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DISTRICT COURT, COUNTY OF LARIMER, COLORADO
Larimer County Justice Center
201 Laporte Avenue, Suite 100
Fort Collins, Colorado 80521-2762
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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 ▲

Case Number: 2020CV030580

Division: 4B

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PLAINTIFF'S REPLY 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

Plaintiff City of Fort Collins ("City") filed the Plaintiff's Opening Brief ("OB") on January 22, 2021. Defendant Board of County Commissioners of Larimer County, Colorado ("Board") filed its Answer Brief of Board of County Commissioners of Larimer County, Colorado ("Board AB") on February 26, 2021. Defendant StreetMediaGroup, LLC ("StreetMediaGroup") filed Defendant StreetMediaGroup, LLC's Answer Brief ("SMG AB") on March 2, 2021. The City now respectfully submits this Reply Brief pursuant to C.R.C.P. 106(a)(4).

Nothing contained in the answer briefs of the Defendants alter the propriety of this Court reversing the Board's July 28, 2020, Findings and Resolution Approving the Street Media Group Sign Appeal ("Findings and Resolution") for its electronic billboard (the "Billboard"). Despite the 48 combined pages of their answer briefs, the Board and StreetMediaGroup fail to justify the Board's Findings and Resolution based on the actual language of the Larimer County Land Use Code (the "LUC") or the evidence in the record before this Court (the "Record"). The Board's interpretation and application of the LUC remains inconsistent with the LUC's language. The Board's Findings and Resolution are also not actually supported by competent evidence in the Record. At bottom, both the Board and StreetMediaGroup expect this Court to overlook the fundamental and dispositive deficiencies in the Board's interpretation, analysis, and lack of

grounding in the Record for its decision. No basis exists for this Court to do so even under the applicable standard of review under C.R.C.P. 106(a)(4).

Additionally, StreetMediaGroup again trots out arguments inapplicable to this matter, already decided by this Court, or subject to a separate motion. None of StreetMediaGroup's extraneous arguments concerning the First Amendment, mootness, or the purported untimeliness of the City's Complaint are issues properly before this Court in its consideration of the City's C.R.C.P. 106(a)(4) challenge to the Board's Findings and Resolution.

APPLICABLE PROVISIONS OF THE LARIMER COUNTY LAND USE CODE

The City has set forth the applicable provisions of Sections 10 and 22 of the LUC. [*See* OB, at 3-4]. Neither the Board nor StreetMediaGroup contest either the applicability of these provisions or the City's articulation of them. [*See* Board AB, at 5-6; SMG AB, at 1-26].

PROCEEDINGS BEFORE THE BOARD OF COUNTY COMMISSIONERS

The City described the proceedings before the Board in considerable detail providing thirty (30) separate paragraphs of the factual and procedural matters presented to the Board all separately supported by the Record. [*See* OB, at 4-16]. Neither the Board nor StreetMediaGroup offer any specific response to these thirty (30) paragraphs. [*See* Board AB, at 1-18; SMG AB, at 1-26]. StreetMediaGroup criticizes the City for allegedly presenting only "a thin slice of the record" in its Opening Brief. [*See* SMG, at 2]. StreetMediaGroup then proceeds generally to reference the parts of the Record it submitted in support of its application and those portions of StreetMediaGroup's counsel's presentation to the Board. [*See* SMG, at 3-5]. The City cannot address StreetMediaGroup's mostly general references to the Record. Instead, the City addresses the Record as part of its Reply to StreetMediaGroup's actual arguments and the claimed support

for those arguments in the Record. The City utilizes this approach because otherwise both the City and this Court would inappropriately be asked to scour the Record generally relied upon by StreetMediaGroup. *See, e.g.,* ***Eateries, Inc. v. J.R. Simplot Co.,*** 346 F.3d 1225, 1232 (10th Cir. 2010) ("We need not sift through the record to find [evidence to support a party's argument] . . ."; alternation in original); ***N.M. Off-Highway Vehicle Alliance v. United States Forest Servs.,*** 645 Fed. Appx. 795, 803 (10th Cir. 2016) ("Judges are not like pigs, hunting for truffles buried in [the record]."; alteration in original)]. No basis exists not to apply the same rule to StreetMediaGroup's general references to the Record here.

STANDARD OF REVIEW

The City set forth the applicable C.R.C.P. 106(a)(4) standard of review at length. [*See* OB, at 16-17]. The Board recognizes a misinterpretation or misapplication of governing law constitutes an abuse of discretion. [*See* Board AB, at 3]. The Board then inappropriately suggests this Court should defer to the Board's interpretation of the LUC. [*See* Board AB, at 3]. However, this Court may review the correctness of the Board's construction and application of its LUC as part of this C.R.C.P. 106(a)(4) action. ***Yakutat Land Corp. v. Langer,*** 462 P.3d 65, 72 (Colo. 2020); ***Roybal v. City & Cty. of Denver,*** 436 P.3d 604, 607-8 (Colo. App. 2019). And this Court's review of the appropriate construction and application of the Land Use Code is *de novo*. "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 ordinance and common sense meaning." ***City of Commerce City v. Enclave,*** 185 P.3d 174, 178 (Colo. 2008) (citations omitted).

"When construing an ordinance, we give effect to every word and, if possible, harmonize conflicting provisions." ***Id.***

Both the Board and StreetMediaGroup invoke the so-called narrow scope of this Court's review under C.R.C.P. 106(a)(4) and suggest the City's arguments represent a disagreement with the Board's determination and inappropriately invite this Court to weigh the evidence before the Board. [*See* Board AB, at 4 & 7; SMG AB, at 9-10]. Both are wrong. The City has asked this Court to do no such thing. Instead, all the City has done is highlight for this Court the three-specific criterion the Board was tasked to consider and apply to each of the sign code prohibitions and standards appealed, provided this Court with the evidence in the Record on each issue, and explained how the Board's Findings and Resolution on each of the three applicable criteria represent an incorrect construction and application of each criterion and are not supported by competent evidence in the Record. [*See* Opening Brief, at 17-27]. Ultimately, the Board to some extent, but particularly StreetMediaGroup, ask this Court to engage in nothing more than a perfunctory review. Importantly, however, review under Rule 106 is not perfunctory. Instead, this Court's review must determine if the Board misinterpreted and misapplied the LUC and whether there is actually evidence in the Record supporting the Board's Findings and Resolution on each of the specific criteria at issue in StreetMediaGroup's appeal. This review also necessarily includes then applying these criteria to each of the specific prohibitions and standards StreetMediaGroup has appealed: (i) the off-premise sign prohibition, (ii) the prohibition of electronic sign messages not changing more frequently than once every minute, (iii) the 90 square feet maximum per face side; (iv) the 18-foot maximum sign height, and (v) the required 36-foot setback from the right-of-way.

ARGUMENT

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

As the City explained, the Board's task in considering StreetMediaGroup's appeal was to interpret and apply the three criteria found at LUC § 22.2.5[1] based on the facts contained in the Record before the Board. [*See* Opening Brief, at 17-25]. None of the arguments or authorities advanced by either the Board or StreetMediaGroup undermine the City's position the Board misinterpreted and misapplied the three applicable criteria.

A. LUC § 22.2.5.A:

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. Initially, as a threshold matter, the City argued "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." [*See* OB, at 18]. Neither the Board nor StreetMediaGroup challenge this threshold proposition in their arguments. [*See* Board AB, at 8-11[2]; SMG AB, at 11-12]. As a result, as the City argued, the only articulation in

[1] The City set forth the applicable LUC § 22.2.5 in its Opening Brief. [*See* OB, at 4]. The three applicable criteria are stated again here to aid the Court's review. They are: (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 advantage over other businesses which have signs which comply with section 10 of this code."

[2] In the conclusion of its argument, the Board suggests the City is wrong in arguing "the [R]ecord does not contain evidence relating to the purposes and intent of the LUC sign code." [*See* Board AB, at 11]. In so arguing, the Board misses the point. The City actually argued the Board failed to offer any finding or description ***concerning its interpretation*** of what the purposes and standards of LUC § 10.1 meant to the Board. None of the Board's arguments address this actual

the Record of the intent and purpose of the sign code provision in the LUC is the one offered by County Staff in their written review provided to the Board. To remind this Court, County Staff articulated the intent of the LUC sign code as follows:

> 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 be annexed to one of those cites.
>
> 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 the freestanding sign is 18 feet (1.7 time 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 (emphasis added)].[3] Again, neither the Board nor StreetMediaGroup challenge the County Staff's articulation of the sign code's intent or purpose. [*See* Board AB, at 8-11; SMG AB, at 11-12].

Instead of actually attempting to explain how the Board's Findings and Resolution are consistent with the purpose of the sign code including the important issue of what the sign code specifically and clearly prohibits - off-premises signs in any zoning district and electronic signs with messages that change more frequently than once every minute - both the Board and StreetMediaGroup discuss generally how the Findings and Resolution are consistent with Section

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argument raised by the City, again leaving the County Staff articulation of the intent and purpose of LUC § 10.1 the only finding from anyone with Larimer County contained in the Record.

[3] Once again, whenever possible, factual references are made to the paragraph numbers in the Proceedings Before the Board of County Commissioners section of the Opening Brief.

10 of the LUC's articulation of the purpose of the sign code divorced from what the sign code permits and prohibits. Fundamentally, while the Board's Findings and Resolution parrots the purpose language from Section 10 of the LUC and then asserts in conclusory fashion how the purpose is allegedly met, it does so entirely divorced from the reality of what the sign code actually allows and does not allow. As previously articulated, Section 10.5 of the LUC 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]. Despite County Staff's articulation of the intent and purpose of the sign code, quoted above, absolutely nowhere in the Board's Findings and Resolution is there any finding whatsoever why this billboard appeal should be approved when, as County Staff states above, off-premises signs have been prohibited in Larimer County since June 15, 1992. It simply cannot be adequate for the Board to ignore LUC §§ 10.5.B and 10.5.E in its Findings and Resolution and then claim it is consistent with the purpose of the LUC based on LUC § 10.1 alone. Allowing an off-premises sign and an electronic sign changing messages more frequently than one minute by virtue of this appeal are only consistent with the purpose and intent of the LUC sign code if the Board explains in a manner supported by competent evidence in the record why this

appeal should be granted when the LUC sign code clearly and unambiguously prohibits ***all such signs***. It is axiomatic the purposes and intent language found in LUC § 10.1 must be read in the context of the prohibitions found in LUC § 10.5. The Board's failure to do so runs afoul of the requirement to review the LUC as a whole, to harmonize potentially conflicting provisions, and to give effect to every word. ***City of Commerce City v. Enclave West, Inc.,*** 185 P.3d 174, 178 (Colo. 2008); *see also* ***Telluride Resort & Spa, L.P. v. Colo. Dep't of Revenue,*** 40 P.3d 1260, 1265 (Colo. 2002) ("When construing statutes, we should give effect to each word and construe each provision in harmony with the overall statutory design, whenever possible."); ***Moffat Coal Co. v. McFall,*** 186 P.2d 1021, 1021 (Colo. 1947) ("We cannot, under the guise of harmonizing various sections of the statute or by employment of rules of construction, ignore the provisions of legislative enactments which are clear and unambiguous."); ***Silva v. Wilcox,*** 223 P.3d 127, 136 (Colo. App. 2009) ("When reviewing municipal ordinances, we apply the same rules of construction used for interpreting statutes."). The Board and StreetMediaGroup ignore this fundamental and dispositive error by the Board. [*See* Board AB, at 8-11; SMG AB, at 11-12].

In addition, the City also argued there was no articulation of the actual legal basis under the LUC for the Board to consider the removal of the other billboards as part of its assessment as to how ***this Billboard*** met the regulatory criteria. [*See* OB, at 19-20]. Again, this argument was left answered by both the Board and StreetMediaGroup. [*See* Board AB, at 8-11; SMG AB, at 11-12].

B. LUC § 22.2.5.B:

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.

First, no dispute exists the plain language of LUC § 22.2.5.B requires the Board to analyze the impact on the ***property owner***. [R. Vol. V]. The Board's Findings and Resolution does not even mention the property owner let alone explain how not allowing the Billboard on the property creates a peculiar or undue hardship on the property owner. [¶ 29]. The City called out these fundamental issues. [*See* OB, at 21]. Neither the Board nor StreetMediaGroup offers any persuasive response to the City's argument.

The Board's response to the City's argument is to assert "[t]he City's application of this criterion is overly literal and unreasonable." [*See* Board AB, at 14]. StreetMediaGroup asserts "[i]t 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." [*See* SMG AB, at 17]. However, the City's argument is premised on the plain language of LUC § 22.2.5.B. Relying on the actual language of the LUC cannot be "overly literal." Nothing contained in LUC § 22.2.5.B references consideration of the hardship on a leasehold tenant as distinct from the property owner. This Court is required to evaluate whether the Board applied the actual language of LUC § 22.2.5.B. ***Langer,*** 462 P.3d at 70; ***Enclave,*** 185 P.3d at 178.[4] No question exists LUC § 22.2.5.B could have included broader

[4] The LUC itself has the same Rules for Language Construction, providing: "Words and phrases must be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning whether by definition under the definitions section of this code, by legislative declaration or otherwise, must be construed accordingly." [*See* LUC § 3.3.A, R. Vol. V]. "Property" is defined in LUC § 10.15

language than its sole focus on the property owner. That the property owner may not be the party seeking construction of a sign under the code is readily apparent based on the reality the property owner and business operator at a particular location may very well be different. Larimer County, however, chose not to craft LUC § 22.2.5.B in a manner to include lessors or tenants like StreetMediaGroup. This Court must hold the Board to applying LUC § 22.2.5.B as it is actually written. The Board never did so here. [¶ 29]. This Court must decline the Board's and StreetMediaGroup's invitation to ignore the actual text of LUC § 22.2.5.B.[5]

Further, StreetMediaGroup had its previous appeal for a different billboard denied by the Board on April 30, 2019. [R. Vol. I, at 20]. Accordingly, StreetMediaGroup was well aware of

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as: "A lot, tract or parcel of land together with the buildings or structures thereon. For purposes of this section 10, individual condominium ownerships in a structure shall not be considered separate property. See also 'multi-tenant center'." The LUC does not define "owner" but Section 1-2 of the Larimer County Code does: "The term 'owner,' applied to a building or land, shall include any part owner, joint owner, tenant in common, tenant in partnership, joint tenant or tenant by the entirety, of the whole or of a part of such building or land." In turn, the Larimer County Code also defines "tenant" and "occupant" as follows: "The terms 'tenant' and 'occupant' applied to a building or land shall include any person holing a written or oral lease of, or who occupies the whole or part of, such building or land, either alone or with others." These definitions, when read together, clearly describe a "property owner" as the owner of real property owning it in fee for at least a fractional interest in the property, and not the owner of a leasehold interest in the property which would be a "tenant" or "occupant" of the property. As such, Larimer County clearly knows how to differentiate between "property owners" and "tenants" and its decision to do so in the LUC must be applied by this Court here.

[5] Perplexingly, the Board argues "it should not matter" if the hardship is suffered by the property owner or the tenant and "the Board did not draw any such distinction when applying this criteria." [*See* Board AB, at 14]. While it might not matter in the abstract, it actually does matter based on the actual language of LUC § 22.2.5.B. Similarly, StreetMediaGroup suggests "[t]he City 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." [*See* SMG AB, at 16]. Again, while StreetMediaGroup may believe there are no legal differences, which is a dubious legal proposition itself, the reason the City focused on this distinction is because it is premised on the language of LUC § 22.2.5.B which only focuses on the undue hardship to the "property owner" and never mentions a lessee.

the applicable provisions of the LUC sign code and how they needed to be met before the Board. Both before this Court and the Board, StreetMediaGroup's persistent focus was not on the provisions of the LUC and how they were met based on the impact on the property owner, but rather was on the impact of the LUC sign code on StreetMediaGroup.

Second, both the Board and StreetMediaGroup argue the alleged harm to the State Land Board by not having the revenue from the Billboard qualifies as an undue hardship. [*See* Board AB, at 14; SMG AB, at 16-17]. Again, however, Defendants ignore the plain language and context of LUC § 22.2.5.B. The actual language of this second criterion provides: "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." [*See* LUC § 22.2.5.B, R. Vol. V]. The basic sentence structure of this provision links the extraordinary or exceptional conditions on the site with the undue hardship. As a result, it is inappropriate to simply assert it would be an undue hardship on the State Land Board to lose revenue. While no doubt this would be an impact, it is not a specific impact from the conditions of the property. Rather, it is an impact from the lease agreement between the State Land Board and StreetMediaGroup.

Moreover, both the Board and StreetMediaGroup totally ignore that the Board's Finding and Resolution on the second criterion does not mention any impact on the State Land Board at all and specifically never mentions the impact on the State Land Board from any inability to fulfill its lease agreement with StreetMediaGroup. [¶ 29]. Further, both the Board and StreetMediaGroup ignore the City's argument the sign code's use of the language "extraordinary," "exceptional," "peculiar" and "undue" are words of limitation. [*See* OB, at 21-22]. Theoretically, one can conceive of a finding by the Board that the State Land Board as the property owner would suffer

an undue hardship based on its inability to contract with StreetMediaGroup as it has done. However, based on the above code language the analysis would necessarily have to include a comparison between what other uses available to the State Land Board for the property. The words of degree and limit in the sign code require the Board to engage in a comparative analysis. It only qualifies as an undue hardship if the State Land Board as property owner not contracting with StreetMediaGroup is comparatively worse than its other options. County Staff noted the signs already on the property still allow for additional signs under the sign allotment for the property, but signs that were compliant with the sign code. [¶¶ 14 & 23]. Here, the Board never considered the impact on the State Land Board at all, let alone on a comparative analytical basis. The Board's failure to address these issues is fatal to its Findings and Resolution.

Third, the Board focuses on 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 experienced in Larimer County. [*See* Board AB, at 14-15]. However, the Board ignores the City's actual argument. The City argued regardless of the legitimacy of this consideration under LUC § 22.2.5.B, there is no actual support in the Record for the Board's Findings and Resolution on this issue. [*See* OB, at 22-23]. Review of the Board's argument on this issue is extremely telling. The Board criticizes the City's argument but includes no citations to evidence in the Record, but rather words of speculation. [*See* Board AB, at 14 ("Finally, the City asks the Court to discount the Board's consideration of the economic downturn or the aid that this sign ***may provide*** to the businesses and citizens of the County."); ("The Board's reference to the condition of the local economy and how StreetMedia's proposed sign ***could provide*** advertising opportunities in aid of local businesses was responsible and proper, not evidence of an abuse of

discretion."); emphases added)]. Notably absent from the Board's argument is any reference to the Record. [*See* Board AB, at 14-15]. The reason for the Board's failure to cite to the Record is because the only reference to this issue in the Record are the statements by Commissioner Donnelly and Commissioner Kefalas explaining their votes, which statements alone are not evidence. [*See* R. Vol.II.A, at 69:9-74:6 & 76:21-78:10]. While these two Commissioners may be correct in their assessment of this issue, there is no actual evidence in the Record to support their statements. No data whatsoever was presented to the Board on any economic downturn or on how the Billboard would assist any businesses in Larimer County to mitigate those impacts. The Board cites nothing from the Record because no actual evidence supports this proposition in the Record at all.

Fourth, StreetMediaGroup suggests the City invites this Court to weigh the evidence by pointing out the stark contrast between County Staff's application and analysis of this criterion which is actually grounded in facts contained in the Record and the Board's ungrounded speculative approach. [*See* SMG AB, at 18]. The City is not asking this Court to weigh the evidence. Instead, the City is only asking this Court to require the Board to base its decision on evidence in the Record and not speculation and based on the applicable sign code criterion and not something else. Any comparison between the manner in which County Staff analyzed this issue and the Board's Findings and Resolution conclusively demonstrates the lack of analytical rigor, evidentiary grounding, and focus on the actual language of LUC § 22.2.5.B by the Board. [*Compare* ¶¶ 14 & 23 *with* ¶ 29]. The City agrees the Board has the ability to depart from County Staff's analysis and conclusion. However, to do so, the Board must actually apply the language of LUC § 22.2.5.B and making findings and conclusions supported by the Record. The Board's

failure here is not its decision not to follow County Staff's recommendation. Its failure is doing so in an improper and unsupported manner.

C. LUC § 22.2.5.C:

LUC § 22.2.5.C necessitates 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.

As argued by the City, the Board's one-sentence "finding" on this third criterion is both a non-sequitur and entirely conclusory supported by no evidence in the Record. [*See* OB, at 23-25]. The Board's statement is a non-sequitur because this criterion does not ask the Board to determine whether the Billboard will assist the marketing efforts of other business who use the Billboard, but rather mandates the Board consider whether other businesses with signs strictly complying with the sign code will suffer an economic or marketing disadvantage if the Billboard is allowed. *See* LUC § 22.2.5.C. Nothing presented by the Board or StreetMediaGroup undermines the City's fundamental points.

Initially, the Board's entire framing of the issue demonstrates the fundamental error of the Board's approach. The Board's Answer Brief titles its analysis of LUC § 22.2.5.C as follows: "The Board reasoned the sign would increase economic and marketing competitiveness." [*See* Board AB, at 15]. The actual language of LUC § 22.2.5.C provides: "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. Just as it did in its Findings and Resolution, the Board continues to analyze the wrong issue.

To support its incorrect analysis, the Board initially references the concluding remarks of Commissioner Donnelly regarding the Billboard's purported assistance to local small businesses and Commissioner Johnson about his opinion on the lack of an impact on other businesses. [*See* Board AB, at 15-16]. Unfortunately, the statements from these two Commissioners are not evidence themselves and unsupported by any actual evidence in the Record. Additionally, and more fundamentally, neither Commissioner's statement links their conclusion to the actual criterion since neither one discusses the relative economic or marketing advantage of the Billboard over other businesses with signs compliant with the LUC sign code.

Similarly, the Board's reliance on the explanations provided by StreetMediaGroup fares no better. [*See* Board AB, at 16-17]. Again, the Board's suggestion the Billboard would increase the advertising marketplace's competitiveness is immaterial to the criterion. The issue is not StreetMediaGroup's ability to compete, the actual issue under the third criterion is whether approving the Billboard results in a competitive disadvantage for property owners with signs that comply with LUC § 22.2.5.C. The Board provides no support for the Findings and Resolution on the third criterion in its Answer Brief.

StreetMediaGroup's analysis of the third criterion is also extremely muddled. [*See* SMG AB, at 18-19]. Like the Board, StreetMediaGroup analyzes the wrong issue. StreetMediaGroup opines "[t]he BOCC properly decided that LUC § 22.2.5.C does not compel the BOCC to fortify the market hegemony of dominant outdoor advertising companies" and proceeds to analyze the purported competitive disadvantage of StreetMediaGroup in the advertising provider marketplace. [*See* SMG AB, at 18-19]. Again, however, the actual language of LUC § 22.2.5.C demonstrates this is not the actual comparison posed by the third criterion. Instead, the Board was required to

compare the competitive disadvantage to property owners with signs that comply with the LUC sign code. Just like the Board in its Findings and Resolution and Answer Brief, StreetMediaGroup offers neither arguments nor citations to the Record on the actual inquiry posed by the third criterion.

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

The City separately argued the Board's Findings and Resolution was not supported by competent evidence in the Record. [*See* OB, at 25-27]. Neither the Board nor StreetMediaGroup separately address this argument, but instead offer their arguments related to the evidence before the Board contained in the Record as part of their discussion of the Board's interpretation and application of the three criteria of LUC § 22.2.5. [*See* Board AB, at 8-16; SMG AB, at 10-19]. While the City continues to maintain the two inquires are separate and both require analysis by this Court, because of the manner Defendants have addressed this issue in their Answer Briefs, the City has offered its Reply arguments on this issue in the above Section I. However, the City does so without waiver of its position this Court must determine whether the Board appropriately interpreted and applied the three criteria of LUC § 22.2.5 and then also must separately decide whether competent evidence in the Record supports the Board's Findings and Resolution on the three criteria when applied to each of the LUC sign code prohibitions and standards StreatMediaGroup appealed.

III. THE BOARD MISINTERPRETS THE CITY'S ARGUMENT CONCERNING ITS "COLLATERAL ISSUE—OTHER SIGN CODE APPEALS"

At the conclusion of its argument, the Board argues "[t]he City references the absence of previous approvals by the Board of similar sign code appeals, suggesting it indicates deficiency

with the Board's decision here." [*See* Board AB, at 17]. However, the Board does not reference where in the City's Opening Brief the City allegedly did so. Counsel for the City has reviewed the City's Opening Brief and the only reference the City makes to a prior appeal is the prior denial of a billboard appeal by the Board from StreetMediaGroup on April 30, 2019. [*See* OB, at 5 n. 2 (citing R. Vol. I, at 20)]. The City does reference potential future appeals in its argument [*see* OB, at 25] and that the LUC sign code has prohibited since 1992 off-premises signs [see OB, at 19-20], but these do not appear to fit what the Board argues concerning previous sign code appeals. Based on the Opening Brief, it appears the Board's argument is a straw man.

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

The City argued the Board neither addressed nor based its decision anywhere in its Findings and Resolution on the First Amendment arguments raised by StreetMediaGroup. [*See* OB, at 27-28]. Neither the Board nor StreetMediaGroup challenge this reality. [*See* Board AB, at 1-18; SMG AB, at 1-27]. Nor could they as the words "First Amendment" appear absolutely nowhere in the Board's Findings and Resolution. [R. Vol. IV, at 1-6]. Accordingly, as the City previously argued, the Board's failure to address or rule on any First Amendment issue makes it irrelevant to this Court's review under C.R.C.P. 106(a)(4). [*See* OB, at 27-28].

V. THIS COURT HAS ALREADY RULED AGAINST STREETMEDIAGROUP'S EXTRANEOUS ARGUMENTS OR THEY ARE ALREADY PRESENTED IN DIFFERENT BRIEFS

StreetMediaGroup suggests "threshold issues remain" for this Court to decide before addressing the merits of the City's C.R.C.P. 106(a)(4) claim. [*See* SMG AB, at 6-8 & 20-25]. However, this Court has already ruled against StreetMediaGroup on the timeliness and First

Amendment issues and the mootness issue is the subject of StreetMediaGroup's latest pending motion to dismiss.

First, StreetMediaGroup again asserts the case is moot because the Billboard has been constructed and its operational. [*See* SMG AB, at 6 & 20-21]. StreetMediaGroup filed a Motion to Dismiss Plaintiff's Complaint on February 24, 2021, raising this same mootness issue (the "Second Motion"). [*See* Defendant StreetMediaGroup, LLC's Motion to Dismiss Plaintiff's Complaint, 2/24/21]. The City filed its Response to this Second Motion on March 17, 2021, presenting in comprehensive fashion why StreetMediaGroup's argument the City's C.R.C.P. 106(a)(4) claim is moot is simply wrong. [*See* Plaintiff's Response to Defendant StreetMediaGroup, LLC's Motion to Dismiss Plaintiff's Complaint, 3/24/21]. No basis exists for this Court to allow StreetMediaGroup to separately argue mootness in its Answer Brief. StreetMediaGroup's mootness argument contained in its Answer Brief should not be considered by this Court.

Second, StreetMediaGroup again argues the City's Complaint is untimely. [*See* SMG AB, at 6-7 & 21-22]. Previously, StreetMediaGroup raised the purported untimeliness of the City's Complaint in a September 22, 2020, motion to dismiss (the "First Motion"). [*See* Defendant StreetMediaGroup, LLC's Motion to Dismiss Plaintiff's Complaint, 9/22/20]. The City filed its Response and StreetMediaGroup filed its Reply. [*See* Plaintiff's Response to Defendant StreetMediaGroup, LLC's Motion to Dismiss Plaintiff's Complaint, 10/23/20; Defendant StreetMediaGroup, LLC's Reply in Support of Motion to Dismiss Plaintiff's Complaint, 10/30/20]. After thoroughly and carefully considering the briefs, this Court denied StreetMediaGroup's First Motion and rejected its claim the City's Complaint was untimely in an

Order dated November 29, 2020. [*See* Order Denying Defendant StreetMediaGroup, LLC's Motion to Dismiss Plaintiff's Complaint]. This Court's Order is the law of the case and StreetMediaGroup offers no justifiable reason for this Court to revisit this decided issue. *See, e.g.*, ***Stockdale v. Ellsworth,*** 407 P.3d 571, 580 (Colo. 2017) ("Generally speaking, the law of the case doctrine provides that prior relevant rulings made in the same case are to be followed unless such application would result in error or unless the ruling is no longer sound due to changed conditions."; citations and internal quotation marks omitted);

Third, StreetMediaGroup again makes its First Amendment arguments challenging the constitutionality of Larimer County's sign code. [*See* SMG AB, at 7-8 & 22-25]. On December 12, 2020, StreetMediaGroup filed its Answer and Cross Claim. [*See* Defendant StreetMediaGroup, LLC's Answer and Cross Claim, 12/12/20]. StreetMediaGroup asserted cross claims against Larimer County seeking declaratory and injunctive relief asserting Larimer County's sign code's application to StreetMediaGroup violates its First Amendment and Colo. Const. Art. II, § 10 rights under the United States and Colorado Constitutions. [*See* ***id.*** at 12-14]. Larimer County moved to dismiss the cross-claims. [*See* Defendant Board of County Commissioners' Motion to Dismiss Crossclaim, 1/15/21]. StreetMediaGroup filed its Response and Larimer County filed its Reply. [*See* Defendant StreetMediaGroup, LLC's Response to Defendant Board of County Commissioners' Motion to Dismiss Crossclaim, 2/5/21; Reply to StreetMedia's Response to Defendant Board of County Commissioners' Motion to Dismiss Crossclaim, 2/12/21]. Again, after consideration of the arguments and authorities presented in the parties' briefs, this Court granted Larimer County's motion to dismiss and dismissed StreetMediaGroup's crossclaims. [*See* Order Granting Motion to Dismiss Crossclaims, 2/26/21].

Again, this Order is the law of the case and StreetMediaGroup presents no basis for reconsideration by this Court.

CONCLUSION

In conclusion, for all the foregoing reasons, as well as based on the arguments and authorities articulated in its Opening Brief, 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 and Billboard height, sign face size, setback and timing of electronic messages), award the City its costs, and all other and further relief as this Court deems just and appropriate.

Dated this 23rd day of March, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of March, 2021, 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:

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