

District Court, Larimer County, State of Colorado Larimer County Justice Center 201 La Porte Avenue, Suite 100 Fort Collins, Colorado 80521-2761 (970) 494-3500	DATE FILED: April 20, 2021 3:11 PM CASE NUMBER: 2020CV30580
Plaintiff: <b>THE CITY OF FORT COLLINS,          COLORADO, a municipal corporation,</b>  v.  Defendants: <b>BOARD OF COUNTY          COMMISSIONERS OF LARIMER COUNTY,          COLORADO; STREETMEDIAGROUP, LLC</b>	▲ COURT USE ONLY ▲  Case No: 2020CV30580 Courtroom: 4B
<p style="text-align: center;"><b>ORDER DENYING PLAINTIFF, THE CITY OF FORT COLLINS', COMPLAINT FOR REVIEW PURSUANT TO C.R.C.P. 106(a)(4) AND FINDING IN FAVOR OF DEFENDANTS BOARD OF COUNTY COMMISSIONERS OF LARIMER COUNTY, COLORADO AND STREETMEDIAGROUP, LLC</b></p>	

This matter comes before the Court on a Complaint for Review Pursuant to C.R.C.P. 106(a)(4) by the Plaintiff, City of Fort Collins (The City), against Defendants, Board of County Commissioners of Larimer County (The County) and StreetMediaGroup, LLC (StreetMedia). The City filed an opening brief on January 22, 2021 arguing that the Board abused its discretion in granting the appeal of StreetMedia's sign proposal. Both the County and StreetMedia have filed their responses arguing that the Board's decision was proper. After reviewing the briefs submitted by the parties and the record, the Court finds the following:

**I. BACKGROUND**

StreetMedia proposed erecting a billboard on the property located at 4414 East Harmony Road. [R. Vol. 1, at 18]. The Property is a 6.46 acre parcel of land owned by the State Land Board of Commissioners (The State Land Board) and StreetMedia entered into a lease with the State Land Board on September 4, 2018, to lease 400 square feet of land

and 1,000 square feet of aerial space on the Property for the purpose of placing an outdoor billboard. [R. Vol. 1, at 21-22.]

StreetMedia submitted to the County Board an appeal requesting an off-premise sign, a 30 foot setback, a 240 square foot sign area, and a six-second dwell time for messages. [R. Vol. I, at 112]. All of which are not typically allowed under § 10 of the LUC unless the appeal meets the criteria under § 22.2.5. The City disagreed with StreetMedia's proposal and sent concerns to County Staff regarding the billboard's impact on the City's neighboring wildlife areas. [R. Vol. 1, at 103-104]. The County Staff reviewed the appeal and concluded that StreetMedia's proposal did not meet the requirements under LUC § 10.22.2.5. [R. Vol. 1, at 10-13]. The County recommended the Board to deny StreetMedia's appeal. The Board considered StreetMedia's appeal in a noticed public hearing it conducted on June 1, 2020. [R. Vol. III. A., at 1-13; Vol. II.A, at 1-82]. The City did not have any representatives at the hearing. *Id.* The County Staff's analysis, findings, and recommendations were provided to the Board during the hearing. [R. Vol. 1, at 7-13]. At the end of the hearing, the Board voted to approve StreetMedia's appeal. [R. Vol. 11.A at 81]. The Board issued its Findings and Resolution on July 28, 2020 in which it briefly states how the appeal met the criteria of LUC § 22.2.5. [R. Vol. IV, at 1-6]. The City appealed the Board's decision under C.R.C.P. 106. for abuse of discretion by misapplying provisions in the LUC to grant the appeal.

StreetMedia provided detailed evidence to the Board justifying an appeal and why it met the requirements § 22.2.1 (R. Vol. I 16-50). The sign would reduce visual clutter by removing five older signs (eight total sign faces) would be proposed for removal after the Harmony Sign was constructed [R. Vol I at 52-53]. The lighting of the sign uses sightline technology that protects the natural area. [R. Vol. II at 59]. The dwell time of six seconds is safe according to an empirical study from the Federal Highway Administration. [R. Vol. II at 58]. The Property's topography made it difficult for a sign to be visible if it strictly adhered to the guidelines. The elevation of Harmony Road increases from West to East as the road crosses over Interstate 25 which limits drivers' ability to view the site.

(R. Vol. I at 22, 35). StreetMedia testified that “the grade installation site is 16-feet below adjacent sidewalk. Strict compliance would deprive the applicant of being able to have a sign at all here that made any sense. Thirty-foot sign height will look like a 14-foot sign.” [R. Vol. II at 61]. If the sign was not approved, then the State Land Board would approximately lose \$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]. With regard to an unfair advantage, StreetMedia testified “others who have a 15-foot tall sign on a level road are going to be a foot taller than this one. So no matter how you look at your competitive standard, this one would comply with it.” [R. Vol. II at 61].

## II. LEGAL AUTHORITY

A court’s review of a quasi-judicial action under Rule 106(a)(4) “shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.” Rule 106(a)(4)(I), C.R.C.P. The object of a Rule 106 proceeding is not to settle or determine disputed facts, but to investigate and correct errors of law of a jurisdictional nature and abuses of discretion. *Doran v. State Bd. of Medical Exmrs.*, 78 Colo.153, 240 P. 335, 337 (1925). A mere disagreement with a ruling is not a sufficient showing of abuse of discretion. *Bristol v. County Court*, 143 Colo. 306, 352 P.2d 785, 786 (1960).

An abuse of discretion occurs only when there is no competent evidence to support the decision. *Ross v. Fire & Police Pension Ass’n.*, 713 P.2d 1304, 1305 (Colo. 1986). “No competent evidence” means that the ultimate decision of the lower tribunal is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority. *Bentley v. Valco, Inc.*, 741 P.2d 1266, 1267 (Colo. App. 1987). A Board’s “findings may not be set aside merely because the evidence was conflicting or susceptible of more than one inference.” *Arndt v. City of Boulder*, 895 P.2d 1092, 1095 (Colo. App. 1994), cert. denied (1995); see also *Bristol v. County Court*, 352 P.2d 785, 786 (Colo. 1960) (finding that mere disagreement with a ruling is not a sufficient showing of abuse of discretion).

The proper function of a district court under Rule 106 action is to affirm a lower tribunal where there is any competent evidence to support the tribunal's decision. *Bauer v. City of Wheat Ridge*, 182 Colo. 324, 513 P.2d 203, 204 (1973).

Misconstruing or misapplying applicable law can be an abuse of discretion. *Board of Cnty. Comm'rs v. Conder*, 927 P.2d 1339, 1343-44 (Colo. 1996). The court is not bound by the agency's construction because the court's review is de novo. *City of Commerce City v. Enclave West, Inc.*, 185 P.3d 174, 178 (Colo. 2008). When a local regulation is clear and unambiguous, it should be construed as written so as to carry out the intent of the legislative body; however, "[i]f the language of an administrative rule is ambiguous or unclear, [the court] give[s] great deference to an agency's interpretation of a rule it is charged with enforcing, and its interpretation will be accepted if it has a reasonable basis in law and is warranted by the record." *Sierra Club v. Billingsley*, 166 P.3d 309, 312 (Colo. App. 2007). "If there is a reasonable basis for the agency's application of the law, the decision may not be set aside on review." *Platte River Env'tl. Conservation Organiz. v. Nat'l Hog Farms*, 804 P.2d 290, 292 (Colo. App. 1990).

Section 10 of the LUC prohibits off premise signs, electronic signs that change more frequently than once every minute, signs above a maximum height of 18 feet above grade, and signs with a setback measured from the right-of-way of less than 36 feet. LUC §§ 10.5; 10.11.B. Section 22.2.5 of the LUC governs sign proposals deviating from the standards in Section 10 and are submitted and considered by the Board. See LUC, § 22.2.1.A.3. It states the following:

To approve an appeal from the applicable requirements in section 10 of this code the county commissioners must consider the following review criteria and find that each criterion has been met or determined to be inapplicable:

- 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;

- 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.

See LUC § 22.2.5. The LUC outlines the purpose of Section 10 as follows: The purpose of this section is to protect the health, safety and welfare of the public; to provide the public and property owners with an opportunity for safe and effective identification of uses and locations within the county; and 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. *See* LUC, § 10.1.

The Larimer County planning director has the authority to interpret the LUC subject to an appeal to the Board. *See* LUC, § 3.5. Before the Board, “the appeal will be granted only if the applicant shows by a preponderance of the evidence that granting the appeal is consistent with the intent and purpose of this code.” *See* LUC, § 22.2.2.B.6.

### **III. LEGAL ANALYSIS**

At the outset, the Board’s decision to consider the appeal was proper because StreetMedia provided more than a preponderance of evidence that granting the appeal was consistent with the purpose of the LUC, as described below in section A. The analysis shall now turn to whether the Board’s decision that StreetMedia met all of the requirements of § 22.2.5 was supported by competent evidence. Court shall note that this matter is strictly a Rule 106 issue and StreetMedia’s efforts to go beyond that scope has not been helpful in deciding this issue. StreetMedia’s threshold arguments regarding constitutionality, untimeliness, and mootness are not only irrelevant but were previously ruled against by this Court. Although the Court considered StreetMedia’s arguments pertaining to Rule 106, this Order focuses mainly on the arguments provided by the City and County regarding whether the Board abused its discretion under Rule 106 as those arguments were the most pertinent.

**A. Whether the Board properly determined that approving StreetMedia’s sign was consistent with the purpose and the intent of the LUC.**

The intent of Section 10 is as follows: the purpose of this section is to protect the health, safety and welfare of the public; to provide the public and property owners with an opportunity for safe and effective identification of uses and locations within the county; and 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. [See LUC, § 10.1, R. Vol. V].

The Board argues that its approval of StreetMedia’s sign considered how it will “avoid clutter and protect and maintain the visual appearance and property values of the agricultural, residential, business, commercial and industrial areas of the county.” In particular, the Findings and Resolution by the Board state “the sign is located in an area with background lighting, and the sign will not significantly affect that background lighting. The sign is also located at an intersection of two high speed roadways, which diminished concerns relating to dwell time. The appeal is consistent with implementation of the sign code because it removes clutter including removal of approximately eight other signs . . . It will beautify roadways and give small businesses an opportunity to communicate with customers. Further, the SITELINE technology employed by the sign allows for directional distribution of light so as to minimize interference and mitigate impacts of a lighted sign.” [Vol. IV at 3]. As a part of its proposal, StreetMedia would be removing 8 sign faces from the county thereby reducing clutter. [Vol. IV at 2]. As reflected in the County’s Brief, the Commissioners made various comments that StreetMedia’s proposal was positive in giving opportunities to small businesses, mitigating negative impacts of a lighted sign due to the new technology the sign uses, and removing clutter. *See*, Answer Brief of Board of County Commissioners, at 9-10 (Feb. 26, 2021). Finally, there are various references to the sign’s ability to successfully co-exist with the surrounding context regarding wildlife, natural areas, and lighting. *See* [Vol. II-A, at 17-18].

The City argues that the County did not properly look at the intent and the purpose of section 10 of the LUC. The LUC has not allowed any new off-premises signs since June 15, 1992 and the Board did not make any findings regarding this aspect of the LUC. Accordingly the Board failed to interpret and apply the actual intent of the LUC's sign regulations. The City argues that the Board's focus on how the sign and its lighting fits at the proposed location is irrelevant and further ignores the actual intent of the LUC which is to not allow off-premise billboard signs since 1992. Moreover, the City argues that there is no legal basis under the LUC to justify StreetMedia's sign proposal based on their removal of other billboards.

The Court agrees with the County's argument and finds that the Board did consider the purpose and intent of section 10 based on the evidence presented that the sign would promote the aesthetic values by reducing visual clutter. There was evidence presented to the Board that the sign proposal would reduce the visual clutter by getting rid of 8 older sign faces, the new lighting technology would not significantly add to the background lighting, and would be able to coexist with wildlife. The Court disagrees with the City that it is the intent of the LUC, in particular section 10, is to not have off-premise signs. Although the LUC prohibits off-premise signs, it also allows deviations from Section 10 by the procedure followed in Section 22. Accordingly, it is the intent of the LUC to allow deviations from the sign regulations in section 10, including the prohibition of off-premise signs, if it meets the standards outlined in Section 22. Moreover, the Court defers to the Board's interpretation of the LUC to allow the removal of older signs as part of the proposal because it is reasonable, the LUC language does not expressly contradict this interpretation, and it aligns with the purposes of reducing clutter.

There is even evidence in the record regarding the purpose of safety. StreetMedia presented evidence that the setback variance is needed to ensure safe viewing of the sign given that it would stand lower due to the topography. Strict adherence to the code would increase the lack of safety of individuals viewing the sign, as well as decrease the ability of those individuals to see the sign. Vol. II-A, at 55. With regard to the dwell time,

StreetMedia noted that based on a Federal Highway Administration study, provided to the Board, the proposed six second loop is safe. *Id.* at 58; see also Vol. I, at 78-80. Finally, the Board considered the economic downturn and the aid the sign may provide to the businesses and citizens of the County as consistent with the purpose of the sign code to provide effective identification of uses and locations within the County. Vol. II-A, at 70. Therefore, the Board's findings meet the requirements of Section 22(A).

**B. Whether the Board properly determined that there were extraordinary or exceptional circumstances on the site which would result in a peculiar or undue hardship on the property owner if Section 10 of the LUC was strictly enforced.**

The County argues that the Board made adequate findings relating to hardship and exception or extraordinary circumstances supported by the record. StreetMedia presented evidence that the unique topography of the property location would create a hardship because a sign following the regulatory height would prohibit a meaningful sign from existing. The Board's findings state: "The Property is located at an elevation below the adjacent roadways, making placement and view of a sign more difficult. Further, the adjacent roadways are high speed major roadways. The topography of the site creates a hardship that can be mitigated by the placement of the sign and the implementation of the strategies of directional lighting and dwell time as indicated in the Application. The placement of the sign as indicated . . . will increase its viewability and make it safer for motorists to view." Vol. IV, p. 3. Strict compliance would not make sense in this particular area; its 30-foot sign would practically appear only as a 14-foot tall sign. *Id.* Moreover, the State of Colorado Land Board, who is the property owner of where the sign is to be located, would suffer approximately \$1,000,000 in lost revenue if StreetMedia is unable to install the proposed sign. Vol. I, p. 38, 1:23-25. This is because enforcing the regulatory standards at this property location would make it impractical to build a sign and for the State land Trust to pursue its mission to generate revenue. *See Id.* at P.46, 1:17-21; p.60, 1:14-16.

The City argues that StreetMedia is not a "property owner" under section B. LUC provides "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 sections 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 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 code 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 entirety, of the whole or of a part of such building or land.” In contrast, it defines “tenant” or “occupant” applied to a building or land shall include any person holding a written or oral lease of, or who occupies the whole or part of, such building or land, either alone or with others.” Given these definitions, the City argues that a property owner under the LUC 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. It is the City’s position that StreetMedia is not a property owner because it has no fractional interest in the land and is rather a lessee of the property, thereby StreetMedia cannot be considered for undue hardship under section 22.2.5.B.

The City further argues that the State Land Trust as the property owner of the site would not have a qualifying undue hardship. City argues the plain language of section B states that the extraordinary or exceptional conditions resulting in undue hardship would have to be on the site. This is because the State Land Board losing revenue would result from the lease agreement rather than conditions of the site.

The Court finds that the Board’s interpretation of StreetMedia as a property owner under LUC § 22.2.5.B had a reasonable basis because StreetMedia owns the sign and the sign is on the land. The City is correct that the Court is required to evaluate whether the Board applied the actual language of LUC § 22.2.5.B. *Yakutat Land Cor. v. Langer*, 462 P.3d

65, 70 (Colo. 2020). However, “property owner” is not defined and therefore ambiguous which allows the Board to interpret it reasonably. The City’s interpretation of “property” in LUC § 10.15 is overly narrow because it fails to account for the fact it states property means “A lot, tract or parcel of land *together with the buildings or structures thereon.*” (emphasis added). Structures include signs. And, if the Court were to accept the definition of “owner” from the Larimer County Code, the definition would apply “to include any part owner, joint owner, tenant in common, tenant in partnership, joint tenant or tenant by entirety, of the whole *or of a part* of such building or land.”

While it is true the State Land Trust owns the land, StreetMedia owns the sign. The sign is a structure on the land, and the structure is a part of the land. Therefore, given the definitions the City cited and there is no exact definition of “property owner” in the LUC, it is a reasonable interpretation for the Board to determine that StreetMedia is a property owner with respect to the sign. This interpretation is supported by the fact 10.15 expressly states that it does not consider ownerships of individual condominiums in a complex shall not be considered separate property. Similarly, it is a reasonable interpretation to say that it is not the case the sign is separate property when it is a structure owned by StreetMedia that is part of the land. LUC section 22.2.5 is ultimately about allowing sign deviations and it makes sense that the sign owner is a property owner regardless of whether the sign owner also owns the land the sign is built on.

Because StreetMedia is a property owner under section B, the Court agrees with the County that there was adequate evidence in the record to show exceptional circumstances creating an undue hardship. The record indicated that the topography of the location would make a meaningful sign impractical if the code’s regulations were strictly applied, causing a unique hardship to StreetMedia with respect to this particular area. Moreover, the State Land Board is also a property owner under section B and the record indicates that it would lose \$1,000,000 in revenue if the sign would not be approved. The Court disagrees with the City’s narrow interpretation that the loss would only come from the lease and not the site. It is because given the unusual topography of

the site that the State Land Board would face undue hardship, as there would be no meaningful sign on the site if the regulations were strictly enforced.

**C. Whether the Board properly determined that approving StreetMedia's sign would not result in an economic or marketing advantage over other businesses which have signs which comply with Section 10 of the LUC.**

The Board argues that there was adequate evidence in the record to support the Board's finding with regard to this section. StreetMedia provided information to the Board that the "sign will not be perceptibly more prominent than other signs in the area." [Vol. I, at 35]. This is because the topography of the property requires the sign to be taller for it to be seen comparably with other signs in the area. Moreover, the Commissioners noted that it is not advertising a business that is competing with any of the other businesses in the area. Finally, the Board also considered that the sign would increase competitiveness among businesses by giving small businesses in the area an opportunity to reach potential customers that they normally would not have an opportunity to reach.

The City argues that it would provide StreetMedia an economic or marketing advantage over businesses adhering to the sign regulations. The City contends the Board improperly focused on inquiries irrelevant to section C such as whether it would help small businesses. Rather, the main inquiry is whether deviating from the regulations in this case would result in an economic or marketing advantage over other businesses adhering to the sign regulations. From the City's point of view, StreetMedia would have a competitive advantage by allowing an increased sign height, having an off-premise sign, and reduced hold time.

The Court finds that there was evidence in the record to support the Board's findings under this section. Although the Court agrees with the City that the reasoning provided by the Board about the economic downturn and giving small businesses a chance to compete do not directly apply to the requirements of section C, StreetMedia provided evidence to the Board that the sign would not be perceptibly more prominent than other signs in the area that follow the regulations. The small business reasoning by

the Board goes toward the fact that the sign is an off-premise sign does not result in a competitive advantage over other businesses in the area following the regulations, and additionally many small businesses will have the opportunity to advertise through the sign and gain potential customers on the highway from the off-premise advertising.

Because the Board's findings were adequately supported by the record with respect to all three provisions of Section 22.2.5, the Court finds there was no abuse of discretion and affirms the Boards findings.

SO ORDERED: April 20, 2021

**BY THE COURT:**

A handwritten signature in blue ink, appearing to read 'D. McDonald', written over a light blue horizontal line.

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**Daniel McDonald**  
**District Court Judge**