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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	
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 C. 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 ANSWER BRIEF	

Defendant StreetMediaGroup, LLC ("StreetMedia"), through its undersigned counsel, Fairfield and Woods, P.C., respectfully submits this Answer Brief, as follows:

I. INTRODUCTION

This Court should deny the relief requested by the City of Fort Collins ("City") or dismiss the case for want of subject matter jurisdiction. First, the City's allegations and summary of what this record contains are, at best, woefully incomplete. Indeed, there is competent evidence in this record to support the decision of the Larimer County ("County") Board of County Commissioners ("BOCC"), and that the BOCC correctly applied the correct law. Second, the City has the burden

to clear three other hurdles before its prayer for relief could be answered in any event: (1) the case is moot; (2) the City's Complaint is time-barred; and (3) the Court cannot mandate the application of unconstitutional regulations.

II. SUMMARY OF FACTS

Larimer County Land Use Code ("LUC") § 22.2.1.A.3. establishes an appeal process that offers the opportunity for applicants to seek relief from the strict application of LUC § 10 ("Sign Code"). (R. Vol. V., LUC §§ 22.2.1.A.3. and 10). On March 24, 2020, StreetMedia filed an appeal ("Sign Appeal") with the County pursuant to LUC § 22.2.1.A.3. (Def. StreetMedia Ans. and Cross Claims ¶ 27). The purpose of the Sign Appeal was to seek relief from several specific provisions of the Sign Code, in order to allow for the construction of a single new sign at the northwest quadrant of I-25 and Harmony Road ("Harmony Sign"). (R. Vol. I at 18). Specifically, the Sign Appeal requested relief from: (1) the ban on off-premises sign content (R. Vol. V, LUC § 10.5.E.); (2) setback requirements (R. Vol. V, LUC § 10.11.B.); (3) maximum sign area (R. Vol. V, LUC § 10.11.B.2.); and (4) minimum "dwell time"[1] (R. Vol. V, LUC § 10.5.B.; Vol. I at 18). In its Staff Report, County Staff identified that an appeal from the sign height limitations in LUC § 10.11 was also required. (R. Vol. I at 9).

With very few exceptions, the City's Complaint for Review Pursuant to C.R.C.P. 106(a)(4) ("106 Complaint") and Opening Brief ("Pl.'s Opening Br.") recite only materials submitted by the City and testimony and recommendations by County Staff that appear to be based on that material. The City's citations are a thin slice of the record. The rest of the record includes StreetMedia's

[1] "Dwell time" is the minimum amount of time a static message must appear on an electronic display before it can be replaced with a new static message.

extensive application materials and exhibits (collectively, "Application"), and its testimony and dialog with the BOCC at the June 1, 2020 appeal hearing (collectively, "Hearing Testimony").

The Application included detailed, pertinent, and focused documentary evidence and technical and legal analysis in support of the Sign Appeal, including:

1. The transmittal letter and application form that, *inter alia*, detail how the Harmony Sign will generate approximately $1 million in revenues for public schools over the term of StreetMedia's lease with the State Land Board. (R. Vol. I at 106-108).

2. Technical materials, including a site plan showing proposed dimensions and setbacks of the Harmony Sign, superimposed over aerial photography (R. Vol. I at 54); a conceptual drawing of the Harmony Sign in elevation view (R. Vol. I at 58); five photosimulations of the proposed Harmony Sign in context (from street-level views) (R. Vol. I at 56-60); a map and pictures of five other existing signs (eight total sign faces) that were proposed for removal after the Harmony Sign was constructed (R. Vol. I at 52-53); and a photometric plan for the proposed Harmony Sign (R. Vol. I at 61).

3. A TECHNICAL AND LEGAL JUSTIFICATION FOR THE REQUESTED APPEALS ("Technical Report"), which set out a comprehensive narrative regarding the context of the application, along with competent evidence and analysis supporting each and every component of the appeal. (R. Vol. I at 16-50).[2, 3]

[2] The Technical Report was accompanied by a 371-page case law attachment that was not included in the official record of this case. That attachment provided full copies of each of the 14 cases cited in the Technical Report.

[3] The record includes some redundant material. The Technical Report included at R. Vol. I at 16-50 is the same as the one included at R. Vol. I at 118-149. Similarly, the one-page summary at R51 is the same as the one-page summary at R. Vol. I at 112. Herein, StreetMedia cites only to the first instance of the Technical Report, and to the second instance of the one-page summary (because it is larger format and easier to read).

4. A one-page "Executive Summary" of the Technical Report that sets out in tabular fashion how each component of the appeal complied with the applicable appeal standards. (R. Vol. I at 112).

5. Two empirical studies, one on the economic impacts of billboards, and the other on the safety of billboards:

a. A report prepared by Econsult Corporation, dated April 2012, titled ECONOMIC IMPACT OF BILLBOARD LOCATIONS ON PROPERTY VALUES IN PHILADELPHIA (R. Vol. I at 62-77); and

b. An executive summary of a peer-reviewed report titled CEVMS AND DRIVER VISUAL BEHAVIOR STUDY, which was downloaded from the Federal Highway Administration's web site. (R. Vol. I at 78-80).

In addition to the documentary evidence and analysis, the extensive Hearing Testimony also addressed and supported all of the components of the Sign Appeal (R. Vol. II at 36-68)—including the Staff-identified issue of the sign height limitation (a restriction that is set out in the same table as sign setbacks). (R. Vol. II. at 24-27; 59-61). During Hearing Testimony, StreetMedia also pointed out in detail how the City's written materials were irrelevant to the Sign Appeal, how the City's arguments (in its correspondence and as advanced by County Staff) were logically and legally flawed, and why the City's input should thus be disregarded. (*e.g.*, R. Vol. II at 35-36, 40-47, 49-50, 56-57, 59-61).

StreetMedia's Hearing Testimony occupies 35 pages of this record. (R. Vol. II at 33 to 68). The City had written notice of that hearing, which was held just a few blocks down the street from City Hall (R. Vol. I at 187). Yet there is no testimony from the City on this record. (R. Vol.

II.A., *passim*). That is because no one from the City showed up to present the City's arguments to the BOCC. (Def. County Ans. Br. at 7).

III. SUMMARY OF THE ARGUMENT

This is not a close case. This Court should deny the relief requested by the City. Relief under C.R.C.P. 106(a)(4) must be denied if there is any competent evidence in the record to support the quasi-judicial decision at issue, and if the decision-maker applied the correct law. The record is replete with competent evidence in support of the BOCC decision, and it demonstrates that the BOCC applied the correct law. There are also three threshold issues that remain, each of which is cause to dismiss or deny relief to the City.

A. *The Record Includes Ample Competent Evidence.*

In a C.R.C.P. 106(a)(4) proceeding, the reviewing Court is not the fact-finder, and the Court may not re-weigh the evidence. Under C.R.C.P. 106(a)(4), the only evidence that matters is the evidence that supports the challenged decision. The record is full of competent evidence that supports the BOCC's decision. The Application lays it out. The Hearing Testimony lays it out. The BOCC's decision was unanimous.

B. *The BOCC Applied the Correct Law and Did Not Abuse Its Discretion*.

All parties agree that the BOCC applied the three sign appeal standards set out in LUC § 22.2.5. Those standards are the correct law. The BOCC applied that correct law correctly.

The City cites the correct law and then quickly presses this Court to rewrite it. (Pl.'s Opening Br. at 3, 6-7). Specifically, the City demands that this Court write in more than a half-dozen entirely new and totally self-serving "criteria" to the LUC—criteria that have not been adopted by ordinance—including: (1) the City's Harmony Gateway Plan; (2) the City's standards

for off-premises billboards; (3) the City's *draft* Harmony Corridor Standards and Guidelines for the Harmony Gateway Area; (4) an "intent" in the LUC to "not allow off-premises signs"; (5) an "intent" in the LUC to "have sign regulations consistent with the regulations adopted by the City of Fort Collins and the City of Loveland"; (6) an intent "to reduce the potential for nonconformities should signs permitted in unincorporated Larimer County [be] annexed to one of those cities"; and (7) a requirement that the BOCC make a specific finding to justify allowing an off-premise message on a sign "when no off-premises signs have been allowed since June 15, 1992." (Pl.'s Opening Br at 6, 7, 19). The text of the LUC § 22.2.5. is plain, and it is the exclusive domain of the BOCC to adopt or amend such provisions (within constitutional boundaries) using established legislative procedures as it sees appropriate. Courts neither write nor rewrite county ordinances.

The BOCC declined to adulterate its LUC with *ad hoc* standards. That may have disappointed the City, but it was the proper thing to do. In no way does the BOCC's application of the plain, unadulterated text of LUC § 22.2.5. constitute an abuse of discretion.

C. *Threshold Issues Remain.*

There are three threshold issues that remain in this case.

1. The case is moot. This Court's order dated February 26, 2021, granting the County's Motion to Dismiss StreetMedia's Cross-Claims ("Feb. 26, 2021 Order"), acknowledges that the Harmony Sign is constructed and operational. The resulting mootness of the 106 Complaint is the subject of a Motion to Dismiss filed by StreetMedia on February 24, 2021, which is pending.

2. The City's Complaint is untimely. To establish jurisdiction under C.R.C.P. 106, the Court must construe the relationship between the general written resolution requirement for land

use approvals set out in LUC § 12.2.7.A. and the specific sign appeal process set out in LUC § 22.2.2.B.3.[4] The Court's construction of that relationship must be a constitutional one. *See People v. Hickman*, 988 P.2d 628, 636 (Colo. 1999); *Kruse v. Town of Castle Rock*, 192 P.3d 591, 597 (Colo. App. 2008).

Because First Amendment rights are at stake, a "specified, brief" time period between application and "final decision" is constitutionally mandated. *See Mahaney v. City of Englewood*, 226 P.3d 1214, 1220 (Colo. App. 2009). Unlike LUC § 22.2.2.B.3., which specifies that a final decision of the BOCC will occur at a hearing within 60 days after a sign appeal is filed, LUC § 12.2.7.A. does not include a "specified, brief" time for the written resolution to be approved. (R. Vol. V at LUC §§ 12.2.7 and 22.2.2.B.). No party has questioned the constitutionality of LUC § 22.2.2.B.3.[5] But LUC § 12.2.7.A., if applied here, unconstitutionally increases the time-frame for the BOCC's "final decision" (in this case, as a practical matter, the time frame nearly doubled), stripping StreetMedia of its constitutional right to a prompt "final decision." The only

[4] StreetMedia recognizes that the Court denied its first motion to dismiss that raised this issue. However, in its Order on that motion, the Court deferred this question, noting that these "concerns are more properly addressed after briefing on the merits." Order Denying Def. StreetMediaGroup, LLC's Mot. to Dismiss Pl.'s Compl. (Nov. 29, 2020) ("11-29 Order") at 3. As such, StreetMedia renews and clarifies the issue here.

[5] In this Court's February 26, 2021 Order dismissing StreetMedia's cross-claims, this Court observed, "If StreetMedia is indeed correct that the whole sign approval process is constitutionally defective, perhaps the proper relief would be to grant the City's appeal and take down the sign. Arguably, if the procedure is defective than its approvals would be defective as well. However, it is clear that StreetMedia does not actually want that remedy." Feb. 26, 2021 Order at 2. StreetMedia respectfully agrees with the Court that it does not want that remedy. No party has questioned the constitutionality of LUC § 22.2.2.B.3., so the approval process itself is not under attack. At issue is only whether the addition to that process of the extra step of LUC § 12.2.7.A. is constitutionally appropriate.

StreetMedia brought the cross-claims to establish the Court's plenary jurisdiction over this question pursuant to 42 U.S.C. § 1983, C.R.S. § 13-51-101, *et seq*., and C.R.C.P. 57, to allow for evidence to be taken on the question, and to provide an opportunity for (if the Court determined it appropriate) injunctive relief under 42 U.S.C. § 1983 and C.R.C.P. 65. This Court dismissed the cross claims, but held, "StreetMedia still has standing to defend the C.R.C.P. 106 appeal as it would be injured if the appeal overturned the sign approval." StreetMedia raises this constitutional question again not to nag about it, but only to assert a complete defense. Based on this Court's February 26, 2021 Order, StreetMedia assumes the Court retained jurisdiction over the threshold constitutional questions, even though the City argues that the Court cannot consider constitutional arguments. (Pl.'s Opening Br. at 27-28).

constitutional construction of the sign appeal process—allowing LUC § 22.2.2.B.3. to stand alone, establishes a "final decision" of the BOCC on June 1, 2020. The 106 Complaint should be dismissed for want of subject matter jurisdiction.

3. At a minimum, LUC § 10.5.E. is unconstitutional and cannot be applied in any event. Based on competent evidence, the BOCC correctly decided to not apply LUC § 10.5.E. But even in the absence of evidence, the BOCC does not have the constitutional authority to apply LUC § 10.5.E. LUC § 10.5.E. is content-based because it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 171 (2015). It is therefore "presumptively unconstitutional," and the burden shifts to the proponent of the standard to defend it. *Id*.

Neither the City nor the County can overcome the presumption of unconstitutionality.[6] Unconstitutional regulations are void *ab initio*—they cannot even be recognized, let alone enforced. *See LaFleur v. Pyfer*, 2021 CO 3, ¶33, *reh'g denied*. LUC § 10.5.E. should therefore be disregarded.[7]

[6] After *Reed v. Town of Gilbert* clarified the First Amendment landscape with regard to signs, content-based regulations like LUC § 10.5.E. are falling with increasing frequency because there is no viable defense to save them. *See, e.g., Thomas v. Schroer*, 248 F. Supp. 3d 868 (W.D. Tenn. 2017), *aff'd, Thomas v. Bright*, 937 F.3d. 721 (6th Cir. 2020), *cert. den., Bright v. Thomas*, 141 S. Ct. 194 (2020); *Reagan Nat'l Adver. of Austin v. City of Austin*, 972 F.3d 696 (5th Cir. 2020); *GEFT Outdoor, L.L.C. v. City of Westfield, et al.*, No. 1:17-cv-04063-TWP-TAB, 2020 WL 5814875 (S.D. Ind. Sept. 30, 2020); and *Boyer v. City of Simi Valley*, 978 F.3d. 618 (9th Cir. 2020); *L.D. Management Co. v. Thomas*, 456 F. Supp. 3d 873 (W.D. Ky. 2020), *aff'd, L.D. Management Co. v. Gray*, No. 20-5547, 2021 WL 567817 (6th Cir. Feb. 16, 2021).

[7] In light of *Reed* and its progeny, it is striking that the City urges this Court to find that County Staff is correct that all parts of the County's sign code have the purpose of disallowing "off-premises" content. (Pl.'s Opening Br. at 8). If the City is right, then under *Reed*, this Court is obligated to strike down the entirety of LUC § 10.0, and dismiss the City's case as moot because there would be no regulations left to apply to the Harmony Sign at all. *See Reed*, 576 U.S. at 166 ("strict scrutiny applies either when a law is content based on its face *or when the purpose and justification for the law are content based*." (emphasis added)).

IV. STANDARDS OF REVIEW

In reviewing a quasi-judicial decision under C.R.C.P. 106(a)(4), the Court's role is quite limited. First, it does not weigh evidence. *Bd. of County Comm'rs of Routt Cnty. v. O'Dell*, 920 P.2d 48, 50 (Colo. 1996); *Bentley v. Valco, Inc.*, 741 P.2d 1266, 1267-68 (Colo. App. 1987). The Court cannot "substitute its own judgment" for that of the quasi-judicial decision-maker. *O'Dell*, 920 P.2d at 50. Instead, it reviews the record only for the presence of competent evidence[8] in support of the quasi-judicial decision, effectively disregarding all other information. *See Valco*, 741 P.2d at 1268; *Colorado Mun. League v. Mountain States Tel. & Tel. Co*., 759 P.2d 40, 44 (Colo. 1988). If it finds evidence that "'a reasonable mind might accept as adequate'" to support the decision, the inquiry ends and the decision is affirmed. *Mountain States*, 759 P.2d at 44 (quoting *NLRB v. Columbian Enameling & Stamping Co., Inc*. 306 U.S. 292, 300 (1939) (internal quotations omitted)).

Second, "findings of fact may be express or implied," and "the absence of findings . . . is not fatal to a decision if there is evidence in the record" that supports the decision. *Burns v. Bd. of Assessment Appeals of State of Colo*., 820 P.2d 1175, 1177 (Colo. App. 1991). As such, the written resolution under review by the Court does not have to be perfect, or even comprehensive. *See id*. In fact, a written resolution is not even a prerequisite to C.R.C.P. 106(a)(4) review. *See, e.g., 3 Bar J Homeowners Ass'n, Inc. v. McMurry*, 967 P.2d 633, 634 (Colo. App. 1998). All that matters is that competent evidence in the record supports the decision of the BOCC to grant the Sign Appeal.

[8] Courts variously call the required evidence "competent evidence," "substantial evidence," or some combination of the two. For clarity, "competent evidence is the same as substantial evidence." *Colorado Mun. League v. Mountain States Tel. & Tel. Co*., 759 P.2d 40, 44 (Colo. 1988). This Brief will use the phrase "competent evidence" to describe the required standard.

Third, the reviewing court cannot interfere with a quasi-judicial decision-maker's application of its own standards absent "a clear abuse of discretion." *O'Dell*, 920 P.2d at 50. To County regulations, the Court must apply "the general canons of statutory interpretation." *Sierra Club v. Billingsley*, 166 P.3d 309, 312 (Colo. App. 2007) (quoting *City of Colorado Springs v. Securcare Self Storage, Inc.* 10 P.3d 1244, 1248-49 (Colo. 2000)). Among those canons are: (1) courts must "give effect to the intent of the legislative body," looking to "the plain language of the ordinance;" (2) regulatory "language should not be subjected to a strained or forced interpretation;" and (3) if there is ambiguity, the agency's "interpretation will be accepted if it has a reasonable basis in law and is warranted by the record." *Id.* Additionally:

> "statutory terms should be construed in a manner that avoids constitutional infirmities. Thus, if a statute is capable of alternative constructions, one of which is constitutional, then the constitutional interpretation must be adopted."

People v. Iannicelli, 2019 CO 80 ¶ 22 (quoting *People v. Zapotocky*, 869 P.2d 1234, 1240 (Colo. 1994)).

V. ARGUMENT

A. *The BOCC's Decision is Supported by Competent Evidence in the Record.*

The record is full of competent evidence that supports the BOCC's decision. The Application and Hearing Testimony lay it all out. Every single County Commissioner accepted the evidence as adequate. The Hearing Testimony shows that the County Commissioners have, as the law requires, "reasonable minds." The BOCC was well-prepared, thoughtful, and deliberative, and on this record, its unanimous decision cannot be overturned.

A sampling of the record, showing how each applicable standard was satisfied with competent evidence, follows--

1. "Approval of the appeal is consistent with the purpose and intent of this code." (LUC § 22.2.5.A.) The Application and Hearing Testimony showed that the Harmony Sign is consistent with the purposes expressed in LUC § 10.1. First, the record shows that the Harmony Sign is consistent with the purpose to protect "the health, safety and welfare of the public" because granting the appeal: (a) protects constitutional rights (a first-order priority for government); (b) optimizes the safety and visibility of sign when viewed from the adjacent street; (c) provides approximately $1,000,000 for public schools; (d) creates opportunities for local businesses and nonprofits; and (e) and allows for the display of public service announcements and emergency alerts. (*e.g.*, R. Vol. I at 112). Any one of those reasons would have met the legal standard for "competent evidence" in its own right, but StreetMedia took it even further and submitted an executive summary of a *peer-reviewed empirical study* to support the proposition that the sign will not have a negative impact on public safety. (R. Vol. I at 78-80).

The record shows further that the Harmony Sign is consistent with the Sign Code's purpose to "provide the public and property owners with an opportunity for safe and effective identification of uses and locations within county." (R. Vol. V, LUC § 10.1). StreetMedia's narrative explains that one purpose of the Harmony Sign is to "create a space for local businesses and noncommercial entities to advertise their presence and location . . ." in an "evenhanded way." (R. Vol. I at 25, 28). It also explains that the proposed setbacks, dimensions, and height of the Harmony Sign improve its safety and effectiveness (R. Vol. I at 37; Vol. II at 60-61) and that they "strike a reasonable balance among considerations of safety, esthetic, and legibility along a major regional thoroughfare . . . ." (R. Vol. II at 57).

Finally, the record shows that the Sign Code's purpose 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" is also advanced by the Sign Appeal. Competent evidence and testimony were presented as to how approval of the Sign Appeal would reduce sign clutter directly by resulting in the removal of five existing signs (eight sign faces total) in exchange for the Harmony Sign, and, further, how the Harmony Sign would be constructed with high quality materials and state-of-the-art technology. (R. Vol. I. at 9, 23-25, 29-30, 32, 34, 36-39, 45-46, 52-61, 112; Vol. II at 3-4, 61, 72-74). This led Commissioner Donnelly to specifically point out:

> . . . this proposal will actually do more to bring the Code into the reality that we would like to see for the future than almost anything you can do. And so, this is a very positive -- this is very positive event for beautifying Larimer County roadways, for still giving opportunity for small business to be able to communicate with the potential customers, especially a time like this, when we're struggling with worldwide pandemic that's keeping people in their homes.

(R. Vol. II. at 73). The evidence is competent and plentiful. The BOCC's decision as to LUC § 22.2.5.A. is fully supported in the record.

2. "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." (LUC § 22.2.5.B.) The Application and Hearing Testimony show that: (a) granting the appeal would protect First Amendment rights (a First Amendment violation would be a "hardship," as "loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1235 (10th Cir. 2005) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976))) (R. Vol. I at 27); and (b) the "elevation of Harmony Road increases from West to East as the road crosses over Interstate 25," such that

"views to the site are limited," and that Harmony Road is "approximately 150 feet wide" at this location. (R. Vol. I at 22, 35). StreetMedia testified to the BOCC about how those facts demonstrated that its proposal met the applicable standard:

> This site is located in a bowl, as the Commission pointed out, next to an elevated roadway [and] an interstate. The adjacent street is a regional thoroughfare. So the physical situation is the classic case, in fact, for a variance, or an appeal.

(R. Vol. II at 46). The evidence is competent and plentiful. The BOCC's decision as to LUC § 22.2.5.B. is also fully supported in the record.

3. "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." (LUC § 22.2.5.C.) The Application and Hearing Testimony show that: (a) the presence of a billboard in this location tends to "level the playing field" among local businesses, nonprofits, and others who may otherwise have a locational disadvantage with respect to signage (R. Vol. I at 28, 35, 43, 50, 112; Vol. II at 61); (b) LUC § 22.2.5.C. should be applied to enhance competition in outdoor advertising, rather than to preserve the market hegemony of the major outdoor advertising company that controls the vast majority of billboard advertising in Larimer County (R. Vol. I at 28; Vol. II at 47); (c) StreetMedia's proposal actually shrinks StreetMedia's sign inventory in Larimer County (R. Vol. I at 29); and (d) the variations in height, setback, and sign area provide for visibility that is comparable to signs that comply with LUC § 10, but are installed in other locations that have fewer contextual challenges (R. Vol. II at 61). Based on that competent evidence, each member of the BOCC accepted that this standard was met (R. Vol. II at 70, 73; 77; 79-80).

The evidence is competent and plentiful. The BOCC's decision as to LUC § 22.2.5.C. is fully supported in the record. Since there is competent evidence in the record to support every standard the BOCC applied to grant the Sign Appeal, the BOCC's decision must be upheld.

B. *The BOCC correctly applied the correct law, and therefore did not abuse its discretion.*

The City asks this Court to rewrite the applicable standards so that it can argue that the BOCC misapplied them and abused its discretion. The BOCC correctly applied the correct law. StreetMedia addresses each criterion in turn:

1. "Approval of the appeal is consistent with the purpose and intent of this code." (LUC § 22.2.5.A.) The City acknowledges that the purpose and intent of the Sign Code is set out in LUC § 10.1. (Pl.'s Opening Br. at 2). It also admits that LUC § 10.1 is "applicable." *Id*. The plain text of LUC § 10.1 is in this record. (R. Vol. V, LUC § 10.1).

Yet in spite of its own admission and record citation, the City dismisses the plain text of the LUC and urges the Court that "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." (Pl.'s Opening Br. at 18). According to the City, this Court should also disregard the plain language of the LUC and find that the intent is of the Sign Code is "to not allow off-premise signs." *Id*. That is a strained (and unconstitutional) interpretation of LUC § 10.1. The BOCC appropriately refused to apply that interpretation, and this Court should do the same.

The City's Opening Brief does not stop there. Instead, it proceeds to "jump the shark." It argues that this Court should write at least a half-dozen more entirely new (and entirely self-serving) "criteria" into LUC § 22.2.5, including: (1) the City's Harmony Gateway Plan; (2) the

City's standards for off-premises billboards; (3) the City's *draft* Harmony Corridor Standards and Guidelines for the Harmony Gateway Area (which had not even been adopted by the City yet); (4) an "intent" in the LUC to "have sign regulations consistent with the regulations adopted by the City of Fort Collins and the City of Loveland"; (5) an intent "to reduce the potential for nonconformities should signs permitted in unincorporated Larimer County [be] annexed to one of those cities"; and (6) a requirement that the BOCC make a specific finding to justify allowing an off-premise message on a sign "when no off-premises signs have been allowed since June 15, 1992." (Pl.'s Opening Br. at 6, 19). The Opening Brief does not (and cannot) recite any principle of law that would allow the Court to rewrite the plain text of the County's LUC in this manner.

In Hearing Testimony, StreetMedia advised the BOCC that the purpose statements that are actually in the LUC control the application of LUC § 22.2.5., and that the County cannot legally tack on additional criteria on an *ad hoc* basis. (R. Vol. II at 42, citing *City of Lakewood v. Plain Dealer Pub. Co*. 486 U.S. 750, 758 (1988) ("express standards" are required, and "*post hoc* rationalizations" are not allowed.)). The BOCC then appropriately declined County Staff's invitation to apply criteria that were not specifically set out in the LUC. The BOCC applied the plain text of the LUC, and despite the City's unsupportable objection on this point (Pl.'s Opening Br. at 18), the BOCC has no obligation to make a specific finding that its code means what it says.

The BOCC considered extensive competent evidence that detailed how every component of the Sign Appeal is, in fact, consistent with the purpose and intent of the code—according to the formally adopted plain text of the code itself. (*e.g.*, R. Vol. I at 25-27, 29-35, 36-42, 44-49; R.

Vol. II. at 37-40, 43-44, 46, 55-59, 60-61).[9] As such, the BOCC correctly applied the correct law and did not abuse its discretion.

2. "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." (LUC § 22.2.5.B.) The City urges the Court again rewrite the LUC by accepting the County Staff's position that "compelling evidence" is required in order to demonstrate compliance with LUC § 22.2.5.B. (Pl.'s Opening Br. at 9, 12). The actual standard of proof as to LUC § 22.2.5.B. is set out unambiguously in the LUC. It is "preponderance of the evidence." (R. Vol. V, LUC § 22.2.2.B.6.).

The City also urges the Court to pretend that there are legal differences between interests of the State Land Board (property owner) and the interests of StreetMedia (its lessee) that are pertinent to this case. (Pl.'s Opening Br. at 23). The record shows that the State Land Board has a constitutionally mandated "duty to 'produce reasonable and consistent income over time' from school lands it controls, for the benefit of public schools." (R. Vol. I at 22). The State Land Board's lease with StreetMedia advances that singular (and critical) purpose by generating approximately $1,000,000 for Colorado's public schools over its term. (R. Vol. I at 107). The lease itself is simply a legal document by which the State Land Board assigns a portion of its property rights to StreetMedia during a specified term, in order to advance the State Land Board's critical mission.

[9] In an abundance of caution, StreetMedia also submitted substantial competent evidence regarding how the Sign Appeal was consistent with the stated purposes of County's LUC in general, as expressed in LUC § 2.3. (R. Vol. I at 26-27, 31-35, 37-42, and 45-49).

It should go without saying that the hardships as to the use of the subject property affect its owners and its tenant in the same way. It is intuitive. The BOCC is at liberty to reasonably construe its regulations to recognize that. Yet the record supports the BOCC decision in any event.

There is no question that State Land Board would suffer "hardship" if the physical context of its property prevented it from being used for outdoor advertising. The record shows that the State Land Board leased out a portion of the property for outdoor advertising. (R. Vol. I at 107). The record shows that the loss to the State Land Board if the lease could not be carried out due to the "hardship" created by the "extraordinary or exceptional circumstances on the site" would be approximately $1,000,000.

As to the "extraordinary or exceptional circumstances on the site," StreetMedia submits that such circumstances simply cannot be identified without reference to context in any event. The City's argument to the contrary (Pl.'s Opening Br. at 22) is either desperate or profoundly uninformed. *Context is everything*.

Put simply, if the subject property were an island, that would be an "extraordinary or exceptional circumstance on the site." Yet an island cannot be defined without reference to its context—the surrounding water. In this case, the record shows that the property is "in a bowl," and situated adjacent to a sloped, 150 foot wide roadway. (R. Vol. I at 35, 39, 42-43, 112; R. Vol. II at 46). This context creates the requisite "extraordinary or exceptional circumstances on the site." That is, unlike other sites that do not have these circumstances, a code-compliant sign installed on the subject property would not be visible to passersby. (R. Vol. II at 25, 55, 60 (an "[e]ighteen-foot tall sign is insufficient to overcome the visual obstruction" of the sixteen foot drop in elevation between Harmony Road and the grade of the subject property)).

The City's allegation that "The Board's application of this criterion stands in sharp contrast to the analysis and conclusion of County Staff," and that "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" (Pl.'s Opening Br. at 23) mischaracterizes the BOCC's authority, and amounts to a request that this Court weigh the evidence. First, it is the BOCC, not the County Staff, that is charged with the "decision" here.[10] Second, C.R.C.P. 106(a)(4) does not allow the Court to weigh evidence.

The BOCC considered the competent evidence as to LUC § 22.2.5.B. The BOCC correctly applied the correct law as it is written. It did not abuse its discretion.

3. "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." (LUC § 22.2.5.C.) LUC § 22.2.5.C. is fraught with potential constitutional problems because it could easily be applied to improperly favor some speakers over others. *See Reed*, 576 U.S. at 157. StreetMedia explained those problems to the BOCC in its Technical Report and during the public hearing. (R. Vol. I at 27-29, 35-36, 43, 50, 112; Vol. II at 46-47, 61) The BOCC properly decided that LUC § 22.2.5.C. does not compel the BOCC to fortify the market hegemony of dominant outdoor advertising companies. The BOCC correctly applied LUC 22.2.5.C. to the Sign Appeal.

The City argues that this court should find—based on zero competent record evidence—that, "the result essentially gives the Billboard monopoly-type power given the long-standing preclusion of off-premises signs and the lack of competition from other electronic billboards in the

[10] To be fair, the City actually takes more than one position on this issue. Later on in its Opening Brief, the City reverses the position referred to here. (Pl.'s Opening Br. at 27 (stating, "Larimer County's Land Use Code allows the Board to review and disagree with County Staff on decisions like StreetMediaGroup's appeal.")).

area." (Pl.'s Opening Br. at 25). Yet, competent record evidence shows the opposite—that the long-standing ban on off-premise content has been to the substantial advantage of StreetMedia's "major competitor" that controls approximately 25 billboards in Larimer County. (R. Vol. II at 47). Ultimately, the BOCC properly relied upon that competent evidence. It is not the role of this Court to second-guess the BOCC's reasonable and supported determination on that point.

The City complains that "one is hard pressed to conceive of how the Board could reject any future appeal for a billboard if this same rationale is applied to all future circumstances." (Pl.'s Opening Br. at 25). That may be true, but it is not at all relevant to this case. As the City ultimately acknowledges (Pl.'s Opening Br. at 27), it is up to the BOCC to make those determinations as they come up. As a legal point, StreetMedia submits that the County *should* stop regulating signs based on content because such content-based regulations are presumptively unconstitutional. *See* Section V.C.3., *infra*.

The BOCC appropriately found that the Sign Appeal satisfied the standard set out in LUC § 22.2.5.C. Its interpretation of that standard was reasonable, constitutional, and supported by the record. The BOCC's decision on the Sign Appeal was supported by competent evidence in the record in all respects. Its application of the standard to the competent evidence in the record was proper. As such, the BOCC correctly applied the correct law. There was no abuse its discretion. As such, the BOCC's decision must stand, and this Court should deny the relief sought by the City.

C. Threshold Issues.

On the basis of the arguments set forth in Sections V.A. and V.B., above, and the related arguments raised by the County in its Answer Brief, the Court should deny the City's requested relief. There are three additional issues that have been raised in the wake of the 106 Complaint:

(1) the 106 Complaint is moot; (2) the 106 Complaint is untimely; and (3) the 106 Complaint demands that the Court require the County to violate StreetMedia's First Amendment rights. As StreetMedia understands the procedural posture of this case, these issues are still properly presented for review. *See* Section III.C., *supra*, at 7, n. 4 and 5.

The first two issues are jurisdictional. The third requires the Court to consider (at least) the content-based billboard ban in LUC § 10.5.E. as "void *ab initio*," which means that: (1) it cannot be applied to restrict the messages on the Harmony Sign, and (2) that any arguments about compliance with LUC § 10.5.E. are moot.

1. The 106 Complaint is moot. As a threshold matter, this Court need not review the record at all because the case is moot. On February 24, 2021, StreetMedia filed "Defendant StreetMediaGroup, LLC's Motion to Dismiss Plaintiff's Complaint" ("Feb. 24, 2021 Motion") on this basis. That motion is pending. The City has the burden to prove that this Court still has jurisdiction. *See DiCocco v. Nat'l Gen. Ins. Co.*, 140 P.3d 314, 316 (Colo. App. 2006). On the facts of this case, the City cannot carry its burden.

The Feb. 24, 2021 Motion details the recent history of the Harmony Sign. (Feb. 24, 2021 Motion at 2-3). The County issued a building permit for the Harmony Sign. *See id*. at 2. The Harmony Sign was constructed. *See id*. at 2-3. StreetMedia honored its commitment to the County to remove the other five signs (eight faces in total) that are depicted in the record. *See id*. at 3; (R. Vol. I at 52 and 53). The County signed off on the final inspection of the Harmony Sign. (Feb. 24, 2021 Motion at 3). The Harmony Sign was turned on. *See id*. It has now been operational for approximately three months. *See id*. This Court ordered dismissal of StreetMedia's cross-claims, at least in part, on the basis of these same facts. *See* Feb. 26, 2021 Order at 2.

The questions the City raises in its 106 Complaint, and the demands it makes that the Court declare that the County made a wrong decision, are moot. *See Zoning Bd. of Adjustment of Garfield Cnty. v. DeVilbiss*, 729 P.2d 353, 359-60 (Colo. 1986). It follows that the case must be dismissed for want of subject matter jurisdiction. *See* C.R.C.P. 12(h)(3) ("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.").

2. The 106 Complaint is untimely under C.R.C.P. 106(b). In Larimer County, sign owners are not allowed to display "off-premises" messages unless they first successfully appeal to the BOCC. (R. Vol. V, LUC § 10.5.E.; LUC § 22.2.2.B.). That makes the sign appeal process a prior restraint on free speech. *Mahaney v. City of Englewood*, 226 P.3d 1214, 1219 (Colo. App. 2009).

Prior restraints are not unconstitutional "*per se*." *Id*. Indeed, they are permissible if (and only if) they include adequate procedural safeguards, including "a brief, specified time period" for decision-making. *Id.* at 1220; *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990). In this context, "specified" means what it says—the time frame for decision-making must be specifically set out in the regulations. If the "time is not limited," then the prior restraint is "impermissible." *See Mahaney*, 226 P.3d at 1220.

It is well-settled that "if a statute is capable of alternative constructions, one of which is constitutional, then the constitutional interpretation must be adopted." *People v. Iannicelli*, 2019 CO 80 ¶ 22 (quoting *People v. Zapotocky*, 869 P.2d 1234, 1240 (Colo. 1994)); *see also People v. Hickman*, 988 P.2d 628, 636 (Colo. 1999). StreetMedia has never challenged the constitutionality

of LUC § 22.2.2.B.3., which sets out the sign appeal process that underpins StreetMedia's approval in this case. StreetMedia submits that LUC § 22.2.2..B.3., by itself, passes constitutional muster.

However, when LUC § 12.2.7.A. (the more generalized written resolution requirement) is tacked onto LUC § 22.2.2.B.3., the end-product is an impermissible prior restraint. As such, either LUC § 12.2.7.A. must be severed as-applied (as provided in the severability clause of Larimer County Code of Ordinances § 1-12), or the Court must find that LUC § 12.2.7.A. is not a part of the sign appeal process at all. The question is not academic, it is jurisdictional.

This Court's jurisdiction under C.R.C.P. 106(b) turns on the selection of one of two conflicting interpretations of the plain text of the LUC, only one of which is constitutional. The constitutional interpretation establishes the date of "final decision" of the BOCC at June 1, 2020. (R. Vol. I at 1). That date renders the 106 Complaint untimely. *See* C.R.C.P. 106(b).

3. LUC § 10.5.E. is unconstitutional (and if the City is correct that the intent of the Sign Code is to ban off-premises signs, then the entire Sign Code is also unconstitutional). The City's central demand is that this Court "reverse" the BOCC decision on the Sign Appeal (Pl.'s Opening Br. at 2), and declare that an unconstitutional, content-based regulation be strictly applied.[11] Under the LUC, "off-premises signs" and "billboards" are the same thing. (R. Vol. V, LUC § 10.15 ("Billboard" and "Off-premise sign")). An off-premise sign is defined as:

> A sign which is used or intended for use to advertise, identify, direct or attract the attention to a business, institution, product, organization, event or location offered or existing elsewhere than upon the same property where such sign is displayed.

[11] The City misapprehends the nature of the available relief under C.R.C.P. 106(a)(4). Relief under C.R.C.P. 106(a)(4) is in the nature of *certiorari*. *See Westlund v. Carter*, 193 Colo. 129, 130 (1977); *see also, Sherman v. City of Colo. Springs Planning Comm'n*, 763 P.2d 292, 297 (Colo 1988) (acknowledging that "*certiorari* review was available . . . pursuant to C.R.C.P. 106(a)(4)"). If a quasi-judicial decision does not stand up to C.R.C.P. 106(a)(4) *certiorari* review, "all that can be done . . . is to quash or refuse to quash the proceeding complained of." *State Civil Svc. Comm'n of Colo. v. Cummings*, 83 Colo. 379, 385 (1942).

(R. Vol. V, LUC § 10.15 ("off-premises sign")). These signs are not defined by their physical structure, but instead only by reference to the content of the messages they display. As such, as Opening Brief hounds the Court to overturn the BOCC's decision to allow an "off-premises" sign, the Court should be aware that what is at stake is not the sign, but instead its content.

Content-based regulations are "presumptively unconstitutional." *Reed*, 576 U.S. at 163. A regulation is "content-based" when it targets speech "based on its communicative content," *National Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (internal quotations omitted), that is, "the topic discussed or the idea or message expressed." *Reed*, 576 U.S. at 163. Content-based regulations are subject to strict-scrutiny review, which means they must be "narrowly tailored" to serve a "compelling governmental interest." *Id*. at 171.

LUC 10.5.E. cannot survive that level of scrutiny. Strict scrutiny review has appropriately been described as "nearly always a death knell for the [challenged] restriction." *Gresham v. Rutledge*, 198 F. Supp. 3d 965, 969 (E.D. Ark. 2016). The strict scrutiny analysis proceeds as follows:

First, neither highway safety nor aesthetics are considered "compelling governmental interests" for First Amendment purposes. *Thomas v. Bright*, 937 F.3d 721, 733 (6th Cir. 2019), *reh'g denied, en banc, cert. denied, Bright v. Thomas*, 141 S. Ct. 194 (U.S. 2020); *Neighborhood Enterprises, Inc. v. City of St. Louis*, 644 F.3d 728, 736 (8th Cir. 2011) ("'interests in traffic safety and aesthetics, while significant, have never been held to be compelling.'" (quoting *Witton v. City of Gladstone*, 54 F.3d 1400, 1408 (8th Cir. 1995)); *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1267 (11th Cir. 2005). Second, there is no relationship at all between the content of the Harmony Sign and any legitimate purpose of the Sign Code as articulated in LUC § 10.1, let alone a "narrowly

tailored" one.

On this record, StreetMedia provided the County with a litany of case citations and rigorous analysis making the point that LUC § 10.5.E. is unconstitutional. (R. Vol. I at 18-20). Among the cases cited for that proposition were *Reed*; *Thomas*; *Contest Promotions, LLC v. City & Cnty. of San Francisco*, 874 F.3d 597 (9th Cir. 2017); *Browne v. City of Grand Junction*, 136 F. Supp. 1276 (D. Colo. 2015); *Mainstream Mktg. Servs. v. FTC*, 358 F.3d 1228 (10th Cir. 2004); and *City of Ladue v. Gilleo*, 512 U.S. 43 (1994). During the pendency of the Sign Appeal, two more cases were decided that reinforced the proposition. *See, e.g.*, *L.D. Mgmt. Co. v. Thomas*, 456 F. Supp. 3d 873 (W.D. Ky. 2020); and *Aptive Env'tl, LLC v. Town of Castle Rock, Colorado*, 959 F.3d 961 (10th Cir. 2020). No one provided a counter-analysis on this record. Consequently, LUC § 10.5.E. cannot be applied, and the BOCC was right to relieve StreetMedia of its burden, even if for reasons that do not invoke the First Amendment.

StreetMedia would leave it there, but the City's Opening Brief mushrooms the constitutional problem. The Opening Brief removes all doubt that this case is not about a sign. It is about the content of the sign. LUC § 10.5.E. is the centerpiece of the City's argument, and the City's pleadings do not leave the question of its censorial intent open to guesswork--

> 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.
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> * * *
>
> 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.

(Pl.'s Opening Br. at 19). The Opening Brief lays out a winding and thorny path to deprive StreetMedia of its free speech rights and then concludes by urging that "First Amendment issue is irrelevant to this Court's review . . . ." *Id*. at 28.

The Opening Brief puts the County's entire sign code at risk. It touts, *three times*, that the County's Staff planner testified, "The intent of the Regulations is to not allow off-premises signs." (Pl.'s Opening Br. at 8, 11, 18; R. Vol. II at 7). The Opening Brief then presses this Court to find that the Staff testimony is conclusive as to the purpose of LUC § 10. (Pl.'s Opening Br. at 18 (arguing that "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")).

Ironically, if the Court accepts the City's proposition, then the Court must subject the *entirety of the LUC § 10* ("Sign Code") to strict scrutiny review. *See Reed v. Town of Gilbert, Arizona*, 576 U.S. 155, 166 (2015) ("strict scrutiny applies either when a law is content based on its face *or when the purpose and justification for the law are content based*." (emphasis added)). LUC § 10 would fail survive strict scrutiny review because there are no compelling governmental interests stated, and even if there were, no part of the LUC § 10 is "narrowly tailored" from a First Amendment perspective.

Unconstitutional regulations cannot be applied by the BOCC or this Court. The BOCC could not abuse its discretion or exceed its jurisdiction by refusing to hold StreetMedia to regulations that are unconstitutional. In the absence of LUC § 10, StreetMedia's rights to construct a new sign would be limited only by the County's adopted building and life safety codes.

VI. CONCLUSION

Based on the foregoing arguments, authority, and circumstances, as well as the ample competent evidence in the record to support the unanimous decision of the BOCC on the Sign Appeal, StreetMedia respectfully requests, in the alternative, that this Court:

1. REFUSE the relief requested by the City; or

2. DISMISS the 106 Complaint as moot; or

3. DECLARE that LUC § 12.2.7.A. is severed from the County's sign appeal process and DISMISS the 106 Complaint as untimely; or

4. DECLARE that LUC § 10.5.E. is facially unconstitutional and void *ab initio,* and further, REFUSE the relief requested by the City on the other aspects of the Sign Appeal because the BOCC decision is supported by competent evidence and the BOCC did not abuse its discretion in granting the Sign Appeal; or

5. DECLARE that based on the record testimony of County Staff, the intent of LUC § 10 in its entirety is content-based, that LUC § 10 does not survive the resulting strict scrutiny, and that consequently, LUC §10 cannot be applied; and Award StreetMediaGroup LLC its attorneys' fees and costs as may be permitted by law, and award StreetMediaGroup any other relief this Court deems just and proper.

DATED this 2nd day of March, 2021.

FAIRFIELD AND WOODS, P.C.

s/ Todd G. Messenger
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CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of March, 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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