Colorado Court of Appeals 2 East 14th Avenue Denver, CO 80203	
Appeal from Arapahoe County District Court Hon. Elizabeth A. Weishaupl Case No. 2019CV32190	
Plaintiff/Appellant: WALKER COMMERCIAL, INC. v. **Defendant/Appellee:** MARSHALL P. BROWN, in his official capacity as Director of Water of the City of Aurora, Colorado.	**▲COURT USE ONLY▲**
Attorneys for *Amicus Curiae* Colorado Municipal League: Laurel Witt (#51188) David W. Broadwell (#12177) 1144 Sherman St. Denver, CO 80203-2207 Phone: 303-831-6411 Fax: 303-860-8175 Emails: lwitt@cml.org; dbroadwell@cml.org	Case No. 2020CA205

BRIEF OF *AMICUS CURIAE*, COLORADO MUNICIPAL LEAGUE, IN SUPPORT OF DEFENDANT-APPELLEE

CERTIFICATION

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

☑ It contains 2,087 words (does not exceed 4,750 words).

The brief complies with the content and form requirements set forth in C.A.R. 29.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

*/s/ Laurel Witt*_____
Laurel Witt, #51188

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutional Provisions

Cases

Rules

Municipal Codes

Other Authorities

Amicus Curiae Colorado Municipal League ("CML" or "the League") respectfully submits the following *Amicus* Brief in Support of the position of Appellee, Marshall P. Brown, in his official capacity as the Director of Water of the City of Aurora, Colorado.

IDENTITY OF THE LEAGUE AND ITS INTEREST IN THE CASE

CML, formed in 1923, is a non-profit, voluntary association of 270 of the 272 municipalities located throughout the state of Colorado, comprising nearly 99 percent of the total incorporated state population. Its members include all 103 home rule municipalities, 166 of the 168 statutory municipalities, and the lone territorial charter city. This membership includes all municipalities greater than 2,000 in population, and the vast majority of those having a population of 2,000 or less.

The League membership consists of municipalities that routinely make quasi-judicial decisions which fall under the purview of the Colorado Rules of Civil Procedure. When municipal decisions, made in a variety of capacities from marijuana to taxation, become "final," individuals can appeal to the state district court where the municipality lies. Aggrieved and adversely affected individuals commonly use this avenue to challenge a municipal final decision. This Court's opinion will affect the entirety of the League membership because all

municipalities can make the sort of final decisions subject to appeal under Colorado Rule of Civil Procedure 106(a)(4).

ISSUES PRESENTED FOR REVIEW

CML's interest in this case is predicated on the assumption that the court will address the following issues in the course of rendering its decision:

1. Whether the district court properly held that any complaint arising under Rule 106(a)(4), C.R.C.P. must be brought within twenty-eight days of a final quasi-judicial decision.

2. Whether the district court properly held that the doctrine of "excusable neglect" does not apply in the present case.

STATEMENT OF THE CASE

CML incorporates by reference any statement of the case, nature of the case, or statement of facts contained in the Opening Brief of the Appellee.

SUMMARY OF THE ARGUMENT

Colorado Rule of Civil Procedure 106(a)(4) is the means by which an aggrieved or adversely affected party may appeal a final quasi-judicial decision from a municipality. Municipalities frequently trigger Rule 106(a)(4) in their day-to-day operations by issuing different types of final decisions. Whether it is

deciding a controversial land use matter or issuing a business license, individuals affected by the final decision can appeal to district court.

Municipalities, in anticipating an appeal, turn to the proverbial shot clock and wait until the deadline to appeal has passed to consider a decision truly "final." This time allows for the aggrieved individual to have a fair opportunity to appeal the municipal decision to state court. However, municipalities need clear and definite deadlines for appeal periods to continue effectively running their governments and to best serve communities across the state.

If this Court allows for appeal deadlines to be blurred, the result could consign municipal decision-making to a state of limbo. Uncertainty surrounding appeal deadlines causes ripple effects, such as the inability to move forward with a land use matter with a lack of a truly final decision. The League asks this Court to confirm that any deadline on appeals to district court under Rule 106 are rigid deadlines, without the possibility of exceptions or potential delays, including excusable neglect.

ARGUMENT

A. The Colorado Rules of Civil Procedure apply to a variety of quasi-judicial decision making and final action at the municipal level.

The Colorado Rule of Civil Procedure ("C.R.C.P.") 106(a)(4) is the main pathway for an aggrieved party who wants to appeal a final quasi-judicial decision

from a municipality to state court. The Colorado Supreme Court outlines the outer boundaries of what cases its courts can adjudicate in the C.R.C.P. Colo. Const. art. 6, § 2. C.R.C.P. Rule 106(a)(4) permits access to state courts where "any governmental body" has "exceeded its jurisdiction or abused its discretion." Individuals subject to a final decision from a municipality may use this remedy to appeal the decision to state court whether or not a municipal code allows for the same remedy.

Municipalities trigger the appeal process available in C.R.C.P. Rule 106(a)(4) when conducting quasi-judicial decision making. Municipal decision-making occurs frequently in all municipalities across a wide range of areas. A municipality may take a final action under a section of its code that does not cite to the Colorado Rules of Civil Procedure, per se, but can still trigger this appeal process. Municipal examples of this include denying a particular use of a zone district; approving or denying an urban renewal plan; approving or denying a liquor license and coming to a final decision in personnel disciplinary cases. *See, e.g., Danielson v. Zoning Bd. of Adjustment of Commerce City*, 807 P.2d 541 (Colo. 1990) (an example of an appeal from a municipal zoning decision); *City of Aurora v. Martin*, 410 P.3d 720 (Colo. App. 2017) (an example of an appeal from an urban renewal plan); *Berger v. City of Boulder*, 195 P.3d 1138 (Colo. App.

2008) (an example of an appeal of a liquor license review); *Barnes v. City of Westminster*, 723 P.2d 164 (Colo. App. 1986) (an example of an appeal from a personnel disciplinary matter). If an individual is a party in interest to any one of these final actions, that person can correctly use C.R.C.P. 106(a)(4) to appeal the decision to district court. In the last example, a personnel manual is more likely than a municipal code provision to provide a path to the aggrieved employee for an appeal. *See, e.g, Barnes*, 723 P.2d at 165; *Bourgeron v. City and Cty. of Denver*, 159 P.3d 701, 704–05 (Colo. App. 2006).

In many cases, a municipality may cross-reference C.R.C.P. 106(a)(4) or otherwise inform an individual on how to appeal a municipal final action. For example, in the City of Greeley's code section covering business taxes, licenses, and regulations, the code states that an order of an administrative hearing officer is subject to review by the district court if the aggrieved individual follows the procedure outlined in C.R.C.P. 106(a)(4). *See* Greeley Municipal Code § 6.04.280. The City of Longmont code section on water and utility wells affirms that the hearing officer renders final decisions, subject to appeal under C.R.C.P. 106(a)(4). *See* Longmont Municipal Code § 14.04.540. The Town of Monument instructs the reader, under the water discharge permit section of its code, that an aggrieved or adversely affected party may appeal an order of the town to "District

Court in and for the County of El Paso, pursuant to" C.R.C.P. 106(a)(4). *See* Monument Municipal Code §13.12.180. The Town of Center instructs that any applicants for zoning may appeal a final decision to the courts "in the nature of a certiorari under rule 106(a)(4)." *See* Center Municipal Code § 44-32. The code continues on to say "[t]he town will be entitled to appeal any decision of the district court under said rule 106 proceedings." The Town of Alma, in its code provisions covering medical marijuana dispensaries, permits decisions made by the Board of Trustees to district court under C.R.C.P. 106(a)(4) and that "[t]he applicant's failure to timely appeal the decision is a waiver the applicant's right to contest the denial or conditional approval of the application." *See* Alma Municipal Code § 6-3-140(5). Municipalities across the state have similar language dotted throughout their code provisions, expanding beyond the issue in the current case to areas from marijuana to taxation, land use to business licensure.

Every Colorado municipality can make final quasi-judicial decisions that are subject to appeal within the appeal period under Rule 106(a)(b) and do so on a regular basis. The case at present has impact on the day-to-day activities of municipalities statewide.

B. Municipalities rely on rigid appeal deadlines to run their governments.

Municipalities understand that when a final decision is made, a shot clock

begins for the length of time a party in interest may appeal to district court. This time allows for the party to have a fair opportunity to appeal the municipal decision to state court. However, if the time allotted can be extended to a date uncertain or waived entirely, municipalities will be negatively impacted. Municipalities rely on these hard deadlines to avoid confusion and to run their governments smoothly. The League asks the Court to ensure that the length of time to appeal to district court be a rigid deadline, a time certain.

In the present case, the Appellant effectively seeks a waiver of the deadline in Rule 106(b). If given the opportunity, the Appellant will not be the last aggrieved party seeking such a waiver. A party, under the theory the Appellant proffers, request a court to extend the deadline in C.R.C.P. 106 and may be allowed to file an action under C.R.C.P. 106(a)(4) days, weeks, months, after the Rule allows.

Municipalities cannot have uncertain or wavering deadlines in litigation. Deadlines, similar to statute of limitations, exist in part to make the judicial system fair and equitable. If a deadline becomes blurred and a plaintiff can sue months later, municipalities would not know when a decision is truly final.

Uncertainty on the finality of decisions will obstruct the business of operating a municipality. If, for example, a potential plaintiff claims “excusable

neglect" and delays the filing of a complaint challenging the approval of an urban renewal plan by the board of a municipality, the plan cannot move forward until the litigation is resolved. If the plaintiff can sue weeks after the deadline has passed, when is the plan truly approved with the ability to move forward? As another example, if a plaintiff is allowed to wait months to challenge the approval of a business license to a medical marijuana store, the license may be held in abeyance until a court resolves the litigation. If this is the case, the municipality loses sales tax revenue that it could otherwise be collecting and, depending on litigation delays, also risks having the marijuana business find other suitable locations. If a plaintiff is permitted to sue past the hard deadline set, then a business license may not be truly granted until months into the future.

The result of blurred deadlines is the slowing down of services to communities because municipalities, who normally wait for the shot clock to wind down, would now need to wait for a plaintiff to file an appeal at some unknown, undefined time in the future.

C. The District Court did not err in holding that excusable neglect fails as a matter of law.

Jurisdictional defect occurs when a plaintiff fails to bring a claim by a deadline, which the League argues should not be blurred by extensions, waivers, or, in the present case, excusable neglect. *See, e.g., Gold Star Sausage Co. v. Kempf*, 653

P.2d 397, 400 (Colo. 1982) ("Failure to bring a C.R.C.P. 106(a)(4) proceeding within the [*sic*] time limit is a jurisdictional defect."). As discussed in the prior section, if the trial court is not affirmed and this Court instead allows the erosion of deadlines, the result would be inequitable and unjust for the defendants, and the municipalities.

Even if the Court were to determine that excusable neglect exists in cases such as those at present, the current situation does not fall within the definition of excusable neglect. Excusable neglect applies to "a situation where the failure to act results from circumstances which would cause a reasonably careful person to neglect a duty." *Farmers Ins. Grp. v. Dist. Court of Second Judicial Dist.*, 507 P.2d 865, 867 (Colo. 1973). Further, the Colorado Supreme Court has held that, in general, excusable neglect applies in cases involving "unforeseen occurrences such as personal tragedy, illness, family death, destruction of files, and other similar situations which would cause a reasonably prudent person to overlook a required deadline date in the performance of some responsibility." *Id.* "Failure to properly read or interpret a statute or city code does not constitute excusable neglect." *See* District Court Order page 6; *see also Kempf*, 653 P.2d at 400. It would be a disservice to all Colorado municipalities who routinely rely on rigid deadlines to permit a waiver of such a deadline because the plaintiff did not properly read or

interpret a municipal ordinance.

CONCLUSION

For the reasons set forth in this brief, the League urges this Court to either uphold the decision of the trial court or ensure that any deadline on appeals to district court from final decisions are rigid deadlines, without the possibility of waivers or potential delays, including excusable neglect. Municipalities need certainty in litigation to conduct municipal business.

DATED this 19th day of May, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May 2020, a true and correct copy of the foregoing **BRIEF OF AMICUS CURIAE, COLORADO MUNICIPAL LEAGUE, IN SUPPORT OF THE DEFENDANT-APPELLEE** was served via Colorado Courts E-Filing to the following:

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