SUMMARY
April 29, 2021

2021COA60

No. 20CA0205, *Walker Commercial v. Brown* — Civil Procedure — Time — Enlargement — Excusable Neglect — Judicial Review — C.R.C.P. 106 — Review of Governmental Body Exercising Judicial or Quasi-Judicial Functions — Limitations as to Time

In this C.R.C.P. 106(a)(4) action, a division of the court of appeals considers whether the district court erred by dismissing the plaintiff's complaint for lack of subject matter jurisdiction because the complaint was filed two days after the jurisdictional deadline set by C.R.C.P. 106(b). Pursuant to C.R.C.P. 6(b)(2), the plaintiff asked the court to accept the untimely complaint, but its request was denied.

The division first concludes that the jurisdictional deadline set by C.R.C.P. 106(b) applies to plaintiff's C.R.C.P. 106(a)(4) complaint, rejecting plaintiff's contention that a municipal code provision provides an alternative deadline. Then, as a matter of first

impression, the division addresses whether C.R.C.P. 6(b)(2) allows a court to accept a C.R.C.P. 106(a)(4) complaint filed beyond the jurisdictional deadline set by C.R.C.P. 106(b) upon a showing of excusable neglect. Because the division concludes that it does, the division also clarifies that the standard for determining whether excusable neglect exists under C.R.C.P. 6(b)(2) parallels the excusable neglect standard under C.R.C.P. 60(b) and requires a balancing of the equities.

Because the district court failed to consider all pertinent factors when denying the plaintiff's C.R.C.P. 6(b)(2) motion for enlargement of time, the division reverses the district court's orders and remands the case for further proceedings.

COLORADO COURT OF APPEALS **2021COA60**

Court of Appeals No. 20CA0205
Arapahoe County District Court No. 19CV32190
Honorable Elizabeth Weishaupl, Judge

Walker Commercial, Inc.,

Plaintiff-Appellant,

v.

Marshall P. Brown, in his official capacity as Director of Water of the City of Aurora, Colorado,

Defendant-Appellee.

ORDERS REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE BROWN
Román and Welling, JJ., concur

Announced April 29, 2021

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Laurel Witt, David Broadwell, Denver, Colorado, for Amicus Curiae Colorado Municipal League

¶ 1 Plaintiff, Walker Commercial, Inc. (Walker), appeals three district court orders that resulted in the dismissal of its C.R.C.P. 106(a)(4) complaint seeking review of a fee imposed by the City of Aurora (the City). The district court concluded it lacked jurisdiction because Walker filed the complaint two days after the deadline set by C.R.C.P. 106(b). It also denied Walker's motion for extension of time filed pursuant to C.R.C.P. 6(b)(2), concluding that C.R.C.P. 6(b) does not authorize a court to extend a jurisdictional deadline like the one in C.R.C.P. 106(b) and that, even if C.R.C.P. 6(b)(2) could apply, Walker failed to demonstrate that its untimely filing resulted from excusable neglect.

¶ 2 As an issue of first impression, we conclude that C.R.C.P. 6(b)(2) authorizes a court to accept a C.R.C.P. 106(a)(4) complaint filed past the deadline set by C.R.C.P. 106(b) upon a showing of excusable neglect. We also clarify that the standard for evaluating excusable neglect under C.R.C.P. 6(b)(2) parallels the standard under C.R.C.P. 60(b) and requires a balancing of the equities. Because the district court did not consider all the pertinent factors when evaluating Walker's C.R.C.P. 6(b)(2) motion, we reverse the orders and remand the case for further proceedings.

I. Background

¶ 3 In the 1980s, certain real property situated in the City was subdivided and platted to be developed into a self-storage facility (the Property). Walker bought the Property in 2011. In 2017, Walker's proposal to develop the Property was approved.

¶ 4 In April 2019, Walker received an invoice from the City for a storm drain development fee (the Fee). Walker disagreed that it owed the Fee, paid it under protest, and petitioned the City's Director of Water (Director) for an administrative hearing pursuant to the Aurora City Code (the Code).

¶ 5 In May 2019, a city attorney left Walker's attorney a voicemail message stating that the City had decided to refund the Fee because it agreed the Fee was not due or owing. But the Director later emailed Walker's attorney retracting the city attorney's communication that the Fee was not due or owing and insisting a hearing be scheduled.

¶ 6 On July 15, 2019, the Director held a hearing on Walker's petition. On August 13, 2019, the Director emailed Walker stating that the City would accept $74,140.32 for the Fee.

¶ 7 Walker's attorney called the City to determine whether the email was the Director's final decision and learned that it was. So, the next day, Walker's attorney emailed the City: "Per our phone conversation, this email confirms that the [August 13 email] was intended as (and is) the City's final decision on the matter." The City did not mail or personally serve the final decision on Walker.

¶ 8 On September 12, 2019, thirty days after the August 13 email, Walker filed a complaint in the district court pursuant to C.R.C.P. 106(a)(4) seeking review of the Director's final decision. The complaint alleged that it was timely filed because the applicable provision of the Code provides a thirty-day deadline to appeal.

¶ 9 The City filed a motion to dismiss Walker's claim for lack of subject matter jurisdiction pursuant to C.R.C.P. 12(b)(1), arguing that Walker's complaint was time barred under C.R.C.P. 106(b), which states that a complaint seeking review under C.R.C.P. 106(a)(4) "shall be filed in the district court not later than 28 days after the final decision of the body or officer." In lieu of a response to the motion to dismiss, Walker filed an amended complaint. It reasserted its C.R.C.P. 106(a)(4) claim but, among other differences, alleged that the Director's August 13 email was not a "final

decision," so the clock on its time to appeal had never started running.

¶ 10 The City filed a motion to dismiss the amended complaint, reasserting its argument that the action was time barred. Walker filed a response and a motion for an extension of time pursuant to C.R.C.P. 6(b)(2), in which it argued that its untimely filing of the original complaint was the result of excusable neglect.

¶ 11 On December 20, 2019, the district court issued two orders: (1) a single-paragraph order concluding that Walker's amended complaint was untimely filed and dismissing the case for lack of subject matter jurisdiction; and (2) an order denying Walker's motion for an extension of time, concluding that C.R.C.P. 6(b) is inapplicable to the jurisdictional deadline contained in C.R.C.P. 106(b) and that, in any event, Walker's mistake or ignorance of the law was not excusable neglect.

¶ 12 Then, on January 28, 2020, the district court issued an eight-page order titled, "Order re: Defendant's Motion to Dismiss Per C.R.C.P. 12(b)(1)." In this third order, the court further explained why Walker's C.R.C.P. 106(a)(4) action was time barred, why Walker

failed to demonstrate excusable neglect, and why holding Walker to the C.R.C.P. 106(b) deadline did not violate due process.[1]

II. Analysis

¶ 13 Walker contends that its C.R.C.P. 106(a)(4) action was timely filed in the district court because the deadline in C.R.C.P. 106(b) does not apply. If we conclude that the C.R.C.P. 106(b) deadline applies, however, then Walker contends that enforcing that deadline under the circumstances presented here violates its right to due process. In the alternative, Walker contends that the untimely filing of its complaint was the result of excusable neglect and that the court should have accepted the complaint two days late

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[1] The January 28 order does not mention the amended complaint or the motion to dismiss the amended complaint, but instead references the City's motion to dismiss Walker's original complaint. Walker characterizes the January 28 order as an order granting the City's motion to dismiss the original complaint. The City characterizes the order as "providing additional grounds in support of" the district court's dismissal of Walker's amended complaint. The text of the order appears to support Walker's characterization. However, the original complaint was superseded by the filing of the amended complaint, *see Currier v. Sutherland*, 218 P.3d 709, 715 (Colo. 2009), and the more robust January 28 order follows the same rationale as the December 20 orders. So, for purposes of resolving this appeal, we will consider the three orders together as reflecting the court's reasoning for dismissing Walker's amended complaint.

pursuant to C.R.C.P. 6(b)(2). Finally, Walker contends that the district court erred by dismissing the third claim asserted in its amended complaint because that claim is not governed by the deadline in C.R.C.P. 106(b).

¶ 14 We conclude that the deadline in C.R.C.P. 106(b) applies to Walker's C.R.C.P. 106(a)(4) complaint and that holding Walker to that deadline under the circumstances of this case does not violate its right to due process. We also conclude that C.R.C.P. 6(b)(2) authorizes a court to accept a C.R.C.P. 106(a)(4) complaint filed beyond the deadline set by C.R.C.P. 106(b) upon a showing of excusable neglect. And we conclude that the standard for evaluating excusable neglect under C.R.C.P. 6(b)(2) parallels the excusable neglect standard under C.R.C.P. 60(b) and requires a balancing of the equities.

A. Walker's C.R.C.P. 106(a)(4) Complaint Was Untimely

1. C.R.C.P. 106(b)'s Twenty-Eight-Day Deadline Applies

¶ 15 Walker contends that the deadline in C.R.C.P. 106(b) applies only where a statute authorizes judicial review of agency action, not where, as here, an ordinance authorizes such review. It argues that a thirty-day deadline set forth in the Code controls. We disagree.

¶ 16 We review de novo whether a district court has subject matter jurisdiction over an action. *Maslak v. Town of Vail*, 2015 COA 2, ¶ 10. And to the extent our review requires us to interpret the Colorado Rules of Civil Procedure, we do so de novo. *Id.*

¶ 17 To interpret the rules, we apply well-settled principles of statutory construction. *Schaden v. DIA Brewing Co.*, 2021 CO 4M, ¶ 32. Thus, we interpret the rules according to their commonly understood and accepted meanings. *Id.* We read them as a whole, giving consistent, harmonious, and sensible effect to all of their parts and avoiding constructions that would render any words or phrases superfluous or lead to illogical or absurd results. *Id.*; *accord Willhite v. Rodriguez-Cera*, 2012 CO 29, ¶ 9. We also construe the rules "liberally to effectuate their objective to secure the just, speedy, and inexpensive determination of every case and their truth-seeking purpose." *Maslak*, ¶ 10 (quoting *DCP Midstream, LP v. Anadarko Petroleum Corp.*, 2013 CO 36, ¶ 24); *see also* C.R.C.P. 1.

¶ 18 C.R.C.P. 106(a)(4) authorizes judicial review "[w]here, in any civil matter, any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its

jurisdiction or abused its discretion, and there is no plain, speedy, and adequate remedy otherwise provided by law." C.R.C.P. 106(b) provides, in relevant part, as follows:

> Where a statute provides for review of the acts of any governmental body or officer or judicial body by certiorari or other writ, or for a proceeding in quo warranto, relief therein provided may be had under this Rule. If no time within which review may be sought is provided *by any statute*, a complaint seeking review under subsection (a)(4) of this Rule shall be filed in the district court not later than 28 days after the final decision of the body or officer.

(Emphasis added.) The rule is clear that, unless *a statute* provides a different deadline for seeking review of a final agency decision, a Rule 106(a)(4) complaint must be filed within twenty-eight days.

¶ 19 Notwithstanding the plain language of the rule, Walker argues that the deadline in Rule 106(b) applies only when judicial review of the final agency decision is authorized in the first instance by a statute — not an ordinance. It asserts that the first sentence of subsection (b) is a specific authorization to seek judicial review whenever a statute provides for it, and that the second sentence means that "if *the authorizing statute* — i.e., the same 'statute' referenced in the first sentence — does not indicate a timeframe

'within which review may be sought,' then the deadline for filing is '28 days after the final decision.'" According to Walker, because an ordinance authorizes review in this case, Rule 106(b)'s twenty-eight-day deadline does not apply.

¶ 20 It is true that an ordinance — Code section 138-398(b) — authorizes judicial review in this case. But we do not read Rule 106(b) as Walker does.

¶ 21 First, we must consider subsections (a) and (b) together. *See Schaden*, ¶ 32. Subsection (a) begins, "[s]pecial forms of pleadings and writs in habeas corpus, mandamus, quo warranto, certiorari, prohibition, scire facias, and proceedings for the issuance of other remedial writs, as heretofore known, are hereby abolished in the district court." C.R.C.P. 106(a). The first sentence of subsection (b) then clarifies that "[w]here a statute provides for review of the acts of any governmental body or officer or judicial body *by certiorari or other writ, or for a proceeding in quo warranto*" — forms of pleadings that subsection (a) "abolished" — "relief therein provided may be had under this Rule." C.R.C.P. 106(b) (emphasis added); *see People in Interest of B.C.*, 981 P.2d 145, 148-49 (Colo. 1999) (noting that Rule 106 abolished "the technical pleading requirements of the

writs that existed before the rule," while the substance of such remedies survived).

¶ 22 The first sentence of subsection (b) simply explains that certain remedies that appear to have been eliminated by the first sentence of subsection (a) may nonetheless be pursued under Rule 106. It is not a specific authorization to seek judicial review under Rule 106 whenever "any statute" provides for it, as Walker contends. Such a broad authorization would be superfluous, as the Colorado Rules of Civil Procedure cannot alter the substantive rights of the parties. *See Schaden*, ¶ 32 (we avoid constructions that render words or phrases superfluous); *Churchill v. Univ. of Colo. at Boulder*, 293 P.3d 16, 32 (Colo. App. 2010) ("[T]he rules of civil procedure are procedural and do not attempt 'to abridge, enlarge, nor modify the substantive rights of any litigants.'") (citations omitted), *aff'd on other grounds*, 2012 CO 54.

¶ 23 Second, the first sentence of subsection (b) does not limit application of the twenty-eight-day deadline in the second sentence in any way. The second sentence plainly states that "[i]f no time within which review may be sought is provided by any statute," the twenty-eight-day deadline applies. C.R.C.P. 106(b).

¶ 24 Walker asks us to read "any statute" to mean "the authorizing statute . . . referenced in the first sentence" of subsection (b). But the phrase "any statute" does not refer to a specific statute or type of statute referenced in the preceding sentence. On the contrary, the word "any" is not limiting at all. *See Proactive Techs., Inc. v. Denver Place Assocs. Ltd. P'ship*, 141 P.3d 959, 961 (Colo. App. 2006) (use of the word "any" without restriction or limitation is generally understood as a term of expansion that means "all").

¶ 25 Walker's interpretation contradicts the plain language of the rule and requires us to read words into it that do not exist. We will not do so. *See In re Marriage of Runge*, 2018 COA 23M, ¶ 33 ("[W]e may not 'judicially legislate' by reading the rule 'to accomplish something the plain language does not suggest, warrant or mandate.'" (quoting *Scoggins v. Unigard Ins. Co.*, 869 P.2d 202, 205 (Colo. 1994))); *see also People v. Diaz*, 2015 CO 28, ¶ 15 ("[W]e must accept the General Assembly's choice of language and not add or imply words that simply are not there." (quoting *People v. Benavidez*, 222 P.3d 391, 393-94 (Colo. App. 2009))); *Boulder Cnty.*

Bd. of Comm'rs v. HealthSouth Corp., 246 P.3d 948, 951 (Colo. 2011) ("We do not add words to a statute.").[2]

¶ 26 If "any statute" provides an alternative deadline, the alternative deadline applies in lieu of the twenty-eight-day deadline in C.R.C.P. 106(b). If no alternative deadline is provided in "any statute," the twenty-eight-day deadline applies. C.R.C.P. 106(b). Thus, unless Walker can point to a statute providing an alternative deadline for seeking judicial review of the Director's final decision, it was required to file its complaint within twenty-eight days.

¶ 27 To the extent Walker contends that the Code provides the applicable alternative deadline, we reject that contention too. "By

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[2] Walker urges us to rely on the title of subsection (b), "Limitations as to Time," to conclude that the second sentence must be limited by the first sentence. Read in isolation, it argues, the first sentence has nothing to do with "limitations on time" as it addresses only the authority — not the timing — to bring a Rule 106(a)(4) action. We acknowledge that the first sentence of subsection (b) does not contain a time limitation. But a title "does not constitute part of [a] statute and is not controlling regarding its construction or interpretation." *United States v. Rakes*, 510 F.3d 1280, 1289 (10th Cir. 2007) (quoting 2A Norman Singer & Shambie Singer, *Sutherland Statutory Construction* § 47:3 (7th ed.)); *see also Jefferson Cnty. Bd. of Equalization v. Gerganoff*, 241 P.3d 932, 936 (Colo. 2010) (title of a statute is not dispositive of legislative intent). We decline to interpret Rule 106(b) contrary to its plain meaning based on its title.

its terms, C.R.C.P. 106(b) is preempted only by differing time limits which are 'provided by any *statute*.'" *Gold Star Sausage Co. v. Kempf*, 653 P.2d 397, 400-01 (Colo. 1982) (quoting C.R.C.P. 106(b)). An ordinance is not a statute and cannot provide an alternative deadline to commence a C.R.C.P. 106(a)(4) action. *Id.* at 401 ("Rule 106(b) does not defer to different time frames provided by municipal ordinance.").

¶ 28 The August 13 email from the Director is the final decision for which Walker seeks judicial review.[3] Accordingly, Walker's Rule 106(a)(4) petition was due twenty-eight days later, on September 10. Because Walker's complaint was not filed until September 12, it was filed two days too late. *See Kempf*, 653 P.2d at 401 (explaining that failure to bring a C.R.C.P. 106(a)(4) proceeding within the twenty-eight-day time limit is a jurisdictional defect).

¶ 29 Having concluded that the deadline in Rule 106(b) controls, we must consider whether strictly applying that deadline under the circumstances of this case violates Walker's right to due process.

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[3] Despite the seemingly contrary allegation in its amended complaint, Walker conceded at oral arguments that the August 13 email was the Director's final decision.

2. Applying C.R.C.P. 106(b)'s Twenty-Eight-Day Deadline Does Not Violate Due Process

¶ 30 Walker contends that applying C.R.C.P. 106(b)'s twenty-eight-day deadline under the circumstances presented — where the Code provides a thirty-day deadline to appeal — is fundamentally unfair and violates its right to due process. We are not persuaded.

¶ 31 We review challenges to the constitutionality of statutes and rules, including as-applied challenges, de novo. *Adams v. Sagee*, 2017 COA 133, ¶ 5; *Hickman v. Catholic Health Initiatives*, 2013 COA 129, ¶ 6. When asserting an as-applied challenge, the party contends that the statute or rule would be unconstitutional under the circumstances in which the party has acted or proposes to act. *Sagee*, ¶ 6; *Developmental Pathways v. Ritter*, 178 P.3d 524, 534 (Colo. 2008).

¶ 32 We also interpret municipal ordinances de novo, employing "well-worn tools of statutory interpretation." *City of Golden v. Sodexo Am., LLC*, 2019 CO 38, ¶ 23. If the ordinance is clear and unambiguous, we apply it as written. *Id.*

¶ 33 The premise of Walker's as-applied constitutional challenge is that the Code provides a thirty-day deadline to appeal the Director's

final decision, so enforcing a shorter deadline violates due process. But the Code contains no such deadline.

¶ 34 The Code directs property owners who dispute the amount of fees assessed by the Director to petition for a hearing. Code § 138-398(a). Within ten days after the conclusion of the hearing, the Director shall make a final decision in accordance with the evidence submitted, which "shall be considered a final order of the director of water and may be reviewed under rule 106(a)(4) of the Colorado Rules of Civil Procedure as provided in this article." Code § 138-398(c). Final decisions "shall become effective upon the expiration of 30 days after notice thereof is mailed to or personally served upon the petitioner, unless proceedings for review by the district court are commenced within that time." Code § 138-398(d).

¶ 35 Thus, the Code indicates that the Director's final decision "shall become effective" thirty days after service, unless "proceedings for review by the district court are commenced within that time." Although the Code essentially holds the Director's decision in abeyance for thirty days to allow an aggrieved party time to appeal, it does not set the deadline to timely seek review. Instead, the Director's final decision "may be reviewed under [R]ule

106(a)(4)." Code § 138-398(c). Complaints filed under Rule 106(a)(4) are governed by the deadline in Rule 106(b), which is twenty-eight days. C.R.C.P. 106(b).

¶ 36 Because the Code does not provide a thirty-day deadline to appeal the Director's final decision, Walker's argument that applying a twenty-eight-day deadline violates due process fails.

¶ 37 We next determine whether the district court was authorized by C.R.C.P. 6(b)(2) to accept Walker's untimely Rule 106(a)(4) complaint upon a showing of excusable neglect.

B. Should the District Court Have Accepted Walker's Untimely Complaint under C.R.C.P. 6(b)(2)?

1. C.R.C.P. 6(b)(2) Authorizes a Court to Accept a C.R.C.P. 106(a)(4) Complaint Filed After C.R.C.P. 106(b)'s Jurisdictional Deadline Upon a Showing of Excusable Neglect

¶ 38 Walker contends that the district court erred by concluding that C.R.C.P. 6(b)(2) does not allow it to accept a C.R.C.P. 106(a)(4) complaint filed beyond C.R.C.P. 106(b)'s jurisdictional deadline. We agree.

¶ 39 As noted, we interpret the Colorado Rules of Civil Procedure de novo, applying well-settled principles of statutory construction.

Schaden, ¶ 32; *Garcia v. Schneider Energy Servs., Inc.*, 2012 CO 62, ¶ 17.

¶ 40 By its plain language, C.R.C.P. 6(b)(2) authorizes a court to accept an untimely C.R.C.P. 106(a)(4) complaint when the failure to timely file was the result of excusable neglect. Rule 6(b) provides, in relevant part, as follows:

> When by these rules . . . an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion . . . (2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rule 60(b) and may extend the time for taking any action under Rule 59 only as allowed by that rule.

¶ 41 Rule 106(b) is a rule of civil procedure that requires a Rule 106(a)(4) complaint to be filed within a "specified period." Thus, Rule 6(b)(2) plainly applies. *See Farm Deals, LLLP v. State*, 2012 COA 6, ¶ 14 (explaining that the phrase "these rules" in Rule 6(b) "plainly refers to the Colorado Rules of Civil Procedure").

¶ 42 In addition, C.R.C.P. 6(b)(2) expressly prohibits a court from extending the deadlines in C.R.C.P. 59 and C.R.C.P. 60(b), *see Schuster v. Zwicker*, 659 P.2d 687, 689 (Colo. 1983), but does not

exclude any other rule. The presence of two enumerated exceptions demonstrates the intent of the Colorado Supreme Court[4] that Rule 6(b)(2) apply to all other rules of civil procedure that require an act to be done within a specified time — including Rule 106(b). *See Town of Telluride v. Lot Thirty-Four Venture, L.L.C.*, 3 P.3d 30, 35 (Colo. 2000) ("[T]he court should not read a statute to create an exception that the plain language does not suggest, warrant, or mandate."); *Beeghly v. Mack*, 20 P.3d 610, 613 (Colo. 2001) ("Under the rule of interpretation expressio unius exclusio alterius, the inclusion of certain items implies the exclusion of others."). If the Colorado Supreme Court intended to exclude Rule 106(b) from Rule 6(b)(2)'s reach, it could have done so, just as it did with Rules 59 and 60(b).

¶ 43 Notwithstanding the plain language of the rule, the City argues that because Rule 106(b)'s deadline is "jurisdictional," it cannot be "tolled or waived." *See Auxier v. McDonald*, 2015 COA 50, ¶ 12. But the concepts of tolling and waiver are distinguishable

[4] The Colorado Rules of Civil Procedure are promulgated by the Colorado Supreme Court with input from the Civil Rules Committee. *Williams v. Crop Prod. Servs., Inc.*, 2015 COA 64, ¶ 17.

from the court's extension of a deadline or acceptance of an untimely filing.

¶ 44 Tolling results in a "delay" or "suspension" of a limitations period. *See Morrison v. Goff*, 91 P.3d 1050, 1053 (Colo. 2004) ("The tolling of a statute of limitations will either 'delay the start of the limitations period' or suspend the running of the limitations period if the accrual date has passed." (quoting 51 Am. Jur. 2d *Limitation of Actions* § 169 (2000))); *see also* Black's Law Dictionary (11th ed. 2019) (defining "tolling statute" as "[a] law that interrupts the running of a statute of limitations in certain situations"). Setting aside the fact that Rule 6(b) would not apply to a limitations period established by statute, *see* C.R.C.P. 6(b) (authorizing extension of deadlines established "by these rules"), the rule does not authorize a court to delay the start of a limitations period or suspend it once it has started to run; instead, the rule authorizes the court to extend a deadline or to accept a filing made after the expiration of the deadline.

¶ 45 A "waiver" is "a voluntary relinquishment of a known right." *See Cordillera Corp. v. Heard*, 200 Colo. 72, 73, 612 P.2d 92, 93 (1980). To the extent Rule 106(b)'s deadline can be characterized as

a "right" the City can waive — an issue we do not decide — neither party argues that the City voluntarily relinquished that right. Rule 6(b) empowers *the court* — not a party — to extend the deadline or accept a late filing, even over the objection of the nonmoving party.

¶ 46 We acknowledge that the deadline in Rule 106(b) is jurisdictional. *Sagee*, ¶ 8; *see also Danielson v. Zoning Bd. of Adjustment*, 807 P.2d 541, 543 (Colo. 1990) (The "time requirement in C.R.C.P. 106(b) is jurisdictional and a complaint to review the actions of an inferior tribunal will be dismissed if it is not filed" by the deadline.); *Baker v. City of Dacono*, 928 P.2d 826, 827 (Colo. App. 1996) ("[A] C.R.C.P. 106(a)(4) action not filed within the . . . limitations period must be dismissed for lack of subject matter jurisdiction."). But that does not end our analysis. No court has answered the question before us: whether C.R.C.P. 6(b)(2) authorizes a court to accept a C.R.C.P. 106(a)(4) complaint filed after the expiration of C.R.C.P. 106(b)'s jurisdictional deadline.[5] We

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[5] In *Adams v. Sagee*, the division noted that "[n]othing in [Rule 106(b)] countenances any exceptions" to the time requirement, 2017 COA 133, ¶ 8, but the division also acknowledged that it was not addressing the question of whether C.R.C.P. 6(b) applied to C.R.C.P. 106(b), *id.* at ¶ 3 n.1. We agree with the *Sagee* division

are not aware of (and the parties have not provided us) any authority holding that a jurisdictional deadline established by a court-promulgated procedural rule cannot, as a matter of law, be extended. On the contrary, our courts have concluded that other rule-based jurisdictional deadlines *can* be extended based upon a showing of good cause or excusable neglect.

¶ 47 For example, in *Estep v. People*, the Colorado Supreme Court considered whether C.A.R. 26(b) authorized an extension of the jurisdictional deadline in C.A.R. 4(b) for filing a notice of appeal in a criminal case. 753 P.2d 1241, 1246 (Colo. 1988). C.A.R. 26(b) authorizes the appellate court "for good cause shown" to permit an act to be done after the expiration of the time prescribed in the

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that Rule 106(b) does not itself provide any mechanism for extending the twenty-eight-day filing deadline. But we note that Rule 6(b) has been applied to extend deadlines imposed by other rules of civil procedure that, like Rule 106(b), do not expressly authorize time extensions. *See Town of Silverthorne v. Lutz*, 2016 COA 17, ¶¶ 8-11 (noting that C.R.C.P. 12's twenty-one-day deadline to file an answer may be extended under C.R.C.P. 6(b)); *People in Interest of M.A.M.*, 167 P.3d 169, 173-74 (Colo. App. 2007) (concluding that C.R.M. 7(a)'s deadline may be extended upon a showing of excusable neglect); *Garcia v. Title Ins. Co. of Minn.*, 712 P.2d 1114, 1114-15 (Colo. App. 1985) (noting that the ninety-day period under C.R.C.P. 25(a)(1) for substituting a party after a suggestion of death may be extended under C.R.C.P. 6(b)).

rules for performing the act. The court explained that, under the facts of the case, counsel's neglect in failing to timely file could constitute "good cause" only if it met the "excusable neglect" standard. *Estep*, 753 P.2d at 1247. The court concluded that the neglect resulting in the untimely filing was inexcusable, but it determined that the "good cause" standard allowed it to consider factors like prejudice to the nonmovant as well as the interests of judicial economy. *Id.* at 1248. Those equitable considerations favored permitting the late filing, notwithstanding that the deadline was jurisdictional. *Id.* at 1248-49; *see also P.H. v. People in Interest of S.H.*, 814 P.2d 909, 912-13 (Colo. 1991) (confirming that the court of appeals has discretion to extend the jurisdictional deadline for filing a notice of appeal under C.A.R. 4(a) upon a showing of "excusable neglect").

¶ 48 In *Farm Deals*, a division of this court considered whether C.A.R. 26(b) authorized an extension of the deadline in C.A.R. 4.2(d) for filing a petition for an interlocutory appeal in a civil case. *Farm Deals*, ¶ 18. It first concluded that the deadline in C.A.R. 4.2(d) was jurisdictional, but "this conclusion [did] not end the inquiry." *Id.* at ¶ 19. It reasoned that, "[t]hough C.A.R. 26(b) says that no such

enlargement may be made for filing a notice of appeal under C.A.R. 4(a), it does not currently contain a like exception for C.A.R. 4.2(d)." *Id.* Thus, even though the division concluded that C.A.R. 4.2(d) was a jurisdictional deadline, it held that C.A.R. 26(b) allowed that jurisdictional deadline to be extended. *Id.* And it clarified that "[t]o obtain an extension for 'good cause' under C.A.R. 26(b), a party must establish that its failure to meet the applicable deadline was due to 'excusable neglect.'" *Id.* at ¶ 20.

¶ 49 We find these authorities persuasive on the question of whether a jurisdictional deadline established by a court-promulgated procedural rule may be extended.[6] By its plain language, Rule 6(b) applies to Rule 106(b). Thus, we conclude that Rule 6(b)(2) authorizes a court to accept a Rule 106(a)(4) complaint

[6] We acknowledge that these cases involved jurisdictional deadlines set by the Colorado Appellate Rules rather than by the Colorado Rules of Civil Procedure, but we are not aware of (and the parties have not identified for us) any other jurisdictional deadlines created by the Colorado Rules of Civil Procedure. We find the Colorado Appellate Rules, which are similarly promulgated by the Colorado Supreme Court with input from the Appellate Rules Committee, analogous.

filed beyond the deadline set by Rule 106(b) upon a showing of excusable neglect.[7]

¶ 50 We next determine whether the district court erred by concluding that Walker failed to establish excusable neglect.

2. The District Court's Analysis of Excusable Neglect under C.R.C.P. 6(b)(2) Was Incomplete

¶ 51 Walker contends that the district court abused its discretion by denying its C.R.C.P. 6(b)(2) motion because the court interpreted "excusable neglect" too narrowly and failed to consider the equities. We conclude that the court's excusable neglect analysis was incomplete, requiring us to remand for further proceedings.

¶ 52 We review a trial court's decision to grant or deny relief under Rule 6(b) for an abuse of discretion. *Premier Members Fed. Credit Union v. Block*, 2013 COA 128, ¶ 9. A trial court abuses its discretion when its decision rests on a misunderstanding or misapplication of the law or is manifestly arbitrary, unreasonable, or unfair. *Vanderpool v. Loftness*, 2012 COA 115, ¶ 19.

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[7] We are sympathetic to the concerns raised in the Colorado Municipal League's amicus brief. We understand the importance of firm deadlines and the need for finality so that municipalities may operate effectively. We are not, however, empowered to rewrite the rules to achieve a particular policy outcome.

a. The Test for Excusable Neglect under C.R.C.P. 6(b)(2)

¶ 53 C.R.C.P. 6(b)(2) authorizes the court to permit an act to be done "after the expiration of the specified period" when the moving party demonstrates the failure to act was the result of "excusable neglect." The Colorado Supreme Court has described "excusable neglect" for the purposes of Rule 6(b)(2) as follows:

> Excusable neglect involves a situation where the failure to act results from circumstances which would cause a reasonably careful person to neglect a duty. It is impossible to describe the myriad situations showing excusable neglect, but in general, most situations involve 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. Failure to act due to carelessness and negligence is not excusable neglect.

Farmers Ins. Grp. v. Dist. Ct., 181 Colo. 85, 89, 507 P.2d 865, 867 (1973).

¶ 54 Colorado courts have relied on the same or a similar standard to define "excusable neglect" as a basis for relief from a judgment or order under C.R.C.P. 55(c), *In re Weisbard*, 25 P.3d 24, 26 (Colo. 2001), and C.R.C.P. 60(b), *Tyler v. Adams Cnty. Dep't of Soc. Servs.*

ex rel. Tyler, 697 P.2d 29, 31 (Colo. 1985); as a basis for accepting an untimely notice of appeal under C.A.R. 4(a), *P.H.*, 814 P.2d at 913, and C.A.R. 4(b), *Estep*, 753 P.2d at 1247; and as the required showing for an enlargement of time under C.A.R. 26(b), *Farm Deals*, ¶ 20. Thus, what constitutes "excusable neglect" is well settled.[8]

¶ 55 But, at least in the context of Rule 60(b), whether the neglect was excusable is just one factor courts must consider when determining whether to grant relief "on the basis of excusable neglect." In *Goodman Associates, LLC v. WP Mountain Properties, LLC*, the Colorado Supreme Court explained that

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[8] Because controlling Colorado authority provides us with a definition of "excusable neglect," we decline Walker's invitation to adopt the definition from *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380, 388 (1993), in which the Supreme Court explained that

> by empowering the courts to accept late filings "where the failure to act was the result of excusable neglect," Congress plainly contemplated that the courts would be permitted, where appropriate to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control.

Id. (citation omitted); *see People v. Allen*, 111 P.3d 518, 520 (Colo. App. 2004) (we are bound by the decisions of the Colorado Supreme Court).

> [its] precedent has identified three factors that guide whether to grant a [Rule 60(b)] motion . . . on the basis of excusable neglect:
>
> (1) whether the neglect that resulted in entry of judgment by default was excusable;
>
> (2) whether the moving party has alleged a meritorious claim or defense; and
>
> (3) whether relief from the challenged order would be consistent with considerations of equity.

222 P.3d 310, 319 (Colo. 2010) (quoting *Buckmiller v. Safeway Stores, Inc.*, 727 P.2d 1112, 1116 (Colo. 1986)).

¶ 56 With respect to the first factor, the court explained that "[a] party's conduct constitutes excusable neglect when the surrounding circumstances would cause a reasonably careful person similarly to neglect a duty. Common carelessness and negligence do not amount to excusable neglect." *Id.* (quoting *Weisbard*, 25 P.3d at 26). This is, essentially, the *Farmers* definition of "excusable neglect." *See Farmers*, 181 Colo. at 89, 507 P.2d at 867.

¶ 57 To satisfy the second factor, the moving party must allege facts, not just legal conclusions, to support its asserted meritorious claim or defense. *Goodman*, 222 P.3d at 319. It appears that the

purpose of this second factor is to ensure that granting the requested relief will not be futile. *See Craig v. Rider*, 651 P.2d 397, 403-04 (Colo. 1982) (explaining that a meritorious defense is one that may result in a judgment materially different than the one entered).

¶ 58 And the third factor requires the court to consider all relevant equitable factors, including but not limited to the promptness of the moving party in filing the Rule 60(b) motion, any detrimental reliance by the opposing party on the order or judgment sought to be set aside, prejudice to the opposing party if the motion were granted, and prejudice to the moving party if the motion were denied. *Goodman*, 222 P.3d at 319.

¶ 59 While a failure to satisfy any one of these factors may result in the denial of the motion, "each factor must be weighed and considered together as a part of the question whether excusable neglect exists to satisfy C.R.C.P. 60(b)(1)." *Id.* at 320; *see also Buckmiller*, 727 P.2d at 1117 (concluding that the trial court abused its discretion by failing to consider all three factors, even though it determined that prejudice to the nonmoving party outweighed any harm to the moving party from denying her motion); *Singh v.*

Mortensun, 30 P.3d 853, 856-57 (Colo. App. 2001) (determining that the trial court abused its discretion by denying motion for C.R.C.P. 60(b) relief where its order "did not mention defendant's alleged meritorious defense" and "provided no indication that it had assessed any equitable considerations").

¶ 60 So, was the district court required to consider factors other than whether the neglect was excusable — as it must when determining whether to grant relief under Rule 60(b) — when determining whether to grant relief under Rule 6(b)(2)? It appears that no Colorado appellate court has directly answered this question. For four reasons, we answer affirmatively.

¶ 61 First, in practice, the Rule 6(b)(2) and Rule 60(b) standards have been cited somewhat interchangeably. As noted, the first factor of the three-factor test set forth in *Goodman* for evaluating excusable neglect under Rule 60(b) sprang from the definition articulated in *Farmers* for excusable neglect under Rule 6(b)(2). *Goodman*, 222 P.3d at 319; *Farmers*, 181 Colo. at 89, 507 P.2d at 867. The *Farmers* definition of excusable neglect, in turn, was derived from a California case considering whether to set aside a default judgment on a showing of excusable neglect, *see Doyle v.*

Rice Ranch Oil Co., 81 P.2d 980, 981 (Cal. Dist. Ct. App. 1938), and an Oregon case considering excusable neglect as an affirmative defense in a declaratory judgment action, which took its definition of the term straight from Black's Law Dictionary, *Gov't Emp. Ins. Co. v. Herring*, 477 P.2d 903, 906 n.3 (Or. 1970). *Farmers*, 181 Colo. at 89, 507 P.2d at 867. Even the district court in this case cited the Rule 60(b) standard set forth in *People v. Weisbard*, 35 P.3d 498, 501 (Colo. O.P.D.J. 2000) when resolving Walker's Rule 6(b)(2) motion.

¶ 62 Second, courts balance equitable considerations when determining whether to accept untimely filings under Rule 6(b)(2) even without an express mandate to do so. For example, in *Town of Silverthorne v. Lutz*, the respondent landowners did not file an answer until the trial court ordered them to do so within fourteen days. 2016 COA 17, ¶ 9. The division first assumed without deciding that the answer was filed out of time. *Id.* at ¶ 10. Then it concluded that the court's order was an appropriate exercise of discretion under Rule 6(b)(2). *Id.* at ¶¶ 10-11. It did not address whether the assumed untimely filing was the result of "excusable neglect." But it noted that the condemnor did not explain how the

relatively short delay caused it any prejudice and that the parties' history of conflict placed the condemnor on notice that the landowners intended to contest the condemnation, *id.* at ¶ 12 — facts that, in our view, speak to "whether relief . . . would be consistent with considerations of equity." *Goodman*, 222 P.3d at 319 (quoting *Buckmiller*, 727 P.2d at 1116).

¶ 63 Third, a balancing of the equities has been required when considering whether excusable neglect exists in contexts other than Rule 60(b). *See, e.g.*, *SL Grp., LLC v. Go W. Indus., Inc.*, 42 P.3d 637, 641 (Colo. 2002) (requiring "balancing of the equities" when determining whether a failure to timely file a protest of a water decree was due to excusable neglect); *People v. Wiedemer*, 852 P.2d 424, 441 (Colo. 1993) (requiring "balancing the interests" when determining whether failure to timely file Crim. P. 35(c) motion resulted from justifiable excuse or excusable neglect).

¶ 64 Fourth, when evaluating excusable neglect, Colorado courts have cited with approval the balancing test employed by the Supreme Court in *Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership*, 507 U.S. 380 (1993). *See, e.g.*, *Goodman*, 222 P.3d at 321; *Wiedemer*, 852 P.2d at 441. In *Pioneer*,

the United States Supreme Court considered whether an attorney's inadvertent failure to file a proof of claim within the deadline set by the bankruptcy court could constitute "excusable neglect" within the meaning of Fed. R. Bankr. P. 9006(b)(1). 507 U.S. at 382-83. Patterned after Fed. R. Civ. P. 6(b)(1), Rule 9006(b)(1) authorizes a court "on motion made after the expiration of the specified period [to] permit the act to be done where the failure to act was the result of excusable neglect." *See Pioneer*, 507 U.S. at 391. After considering how excusable neglect is analyzed in a variety of other contexts, the Court concluded that the determination of what sorts of neglect will be considered excusable under Rule 9006(b)(1) "is at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Id.* at 395. Such circumstances include "the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.*

¶ 65 Thus, the Supreme Court requires a balancing of equities when evaluating what constitutes excusable neglect under a rule

containing language substantially similar to C.R.C.P. 6(b)(2). *See Garcia*, ¶ 10 ("While this Court is not bound to interpret our rules of civil procedure the same way the United States Supreme Court has interpreted its rules, we do look to the federal rules and federal decisions interpreting those rules for guidance."); *Garrigan v. Bowen*, 243 P.3d 231, 235 (Colo. 2010) ("Because the Colorado Rules of Civil Procedure are patterned on the federal rules, we may also look to the federal rules and decisions for guidance."). The Court expressly rejected the notion that "the question of excusable neglect is a threshold matter to be determined before the full range of equitable considerations may be taken into account." *Goodman*, 222 P.3d at 321 (citing *Pioneer*, 507 U.S. at 395 n.14). And, as the Colorado Supreme Court explained, "[w]hile our excusable neglect analysis is not identical to *Pioneer*'s, our case law similarly ascribes a more flexible meaning to excusable neglect and requires joint consideration of the reasons for the neglect and the surrounding circumstances." *Id.* at 321-22.

¶ 66 For these reasons, we conclude that the standard for evaluating excusable neglect under C.R.C.P. 6(b)(2) parallels the standard under C.R.C.P. 60(b) and requires a balancing of the

equities. That is, a court considering whether to accept an untimely filing under Rule 6(b)(2) should consider (1) whether the neglect that resulted in the untimely filing was excusable; (2) whether granting the enlargement of time would be futile; and (3) whether granting the enlargement of time would be consistent with considerations of equity.

¶ 67 With respect to the first factor, "[a] party's conduct constitutes excusable neglect when the surrounding circumstances would cause a reasonably careful person similarly to neglect a duty. Common carelessness and negligence do not amount to excusable neglect." *Goodman*, 222 P.3d at 319 (quoting *Weisbard*, 25 P.3d at 26); *see also Farmers*, 181 Colo. at 89, 507 P.2d at 867. The second factor has the same purpose as in the Rule 60(b) context — to ensure that granting the requested relief is not an empty exercise — but because Rule 6(b)(2) can apply to a variety of missed deadlines, we have tailored the language to make it more broadly applicable. And the third factor requires the court to consider all relevant circumstances, including but not limited to the promptness of the moving party in seeking relief, whether the opposing party contributed to the delay, the prejudice to the opposing party if the

motion were granted, and the prejudice to the moving party if the motion were denied.

b. The District Court's Analysis Was Incomplete

¶ 68 In denying Walker's C.R.C.P. 6(b)(2) motion, the district court considered only one factor — whether the neglect that resulted in the untimely filing was excusable. It found that Walker's "[f]ailure to properly read or interpret a statute or city code" was mere carelessness or negligence and did not constitute excusable neglect. But the court improperly treated the question of whether the neglect at issue was excusable as "a threshold matter to be determined before the full range of equitable considerations may be taken into account." *Goodman*, 222 P.3d at 321; *see also Pioneer*, 507 U.S. at 395 n.14. The court should have weighed and considered all the factors together to determine whether Walker demonstrated excusable neglect justifying the late filing of its complaint. *See Goodman*, 222 P.3d at 320. Because the district court did not make findings on the second and third factors, we cannot determine whether it assessed those factors or, if it did, whether its balancing of the equities reflects an appropriate exercise

of its discretion. *See Sumler v. Dist. Ct.*, 889 P.2d 50, 56 (Colo. 1995).

¶ 69 Consequently, we must reverse the district court's orders dismissing Walker's C.R.C.P. 106(a)(4) complaint as untimely and denying Walker's C.R.C.P. 6(b)(2) motion and remand the case to the district court to reconsider the C.R.C.P. 6(b)(2) motion, applying the standard articulated herein. *See Buckmiller*, 727 P.2d at 1117 (concluding that the trial court's failure to apply the correct legal criteria to the movant's Rule 60(b) motion required a remand); *Singh*, 30 P.3d at 856-57 (concluding that the trial court's order failed to reflect proper consideration of the movant's Rule 60(b) motion and required a remand); *see also N.A.H. v. S.L.S.*, 9 P.3d 354, 366 n.13 (Colo. 2000) ("When appellate review is hindered by the absence of factual findings as to key contested issues, we will remand the case for further fact finding by the trial court."). If the court again denies Walker's C.R.C.P. 6(b)(2) motion, it may reinstate its order dismissing the untimely complaint for lack of subject matter jurisdiction, subject to further appeal.

C. Dismissal of Walker's Third Claim

¶ 70 Finally, Walker contends that the district court erred by dismissing as untimely the third claim asserted in its amended complaint, its "Claim for Declaratory Relief and for Relief Under Rule 106(a)(2)." Through the third claim, Walker sought a declaration that the Director's decision was not effective and an order compelling the Director not to enforce it against Walker. Walker argues that claims brought pursuant to C.R.C.P. 106(a)(2) are not subject to the time bar in C.R.C.P. 106(b). The City counters that Walker was not entitled to amend its complaint to add claim three and, in any event, claim three is a C.R.C.P. 106(a)(4) claim in disguise.

¶ 71 Because the district court did not address claim three in its order dismissing Walker's amended complaint, we are unable to determine why that claim was dismissed. Thus, if the district court again dismisses the amended complaint on remand, it must articulate a reason for dismissing Walker's C.R.C.P. 106(a)(2) claim, which shall also be subject to further appeal.

III. Conclusion

¶ 72 We reverse the district court's order dismissing Walker's amended complaint for lack of subject matter jurisdiction and its order denying Walker's C.R.C.P. 6(b)(2) motion. We remand for the district court to reconsider the C.R.C.P. 6(b)(2) motion under the standard articulated herein and for further proceedings as necessary.

JUDGE ROMÁN and JUDGE WELLING concur.