IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 19-cv-01301-CMA-STV

ALISON BROWN,

Plaintiff,

v.

CHAFFEE COUNTY,
CHAFFEE COUNTY BOARD OF REVIEW,
JON ROORDA, PLANNING MANAGER, CHAFFEE COUNTY PLANNING AND ZONING,
DAN SWALLOW, DIRECTOR OF DEVELOPMENT SERVICES, CHAFFEE COUNTY, and
CHAFFEE COUNTY BOARD OF COUNTY COMMISSIONERS,

Defendants.

MOTION TO DISMISS AMENDED COMPLAINT

All defendants, by undersigned counsel, move pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss "Plaintiff's First Amended Complaint" (Doc. 18) for failure to state a legally cognizable claim:

I. INTRODUCTION

This lawsuit arises out of land use process in Chaffee County that led to a state court permanent injunction against the plaintiff's position, entered in May 2018. *See* Am. Compl. ¶¶ 29, 37, and 63-64; Ex. A, Order Imposing Permanent Injunction, *Chaffee County BOCC v. Brown*, 2017CV30035.

Notwithstanding the permanent injunction that is now over a year old, and which plaintiff did not appeal, plaintiff argues that the county's giving her a "building permit" in October 2016, to build an "accessory residential dwelling/guest house" – a process that also required a certificate of zoning compliance -- constituted a waiver of the county's requirement that she go

through a limited impact review in order to permit non-residential activities on her land. *See, e.g.,* Am. Compl. ¶¶ 17-23.

Although verbose, Dr. Brown's claim is that a building permit to construct a residential structure created vested property rights to maintain an unregulated number of hounds on the property and to use the land to operate foxhound hunting expeditions without going through the county's process for "limited impact review." *See* Am. Compl. ¶¶ -17 – 21, 71. Since plaintiff's amended complaint refers to her residential building permit application, and the "certificate of zoning compliance" that is part of these applications, and since she has made this application central to her claim, the portions to which she refers accompany this motion to dismiss and can be considered without this motion being converted into a motion for summary judgment. Ex. B, Brown's Application for Residential Permit (pages 3-5).

Under U.S. Supreme Court and Tenth Circuit cases, the state court injunction order precludes Dr. Brown's attempt to relitigate the issues by pursuing this new complaint alleging civil rights violations. Plaintiff's claim is likewise foreclosed by the quasi-judicial reviews conducted by the County's Board of Adjustment.

II. PROCEDURAL BACKGROUND

1. Plaintiff's amended complaint refers to land use and judicial proceedings that occurred after plaintiff applied in August 2016 for a residential building permit to construct a residential structure on a 40-acre parcel in Chaffee County. *See* Am. Compl. ¶¶ 2, 12, 17-21; Ex. B, Brown's Residential Permit Application ("accessory residential dwelling/guest house").[1] The

[1] Brown alleges that she later withdrew the guest house. *See* Am. Compl. 19. Defendants submit that this is immaterial.

application form requires that the applicant sign a page titled "Certificate of Zoning Compliance." *See* Ex. B (pdf page 3 of the exhibit, "Page 5" of the original application form).

2. In paragraphs 54-62, Brown describes administrative proceedings with the county through early 2018. She describes administrative interpretations and her pursuit of appeals to the County's Board of Adjustment that concluded against her positions. Am. Compl. ¶¶ 56-62 (Brown describes two appeals to the Board of Adjustment).

3. In paragraphs 29, 37, 63-64, Brown acknowledges that the county filed a state court action in 2017 that concluded, on May 9, 2018, in a state district court order of permanent injunction against her activity of guiding hunts using hounds and horses unless and until she obtains a permit. Am. Compl. ¶¶29, 37, 63-64.

III. COMPLAINT ALLEGATIONS

1. Brown complains that, by enforcing its zoning regulations that require limited impact review in order to obtain a permit to operate a kennel and outfitting facility, Chaffee County deprived her of due process and equal protection. *See* Am. Compl. *passim*, concluding in ¶¶ 71-83.

2. Brown describes a lengthy history with the county over her contention that housing 30 or more hounds was not a "kennel" and therefore, she was not required to go through limited impact review. *See, e.g.,* Am. Compl. ¶¶ 18, 30-36, 47, 57-62.

3. Brown also describes a lengthy history of resisting the county's urging to initiate limited impact review with respect to the activity of leading expeditions of horses and hounds in hunting and chasing coyotes. *See, e.g.*, Am. Compl. ¶¶ 19, 23, 24, 37-64.

4. Brown contends that the county's giving her a building permit, in October 2016, to construct a house -- a process which included a certificate of zoning compliance -- created

vested rights to maintain an unregulated number of hounds and to maintain facilities that support Brown leading others in hunts with horses and hounds, primarily she states, to chase coyotes on public and private lands, without having to seek a permit for these activities by going through limited impact review. *See* Am. Compl. *passim*, e.g., ¶¶ 13, 17, 20-21, 54, 72-73.

5. While arguing that limited impact review requirements to operate a "kennel" and "outfitting facility" do not apply to her, plaintiff's complaint acknowledges that county officials began informing her of the need to go through limited impact review for these activities even before she obtained the residential structure building permit. *See* Am. Compl. ¶ 21 ("On October 12, 2016, Roorda suggested the aggregate use of her property would qualify as an "outfitting facility" under the CCLUC, **which would require a limited impact review**") (emphasis added).

6. Brown's complaint includes allegations to the effect that county officials continued to inform her of the need to go through limited impact review. *See* Am. Compl. ¶ 23 ("on March 28, 2017 . . . Roorda . . . identified her use of the property as unlawful and required Dr. Brown to submit applications for limited impact review so as to obtain permission from the County . . . .") and ¶ 24 ("On May 8, 2017, Dr. Brown received another letter from Roorda demanding a limited impact review be submitted by May 30, 2017 . . . .").

7. Instead of initiating limited impact review, Brown appealed the administrative determination that these activities require limited impact review. Am. Compl. ¶ 25 ("On May 30, 2017, Dr. Brown submitted an application to the Board of Adjustment for Appeal of the administrative decision that a limited impact review as an outfitting facility and kennel was required.").

8. Brown pleads that the Board of Adjustment denied her appeal. Am. Compl. ¶ 28 ("On June 29, 2017, Dr. Brown received a letter from the Board of Adjustment denying her appeal.").

9. Brown also describes that she filed more administrative appeals in 2018, each of which terminated against her position. *See* Am. Compl. ¶¶ 49, 56-62.

10. Brown acknowledges that, when she continued the disputed activities without seeking a permit, the county initiated an enforcement action in state court. Am. Compl. ¶ 29 ("On August 17, 2017, the County then filed a complaint against Dr. Brown for declaratory judgment and sought injunctive relief).

11. Brown further acknowledges that the state district court lawsuit terminated on May 9, 2018, when the state district court permanently enjoined Brown from "using any improved structures or facilities at 11600 Antelope Road to provide service, housing, or safekeeping to any animal or equipment that is used in conjunction with guiding services, specifically such guiding services that involve Dr. Brown's riding out or hunting with foxhounds on public lands with any other individuals who are not affecting substantial control over the foxhounds" until Brown obtains a permit to operate as an "outfitting facility." *See* Am. Compl. ¶¶ 63-64 *and* Ex. A, Order Imposing Permanent Injunction, p. 7 (May 9, 2018).

IV. ARGUMENT

A. The Chaffee County Land Use Code, state court injunction order, and other documents to which plaintiff refers in her amended complaint may be considered without converting this motion to one for summary judgment.

Plaintiff's complaint makes extensive reference to Chaffee County's Land Use Code ("CCLUC") (¶¶ 10, 19, 30, 34, 35, 45, 47, 50, 53, 56, 57, 61, 65) and also, refers to a state court proceeding that ended in a permanent injunction adverse to plaintiff's position (¶¶ 29, 37, and

63-64). Due to the centrality of the CCLUC and also considering the centrality of the state court proceeding that led to a permanent injunction, or alternatively, as matters of judicial notice under Fed. R. Evid. 201, the county is submitting a copy of the state court permanent injunction as Exhibit A, and referring to the CCLUC published on Chaffee County's website: http://www.chaffeecounty.org/Planning-and-Zoning-Land-Use-Codeinternet. It is also useful to bring to the Court's attention the document to which plaintiff anchors her allegation of a vested property right against having to seek a permit for the operation of a kennel and outfitting facility, that is, her residential permit application. *See* Am. Compl. ¶¶ 17, 20-21; Ex. B, Brown's Residential Permit Application (pages 3-5 of the original form).

While "a motion to dismiss challenging the legal sufficiency of the complaint is properly considered under Rule 12(b)(6) if the court analyzes only the complaint itself," the district court **"may consider documents** attached to or **referenced in the complaint if they 'are central to the plaintiff's claim and the parties do not dispute the documents' authenticity.'"** *Brokers' Choice of America, Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1103 (10th Cir. 2017) (quoting *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002). The court in *Brokers' Choice* also quoted *GFF Corp. v. Assoc'd Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997):

> [C]onversion to summary judgment when a district court considers outside materials is to afford the plaintiff an opportunity to respond in kind. **When a complaint refers to a document and the document is central to the plaintiff's claim, the plaintiff is obviously on notice of the document's contents, and this rationale for conversion to summary judgment dissipates.**

GFF Corp., 130 F.3d at 1384 (emphasis added).

In addition to documents referenced in a complaint that are central to the claim, facts subject to judicial notice may be considered without converting a motion to dismiss into a

motion for summary judgment. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 322, 127 S.Ct. 2499, 2509, 168 L.Ed.2d 179 (2007) ("courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial notice."); *Grynberg v. Koch Gateway Pipeline Co.*, 390 F.3d 1276, 1279 n.1 (10th Cir. 2004)(citations omitted). Furthermore, when considering a motion to dismiss, "the court is permitted to take judicial notice of its own files and records, as well as facts which are a matter of public record." *Van Woudenberg v. Gibson*, 211 F.3d 560, 568 (10th Cir. 2000), *abrogated on other grounds by McGregor v. Gibson*, 248 F.3d 946, 955 (10th Cir. 2001). "[I]f a plaintiff does not incorporate by reference or attach a document to its complaint, but the document is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss." *GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997) (citations omitted).

Regarding the permissibility of taking judicial notice of city ordinances, the Tenth Circuit resolved conflicting lines of cases within the circuit in favor of allowance, stating: "We believe that the better rule permits the appellate court to take judicial notice of matters 'not subject to reasonable dispute in that [they are] ... capable of accurate and ready determination by resort to sources whose accuracy cannot ... reasonably be questioned.'" *Melton v. City of Oklahoma City,* 879 F.2d 706, 724, n.25 (10th Cir. 1989) (taking judicial notice of city charter).

B. Abuse of discretion is the standard of review on a refusal to convert a Rule 12(b)(6) motion to dismiss.

The standard for review of a district court's refusal to convert a Rule 12(b)(6) motion to dismiss into a Rule 56 motion for summary judgment is abuse of discretion. *Brokers Choice,* 861 F.3d at 1103 (citing *Lowe v. Town of Fairland*, 143 F.3d 1378, 1381 (10th Cir. 1998). When presented with a Rule 12(b)(6) motion, district courts have broad discretion in determining whether to accept materials beyond the pleadings. *Id.* (citation omitted).

C. Even amended, plaintiff's complaint does not set forth a plausible claim for deprivation of property without due process.

On a motion to dismiss under Rule 12(b)(6), courts must accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. *Jordan-Arapahoe, LLP v. Board of County Com'rs of County of Arapahoe, Colo.*, 633 F.3d 1022, 1025 (10th Cir. 2011) (citing *Beedle v. Wilson*, 422 F.3d 1059, 1063 (10th Cir.2005). "To survive a 12(b)(6) motion to dismiss, a plaintiff must allege that 'enough factual matter, taken as true, [makes] his 'claim to relief ... plausible on its face.' " *Jordan-Arapahoe, LLP*, 633 F.3d at 1025 (citing *Bryson v. Gonzales*, 534 F.3d 1282, 1286 (10th Cir.2008) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). "A claim has facial plausibility when the [pleaded] factual content [ ] allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Jordan-Arapahoe, LLP*, 633 F.3d at 1025 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1940, 173 L.Ed.2d 868 (2009) and *Gee v. Pacheco*, 627 F.3d 1178, 1182–83 (10th Cir.2010)).

In this case, to state a claim for the deprivation of property without due process, Brown must allege facts plausibly suggesting (1) Chaffee County deprived her of a protected property

interest and (2) the deprivation was arbitrary. *See Jordan-Arapahoe, LLP,* 633 F.3d at 1025 (citing *Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir.2000)).

In *Jordan-Arapahoe, LLP*, the claim was that the county violated due process when it rezoned land to remove a previously allowed use consisting of a car dealership, because that use had been allowed in a preliminary development plan. In reliance, the owner spent $2.5 million preparing the property. The trial court dismissed the complaint for failure to state a claim. Affirming, the Tenth Circuit provided an extensive analysis of the interface between property rights, which are largely matters of state law, and zoning. *Jordan- Arapahoe, LLP*, 633 F.3d at 1025. The court explained that property rights are subject to the proper exercise of the local land use authority's police power of zoning. *Jordan-Arapahoe, LLP*, 633 F.3d at 1026.

To constitute a "vested" right – a right that has independent legal existence – the right must be something over which the land use entity has no discretion:

> We have explained generally that a landowner's protected interest in a particular zoning decision depends on "whether there is discretion in the [local zoning authority] to deny a zoning or other application." *Norton v. Vill. of Corrales*, 103 F.3d 928, 931–32 (10th Cir.1996). "A property interest exists if discretion is limited by the procedures in question, that is, whether the procedures, if followed, require a particular outcome." *Nichols*, 506 F.3d at 970. Accordingly, "where the governing body retains discretion and the outcome of the proceeding is not determined by the particular procedure at issue, no property interest is implicated." *Crown Point I, LLC v. Intermountain Rural Elec. Ass'n*, 319 F.3d 1211, 1217 (10th Cir.2003).

Id.

Examining state and local law, the panel in *Jordan-Arapahoe* determined that neither state nor local law created a vested right to develop a car dealership even though the landowner incurred $2.5 million preparing the property after obtaining a preliminary development plan for such a use, consistent with prior zoning.

At the foundation of Brown's allegation of a vested right to use the property for unregulated kennels and unregulated leadership of hunting expeditions with horses and hounds, Brown states that, after applying for a permit to build a residential structure, she was given the permit. *See* Am. Compl. ¶¶ 17 and 20. In paragraph 17, she alleges that on August 8, 2016, she "submitted a residential permit application to the Chaffee County Building Department to construct an 'accessory residential dwelling/guest house'." This can be seen in Exhibit B attached to this motion. In paragraphs 20 and 21, she alleges that on October 24, 2016, she was issued a building permit and a certificate of zoning compliance. As shown in Exhibit B, the certificate of compliance was Brown's certificate that her proposed residential structure was in compliance with rural zoning. *See* Ex. B, Brown's App. Residential Building Permit (pdf p. 3).

Plaintiff's allegations reflect a steadfast, but illogical insistence that a "building permit" for an accessory residential structure made it unnecessary for her to undergo "limited impact review" in order to permit her to maintain a "kennel" and operate an "outfitting facility." Am. Compl. ¶¶ 17-67. This theory conflates different facets of zoning law and process. The county defines terms in Section 15.2 of its Code (http://www.chaffeecounty.org/EndUserFiles/57421.pdf):

> **"Building Permit"** is "[a] permit which is issued by the County prior to the erection, construction, alteration, moving, or relocation of a building or structure."
>
> **"Outfitting Facilities"** are "[a]ny improved structures and facilities related to guiding services for outdoor expeditions, including fishing, camping, biking, motorized recreation and similar."
>
> **"Kennel"** is "[a]ny lot, parcel, tract or structure in which more than seven dogs, six months old or older, are bred, or are kept, raised, trained, housed or boarded for longer than two weeks. This definition shall not apply to a properly permitted pet shops or veterinary hospital."

> **"Limited Impact Review"** is "[a] shortened land use change permit application and review process, described in Article 4, Section 4.2.2 of this Land Use Code, by which the Planning Commission approve permits for uses being allowed on the basis of their limited impact with regard to compatibility with the site and surrounding land and uses, and the adequacy of required services.

Thus, by definition, a building permit for a structure – here, a residential structure – does not waive limited impact review to consider a landowner's permission to operate kennels and outfitting activities.

As allowed under state statute, Chaffee County follows the international building codes promulgated by the International Conference of Building Officials. *See* C.R.S. § 30-28-201; Chaffee County Ordinance 2018-02 (contains history of county's adoption of international building codes). These building codes include the International Residential Building Code (IRC). Under the IRC, a building permit does not create a vested right to a certificate of occupancy. The following sections are directly pertinent:

> **R 105.4 Validity of permit**.
>
> ***The issuance or granting of a permit shall not be construed to be a permit for, or an approval of, any violation of the provisions of this code or of any other ordinance of the jurisdiction.*** Permits presuming to give authority to violate or cancel the provisions of this code ***or other ordinances of the jurisdiction*** shall not be valid. The issuance of a permit based on construction documents and other data shall not prevent the building official from requiring the correction of errors in the construction documents and other data. ***The building official is also authorized to prevent occupancy or use of a structure where in violation of this code or of any other ordinances of this jurisdiction.***

IRC § R105.4 (emphasis added). This section should make clear that the issuance of a building permit is but one step in the development process, and is not a certification as to the absence of any existing or future zoning violation.

> **R 110.1 Use and occupancy.**
>
> No building or structure shall be used or occupied, and no change in the existing occupancy classification of a building or structure or portion thereof shall be made until the building official has issued a certificate of occupancy therefor as provided herein. Issuance of a certificate of occupancy shall not be construed as an approval of a violation of the provisions of this code or other ordinances of the jurisdiction. Certificates presuming to give authority to violate or cancel the provisions of this code or other ordinances of the jurisdiction shall not be valid.

This code section states that certificates of occupancy are contingent on compliance not only with the building code, but also compliance with other ordinances of the jurisdiction.

The International Residential Code (IRC) makes clear that building permits to construct residential structures do not foreclose jurisdictions from enforcing their zoning codes in other respects through the withholding of certificate of occupancy. There is no equation between a building permit on the one hand and a certificate of occupancy on the other. In land use, certificates of occupancy are a primary way that jurisdictions enforce their zoning codes. In this case, Brown's application for a residential structure building permit, including her certification of zoning compliance, could not create a vested right to avoid seeking a permit to operate a kennel and outfitting facility.

D. "Class-of-one" equal protection claims require plausible non-conclusory allegations to establish that identified comparators, "similarly situated in every material respect," were treated differently, and that a rational basis was utterly lacking, amounting to irrational and abusive government conduct.

Brown's titled claim remains that of alleged violation of 14th Amendment due process, but her concluding paragraphs endeavor to add a "class-of-one" equal protection claim. *Compare* Am. Compl. p. 15 and ¶¶ 80-82.

Even before *Iqbal* and *Twombly*, the Tenth Circuit approached "class-of-one claims" with caution, "wary of 'turning even quotidian exercises of government discretion into constitutional

causes.'" *Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1216 (2011) (quoting *Jicarilla Apache Nation v. Rio Arriba County*, 440 F.3d 1202, 1209 (10th Cir. 2006)). Addressing a class-of-one claim in *Kansas Penn*, the Tenth Circuit summarized the standard as follows:

> To prevail on this theory, a plaintiff must first establish that others, "similarly situated in every material respect" were treated differently. *Jicarilla Apache Nation v. Rio Arriba County*, 440 F.3d 1202, 1210 (10th Cir. 2006). A plaintiff must then show this difference in treatment was without rational basis, that is, the government action was "irrational and abusive," *id.* at 1211, and "wholly unrelated to any legitimate state activity," *Mimics, Inc. [v. Vill. of Angel Fire,* 394 F.3d 836, 849 (10th Cir.2005)*]* (quotation omitted). This standard is objective—if there is a reasonable justification for the challenged action, we do not inquire into the government actor's actual motivations. *Jicarilla Apache Nation*, 440 F.3d at 1211.

Kansas Penn Gaming, LLC v. Collins, 656 F.3d 1210, 1216 (2011).

Explaining the reasons for these standards, the *Kansas Penn* panel quoted from *Jennings v. City of Stillwater*, 383 F.3d 1199, 1210–11 (10th Cir.2004):

> [T]he concept of a class-of-one equal protection claim could effectively provide a federal cause of action for review of almost every executive and administrative decision made by state actors. It is always possible for persons aggrieved by government action to allege, and almost always possible to produce evidence, that they were treated differently from others, with regard to everything from zoning to licensing to speeding to tax evaluation. It would become the task of federal courts and juries, then, to inquire into the grounds for differential treatment and to decide whether those grounds were sufficiently reasonable to satisfy equal protection review. This would constitute the federal courts as general-purpose second-guessers of the reasonableness of broad areas of state and local decisionmaking: a role that is both ill-suited to the federal courts and offensive to state and local autonomy in our federal system.

Kansas Penn Gaming, 656 F.3d at 1216 (quoting *Jennings v. City of Stillwater*, 383 F.3d at 1210–11).

"[I]n the wake of *Twombly* and *Iqbal*, and consistent with [Tenth Circuit] cases establishing a more refined analytical framework for class-of-one claims," the Tenth Circuit cited the following cases with approval:

> This understanding is consistent with the practice of other circuits. *See, e.g., Analytical Diagnostic Labs, Inc. v. Kusel*, 626 F.3d 135, 143 (2d Cir.2010) ("[P]laintiff [must] show that no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy." (quotation omitted)); *Cordi–Allen v. Conlon*, 494 F.3d 245, 251 (1st Cir.2007) ("This requirement demands more than lip service. It is meant to be a very significant burden." (quotation omitted)); *Purze v. Village of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir.2002) (requiring a class-of-one plaintiff to demonstrate that the comparable properties were "prima facie identical in all relevant respects").

Kansas Penn Gaming, 656 F.3d at 1218. The panel also described the Tenth Circuit decision in *Glover v. Mabrey,* 384 Fed.Appx. 763, 778 (10th Cir.2010) as a representative -- though unpublished – class-of-one dismissal where the complaint "failed to allege . . . the identity or characteristics of other, similarly situated contractors and how those similarly situated contractors were treated differently." *Kansas Penn Gaming*, 656 F.3d at 1219.

E. Brown fails to establish a plausible "class-of-one" equal protection violation.

In paragraph 80, Brown recites the conclusory allegation that "as a class of one, she has been intentionally treated differently from others similarly situated in Chaffee County and there is no rational basis for the difference in treatment." While this paragraph introduces an equal protection claim, it is a conclusory assertion that *Twombly, Iqbal,* and Tenth Circuit cases such as *Kansas Gaming* disregard in determining plausibility.

Plaintiff's amended complaint alleges the following comparators:

> 81. For example, there are number of properties in Chaffee County zoned rural who also offer guiding services, including trail rides and pack trips, with

improved structures and facilities related to those guiding services. These include but are not limited to:

i. Mt. Princeton Hot Springs Stables at 14582 County Road 162, Buena Vista, CO 81211, a property with facilities used in connection with guiding services for daily trail rides year round as well as horse leasing.

ii. Rocky Mountain High Adventure Base at 600 US Highway 285, Poncha Springs, CO 81242, a property with facilities used in connection with guiding services for white water rafting, hiking, backpacking, camping, biking, climbing and rappelling.

iii. Antero Llamas at 11100 County Road 194, Salida, CO 81201, a property with facilities used in connection with leasing pack llamas and gear for self-guided llama treks, expeditions, hunts, and llama packing workshops.

iv. Spruce Ridge Llamas at 4141 County Road 210, Salida, CO 81201, a property with facilities used in connection with guiding services for guided treks and hiking with llamas. v. Trail West Lodge at 18800 Trail W. Dr., Buena Vista, CO 81211, a property with facilities used in connection with guiding services for horseback riding, climbing, rafting, and jeep tours.

vi. Adventure Unlimited Ranches at 18325 County Road 366, Buena Vista, CO 81211, a property with facilities used in connection with adult and youth guiding services for outdoor education and a variety of outdoor adventure experiences including hiking, biking, and horseback riding.

vii. 100 Elk Outdoor Center at 18325 County Road 366, Buena Vista, CO 81211, a property with facilities used in connection with guiding services as to archery, canoeing, kayaking, hiking, and horseback riding. viii. Deer Valley Ranch at 16825 County Road 162, Nathrop, CO 81236, a property with facilities used in connection with guiding services as to horseback riding.

ix. Frontier Ranch at 22150 County Road 306, Buena Vista, CO 81211, a property with facilities used in connection with guiding services as to horseback riding.

x. Ute Trail Guide Service at 10615 County Road 150, Salida, CO 81201, a property with facilities used in connection with guiding services for hunts on public land.

> xi. Buena Vista Mountain Adventures at 32701 Columbia Ranch Rd., Buena Vista, CO 81211, a property with facilities used in connection with guiding services for backpacking trips.

Am. Compl. ¶ 81.

None of these alleged comparators has the required identity to plaintiff's situation. The salient factors of identity are: (1) the proposed comparator is NOT grandfathered (C.R.S. § 38–1–101(3)(a); (2) as to any outfitter that is NOT grandfathered, whether the county received a complaint and failed to act[2]; (3) the comparator is actually engaged in guiding services as defined by the Chaffee District Court, including exerting control over the activities.

In the last subparagraph of paragraph 81, plaintiff alleges:

> xii. Planning Commission member, Bruce Cogan, identified that his family property has facilities used in connection with guiding services for fishing. However, Plaintiff has reason to believe these properties have not been required by Chaffee County to submit to a limited impact review and obtain an outfitting permit as she has.

In fact, Planning Commissioner Cogan stated that his family does NOT do guiding, but regardless, this amounts to a conclusory allegation that fails to establish identity of activity with the required level of specificity.

Plaintiff ends paragraph 81 with this allegation:

> Plaintiff has reason to believe there are countless persons in Chaffee County who ride out or "guide" outdoor expeditions, including fishing, camping, biking, motorized recreation, and similar private activities without obtaining such a permit. Like Dr.

[2] Chaffee County has a complaint-based enforcement system.

> Brown, these persons do not operate commercial enterprises. However, unlike Dr. Brown, they have avoided selective enforcement of the CCLUC by County officials.

Am. Compl. 81. Along with its footnote, this conclusory allegation appears targeted to a political audience rather than the court. It is not true – and under *Iqbal-Twombly* --should be disregarded, but this is the kind of assertion designed to incite political opposition by untruthful fearmongering.

These allegations fail to provide the specificity necessary to satisfy "class-of-one" pleading requirements. Contrary to the cases that the Tenth Circuit cited with approval from the Second, First, and Seventh Circuits (*Kansas Penn Gaming*, 656 F.3d at 1218), and the Tenth Circuit's own unpublished but representative case of *Glover v. Mabrey (id.* at 1219), Brown does not plead facts to plausibly establish that "no rational person could regard the circumstances of the plaintiff to differ from those of a comparator to a degree that would justify the differential treatment on the basis of a legitimate government policy" or that even these alleged comparators are "prima facie identical in all relevant respects."

F. The permanent injunction order issued by the state court precludes Brown's claims.

Federal courts must give state court judgments the same preclusive effect as would the originating state. *See, e.g., San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 336-337, 125 S.Ct. 2491, 2500-2501, 162 L.Ed.2d 315 (2005) (full faith and credit statute precluded further litigation of issues that had been adjudicated by California courts, abrogating *Santini v. Connecticut Hazardous Waste Management Service*, 342 F.3d 118); *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81-84, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984). The Supreme Court has "repeatedly held . . . that issues actually decided in valid state-court

judgments may well deprive plaintiffs of the 'right' to have their federal claims relitigated in federal court." *San Remo Hotel,* 545 U.S. at 342, 125 S.Ct. at 2504 (citations omitted). *See also Fox v. Maulding*, 112 F.3d 453, 456 (10th Cir. 1997) (affirming dismissal, as under res judicata doctrine, failure to raise RICO claims in previous foreclosure action barred their subsequent assertion); *Wilkinson v. Pitkin County Bd. of County Com'rs*, 142 F.3d 1319 (10th Cir. 1998) (affirming summary judgment entered by Judge Kane, holding that land owners' claims were barred by res judicata and collateral estoppel due to previous state court litigation).

Here, Brown's complaint seeks to relitigate the issues that resulted in the permanent injunction order issued in May 2018. *Compare* Ex. A, Order Imposing Permanent Injunction, Chaffee County BOCC v. Brown, Chaffee County District Court, Case No. 2017CV30035 *and* Am. Compl. ¶¶ 17-65. Contrary to her obvious belief that she has a "right" to relitigate these claims under 42 U.S.C. § 1983, the state court's permanent injunction order precludes her claims. To the degree she may argue that she did not raise constitutional defenses in that proceeding, under *Fox v. Maulding*, they were required to have been raised if they existed and are waived to the degree they were not raised.

G. The claims against "the County" and the County "Board of Review" should be dismissed as they lack capacity to be sued and are not "persons" who can be sued under 42 U.S.C. § 1983

In Colorado, counties have the capacity to sue and be sued, C.R.S. § 30-11-101(a), but claims against a Colorado county must be brought against the Board of County Commissioners of that county. C.R.S. § 30-11-105 ("In all suits or proceedings by or against a county, the name in which the county shall sue or be sued shall be, "The board of county commissioners of the county of . . . . . ."). Planning and zoning commissions and boards of review (aka boards of adjustment) are merely administrative units of a county and lack capacity to be sued.

Therefore, the claims against "Chaffee County" and the "Chaffee County Board of Review" must be dismissed.

In order to be sued as a "person" under 42 U.S.C. § 1983, "[A] separate identity as a body politic or corporate is essential . . . ." *Stump v. Gates*, 777 F. Supp. 808, 816 (D. Colo.1991) (citing *Monell v. Dept. of Social Services*, 436 U.S. 658, 690 (1978)). "Under Colorado law municipalities and counties, not their various subsidiary departments, exist as 'bodies corporate and politic' empowered to 'sue and be sued.' " *Id.* (citing C.R.S. § 31-15-101(1)(a), (b) and § 30-11-101(1)(a). Police departments, for example, are not "persons" subject to suit under § 1983. *Id.* ("Police departments . . . [do not] have the capacity to commit acts depriving individuals of civil rights . . . .") Here, "the County" has the capacity to be sued through its Board of County Commissioners, but not directly as "the County," and not through its Board of Review.

H. The claims against the individual land use officials must be dismissed as duplicative of the claim against the county through its board of county commissioners; official capacity individuals are therefore not "persons" under *Monell*

Plaintiff sues Jon Roorda, Planning Manager, and Dan Swallow, Director of Development Services, but admits that her claims against them are solely in their "official" capacities. Am. Compl. ¶¶ 5 and 6. Such claims simply duplicate the claim against the entity. In Colorado, counties have the capacity to be sued, but only through their boards of county commissioners. C.R.S. § 30-11-105. Therefore, in this case, plaintiff's claims against Mr. Roorda and Mr. Swallow in their official capacities mean that they are not "persons" who can have *Monell* liability. The only "person" for purposes of plaintiff's lawsuit is the Chaffee board

of county commissioners. Plaintiff's claims against Roorda and Swallow are redundant of plaintiff's claim against the BOCC. The claims against them are thus not viable under *Monell*.

V. CONCLUSION

The Chaffee County Land Use Code, the state court injunction order, and the residential building permit that plaintiff alleges at the heart of her claim may be considered on this motion to dismiss under Fed. R. Civ. P. 12(b)(6) without conversion to summary judgment under Rule 56. This is true because plaintiff refers to these in her complaint and central to her claim. The court order and county codes are also capable of judicial notice.

Under *Twombly, Iqbal,* and Tenth Circuit authority, even as amended, Brown's complaint fails to set forth plausible claims for deprivation of property without due process or "class-of-one" equal protection. Additionally, the state court's permanent injunction order issued in May 2018 precludes Brown's effort to relitigate the issues through this lawsuit.

Putting aside for the moment the substantive issues over whether plaintiff has a viable claim on which relief can be granted, plaintiff's claim here can only be against the Chaffee Board of County Commissioners. Plaintiff's claims against "the County" and its "Board of Review" must be dismissed as they lack capacity to be sued. The claims against the individual land use officials must likewise be dismissed as duplicative of the claim against the county through its board of county commissioners. There is only one "person" for purposes of assessing *Monell* liability in this case, and it is the Chaffee Board of County Commissioners.

Defendants request that plaintiff's amended complaint be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a legally cognizable claim in any respect.

Respectfully submitted,

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ATTORNEYS FOR DEFENDANTS

CERTIFICATE OF SERVICE (CM/ECF)

I hereby certify that on July 8, 2019, I electronically filed the foregoing **MOTION TO DISMISS AMENDED COMPLAINT** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following e-mail addresses:

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s/*Marisa Showalter*
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