cannot decide whether unconstitutional regulations were “correctly applied.”

*B. The Cross-Claims Provide the Jurisdiction to the Court to Consider Off-Record Evidence and Testimony on Pressing Constitutional Questions.*

The City complains that the County got it wrong in allowing StreetMedia to construct a “billboard”—a type of sign that the County defines solely based on the message that the sign displays.<sup>1</sup> The applicable code provision, LUC 10.5.E. (the County’s ban on billboards and off-premise signs that the City relies upon for its case) is, facially, a content-based restriction on free speech.<sup>2</sup> See *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). That means it is “presumptively unconstitutional.” *Id.* at 171. If the Court ultimately finds that the provision is unconstitutional, then it is “no law.” *LeFleur* at \*9. In that event, the provision must be “ignored,” and City cannot ask the Court to revisit how it was applied.

The City’s C.R.C.P. 106(a)(4) action is a proceeding on the record that does not provide sufficient jurisdiction to this Court to evaluate the First Amendment questions presented in the cross claims. Among other things, StreetMedia alleges—and can easily prove—that LUC 10.5.E. is, on its face, content-based. As such, the burden will shift to the County to prove to this Court that the provision passes muster under strict scrutiny (that the provision advances “compelling

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<sup>1</sup> The City’s pleadings demonstrate that it vehemently opposes the County’s decision to grant relief to StreetMedia from content-based restriction set out in LUC 10.5.E. (the County ban on “billboards” and “off-premises signs”), and the City wants the Court to impose the restriction. (Compl. at ¶¶ 2, 5, 27-29, 42, 71, 77; Pl. Opening Brief at 19). The record shows that the City does not like billboards in large measure because of their content.

<sup>2</sup> This Court may find that other material provisions of the LUC may be “content-based” as well, based on the motivations of those who apply them.

governmental interests,” and is “narrowly tailored”). *See Reed* 576 U.S. at 171. That will require the consideration of evidence and testimony that is not in the record before the Court. The cross-claims invoke the Court’s jurisdiction under C.R.C.P. 13, 57, and 65; 42 U.S.C. § 1983; and C.R.S. § 13-51-101, *et seq.*, and therefore allow the Court to consider the constitutional questions outside of that record.

*C. The Cross-Claims Also Present Threshold Questions About This Court’s Jurisdiction.*

The timeliness of the City’s petition is essential to the Court’s jurisdiction. *See* C.R.C.P. 106(b); *Danielson v. Zoning Bd. of Adjustment of City of Commerce City*, 807 P.2d 541, 543 (Colo. 1990). As a preliminary matter, the City urged this Court to find that the Rule 106(b) “clock” started ticking upon the adoption of a written order pursuant to LUC § 12.2.7.C. However, if this Court ultimately finds that LUC § 12.2.7.C. is (on its face or as applied to StreetMedia) an unconstitutional prior restraint, then LUC § 12.2.7.C. is “no law” and cannot be applied.<sup>3</sup> That would render the Rule 106 Complaint untimely, and divest the Court of subject matter jurisdiction.

The Court has made a preliminary ruling in the City’s favor on this issue, but specifically reserved a final decision for a later date. (November Order at 9). The cross claims allow for the proper presentation of the question to the Court. Like the constitutional issues the County’s billboard ban raises, the prior restraint issue requires the evaluation of off-record evidence.

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<sup>3</sup> StreetMedia submits that this is a likely outcome. Since the County requires that an appeal be granted by the Board of County Commissioners prior to the display of “off-premise” content, the County’s sign appeal process is a prior restraint. *See Mahaney v. Englewood*, 226 P.3d 1214, 1219-21 (Colo. App. 2009); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990). Prior restraints come with a “heavy” presumption of unconstitutionality. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). That presumption can only be overcome if the regulations contain adequate procedural safeguards to prevent abuse. *See Mahaney*, 226 P.3d at 1219-21. One of the safeguards is a “specified brief period” for decision-making. *Id.* at 1219.

StreetMedia submits that the County is required to make proof on this point in order to overcome the heavy presumption against it. A motion to dismiss is not a proper vehicle to make that proof. If the County can carry its heavy burden, it has not done so on this record.

*D. The Cross-Claims Affect the Harmony Road Sign At Issue In This Case, As Well As Sign Permit Applications that Were Subsequently Filed.*

After the Cross Claims were timely filed, StreetMedia filed five new applications with the County for the issuance of sign permits. (Young Decl. at ¶ 7). StreetMedia’s intent is to display “off-premise” messages on those signs. (Young Decl. at ¶ 7). Consequently, the Cross Claims also seek a declaration of StreetMedia’s rights and protection from the application of unconstitutionally content-based restrictions to those signs. StreetMedia has standing with respect to those signs, the issue is ripe because the permits are pending, and StreetMedia does not have to wait for content-based regulations to be enforced before challenging them. *See Board of County Comm’rs, La Plata County v. Bowen/Edwards Associates, Inc.*, 830 P.3d 1045, 1053 (Colo. 1992) (“A plaintiff seeking a declaratory judgment on the validity of a regulatory scheme need not violate the regulation and thus become subject to punishment ‘in order to secure the adjudication of uncertain legal rights.’” (quoting *Community Tele-Communications, Inc. v. Heather Corp.*, 677 P.2d 330, 334 (Colo. 1984))).

*E. If the Rule 106 Complaint is Dismissed as Moot, StreetMedia’s Cross Claims are Extinguished as Well—and C.R.C.P. 12(h)(3) Requires the Court to Dismiss the Rule 106 Complaint as Moot.*

This Response argues that, for the reasons set out above, the cross claims must be preserved for so long as the City’s Rule 106 Complaint is pending, and that they must be heard in conjunction with the Rule 106 Complaint if that complaint moves forward. However, the County correctly

points out that since the November Order, events have occurred that moot the Rule 106 Complaint. Consequently, C.R.C.P. 12(h)(3) requires the Court to dismiss the Rule 106 Complaint.<sup>4</sup>

StreetMedia concedes that if the Court dismisses the Rule 106 Complaint as moot, StreetMedia's cross claims go with it. StreetMedia acknowledges that if its new signs in the County spawn additional legal issues, those issues can be addressed in a new and separate cause of action.

The operative new facts are as follows:

1. As the County correctly details, under the lawful authority of the County's approval of StreetMedia's appeal, StreetMedia applied for a building permit for the sign that is at the center of the City's Rule 106 Complaint ("Harmony Sign"). (County Motion at 20).

2. In due course, the County issued the permit on October 15, 2020. (Ex. 1).

3. The Harmony Sign was installed pursuant to that validly issued building permit on or about October 28, 2020 (Young Decl. at ¶ 5).

4. On or about November 18, 2020, the County signed off on the final inspection (Ex. 1), and StreetMedia turned on the display (Ex. 2).

As of the date of this Response, it has been more than three months since the Harmony Sign was installed and turned on. Though the City had the option under C.R.C.P. 106(a)(4)(V), its Rule 106 Complaint did not seek to stay the County's decision. As such, StreetMedia also agrees with the County that the Rule 106 Complaint did not restrain further action by the County or StreetMedia in furtherance of the construction of the Harmony Sign. (County Motion at 20); *see generally, Zoning Bd. of Adjustment of Garfield County v. DeVilbiss*, 729 P.2d 353, 359 (Colo. 1986).

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<sup>4</sup> C.R.C.P. 12(h)(3) provides: "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

At this point, the Rule 106 Complaint is moot and must be dismissed. *See DeVilbiss*, 729 P.2d at 359. If the Rule 106 Complaint is dismissed, the cross claims go with it. If the Rule 106 Complaint is not dismissed, the cross claims are ripe and pressing, and cannot be dismissed.

DATED this 5<sup>th</sup> day of February, 2021.

FAIRFIELD AND WOODS, P.C.

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 5<sup>th</sup> day of February, 2021, I filed the foregoing with the Clerk of the Court using Colorado Courts E-Filing. I further certify that a copy of the foregoing was sent via Colorado Courts E-Filing to the following:

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