SUMMARY
June 20, 2024

2024COA65

No. 23CA0965, *Freed v. Bonfire Entertainment LLC* — Public Health and Environment — Noise Abatement — Maximum Permissible Noise Levels — Preemption; Municipal Law — Noise Ordinances

Hobbs v. City of Salida, 2024 COA 25, interpreted the scope of a statutory exemption to our state's noise pollution laws. This case, coming on the heels of *Hobbs*, presents the same question of statutory interpretation. Agreeing with the dissent in *Hobbs*, a division of the court of appeals concludes that the General Assembly did not intend for the challenged statutory exemption to apply to a private entity's music festival simply because the private entity secured a local amplified noise permit.

COLORADO COURT OF APPEALS **2024COA65**

Court of Appeals No. 23CA0965
Chaffee County District Court No. 22CV30024
Honorable Dayna Vise, Magistrate

Maryanne Freed, Carle Linke, David Olmstead, Shari Perkins, Randall Peters, Rich Rau, Amy Senter, Judy Senter, Mike Senter, Cary Unkelbach, and Alan Warholoski,

Plaintiffs-Appellants,

v.

Bonfire Entertainment LLC, South Main Arts and Parks Trust, The Meadows Farm LLC, and Board of County Commissioners of the County of Chaffee County,

Defendants-Appellees.

JUDGMENT AFFIRMED IN PART AND REVERSED IN PART,
AND CASE REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE FOX
Grove and Sullivan, JJ., concur

Announced June 20, 2024

Miller & Steiert, P.C., Gregory A. Eurich, Littleton, Colorado, for Plaintiffs-Appellants

Hall & Evans, LLC, Brian Molzahn, Denver, Colorado; Hall, Render, Killian, Heath & Lyman, P.C., Christopher A. Adelman, Glenwood Springs, Colorado, for Defendants-Appellees Bonfire Entertainment LLC, South Main Arts and Parks Trust, and The Meadows Farm LLC

Dagner Schluter Werber LLC, Leslie L. Schluter, Greenwood Village, Colorado, for Defendant-Appellee Board of County Commissioners of the County of Chaffee County

¶ 1 In *Hobbs v. City of Salida*, 2024 COA 25, a division of this court interpreted the scope of a statutory exemption to our state's noise pollution laws. This case, coming on the heels of *Hobbs*, presents the same question of statutory interpretation. The plaintiffs — Maryanne Freed, Carle Linke, David Olmstead, Shari Perkins, Randall Peters, Rich Rau, Amy Senter, Judy Senter, Mike Senter, Cary Unkelbach, and Alan Warholoski — appeal the district court's order dismissing their complaint against the defendants — Bonfire Entertainment LLC (Bonfire), South Main Arts and Parks Trust (SMAPT), The Meadows Farm LLC (Meadows Farm) (collectively, the Promoter defendants), and the Board of County Commissioners of Chaffee County (BOCC) — based on its conclusion that the defendants fell within the challenged statutory exemption. Agreeing with the dissent in *Hobbs*, we conclude that the General Assembly did not intend for the exemption to apply to a private entity's music festival simply because the private entity secured a local amplified noise permit; the property subject to the permit must be used by the statutorily authorized permitting entity. Therefore, we reverse the district court's dismissal of the plaintiffs' claims against the Promoter defendants. We otherwise affirm.

I. Background

¶ 2 This appeal arises from the plaintiffs' objections to the BOCC's issuance of a special event permit to the Promoter defendants to hold a two-day outdoor music festival on private property near their residences. According to the plaintiffs' complaint, concert promoter Bonfire filed an application with the BOCC in January 2022 to hold a music festival at Meadows Farm — a private entity that owns land in Chaffee County. Meadows Farm later clarified that it would lease the property to SMAPT, a purported nonprofit, which would then sublease the property to Bonfire. After holding a public hearing on the application, the BOCC issued a permit on May 3, 2022, for the September music festival. Concluding that a statutory exemption applied to the event, the BOCC permitted noise levels that exceeded the residential limit in Colorado's Noise Abatement Act, *see* §§ 25-12-101 to -110, C.R.S. 2023.

¶ 3 The plaintiffs, a group of property owners residing near Meadows Farm, complained that the BOCC had granted similar permits for concerts at Meadows Farm starting in 2016 that had negatively impacted their quality of life and enjoyment of their respective properties. They claimed that the 2022 music festival

would be no different. The plaintiffs' complaint asserted four causes of action: (1) statutory nuisance (against the Promoter defendants); (2) common law nuisance (against the Promoter defendants); (3) conspiracy to commit nuisance (against the Promoter defendants); and (4) declaratory judgment and injunctive relief (against the BOCC and the Promoter defendants).

¶ 4 The plaintiffs asked the district court to enter the following declaratory judgments:

1. All defendants have authorized or created a public nuisance and will do so again if the 2022 concert is held.
2. The exemption in section 25-12-103(11), C.R.S. 2023, does not apply to private subleases of property for concerts, so section 25-12-103(1)'s residential noise limits apply to the concert.
3. Section 25-12-103(11) when read in conjunction with sections 25-12-101, -103(1), and -108, C.R.S. 2023, does not apply to subleases of private property between private actors, notwithstanding their possession of an amplified noise permit from the BOCC.

4. The defendants' actions affected the plaintiffs' peaceful use and enjoyment of their properties during all music festivals held at Meadows Farm.

5. The BOCC authorized a public nuisance when it approved the past and present music festivals.

The plaintiffs also asked for a permanent injunction barring the 2022 festival and future festivals from exceeding statutory noise limits and barring the BOCC from authorizing events that would exceed the limits.

¶ 5 The BOCC and the Promoter defendants moved to dismiss the claims against them. The September 2022 festival apparently occurred before the parties finished filing their respective responses and replies.

¶ 6 In April 2023, the district court granted the BOCC's and the Promoter defendants' motions to dismiss. The court found that it lacked subject matter jurisdiction over all the claims because the plaintiffs had failed to timely seek review of the BOCC's permit under C.R.C.P. 106(a)(4). The court also found that, even if it had jurisdiction, the plaintiffs' claims would fail because section 25-12-103(11) broadly exempts permittees of political subdivisions from

complying with the Noise Abatement Act's limits when they hold, as relevant here, concerts or music festivals, even if the property is only used by a private, for-profit entity.

¶ 7 The plaintiffs appeal, contending that the district court erred by dismissing all claims for lack of subject matter jurisdiction and by interpreting section 25-12-103(11) to exempt all permittees of political subdivisions from the general noise limits, regardless of whether the property is used by the political subdivision.

II. Subject Matter Jurisdiction

¶ 8 The plaintiffs first challenge the district court's conclusion that it lacked subject matter jurisdiction over each claim. As noted, their complaint asserted four claims — three nuisance claims against the Promoter defendants and a claim for declaratory judgment and injunctive relief against all defendants.

¶ 9 The BOCC and the Promoter defendants characterize the complaint as a backdoor effort to overturn the BOCC's permit. As such, they argue, the complaint was effectively an untimely request for judicial review of a governmental body's quasi-judicial action under Rule 106(a)(4), (b).

A. Applicable Law and Standard of Review

¶ 10 Rule 106(a)(4) "provides for review of quasi-judicial decisions made by a governmental body or officer in a civil matter where the law otherwise provides no plain, speedy, and adequate remedy." *Brown v. Walker Com., Inc.*, 2022 CO 57, ¶ 1. The review contemplated by Rule 106(a)(4) is narrow: "Courts simply review the lower body or officer's decision to determine whether it 'has exceeded its jurisdiction or abused its discretion.'" *Id.* at ¶ 27 (quoting C.R.C.P. 106(a)(4)). A Rule 106(a)(4) complaint must be filed within twenty-eight days of the governmental body's or officer's final decision. C.R.C.P. 106(b). The twenty-eight-day deadline is jurisdictional and thus cannot be extended for excusable neglect. *Brown*, ¶ 17.

¶ 11 In contrast, Rule 57 allows interested parties to petition a court to determine a question of construction arising under, as relevant here, a statute affecting the parties' rights. C.R.C.P. 57(a), (b). Rule 57 is remedial in nature and should be liberally construed to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations. *City of Boulder v. Pub. Serv. Co. of Colo.*, 2018 CO 59, ¶ 28; § 13-51-102, C.R.S. 2023.

The Colorado Supreme Court has "long acknowledged that litigants can use C.R.C.P. 57 to request the resolution of questions regarding the validity or interpretation" of legislation. *City of Boulder*, ¶ 28.

¶ 12 Rule 106(a)(4) provides the exclusive remedy for review of a governmental body's quasi-*judicial* decisions, but a governmental body's quasi-*legislative* actions are reviewed under Rule 57. *Native Am. Rights Fund, Inc. v. City of Boulder*, 97 P.3d 283, 287 (Colo. App. 2004); *Bd. of Cnty. Comm'rs v. Sundheim*, 926 P.2d 545, 548 (Colo. 1996). An action is quasi-judicial, and thus subject to review under Rule 106(a)(4), when it "involves the determination of the rights, duties, or obligations of specific individuals" based on "application of presently existing legal standards or policy considerations to past or present facts developed at a hearing conducted for the purpose of resolving the particular interests in question." *Farmers Water Dev. Co. v. Colo. Water Conservation Bd.*, 2015 CO 21, ¶ 18 (quoting *Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village*, 757 P.2d 622, 625 (Colo. 1988)). On the other hand, quasi-legislative actions are usually prospective, reflect public policy relating to matters of a permanent or general

character, and are not restricted to identifiable persons or groups. *Id.*; *see also Native Am. Rights Fund*, 97 P.3d at 287.

¶ 13 We review de novo a district court's determination that it lacks subject matter jurisdiction. *See City of Boulder*, ¶ 14. Similarly, we review de novo the court's determination of whether a plaintiff's complaint sought review of a governmental body's quasi-judicial functions or its quasi-legislative actions. *Farmers*, ¶ 14.

B. Application

¶ 14 We first conclude that the district court erred by dismissing the claims against the Promoter defendants for lack of subject matter jurisdiction. The court reasoned that dismissal was appropriate because "all claims center around the decision by BOCC to grant special event permits." So, reasoned the court, the "core" of the dispute was whether the BOCC had properly granted the permit — an action it concluded was quasi-judicial, and thus subject to Rule 106(a)(4) review. But Rule 106(a)(4) provides for review only of the actions of a governmental body or officer. It does not apply to the actions of private parties.

¶ 15 We recognize that the propriety of the BOCC's permit may relate to the nuisance claims asserted against the Promoter

defendants. The Promoter defendants will no doubt invoke the BOCC's permit to defend against some or all of the nuisance claims. But the plaintiffs' failure to assert their nuisance claims against the private actors in a timely Rule 106(a)(4) action did not deprive the court of subject matter jurisdiction over those claims in the first instance. *See Tri-State Generation & Transmission Co. v. City of Thornton*, 647 P.2d 670, 677 (Colo. 1982) (holding that independent claims for relief that do not challenge governmental action "can be asserted independent of any proceeding for review of the Council's action").

¶ 16 The plaintiffs' request for a declaratory judgment and permanent injunction against the BOCC presents a closer question because the plaintiffs sought declarations specific to the 2022 permit and declarations about the meaning of the relevant statutory exemption more broadly.

¶ 17 We conclude that any declarations regarding the propriety of the amplified noise permits, including the 2022 permit, were requests for review of a quasi-judicial function of the BOCC. *See Cherry Hills*, 757 P.2d at 628 (city's approval of a development plan constituted quasi-judicial action). Granting the permits required

the BOCC to determine the rights and duties of particular individuals in a specific factual context. *See Farmers*, ¶ 18. The BOCC applied the existing legal framework to past or present facts developed at a hearing conducted to resolve the interests in question. *See id.* These are the hallmarks of a quasi-judicial function of a governmental body. *Id.*

¶ 18 Any challenge specific to those permits, then, must have been raised according to Rule 106(a)(4) and within twenty-eight days of the BOCC's issuance of the permit. C.R.C.P. 106(b). The parties do not dispute that the July 2022 complaint failed to comply with Rule 106(b)'s strict twenty-eight-day deadline.[1]

¶ 19 The plaintiffs' broader request for a declaratory judgment against the BOCC — one that involves only a question of statutory interpretation — warrants further analysis. That claim asked the district court to interpret the meaning of section 25-12-103(11) and determine whether it applies to private sublessees of property not used by the entity issuing the permit.

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[1] Plaintiffs do not claim they were unaware of when the BOCC issued the permit or that they were otherwise precluded from challenging the permit within C.R.C.P. 106(b)'s timeline.

¶ 20 To have standing to bring a declaratory judgment action under Rule 57, the plaintiff must have suffered an injury in fact. *State v. Hill*, 2023 CO 31, ¶ 10. In support of their Rule 57 claim against the BOCC, the plaintiffs alleged facts showing that they were injured by the BOCC's issuance of its permits, in May 2022 and earlier, because the permits allowed excessive decibel levels. None of the plaintiffs' factual allegations, however, suggested that actions by the BOCC unrelated to its permitting decisions caused them injury. And as we have explained, the BOCC's issuance of its amplified noise permits constitutes a quasi-judicial function, rendering Rule 106(a)(4) the exclusive remedy for reviewing the BOCC's permitting decisions. *See JJR 1, LLC v. Mt. Crested Butte*, 160 P.3d 365, 369 (Colo. App. 2007).

¶ 21 Because the plaintiffs failed to seek timely review of the BOCC's May 2022 permitting decision under Rule 106(b), they cannot now request a declaratory judgment against the BOCC that effectively seeks review of that same decision, even if framed as a purely legal question under Rule 57. *See Tri-State*, 647 P.2d at 676 n.7 ("[A] party may not seek to accomplish by a declaratory judgment what it can no longer accomplish directly under C.R.C.P.

106(a)(4) . . . ."); *JJR 1*, 160 P.3d at 369 ("[B]ecause C.R.C.P. 106(a)(4) is the exclusive remedy for reviewing quasi-judicial decisions, all claims that effectively seek such review (whether framed as claims under C.R.C.P. 106(a)(4) or not) are subject to the . . . filing deadline [in] C.R.C.P. 106(b).").

¶ 22 For these reasons, we conclude that the district court correctly determined that it lacked subject matter jurisdiction over the declaratory judgment claim against the BOCC. But it had subject matter jurisdiction to consider the claims raised against the Promoter defendants.

¶ 23 Finally, we reject the Promoter defendants' argument that the plaintiffs did not preserve for appellate review their arguments regarding the proper interpretation of the Noise Abatement Act. The plaintiffs' request for a declaration of the exemption's meaning, as to the Promoter defendants, was sufficient to preserve the issue for appellate review. *See Madalena v. Zurich Am. Ins. Co.*, 2023 COA 32, ¶ 50 ("If a party raises an argument to such a degree that the court has the opportunity to rule on it, that argument is preserved for appeal.") (citation omitted). We will, accordingly, address the meaning of the statute below.

III. Noise Abatement Act

¶ 24 Notwithstanding its conclusion that it lacked subject matter jurisdiction, the district court opined that the plaintiffs' claims still failed because the exemption to the general noise limits in section 25-12-103(11) applies to permittees of a political subdivision when holding concerts or music festivals even if the property is not used by that political subdivision. The plaintiffs claim that the court misinterpreted the statute.

A. Standard of Review and Interpretation Principles

¶ 25 We review issues of statutory interpretation de novo. *Dep't of Nat. Res. v. 5 Star Feedlot, Inc.*, 2021 CO 27, ¶ 20. In doing so, our primary goal is to ascertain and give effect to the General Assembly's intent. *Id.*

¶ 26 We look first to the statutory text, giving its words and phrases their plain and ordinary meanings. *Godinez v. Williams*, 2024 CO 14, ¶ 20. We read a statute's words and phrases in context, and we "construe them in accordance with the rules of grammar and common usage." *Id.* "We look to the entire statutory scheme because we are required to give consistent, harmonious, and sensible effect to all its parts, while simultaneously avoiding

constructions that would either render any of its words or phrases superfluous or yield illogical or absurd results." *Dep't of Nat. Res.*, ¶ 20.

¶ 27 If a statute's language is clear and unambiguous, we apply it as written. *Kinslow v. Mohammadi*, 2024 CO 19, ¶ 11. But if a statute is "reasonably susceptible of multiple interpretations," it is ambiguous. *Hice v. Giron*, 2024 CO 9, ¶ 10 (quoting *McBride v. People*, 2022 CO 30, ¶ 23). To ascertain the meaning of ambiguous statutes, we may consider "other aids to statutory construction, including the consequences of a given construction, the end to be achieved by the statute, and the statute's legislative history." *Godinez*, ¶ 20 (quoting *McCoy v. People*, 2019 CO 44, ¶ 38); *see also* § 2-4-203, C.R.S. 2023.

B. Applicable Law

¶ 28 The General Assembly adopted the Noise Abatement Act in 1971. *Hobbs*, ¶ 23. In so doing, it declared that "noise is a major source of environmental pollution which represents a threat to the serenity and quality of life in the state of Colorado" and that "[e]xcess noise often has an adverse physiological and psychological effect on human beings, thus contributing to an economic loss to

the community." § 25-12-101. Therefore, the General Assembly expressed its intent to "establish statewide standards for noise level limits for various time periods and areas," the violation of which "constitutes a public nuisance." *Id.*

¶ 29 For property that is residentially zoned, as here, the General Assembly set the noise limit at 55 db(A) during the day (7 a.m. to 7 p.m.) and 50 db(A) at night (7 p.m. to 7 a.m.).[2] § 25-12-103(1). "[N]oise radiating from a property line at a distance of twenty-five feet or more therefrom in excess of [the noise limit] shall constitute prima facie evidence that such noise is a public nuisance." *Id.* For context, lawnmowers and other power tools produce noise levels between 85 and 90 db(A). *Hobbs*, ¶ 6 n.1. The BOCC set the maximum noise limit for the 2022 music festival at 105 db(A).

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[2] A decibel is a unit to express "the magnitude of a change in sound level." § 25-12-102(3), C.R.S. 2023. And "'db(A)' means sound levels in decibels measured on the 'A' scale of a standard sound level meter." § 25-12-102(2). A one-to-one increase in decibels does not equate to a one-to-one increase in volume. For example, "a three-decibel change is a one hundred percent increase or decrease in the sound level, and a ten-decibel change is a one thousand percent increase or decrease in the sound level." § 25-12-102(3).

¶ 30 Section 25-12-104, C.R.S. 2023, provides a cause of action in equity "to abate and prevent" nuisances and to perpetually enjoin the person creating the nuisance from doing so.

¶ 31 The General Assembly provided that the Noise Abatement Act "shall not be construed to preempt or limit the authority of any municipality or county to adopt standards that are *no less restrictive*" than those it established. § 25-12-108 (emphasis added).

¶ 32 In 1987, the General Assembly created an exemption to its general noise limitations. *Hobbs*, ¶ 24. The exemption provides as follows:

> This article is not applicable to the use of property by this state, any political subdivision of this state, or any other entity not organized for profit, including, but not limited to, nonprofit corporations, or any of their lessees, licensees, or permittees, for the purpose of promoting, producing, or holding cultural, entertainment, athletic, or patriotic events, including, but not limited to, concerts, music festivals, and fireworks displays. This subsection (11) shall not be construed to preempt or limit the authority of any political subdivision having jurisdiction to regulate noise abatement.

§ 25-12-103(11). The district court concluded that the Promoter defendants were exempt from the Noise Abatement Act's limits because they were "permittees" of a "political subdivision."

¶ 33 Another division of this court recently interpreted the meaning of section 25-12-103(11) for the first time. In *Hobbs*, the majority concluded that a political subdivision may issue a permit for a private entity to exceed the Noise Abatement Act's general limits on property that the political entity does not use. *Hobbs*, ¶ 2. In other words, the exemption applies to private actors holding a concert on private property if they have a permit from a political subdivision. *See id.* at ¶ 36. The dissent concluded that for a lessee, licensee, or permittee to fall within the exemption, the property must be used by one of the primary actors (the state, a political subdivision of the state, or another nonprofit) for an exempted purpose. *See id.* at ¶ 69 (J. Jones, J., dissenting).

C. Application

¶ 34 We adopt the *Hobbs* dissent's reasoning and largely depart from that of the majority. Nevertheless, we share common ground with the majority in the following respects.[3]

¶ 35 First, we agree that section 25-12-103(11) does not require any of the stated entities to *own* the property they use to qualify for the exemption. *See Hobbs*, ¶¶ 31-33. We see nothing in the statute, express or implied, to suggest that property ownership is a prerequisite to exemption. *See Nieto v. Clark's Mkt., Inc.*, 2021 CO 48, ¶ 12 ("[W]e do not add words to or subtract words from a statute.") (citation omitted).

¶ 36 Second, we agree that "permittees" do not also have to be a nonprofit entity or nonprofit corporation to fall within the exemption. *See Hobbs*, ¶¶ 34-37. The statute does not indicate any such requirement, and if "permittees" also had to be nonprofits to qualify for the exemption, the General Assembly's inclusion of "permittee" at all would be superfluous. *See Dep't of Nat. Res.*, ¶ 20.

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[3] We note that the *Hobbs* dissent also agreed with the following three points.

¶ 37 Third, we agree that the reference to "any of their lessees, licensees, or permittees" does not only modify the immediately preceding entity — "any other entity not organized for profit, including, but not limited to, nonprofit corporations." *See Hobbs*, ¶ 40; *id.* at ¶ 69 (J. Jones, J., dissenting). When a "qualifying clause follows several words or phrases and is applicable as much to the first word or phrase as to the others in the list, . . . the clause should be applied to all of the words or phrases that preceded it." *Est. of David v. Snelson*, 776 P.2d 813, 818 (Colo. 1989); *see also* § 2-4-214, C.R.S. 2023 (rejecting the "last antecedent rule"). The majority and the dissent in *Hobbs* agreed that the reference to lessees, licensees, and permittees relates just as much, if not more, to the state and political subdivisions of the state as to other nonprofit entities. *See Hobbs*, ¶ 40; *id.* at ¶ 69 (J. Jones, J., dissenting). For the reasons articulated in those opinions, we agree that the "lessees, licensees, or permittees" modifier relates to each of the three preceding types of entities. *See id.* at ¶ 40 (majority opinion); *id.* at ¶ 69 (J. Jones, J., dissenting).

¶ 38 Notwithstanding our agreement on these points, we believe section 25-12-103(11)'s construction leaves it reasonably

susceptible of two interpretations. *See Hice*, ¶ 10. The exemption begins by stating that the Noise Abatement Act "is not applicable to the *use* of property *by*" certain entities. § 25-12-103(11) (emphasis added). To fall within the exemption, therefore, the identified entities must be *users* of property. *See id.* That requirement is followed by a list of three categories of entities not organized for profit: the state, its subdivisions, and other nonprofit entities. *Id.* The second and third listed categories are separated by the word "or." *Id.* After identifying the first three types of exempted users, the statute includes a second "or," followed by "any of *their* lessees, licensees, or permittees." *Id.* We believe the inclusion of a second disjunctive "or" and the use of the possessive "their" leave room for two interpretations.

¶ 39 On the one hand, the exemption could be read to include twelve discrete categories of exempted property users: the state, its political subdivisions, other nonprofit entities, lessees of those

entities, licensees of those entities, or permittees of those entities.[4] *See Hobbs*, ¶ 36. Under this interpretation, a private permit holder would fall within the exemption if it used private property to host a qualifying event simply by virtue of being a political subdivision's permittee. *See id.*

¶ 40 On the other hand, the exemption could be read to establish three categories of exempted property users — the state, its political subdivisions, and other nonprofit entities — and to include their lessees, licensees, or permittees within the exemption only to the extent that they are associated with the state's, subdivision's, or other nonprofit entity's use of the subject property. *See id.* at ¶ 69 (J. Jones, J., dissenting). Under this interpretation, a private permit holder would not fall under the exemption to put on a qualifying event on private property unless the state, a political subdivision, or another nonprofit uses the property. *See id.*

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[4] Although condensed in the statutory language, because any of the last three categories could apply to any of the first three categories, those twelve categories are the state, its subdivisions, other nonprofits, lessees of the state, lessees of a subdivision, lessees of other nonprofits, licensees of the state, licensees of a subdivision, licensees of other nonprofits, permittees of the state, permittees of a subdivision, and permittees of other nonprofits.

¶ 41 Because the statute is reasonably susceptible of two meanings, we conclude that it is ambiguous. *See Hice*, ¶ 10; *see also R.L. v. State*, 437 N.E.2d 482, 484 (Ind. Ct. App. 1982) (use of disjunctive "or" twice in a list presents ambiguity). *Compare Hobbs*, ¶ 30 (language unambiguously means the first interpretation), *with id.* at ¶ 75 n.9 (J. Jones, J., dissenting) (if the language does not clearly mean the second interpretation, the exemption is at least ambiguous). Therefore, we will rely on the plain language of the exemption alongside other tools of statutory construction to determine its meaning, such as its legislative history, the consequences of a given construction, and the end to be achieved by the statute. *Godinez*, ¶ 20; § 2-4-203.

¶ 42 We believe the General Assembly's intended meaning was the second one — that lessees, licensees, and permittees are exempted from the Noise Abatement Act only to the extent that they are involved in a state's, political subdivision's, or other nonprofit entity's use of property. This interpretation finds support in the plain language of the exemption, it harmonizes the broader statutory scheme, and it aligns with the Noise Abatement Act's purpose and legislative history.

¶ 43 When the drafters of a statutory section separate elements with punctuation and the disjunctive "or," that ordinarily demarcates different categories. *Kulmann v. Salazar*, 2022 CO 58, ¶ 33. Here, the disjunctive "or" was included twice — once before "any other" nonprofit entities or corporations and again before the "lessees, licensees, and permittees" clause. § 25-12-103(11). Being careful not to add words to or subtract words from the statute, *Nieto*, ¶ 12, we conclude that the duplicate inclusion of the disjunctive "or" was meant to indicate a primary set of categories and a subordinate set of categories. *See Hobbs*, ¶ 69 (J. Jones, J., dissenting). To read the statute as identifying twelve equal categories of property users would render the first "or" meaningless. *See Dep't of Nat. Res.*, ¶ 20.

¶ 44 This interpretation finds further support in the use of the possessive pronoun "their." The exemption previously defined who "their" refers to: the state, its subdivisions, or other nonprofits *that use property*. *See* § 25-12-103(11). So, if we were to substitute this pronoun with the noun to which it refers, the clause would read, "or any of the state's, political subdivision's, or other nonprofit property users' lessees, licensees, or permittees." *See id.* Thus, a lessee,

licensee, or permittee does not receive an exemption unless the state, a subdivision, or another nonprofit *uses* the property in question.

¶ 45 Contrary to the BOCC's argument, we do not believe this interpretation renders the inclusion of "permittee" meaningless. The exemption sweeps into its breadth any permittee of a state, subdivision, or other nonprofit *property user*. Thus, if a political subdivision hosts a qualifying event on property it uses, those lessees, licensees, and permittees involved in putting on the event would receive protection under the exemption alongside the political subdivision.

¶ 46 This interpretation also harmonizes the exemption with the broader statutory scheme. The General Assembly, recognizing the detrimental impact that excessive noise can have on quality of life and the economy, set out to establish statewide noise limitations. § 25-12-101. To the extent that the General Assembly intended to leave room for local noise regulation, we conclude that it most clearly defined that division of power in section 25-12-108, where it established that municipalities and counties are free to adopt any standards they see fit so long as those standards are "no less

restrictive" than those set in the Noise Abatement Act. Thus, the Noise Abatement Act set the minimum standards, while leaving room for localities to create even more restrictive noise limits. *See id.*; *see also Hobbs*, ¶ 63 (J. Jones, J., dissenting).

¶ 47 Finally, our interpretation finds support in the legislative history. *See Godinez*, ¶ 20 (we may resort to an ambiguous statute's legislative history to ascertain its meaning). First, the 1987 bill introducing the exemption was titled "An Act Concerning the Exemption of Property *Used by Not for Profit Entities* for Public Events from Statutory Maximum Permissible Noise Levels," suggesting that the drafters always intended to exempt only events on property used by governmental and nonprofit actors. Ch. 212, 1987 Colo. Sess. Laws 1154 (emphasis added); *see also Hobbs*, ¶ 75 (J. Jones, J., dissenting); *see also Land Owners United, LLC v. Waters*, 293 P.3d 86, 93-94 (Colo. App. 2011) ("The title of a bill is a factor that may be considered in determining legislative intent.").

¶ 48 The *Hobbs* dissent also identified various statements by the bill's proponents that lend further support to this interpretation. *See Hobbs*, ¶ 76 (J. Jones, J., dissenting). While we do not recount them all here, we find the following most persuasive.

¶ 49 In introducing the bill to the House Finance Committee, bill sponsor Representative Schauer explained, "There is no exemption for, in essence, open air concerts. If someone, for instance, that surrounded Wash Park wanted to enjoin the city from having open air concerts at Wash Park, they could do it." Hearing on H.B. 1340 before the H. Fin. Comm., 56th Gen. Assemb., 1st Reg. Sess. (Apr. 1, 1987); *see also Hobbs*, ¶ 76 (J. Jones, J., dissenting). When asked about the Centennial amphitheater Fiddler's Green — the apparent impetus for the bill — Representative Schauer explained that while the bill applied to the "private, nonprofit facility," it also applied more broadly. Hearing on H.B. 1340 before the H. Fin. Comm., 56th Gen. Assemb., 1st Reg. Sess. (Apr. 1, 1987); *see also Hobbs*, ¶ 76 (J. Jones, J., dissenting). Other contemplated exemptions included a fireworks show at the Pueblo State Fair Grounds or a concert performed by the Air Force Academy Band at a city park in Colorado Springs, so long as the locality did not pass local ordinances prohibiting such actions. Hearing on H.B. 1340 before the H. Fin. Comm., 56th Gen. Assemb., 1st Reg. Sess. (Apr. 1, 1987); *see also Hobbs*, ¶ 76 (J. Jones, J., dissenting). Each example involved a public or nonprofit entity hosting a qualifying

event. Nothing in the discussion indicated that the sponsor contemplated the exemption would apply to a concert or festival hosted by a private, for-profit promoter on property not used by one of the three primary entities identified in the exemption.

¶ 50 Similarly, bill sponsor Senator Bird explained to the Senate State Affairs Committee, in response to a question about rock concerts at the University of Colorado's Folsom Field, that for-profit concerts would be exempt from the Noise Abatement Act *if* the concerts were held by a nonprofit entity (there, the state). Hearing on H.B. 1340 before the S. State Affs. Comm., 56th Gen. Assemb., 1st Reg. Sess. (Apr. 27, 1987); *see also Hobbs*, ¶ 76 (J. Jones, J., dissenting).

¶ 51 For these reasons, we conclude that the General Assembly intended that the exemption apply to property that the state, localities, and nonprofit entities use, and to lessees, licensees, or permittees of those entities for a qualifying event.

¶ 52 As our foregoing analysis foreshadows, we do not believe that the General Assembly intended to ascribe the first meaning to the exemption — that all twelve subcategories are separately exempt from the Noise Abatement Act. As previously discussed, this

interpretation renders the first disjunctive "or" meaningless and it ascribes to the possessive pronoun "their" a meaning that fails to fully account for the nouns proceeding it. Worse, this interpretation finds no affirmative support in the legislative history and yields absurd results.

¶ 53 As written, the statute identifies the state, political subdivisions, and other nonprofit entities. It also identifies lessees, licensees, and permittees of the same. Without proper limitation, the entities that could fall into these twelve categories are effectively endless. By way of example, imagine how many leases the State of Colorado, or even the City and County of Denver, issues each year for its properties. Is every tenant, company, or professional organization that leases space in a government building and hosts a qualifying event exempt from the Noise Abatement Act simply by leasing property from the government? Imagine the sheer quantity of permits the state issues in a calendar year for countless public health, safety, and development purposes. Indeed, the regulatory scheme within Chaffee County alone — which includes land use change permits, building permits, plat corrections, special event

permits, and individual sewage disposal system permits — is vast.[5] Does every permit holder receive shelter from nuisance litigation simply by possessing a permit? Even without wading into the question of whether "licensee" was intended to include those who hold professional or driver's licenses, *see Hobbs*, ¶ 74 n.8 (J. Jones, J., dissenting), it is clear that such an interpretation would cause the exemption to swallow the rule. If the legislature intended to exempt only holders of *amplified noise permits* from the Noise Abatement Act, it could have said so. *See id.* at ¶ 32 (majority opinion). But until such a limitation is more clearly defined legislatively, we must presume that the General Assembly did not intend such an untenably broad exemption.

¶ 54 The *Hobbs* majority states that the foregoing "parade of absurdities" would not occur, *id.* at ¶ 49, based on the last sentence of section 25-12-103(11), which reads, "This subsection (11) shall not be construed to preempt or limit the authority of any political subdivision having jurisdiction to regulate noise abatement." The

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[5] Articles one through four of Chaffee County's Land Use Code house pertinent regulatory provisions. Chaffee Cnty. Land Use Code arts. 1-4, https://perma.cc/U7DG-F5T6.

majority concluded that its broad interpretation will not yield absurd results because localities retain power to regulate noise through the issuance of amplified noise permits. *Hobbs*, ¶¶ 50-51. But even so, the remaining problem is exemplified by what happened here: such a broad reading of the exemption effectively forecloses a plaintiff's ability to seek relief for an excessively noisy qualifying event — permitted or not — against any private actor that falls within one of the twelve expansive categories. And yet, the General Assembly saw fit to create a statutory cause of action to abate violations of the Noise Abatement Act. *See* § 25-12-104. Coupled with the other indicia of legislative intent that we have discussed, we do not believe that the General Assembly intended the exemption to cut as broadly as the *Hobbs* majority would have it.

¶ 55 For these reasons, we conclude that the exemption applies to property that the state, the state's political subdivisions, and other nonprofit entities use to hold a qualifying event. To the extent that one of the foregoing users has associated lessees, licensees, or

permittees for the qualifying event, those parties are also exempt from the Noise Abatement Act.[6]

IV. Attorney Fees

¶ 56 The Promoter defendants seek attorney fees under section 13-17-201(1), C.R.S. 2023, and appellate attorney fees under C.A.R. 39.1. Section 13-17-201(1) provides that when a tort action is dismissed on a defendant's C.R.C.P. 12(b) motion, the defendant shall receive reasonable attorney fees incurred in defending against the action. Because we reverse the district court's dismissal for lack of subject matter jurisdiction under Rule 12(b)(1) and disagree with the court's interpretation of section 25-12-103(11) underlying its Rule 12(b)(5) dismissal, the Promoter defendants are not now entitled to those fees. *See also* § 13-17-201(2) (no fees for a good

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[6] We recognize that a related question flows from our conclusion: What qualifies as a "use of property" within the meaning of section 25-12-103(11), C.R.S. 2023? Does a nonprofit that, as here, secures a lease for private property and then subleases the property to a private concert promoter "use" the property? We do not address this question because the existing record does not allow us to determine whether SMAPT qualifies as a nonprofit entity or corporation, so a legal conclusion on the issue would be advisory until that threshold question is answered. *See Stor-N-Lock Partners # 15, LLC v. City of Thornton*, 2018 COA 65, ¶ 38 (holding that this court does not have authority to issue advisory opinions).

faith, nonfrivolous claim to establish the meaning of a law if the meaning has not been determined by the Colorado Supreme Court and the plaintiff has adequately pleaded the claim in its complaint). For the same reason, the Promoter defendants are not entitled to appellate attorney fees under C.A.R. 39.1.

V. Disposition

¶ 57 We affirm in part and reverse in part. We affirm the district court's judgment that it lacked subject matter jurisdiction to review the plaintiffs' claim against the BOCC. We reverse the district court's dismissal of the statutory nuisance, common law nuisance, conspiracy to commit nuisance, and declaratory judgment claims against the Promoter defendants. We remand for further development of the factual record, including SMAPT's non-profit status. We also remand for the court to resolve, in light of this opinion, the plaintiffs' request that the Promoter defendants be enjoined from hosting concerts at Meadows Farm that exceed the Noise Abatement Act's limits.

JUDGE GROVE and JUDGE SULLIVAN concur.