DISTRICT COURT, COUNTY OF LARIMER, STATE OF COLORADO Larimer County Justice Center 201 Laporte Avenue, Suite 100 Fort Collins, CO 80521-2762 Telephone: (970) 498-6100	DATE FILED: March 24, 2021 10:21 PM FILING ID: DABBA36746965 CASE NUMBER: 2020CV30580
Plaintiff: THE CITY OF FORT COLLINS, COLORADO, a municipal corporation, v. **Defendants:** BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY, COLORADO; STREETMEDIAGROUP, LLC	**▲ COURT USE ONLY ▲**
Attorneys for Defendant, StreetMediaGroup, LLC: Todd G. Messenger, Reg. No. 38783 Amanda 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 REPLY IN SUPPORT OF MOTION TO DISMISS	

Defendant StreetMediaGroup, LLC ("StreetMedia"), through its undersigned counsel, Fairfield and Woods, P.C., respectfully submits its Reply in Support of its Motion to Dismiss and in support thereof states a follows:

I. Introduction

In Colorado, the law of the land is that an injunction cannot be issued unless it is requested. Further, that in the absence of an injunction, the *status quo* can change as parties exercise their unhindered legal rights in due course. Changed circumstances often render cases moot.

That is what happened here. The Board of County Commissioners' ("BOCC's") decision

was step one in a three-step process. The second step was the administrative issuance of the building permit (which is not reviewable under C.R.C.P. 106(a)(4) because it is not quasi-judicial). The County issued the permit. The third step was construction of the sign ("Harmony Sign") and removal of the signs StreetMedia committed to remove during the process. The Harmony Sign was constructed and turned on nearly four months ago pursuant to that permit, and the other signs were removed. Vacating the BOCC decision cannot undo the building permit or the actions that StreetMedia took pursuant to that permit. This case is moot and must be dismissed.

II. Argument

A. The Controlling Law.

A case is moot when "'a judgment, if rendered, would have no practical legal effect upon the existing controversy.'" *Tesmer v. Colo. High Sch. Activities Ass'n*, 140 P.3d 249, 252 (quoting *Van Schaack Holdings, Ltd. v. Fulenwider*, 798 P.2d 424, 426 (Colo. 1990)). A change in circumstances during the pendency of litigation can render a matter moot. *See Zoning Bd. of Adjustment of Garfield Cnty. v. DeVilbiss*, 729 P.2d 353, 356 (Colo. 1986); *In re Marriage of Salby*, 126 P.3d 291, 301 (Colo. App. 2005) ("An appellate court will not render an opinion on the merits of an appeal when the issues presented become moot because of subsequent events."). On a motion to dismiss based on subject matter jurisdiction, the plaintiff bears the burden of proving jurisdiction. *See DiCocco v. Nat'l Gen. Ins. Co.*, 140 P.3d 314, 316 (Colo. App. 2006). Plaintiff has not and cannot carry that burden. This case is controlled by *DeVilbiss*.

B. The Case Is Moot Because Plaintiff Stood By While Circumstances Changed, and *Certiorari* Under C.R.C.P. 106(a)(4) Cannot Provide the Relief the Plaintiff Demands.

Plaintiff's Complaint seeks *certiorari* review[1] of the quasi-judicial decision of the BOCC's approval of StreetMedia's appeal ("Sign Appeal"), invoking this Court's jurisdiction under C.R.C.P. 106(a)(4). (Pl.'s Compl. at 12 (Prayer for Relief), ¶¶ 54-57); *see Westlund v. Carter*, 193 Colo. 129, 130 (1977) (noting that C.R.C.P. 106(a)(4) sets out the procedure for *certiorari* review). Plaintiff's Complaint does not seek injunctive relief, even though C.R.C.P. 106(a)(4)(V) would have allowed Plaintiff to invoke this Court's jurisdiction to grant injunctive relief under C.R.C.P. 65 as part of its Complaint. Under C.R.C.P. 106(a)(4) *certiorari* jurisdiction, the court has two options: (1) it may affirm the decision below; or (2) it may quash the decision and remand the case. No other relief is available. *See State Civil Service Comm'n of Colo. v. Cummings*, 83 Colo. 379, 385 (1928) (*Certiorari* "is not a flexible writ. All that can be done under it is to quash or refuse to quash the proceeding complained of.").

Here, the Court cannot (as the City demands) "reverse" the BOCC. (Pl.'s Resp. at 10) Moreover, the Court cannot order injunctive relief or mandate any other particular outcome. Since a building permit has already been issued, the Harmony Sign has already been constructed, and StreetMedia already honored its commitment to remove its other signs, an adjudication vacating the Sign Appeal would have no effect.

The question urged by the City is academic. The case is moot and must be dismissed.

C. This Case is Controlled by *Zoning Bd. of Adjustment of Garfield Cnty. v. DeVilbiss*.

Based on the City's pleadings, it appears that not only does the City want the Court to

[1] C.R.C.P. 106(a)(4), is Colorado's name for the writ of *certiorari*—a common law writ that has, substantively, changed very little in nearly 1,000 years. *See generally*, Jenks. "The Prerogative Writes in English Law," 32 YLJ 523, 529 (1923).

rewrite the County's Land Use Code, but also to unwind and rewrite the Colorado Rules of Civil Procedure and expand the scope of this Court's jurisdiction under C.R.C.P. 106(a)(4) to create essentially plenary jurisdiction—all because it is offended that the BOCC approved a modest sign that will be allowed to display "off-premises" content. (Pl.'s Resp. at 9; Pl.'s Compl. at ¶¶ 27, 29, 71, and 77).

Plaintiff's Response desperately attempts to distinguish this case from *DeVilbiss*. It cites subsequent cases (including decisions outside of Colorado that are not controlling and apply a different body of law) that, unlike this case, are distinguishable from *DeVilbiss*.[2] Further, it throws six "distinguishing features" at the wall, none of which are legally operative, and several of which are fallacies.[3] The only meaningful distinguishing feature between this case and *DeVilbiss* is that in *DeVilbiss, the plaintiff actually sought a permanent injunction in its complaint*. As such, unlike this Court, the *DeVilbiss* Court was confronted with how to deal with the request for injunctive relief after the facility at issue had been built. *DeVilbiss*, 729 P.2d at 356. Naturally, that involved

[2] *Russel v. City of Central*, 892 P.2d 432 (Colo. App. 1995) and *Save Cheyenne v. City of Colorado Springs*, 425 P.3d 1174 (Colo. App. 2018) are both inapposite to this case. *Russel* involved a claim for *declaratory relief* "challenging the validity of an amendment of general application to the zoning ordinance . . . ." 892 P.2d at 436 (emphasis added). The Court of Appeals in *Russel* distinguished the case from *DeVilbiss*, noting that *DeVilbiss* was limited to *certiorari* review and injunctive relief. *Save Cheyenne* involved the filing of a notice of *lis pendens* in a land exchange matter, which the Colorado Court of Appeals found to provide sufficient notice "to any person thereafter acquiring, by, through, or under any party named in such notice [that] an interest in the real property described in the notice . . . [might] be affected by the action described in the notice." *Save Cheyenne*, 425 P.3d at 1177.

[3] Four of Plaintiff's string of six "important reasons" for disregarding *DeVilbiss* (Pl.'s Resp. at 7-8) are not legally operative: (1) the cost of the Harmony Sign; (2) StreetMedia's notice of the C.R.C.P. 106(a)(4) Complaint; (3) the nature of Plaintiff's C.R.C.P. 106(a)(4) challenge; and (4) the BOCC's position on the Motion to Dismiss (it is not up to the BOCC to determine whether the case is moot, and the BOCC's decision to sit out the motion practice on mootness does not constitute either support or opposition). The other two "important reasons" are simply false claims: (1) regarding the cost of removal of the Harmony Sign, while there was no reason to present evidence on the cost of removal of the Harmony Sign, the record evidence shows that the cost to Colorado's public schools (a public cost) would be approximately $1,000,000, and since StreetMedia is a for-profit company, one should expect that the cost of removal to StreetMedia would be well in excess of that); and (2) the claim StreetMedia's position regarding mootness would represent a "sea change in the law" of C.R.C.P. 106(a)(4) is not supported.

weighing certain equities. By contrast, this Court is only faced with the decision of whether to quash a decision that has already been fully implemented.

Even if the holding in *DeVilbiss* is narrow with regard to whether a request for a permanent injunction can be considered after construction of the facility that is the subject of a challenged quasi-judicial approval, it certainly stands for the proposition that plaintiffs that invoke C.R.C.P. 106(a)(4) must also invoke C.R.C.P. 65 and seek a preliminary injunction to preserve the *status quo*—that is, if preservation of the *status quo* is important to them.[4] *Id.* at 357 ("A temporary or preliminary injunction is a remedy specifically designed to maintain the *status quo* in order to preserve the trial court's power to decide the case on the merits."). Time and again, the Plaintiff in this case has failed to take steps to try to protect its alleged interests, and it cannot be afforded retroactive relief.[5] There is no vehicle for that. The case is now moot and must be dismissed.

D. C.R.C.P. 106(a)(4)(V) and C.R.C.P. 65 Cannot Be Disregarded.

Plaintiff states that StreetMedia's argument "would require all litigants pursuing claims under C.R.C.P. 106(a)(4) to also seek a preliminary injunction under C.R.C.P. 65 to prevent a private party from mooting the C.R.C.P. 106(a)(4) during its pendency by taking action pursuant to the approved zoning decision being challenged." Yes. However, the proposition is not *argument*, it is the long embedded law in Colorado, codified in C.R.C.P. 106(a)(4)(V) (which allows a plaintiff to seek an injunction with a C.R.C.P. 106(a)(4) complaint), and C.R.C.P. 65 (which allows

[4] A large number of C.R.C.P. 106(a)(4) cases are brought by parties who are denied a quasi-judicial approval. In those cases, there is generally no need to preserve the *status quo* because it will preserve itself.

[5] It is not unreasonable to expect parties to diligently follow matters that are important to them. StreetMedia did not conceal the fact that it was constructing the sign. Its building permit application is a public record, and the sign was constructed out in the open along a major thoroughfare next to the City over a three-week period. The City had ample opportunity to attempt to challenge that construction with a motion for temporary restraining order or preliminary injunction, but never made such an attempt.

a plaintiff to seek injunctive relief), and reinforced by the Colorado Supreme Court in *DeVilbiss*. No party to this dispute is in a position to question that law. If Plaintiff wanted an injunction it was obligated to ask for one. The time for that request has long since passed.

In Colorado, the risks that circumstances may change during the pendency of a C.R.C.P. 106(a)(4) petition is the Plaintiff's risk. *See DeVilbiss*, 729 P.2d at 357 ("A party who seeks to enjoin presumptively legal conduct of another but who refuses to submit his case for a preliminary determination on the propriety of injunctive relief must bear some responsibility for a change in circumstances between the commencement of the action and the ultimate resolution of the case on the merits."). In the absence of an injunction, defendants in such proceedings are free to—indeed expected to—go about their business in due course:

> We initially note that Snowmass Coal Company was not guilty of any legally impermissible or culpable conduct in proceeding with the construction of the coal-loading facility. The company sought and obtained from the Board of County Commissioners of Garfield County a special use permit which was conditioned on its obtaining a height variance from the Board of Adjustment. The Board of Adjustment granted the height variance, and Snowmass Coal Company obtained in due course various building permits from the Garfield County Building Official, the Colorado Mined Land Reclamation Board, and the Colorado Air Pollution Control Board. The fact that DeVilbiss elected to challenge the legal validity of the height variance and sought to permanently enjoin the construction of the facility did not somehow transform the company's continued activities, all of which were conducted under governmental permits, into legally impermissible and blameworthy conduct.

Id. at 359. In the instant case, C.R.C.P. 65(c) would have allowed the Plaintiff to seek an injunction *without even providing security* due to its status as a "municipal corporation," yet the Plaintiff still failed to do so. C.R.C.P. 65(c) ("[n]o such security shall be required of the state or of any county or municipal corporation of this state . . . .").

Parties—and courts—rely on the stability of these rules and the precedent set by *DeVilbiss*.

Plaintiff's apparent suggestion (at least for the purposes of this case) that these clear rules are either impractical or unfair or both is not legally operative.[6] The rules are simple to articulate, and they are appropriately applied. By way of example (and not recitation of controlling precedent) the Denver County District Court has held that a plaintiff's claim was moot when "the action sought to be prevented by the plaintiff has been accomplished." *Anderson v. Suthers*, No. 2011CV7798, 2012 WL 12265582 (Colo. Dist. Ct. Sept. 28, 2012), *aff'd on other grounds, Anderson v. Suthers*, 338 P.3d 384, 387 (Colo. App. 2013) (still recognizing that "the trial court dismissed the plaintiffs' claims as moot and concluded, relying on *Zoning Bd. Of Adjustment of Garfield County v. DeVilbiss*, 729 P.2d 353, 357 (Colo. 1986), that the public interest exception to mootness did not apply because the plaintiffs did not seek a preliminary injunction before the transaction closed.").

E. Plaintiff's Attack on C.R.C.P. 106(a)(4)(V) and C.R.C.P. 65 Is Unwarranted and Must Fail.

Plaintiff lodges an attack on C.R.C.P. 106(a)(4)(V) and C.R.C.P. 65 by demanding that this Court find that the rules that all Colorado attorneys practice by do "not make sense." Plaintiff's attack is unjustifiable and borders on the incoherent:

> To obtain a preliminary injunction, a litigant is required to establish, among other factors, a reasonable probability of success on the merits . . . . To do so at the outset of a Rule 106 action would require a litigant to meet this requirement without the certified record and to essentially prove in a preliminary proceeding the quasi-judicial governmental body abused its discretion or exceeded its jurisdiction on limited or incomplete facts. Moreover, because a C.R.C.P. 106(a)(4) action is limited to a review of the certified record before the quasi-judicial body, it would be at least incongruous if not prohibited for the litigant to make its Rule 65 showing with evidence extrinsic to the certified record. Holding a preliminary injunction hearing, presenting evidence, and taking testimony outside the four corners of the certified record would be inconsistent with the rules governing Rule 106(a)(4)

[6] Since the Plaintiff is a municipal corporation in a dynamic region where quasi-judicial land use decisions are commonplace, it is not hard to imagine the City being on the other side of a comparable case at some point and then taking a position that it fundamentally at odds with the unsupportable position it takes here.

> actions. Then, if the injunction is denied, the challenged project approved by the lower tribunal can be built to moot the Rule 106(a)(4) challenge thereby swallowing the remedy Rule 106(a)(4) provides.

Plaintiff cannot avoid C.R.C.P. 106(a)(4)(V) and C.R.C.P. 65 by attacking them. Whether Plaintiff likes it or not, they are the applicable rules. These are well-established, statewide rules of procedure that reflect the wisdom, considered judgment, and long experience of the Colorado Supreme Court. They do "make sense"—and they work. Attorneys are charged with knowing these rules, and Plaintiff's dissertation about how it fails to comprehend them is remarkable.

Plaintiff grumbles that under the applicable Colorado Rules of Civil Procedure, it could not possibly make its case for a preliminary injunction. While StreetMedia agrees with the Plaintiff that Plaintiff's case, on the merits, is exceedingly weak and as such, that a preliminary injunction (or any injunction for that matter) would not be justified, the procedures Plaintiff is expected to follow are not difficult. The excuse that Plaintiff does not understand the applicable rules is not a legitimate excuse to raise in the context of a response to a motion to dismiss on mootness grounds.

Turning to how the rules work, first, Parties *show up* and participate in quasi-judicial hearings when they believe that their interests are at stake. That way, they become familiar with what is in the record, they can contribute to that record in real time, and they can even (if they think it is important), bring a court reporter with them to take a transcript in real time if they believe their position is at risk. It is a lot like being in trial court. Second, if the quasi-judicial hearing does not go well, the diligent party will already be familiar with what is in the record. Third, a diligent and well-prepared party that took steps one and two will have no problem making a case to the Court (if there is a case to be made) on a motion for preliminary injunction under C.R.C.P. 65.

Plaintiff's attack on the Colorado Rules of Civil Procedure is a distraction.

F. Plaintiff Failed to Disclose that *Stor-N-Lock Partners* Has "No Value As Precedent."

Plaintiff leans on *Stor-N-Lock Partners #15, LLC v. City of Thornton*, No. 17CA0696, 2018 WL 2054320 (Colo. App. May 3, 2018) but fails to disclose to this Court that that case was not selected for publication. Cases that are not selected for publication "have no value as precedent." *Welby Gardens v. Adams County Bd. of Equalization*, 71 P.3d 992, 999 (Colo. 2003). In fact, if this case were to reach the Court of Appeals, citation to *Stor-N-Lock* would be *forbidden* under the court's "Policy Concerning Citation of Unpublished Opinions."[7] At the trial court level, the court may consider whether an unpublished decision provides any useful insight, but the court is also "free to disregard [unpublished decisions] entirely if it so chooses." *Patterson v. James*, 454 P.3d 345, 353 (2018).

As a matter of law, Plaintiff is wrong in suggesting that *Stor-N-Lock* (an unpublished decision of the Colorado Court of Appeals) in any way qualifies *DeVilbiss* (a published Colorado Supreme Court decision). Moreover, the persuasive value of *Stor-N-Lock*, if any, works against the Plaintiff. In that case, Resolute (a co-defendant with the City of Thornton) argued that the plaintiff (Stor-N-Lock) should be required to post a bond because "the mere filing of the [C.R.C.P. 106(a)(4)] action effectively enjoins the defendant from using its property." *Stor-N-Lock*, 2018 WL 2054320 at ¶35. The Court disagreed, holding that the:

> use of the property was not "enjoined or restrained" under Rule 65 because Stor–N–Lock did not seek, and the district court did not enter, a preliminary injunction or a temporary restraining order. Thus, there could be no occasion to determine whether it had been "wrongfully" enjoined or restrained from using the property, and no need for a remedy in the event of such a wrongful restraint.

[7] *See Policy Concerning Citation of Unpublished Opinions*. https://www.courts.state.co.us/Courts/Court_Of_Appeals/Forms_Policies.cfm

Id. at ¶46. In other words, the court held that C.R.C.P. 106(a)(4) does not create an implied injunction—it does not enjoin or restrain a party from continuing to exercise its rights during the pendency of the proceeding. All of the other discussion in the *Stor-N-Lock* case is *dicta*, and must be disregarded to the extent it conflicts with *DeVilbiss*, which is controlling law.

The Harmony Sign was turned on more than four months ago, and has been operational ever since. The signs that StreetMedia agreed to remove as part of the Sign Appeal have been removed. There is nothing left for this Court to decide, and remaining questions, if any, are purely academic, outside of the jurisdiction of this Court. *Elliott v. City of Fort Collins*, 135 Colo. 558, 560 (1957) ("it is necessary that there be a genuine and existing controversy and if the elements of the controversy have been presented and before an adjudication of the acts of the parties involved has disposed of the matter, it is the duty of the court, upon being shown such fact, to dismiss the action."); *Hays v. Huskin*, 539 P.2d 500, 500 (Colo. App. 1975) (Colorado Courts do not decide academic questions). This case is moot.

G. There Is No "Mootness Exception" to Save Plaintiff's Case.

1. *"Capable of Repetition Yet Evading Review."*

Where, as in this case, the challenge concerns the application of a particular law, rather than the law itself, the "capable of repetition yet evading review" exception to the mootness doctrine is inapplicable. *Freedom from Religion Found, Inc. v. Romer*, 921 P.2d 84, 88 (Colo. App. 1996) (finding the mootness exception did not apply when the plaintiffs did "not seek a declaration as to any general statute, ordinance, or regulation of the government entities that might be applied in future situations."); *see also Anderson v. Suthers*, No. 2011CV7798, 2012 WL 12265582 (Colo. Dist. Ct. Sept. 28, 2012). Plaintiff admits that it does not challenge the LUC or any provision of it.

As such, the "capable of repetition yet evading review" exception to mootness does not apply as a matter of law.

Plaintiff boldly asserts that "No question exists Larimer County retains its existing Land Use Code and unless this matter is reviewed by this Court, nothing will prevent future Boards of County Commissioners of Larimer County from incorrectly interpreting and applying the Land Use Code's sign appeal provisions as they did in this case." (Pl.'s Resp. at 13). In point of fact, after a very public process, Larimer County adopted a new Land Use Code in December 2020 ("December 2020 LUC"). The December 2020 LUC becomes effective on March 31, 2021—seven days from the date of this Reply.[8]

The sign appeal process that generated this dispute is not included in the December 2020 LUC. As such, even if there were a case for the application of the "capable of repetition yet evading review" exception as a legal matter, such application could not be supported on these facts. Not only has the Sign Appeal been fully carried out, but the LUC is new. Moreover, two-thirds of the County Commissioners have been replaced since this case was filed. One of the new commissioners is the former Mayor Pro Tem of Fort Collins, who was part of the Council that voted to bring this case in the first place. In this context, it really pushes limits to for Plaintiff to declare that this case is "capable of repetition yet evading review."

2. *"Great Public Importance."*

The mootness exception for issues of "great public importance" is inapplicable. Plaintiff's unsupported (and unsupportable) assertion that the continuation of this moot case is that important

[8] The December 2020 LUC is published online at:
https://www.larimer.org/sites/default/files/uploads/2021/larimer_luc_adoptiondraft_final_1.pdf

is simply wrong. The City's displeasure with off-premises messaging is a censorial interest, not a legitimate governmental interest, let alone a matter of "great public importance." Ultimately, the fact is that the City has presented a relatively unremarkable case involving laws that will be replaced in a week.

It is, of course, true that "a court may decide a moot case involving issues of great public importance or recurring constitutional violations." *Grossman v. Dean*, 80 P.3d 952, 960 (Colo. App. 2003) (finding the great public importance exception applied to a case that involved the interpretation of a state constitutional amendment adopted by ballot initiative); *see also Englewood Police Ben. Ass'n v. City of Englewood*, 811 P.2d 464 (Colo. App. 1990) (finding that whether a special election can take place on the same day as a general election was a question of great public concern). This case is very important to StreetMedia, but that does not bootstrap the case into the category of "great public importance." Neither does the fact that the case involves two local governments.

It is not surprising that Plaintiff cites no authority for its novel proposition that this case rises to the level of "great public importance." Essentially, it simply applies the "because I said so" logic that is ever-present its pleadings. This case is about a single quasi-judicial decision based on a now-superseded process to allow for a modest sign that is well under half the size of a traditional billboard. That is all. Again, it is very important to StreetMedia, but just because it involves a spat between two local governments does not make it a matter of "great public importance."

III. CONCLUSION

The Harmony Sign is constructed. The signs that StreetMedia committed to remove are

removed. The BOCC decision on the Sign Appeal is fully carried out. To analogize, the horses have left the barn.

This Court should not reward Plaintiff by bending the Colorado Rules of Civil Procedure and ignoring *DeVilbiss* as Plaintiff suggests. Plaintiffs predicament is self-inflicted, caused by a total failure of diligence in its examination of the facts of this case and the rules and the law that apply to them. It is inappropriate for the Plaintiff to attack the well-established procedural rules as cover for these obvious missteps—and it is worse to ask this Court to ignore those rules in order to help Plaintiff resolve its resulting dilemma.

Plaintiff is a sophisticated home-rule municipality with able outside counsel. Plaintiff made a strategic decision to not protect the *status quo* when it had the clear opportunity to do so—*without even providing security under C.R.C.P. 65(c) to protect StreetMedia's significant free-speech and financial interests*.

DeVilbiss controls, the Defendants proceeded properly, the Sign Appeal is carried out, and the case must be dismissed as moot.

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

Respectfully submitted this 24th 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 24th 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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