District Court, Larimer County, State of Colorado Larimer County Justice Center 201 LaPorte Avenue, Suite 100 Fort Collins, Colorado 80521-2761 (970) 494-3500	DATE FILED: April 12, 2021 6:01 PM CASE NUMBER: 2020CV30580
Plaintiff: THE CITY OF FORT COLLINS, COLORADO, a municipal corporation, v. **Defendants: BOARD OF COMMISSIONERS OF LARIMER COUNTY, COLORADO AND STREETMEDIAGROUP, LLC.**	**COURT USE ONLY** Case No: **2020CV30580** Courtroom: **4B**

ORDER DENYING DEFENDANT STREETMEDIAGROUP, LLC'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

This matter comes before the Court on Defendant StreetMediaGroup, LLC ("StreetMediaGroup")'s Motion to Dismiss Plaintiff's Complaint ("Motion") filed February 24, 2021. Plaintiff the City of Fort Collins ("City") responded on March 17, 2021 and StreetMediaGroup filed a reply in support on March 24, 2021. Having reviewed the pleadings and applicable law, the Court hereby DENIES StreetMediaGroup's Motion.

Background

In the summer of 2020 the Board of Commissioners of Larimer County ("Board of Commissioners") approved an appeal from StreetMediaGroup seeking to construct a large sign along I-25 and Harmony Road just outside Fort Collins city limits. The City filed its Complaint in this matter on August 25, 2020, seeking review of the Board of Commissioners' decision allowing StreetMediaGroup to construct the sign.

The City did not seek a stay or a preliminary injunction in this matter, and during the pendency of the case StreetMediaGroup applied for a building permit—which was granted—and constructed the sign. After removing other signs in Larimer County as required by the Board of Commissioners, construction was completed, and the sign began operation on or about November 18, 2020.

StreetMediaGroup now seeks to have Plaintiff's complaint dismissed as moot.

Standard of Review

"A court will generally not render an opinion on the merits of an appeal when issues presented in the litigation become moot because of subsequent events." *United Air Lines, Inc. v. City & County of Denver*, 973 P.2d 647, 652 (Colo. App. 1998). A claim is moot when "a judgment, if rendered, would have no practical legal effect upon the existing controversy." *Tesmer v. Colorado High School Activities Ass'n*, 140 P.3d 249, 252 (Colo. App. 2006) (quoting *Van Schaak Holdings, Ltd. v. Fulenwider*, 798 P.2d 424, 426 (Colo. 1990)). "The central question in a mootness problem is whether a change in the circumstances that prevailed at the beginning of litigation has forestalled the prospect for meaningful relief." *Zoning Bd. of Adjustment of Garfield County v. DeVilbiss*, 729 P.2d 353, 256 (Colo. 1986)

Analysis

StreetMediaGroup argues that the construction of the disputed sign, and the related destruction of five other signs (which the Board of Commissioners required in

order to allow construction of the disputed sign) moots the current appeal as "[a]ll obligations related to the [s]ign [a]ppeal are fully performed." Motion at 4. Analogizing this case to *Devilbiss*, StreetMediaGroup argues that their completion of the project which was the subject of the initial dispute in front of the Board of Commissioners makes this Court's review moot. In response Plaintiff attempts to distinguish *DeVilbiss*, arguing that the 1986 case represents a "fact-specific and narrow holding, "and that this case is more in line with subsequent decisions, such as *Wells v. Lodge Properties, Inc.*, 976 P.2d 321 (Colo. App. 1998), which held (based on the specific facts of the case) that completing construction of a challenged project does not necessarily moot appellate review. Response to Motion at 6

As a point of departure, it is perhaps worth noting that Plaintiff here merely seeks C.R.C.P 106 review and does not explicitly seek a permanent injunction. Complaint at 12 – 16, Cf. *DeVilbiss*, 729 P.3d at 355, *Russell v. City of Central*, 892 P.2d 432, 434 (Colo. App. 1995). That said, Plaintiff's likely goal here and Plaintiff's goals in *DeVilbiss* – to prevent or remove construction based on alleged improprieties in the approval process—is the same.

DeVilbiss concerns the construction of a "fifty-five foot tall, $7.7 million coal loading facility that already employed 250 people." *Save Cheyenne v. City of Colorado Springs*, 425 P.3d 1174, 1177 (Colo. App. 2018). *Devilbiss* itself limits its holding to the "particular facts of this case" and ultimately concludes that "a trial court may properly conclude that the permanent injunctive relief sought by the plaintiff is so inappropriate

under the circumstances of the case as to render the plaintiffs' equitable claim moot." *DeVilbiss*, 729 P.3d at 360.

Subsequent decisions have shown just how fact-specific the Court's mootness inquiry must be. *Russell* concerns a complaint seeking declaratory relief and C.R.C.P. 106 review of a decision by the Central City Board of Aldermen to 1) amend the city's zoning ordinance to permit a rehearsal hall as a special review use and 2) to approve the use of a certain property as a rehearsal hall. In *Russell* the Plaintiff never sought injunctive relief, and the rehearsal hall was completed during the pendency of the appeal at a cost of more than $2 million. In holding that the appeal was not mooted, the court relied on 1) a distinction between the height variance sought in *DeVilbiss* and the use variance sought in *Russell* and 2) "[m]ore importantly" the fact that Plaintiff sought a declaratory judgment declaring a generally-applicable zoning ordinance invalid." *Russell*, 892 P.2d at 436.

Wells v. Lodge Properties, Inc., 976 P.2d 321 (Colo. App. 1998) concerns a change in zoning requirements which took place after a property owner received initial approval of a project. The town of Vail required two steps of administrative approval for certain development projects (the Planning and Environmental Commission ("PEC") and the Design Review Board), and obtaining a building permit, before a property owner could begin construction. In 1983 Lodge Properties obtained approval from the PEC. At the time PEC approvals were valid indefinitely, but in 1993 Vail enacted an ordinance which caused PEC approvals to lapse after two years.

Wells then filed suit seeking a declaratory judgment that the PEC approval, obtained in 1983, had lapsed pursuant to the new ordinance. Lodge Properties obtained a building permit and commenced construction in 1996. The appellate court in *Lodge Properties* applied the test from *DeVilbiss* and found that the case was not moot despite "substantial construction" of the project. The court emphasized that Wells sought a temporary restraining order and a preliminary injunction, that construction on the project was not complete, and that the building permit was not obtained until after suit was filed. *Lodge Properties*, 976 P.2d at 325.

Finally, *Save Cheyenne v. City of Colorado Springs*, 425 P.3d 1174 (Colo. App. 2018) concerns a land transfer from Colorado Springs to a group of private companies. A local non-profit filed suit seeking "(1) a declaration that the resolution authorizing the exchange is null and void and (2) injunctive relief preventing the land exchange. It also alleged a zoning violation." *Id.*, 425 P.3d at 1176. The appellate court found that the appeal was not moot as "If the City Council did not have the power to authorize the land exchange, our ruling would result in a declaration that the resolution and subsequent exchange are null and void, and thus the transaction could be unwound." *Id.*, 425 P.3d at 1177.

While Plaintiffs in *Save Cheyenne* did not file for a temporary restraining order, preliminary injunction, or stay of the district court's judgment, the appellate court emphasized that 1) the filing of a lis pendens was sufficient to protect Plaintiff's interests through the course of an appeal and 2) *DeVilbiss* required destruction of a large,

expensive coal-loading facility which already employed 250 people, concerns which were not present in *Save Cheyenne*. *Save Cheyenne*, 425 P.3d at 1177.

Again, these cases emphasize the fact specific nature of the mootness inquiry.

Turning to the case at hand, *DeVilbiss* names three "pertinent factors for resolving a mootness issue with respect to a claim for permanent injunctive relief against the construction of a facility that has already been completed." *Lodge Properties*, 976 P.2d at 324. While the City here does not seek directly seek a permanent injunction, the factual similarity between *DeVilbiss* and this case suggests the factors merit consideration. The *Devilbiss* factors are:

> 1) the relative fault or blamelessness of the party defendant in completing the project against which a permanent injunction is sought;
>
> 2) whether the party plaintiff sought some form of temporary or preliminary injunctive relief in order to preserve the status quo during the pendency of the litigation; and
>
> 3) the varied interests likely to be affected and the potential hardships likely to be caused by entertaining a claim for a permanent injunction with respect to the construction of the facility already completed.

Id., 924 P.2d at 324 – 25.

Applying those factors here, the Court finds that Defendant is blameless in completing the project as there was no legal impediment to construction and there is no

evidence suggesting completion of the construction was in bad faith. Like in *DeVilbiss*, Plaintiff never sought injunctive relief. However, in this case the balancing of the equities weighs against a mootness determination. While there are some procedural similarities, the significant difference in the relief sought—the removal of a single sign here as opposed to the removal of a coal loading plant which employed 250 people—justifies a different outcome.[1]

Conclusion

For the reasons stated above, Defendant StreetMediaGroup's Motion is DENIED. The construction and operation of the disputed sign, and the removal of other signs, is not so significant that it cannot reasonably be unwound.

SO ORDERED: April 12, 2021

BY THE COURT:

Daniel McDonald
District Court Judge

[1] The record does not contain any evidence of StreetMediaGroup's costs incurred to build the disputed sign and to remove others. While StreetMediaGroup argues there was "no reason to present evidence on the cost of removal of the [disputed] sign," Reply at 4 n. 3, the Court disagrees. The Court's reading of *DeVilbiss* places significant weight on the amount Defendant spent constructing the complained-of improvement (in *DeVilbiss* the coal loading facility). Without evidence of a significant expenditure, *DeVilbiss*'s fact-specific reasoning is less directly applicable.