

DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO Larimer County Justice Center 201 Laporte Avenue, Suite 100 Fort Collins, CO 80521-2762 Telephone: (970) 498-6100	DATE FILED: February 24, 2021 1:42 PM FILING ID: 4C8CC855E7CD1 CASE NUMBER: 2020CV30580
Plaintiff: THE CITY OF FORT COLLINS, COLORADO, a municipal corporation, v. Defendants: BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY, COLORADO; STREETMEDIAGROUP, LLC	▲ COURT USE ONLY ▲
Attorneys for Defendant, StreetMediaGroup, LLC: Todd G. Messenger, Reg. No. 38783 Amanda Jokerst, Reg. No. 47241 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; ajokerst@fwlaw.com	Case Number: 2020CV030580 Division: 4B
DEFENDANT STREETMEDIAGROUP, LLC'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT	

Defendant StreetMediaGroup, LLC (“StreetMedia”), through its undersigned counsel, Fairfield and Woods, P.C., and pursuant to C.R.C.P. 12(b)(1), hereby submits this Motion to Dismiss Plaintiff’s Complaint and states as follows:

CERTIFICATE OF CONFERRAL

Defendant’s counsel has conferred with Plaintiff’s counsel and counsel for Defendant, Board of County Commissioners of Larimer County concerning this Motion. Plaintiff opposes the instant motion. The Board of County Commissioners of Larimer County does not take a position on the motion.

A SHORT HISTORY OF THE HARMONY SIGN

The sign that is at the center of this dispute (“Harmony Sign”) is located at the northeast quadrant of the Harmony Road / Interstate 25 interchange, in unincorporated Larimer County (“County”). (R.22). The Board of County Commissioners (“BOCC”) approved an appeal (“Sign Appeal”) from four provisions of Section 10 of the Larimer County Land Use Code (“Sign Code”) on June 1, 2020. BOCC approval of the Sign Appeal allowed StreetMedia to obtain a building permit for the Harmony Sign. (R.1, 4). On July 28, 2020, during its “administrative matters meeting,” the BOCC approved a consent agenda that included its “Findings and Resolution Approving the Street Media Group Sign Appeal” (R.1, 5). The City of Fort Collins (“City”) filed its “Complaint for Review Pursuant to C.R.C.P. 106(a)(4)” (“106 Complaint”) on August 25, 2020. (Pl.’s Compl. at 17).

In its 106 Complaint, the City demands only declarations that this Court declare that the County applied the wrong law and abused its discretion. (Pl.’s Compl. at 16). The City did not request a stay pursuant to C.R.C.P. 106(a)(4)(V). *See id.* The 106 Complaint did not pray for injunctive relief. *See id.* The City did not move the Court for a temporary restraining order or preliminary injunction pursuant to C.R.C.P. 65.

In accordance with the timing requirements of C.R.C.P. 12(a)(1), StreetMedia moved to dismiss the 106 Complaint on September 22, 2020.¹ While its motion was pending,² StreetMedia applied for a building permit for the Harmony Sign. The County issued the permit on October 15, 2020. (Def. StreetMedia Resp. to Def. County Mot. to Dismiss, Ex. 1). Installation of the sign

¹ The Motion to Dismiss filed on September 22, 2020 addressed standing and timeliness under C.R.C.P. 106. At that time, the building permit had not yet been issued for the Harmony Sign.

² This Court denied StreetMedia’s Motion to Dismiss on November 29, 2020.

structure commenced on or about October 28, 2020. *See id.* StreetMedia then honored its commitment to the BOCC and removed five existing signs (eight sign faces in total), after which the County signed off on final inspection. *See id.*

After final inspection, StreetMedia turned the Harmony Sign on and started using it. (Def. StreetMedia Resp. to Def. County Mot. to Dismiss, Ex. 2). That was on or about November 18, 2020. (Def. StreetMedia Resp. to Def. County Mot. to Dismiss, Ex. 2). In the three weeks between October 28 (when installation of the sign structure commenced) and November 18, 2020 (when the sign was turned on), the City made no attempt to stop StreetMedia's lawful construction activity. As of the date of this motion, the sign has been operational for nearly three months.

ARGUMENT

This case is moot. Mootness is a threshold issue of subject matter jurisdiction. *See Tesmer v. Colo. High Sch. Activities Ass'n*, 140 P.3d 249, 252 (Colo. App. 2006); *see also People ex rel. K.A.*, 155 P.3d 558, 560-61 (Colo. App. 2006). Subject matter jurisdiction can be raised at any time. *Currier v. Sutherland*, 218 P.3d 709, 714 (Colo. 2009). C.R.C.P. 12(h)(3) mandates, "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." On a motion to dismiss based on subject matter jurisdiction, the plaintiff has the burden to prove jurisdiction. *DiCocco v. Nat'l Gen. Ins. Co.*, 140 P.3d 314, 316 (Colo. App. 2006). Under the circumstances of this case, the City cannot carry that burden.

A case is moot when "a judgment, if rendered, would have no practical legal effect upon the existing controversy." *Tesmer*, 140 P.3d at 252 (quoting *Van Schaack Holdings, Ltd. v. Fulenwider*, 798 P.2d 424, 426 (Colo. 1990)). The Harmony Sign was turned on nearly three months ago, and has been and operational ever since. The signs that StreetMedia agreed to remove

have been removed.

All obligations related to the Sign Appeal are fully performed. StreetMedia is using the Harmony Sign, and its other five signs are destroyed. Since it is in use, the sign is generating revenue, a portion of which will be paid to the State Land Board to further its mission of funding Colorado public schools. (R. Vol. I at 23). At this point, the City's demands that this Court find and declare flaws in the BOCC approval of the Sign Appeal are academic. Colorado Courts do not decide "academic questions." *Hays v. Huskin*, 539 P.2d 500, 500 (Colo. App. 1975).

A similar situation occurred in *Zoning Bd. of Adjustment of Garfield Cnty. v. DeVilbiss*, 729 P.2d 353 (Colo. 1986). In *DeVilbiss*, the Colorado Supreme Court upheld dismissal of a C.R.C.P. 106(a)(4) case on the basis that it was moot, because the facility that was at the center of the controversy was lawfully constructed during the pendency of the litigation. *See id.* at 354. The complaint in that case actually sought a permanent injunction, but the plaintiff "did not seek a temporary restraining order or a preliminary injunction under C.R.C.P. 65, nor did he request a stay under C.R.C.P. 106(a)(4)." *Id.* at 355.

In upholding the dismissal, the Court reasoned that the case became moot because DeVilbiss utterly failed to use available procedures to protect the *status quo*. *See id.* at 360 (holding that since DeVilbiss failed to request a stay or preliminary injunction, he "must bear some responsibility for a change in circumstances . . ."). In light of DeVilbiss' failure to take steps to protect its interests, the Court emphasized that the defendants were not blameworthy or culpable in any way for permitting and constructing the facility during the pendency of the case. *See id.* at 359 (holding that the defendant "was not guilty of any legally impermissible or culpable conduct in proceeding with the construction . . .").

DeVilbiss standards for the proposition that a complaint pursuant to C.R.C.P. 106(a)(4),

alone, does not restrain further permitting and construction pursuant to a decision that is under review. Plaintiffs have easily identifiable procedures at their disposal to manage that risk. Those procedures, set out in C.R.C.P. 106(a)(4)(V) and C.R.C.P. 56 are not secrets.

StreetMedia submits that the City had a choice of how to proceed. It never tried—in any way—to legally restrain the County from issuing a permit. There is no request for a stay on this record. There is no motion for preliminary injunction anywhere on this docket. The City did not demand permanent injunctive relief in its Complaint. As such, the defendants were not legally restrained. It is entirely appropriate that the County issued the building permit in the ordinary course of business. StreetMedia built the sign and turned it on three months ago.

The case is moot and must be dismissed pursuant to C.R.C.P. 12(h)(3).

CONCLUSION

The 106 Complaint does not demand any particular action. It just requests that this Court review the BOCC's decision on the Sign Appeal and declare that it was incorrect. While the City stood by and chose not to invoke procedures to maintain the *status quo*, StreetMedia and the County fulfilled all of their respective obligations under the Sign Appeal—that is, in the absence of a stay or preliminary injunction, the Harmony Sign was legally permitted and legally constructed, and five signs controlled by StreetMedia were destroyed.

The Harmony Sign has been operational for nearly three months. Any decision by this Court to grant the City's requested declaratory relief would have no practical legal effect. Under C.R.C.P. 12(h)(3) and *DeVilbiss*, dismissal is not only required, it is also a fair, appropriate, and predictable result. The case is moot and must be dismissed for lack of subject matter jurisdiction.

WHEREFORE, based on the foregoing, Defendant StreetMedia respectfully requests this Court to dismiss the Complaint with prejudice and grant any other relief this Court deems fair and just.

DATED this 24th day of February, 2021.

FAIRFIELD AND WOODS, P.C.

s/ Todd G. Messenger

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CERTIFICATE OF SERVICE

I hereby certify that on this 24th 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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