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

RESPONSE TO MOTION TO DISMISS AMENDED COMPLAINT

Plaintiff Alison Brown files this Response to Defendants' Motion to Dismiss Amended Complaint [Docket No. 30] and requests the Court deny the motion because Plaintiff has sufficiently pleaded plausible claims for relief and Defendants' attempt to challenge Plaintiff's amended complaint misapplies both law and fact.

I. INTRODUCTION

1. Based on the arguments Defendants have reasserted in their second 12(b)(6) motion, it is still necessary to reaffirm in this Response what the actual analysis before the Court is—a pleading sufficiency analysis. The purpose of this analysis is to look to Plaintiff's complaint and the factual allegations pleaded within it—which are accepted as true—solely to determine whether Plaintiff has alleged facts sufficient to give rise to a plausible entitlement to relief. It is not intended to weigh evidence, dispute facts, or attempt to prove a case—something Defendants' motion wholly fails to understand.

2. When looking to the facts that were pleaded and the applicable law, Plaintiff has more than sufficiently stated plausible claims for relief. And Defendants' attempts to challenge Plaintiff's amended complaint fundamentally fail because they (1) misapply the *Twombly-Iqbal* pleading analysis; (2) misstate and misapply Colorado law as to vested property rights, issue preclusion, and dismissal based on capacity pleaded; and (3) blatantly mischaracterize, disregard, or attempt to dispute facts alleged in Plaintiff's amended complaint.

3. Plaintiff raised these issues in response to Defendants' first flawed motion to dismiss; Plaintiff amended her complaint to provide a level of specificity and detail that neither Federal Rule of Civil Procedure 8(a)(2) nor the *Twombly-Iqbal* plausibility standard required in an effort to satisfy Defendants' unsupported demands; and Plaintiff painstakingly clarified factual allegations that Defendants' first motion seemingly misconstrued. Despite this, Defendants have substantially reasserted the same specious arguments in their most recent motion to dismiss.

4. Accordingly, Plaintiff reasserts the same legal authority that supports her claims and again respectfully requests the Court deny Defendants' motion to dismiss.

II. ARGUMENT AND AUTHORITIES

A. Defendants accurately state but ultimately misapply the Twombly-Iqbal plausibility standard.

5. A motion to dismiss for failure to state a claim for relief under Rule 12(b)(6) is a minimum standard analysis. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007) (describing the plausibility standard as "the minimum standard of adequate pleading to govern a complaint's survival"). It is an analysis of a complaint and the factual allegations within it. *See id.* at 555–57; *see also Ashcroft v. Iqbal*, 556 U.S. 662, 677–80 (2009). A

complaint is solely required to have "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). This pleading standard does not require detailed factual allegations. *Twombly*, 550 U.S. at 555; *Iqbal*, 556 U.S. at 678. Instead, it requires sufficient factual allegations to be pleaded, which are accepted as true, and which state a claim to relief that is plausible on its face. *Twombly*, 550 U.S. at 555-57 and 570; *Iqbal*, 556 U.S. at 678. The purpose of this pleading standard is to require fair notice to opposing parties of the claims levied against them and to prevent the assertion of claims with no legal basis. *See Twombly*, 550 U.S. at 555. When assessing the pleading sufficiency of a complaint, courts must accept pleaded factual allegations as true and view them in the light most favorable to the plaintiff. *See* Defs' Mot. to Dismiss at § IV(C) (citing *Jordan-Arapahoe, LLP v. Bd. of Cnty. Comm'rs of Cnty. of Arapahoe, Colo.*, 633 F.3d 1022, 1025 (10th Cir. 2011)).

6. While acknowledging this pleading standard in their motion, Defendants do not actually apply it. Instead, their motion primarily attempts to dispute the facts that are pleaded and invites the Court to impermissibly weigh those disputed facts. These disputes are inherently irrelevant and improper in a 12(b)(6) analysis.[1] Further, the manner in which Defendants attempt to dispute the facts pleaded is also improper because Defendants do not address the factual allegations that Plaintiff actually pleaded. Instead, Defendants carefully select and assert incomplete portions of those facts, divorced from their context, that at best misstate the pleading. This includes, but is not limited to, mischaracterizing:

[1] *See Twombly*, 550 U.S. at 556 ("a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable" or "that recovery is very remote"); *see also Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (finding Rule 12(b)(6) does not permit "dismissals based on a judge's disbelief of a complaint's factual allegations.").

i. Plaintiff's claims for vested rights in a recognized lawful land use as claims for vested rights in a violation;[2]

ii. the basis for Plaintiff's claims for vested rights as being limited to the two documents Defendants attached to their motion;[3]

iii. the completeness of and information within the two documents attached to Defendants' motion;[4]

iv. the nature, scope, and preclusive effect of the permanent injunction issued in the state court proceeding;[5]

v. the timing of the land use at issue as occurring only *after* Plaintiff submitted an application for a building permit;[6]

vi. Plaintiff's allegations clearly stating the County resolved any issue regarding limited impact review when Dr. Brown amended her plans at the County's direction as "an acknowledgement" the County informed Plaintiff her land use was subject to a limited impact review;[7]

vii. Plaintiff's allegations clearly stating the County represented her land use was lawful before subsequently and substantially altering its position as the County "continu[ing] to inform her of the need to go through limited impact review;"[8]

viii. Plaintiff's 2018 administrative appeals, which Defendants are aware were appealed and now pending for review before the state district court, as "terminat[ing] against her position;"[9] and

ix. the relationship between the building permit that was issued approving identified land uses and the subsequent denial of the certificate of occupancy based on the County now deeming those same approved land uses as violations.[10]

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[2] *Compare* Defs.' Mot. to Dismiss § I, III, IV(C), *with* Pl.'s Amended Complaint at ¶¶ 9–10, 17–23, and 71-73.

[3] *Compare* Defs.' Mot. to Dismiss §§ I, IV(A) and (C), *with infra* § II(B) at ¶ 14.

[4] *Compare* Defs.' Mot. to Dismiss §§ I, II(1), IV(C), *with infra* § II(B) at ¶ 14.

[5] *Compare* Defs.' Mot. to Dismiss §§ I, IV(F), V, *with infra* § II(D).

[6] *Compare* Defs.' Mot. to Dismiss § II(1), *with* Pl.'s Amended Complaint at ¶¶ 11–13, 17–19 (identifying past, current, and future land uses at the time of the application).

[7] *Compare* Defs.' Mot. to Dismiss § III(5), *with* Pl.'s Amended Complaint at ¶¶ 19–21.

[8] *Compare* Defs.' Mot. to Dismiss § II(6), *with* Pl.'s Amended Complaint at ¶¶ 19–21, 23.

[9] *Compare* Defs.' Mot. to Dismiss § III(9), *with Brown v. Chaffee Cnty. Bd. of Review, et al.*, 2018 cv 30016, Chaffee County District Court.

[10] *Compare* Defs.' Mot. to Dismiss § IV(C), *with* Pl.'s Amended Complaint at ¶¶ 20–21, 23, 39, 41.

B. Defendants misapply both law and fact regarding the sufficiency of Plaintiff's due process claims.[11]

7. Plaintiff has asserted procedural due process violations under the Fourteenth Amendment of the United States Constitution pursuant to 42 U.S.C. section 1983. To adequately state this claim for relief, a plaintiff must allege that (1) she was deprived of a federal right and (2) that such deprivation was affected by one acting under color of state law.[12] The Fourteenth Amendment mandates that a state may not deprive any person of life, liberty, or property without due process of law. U.S. Const. amend. XIV, § 1. The definition of the type of property that is safeguarded by the Fourteenth Amendment has evolved to encompass not only tangible physical property, but also a legitimate claim of entitlement to certain circumscribed benefits. *Eason v. Bd. of Cnty. Comm'rs of Cnty. of Boulder*, 70 P.3d 600, 604 (Colo. App. 2003) (hereinafter *Eason II*)[13] (citing *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 576–77 (1972)). Those benefits and the legitimate claim of entitlement to them is determined by state law, in this case Colorado law. *See id.* at 604–05 (citing *Hillside Cmty. Church v. Olson*, 53 P.3d 1021, 1025 (Colo. 2002)); *see also Jordan-Arapahoe, LLP*, 633 F.3d at 1025–26.

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[11] Defendants' motion does not dispute that the actions taken were by one acting under color of state law, and, instead, focuses on whether Plaintiff adequately pleaded her vested property rights. *See* Defs' Mot. to Dismiss at § IV(C).

[12] A showing of arbitrariness is not an element of a procedural due process claim brought pursuant to 42 U.S.C. § 1983, but rather a substantive due process claim. *See Hyde Park Co. v. Santa Fe City Council*, 226 F.3d 1207, 1210 (10th Cir. 2000) ("Procedural due process ensures the state will not deprive a party of property without engaging in fair procedures to reach the decision, while substantive due process ensures the state will not deprive a party of property for arbitrary reason"); *see also Gomez v. Toledo*, 446 U.S. 635, 640 (1980) ("By the plain terms of § 1983, two—and only two—allegations are required in order to state a cause of action under that statute. First, the plaintiff must allege that some person has deprived him of a federal right. Second, he must allege that the person who has deprived him of that right acted under color of state or territorial law.").

[13] There are two appellate opinions issued in the case *Eason v. Bd. of Cnty. Comm'rs of Cnty. of Boulder*. For clarity, this Response will refer to these different opinions as *Eason I* and *Eason II* based on the date of issuance of the opinions.

8. Defendants recognize that state law is at issue and even cite to *Jordan-Arapahoe* when challenging the sufficiency of Plaintiff's pleading as to vested property rights, but somehow fail to accurately represent or apply the holding from that case. *See* Defs.' Mot. to Dismiss § IV(C). Significantly, Defendants failed to mention that in *Jordan-Arapahoe*, the Tenth Circuit identified three different vested property rights recognized under Colorado law that arise in the intersection of land use rights and zoning ordinances: (1) a statutory right under the Colorado Vested Property Rights Act; (2) a common law right that vests in a particular land use after a building permit has been issued and a landowner acts in reliance on it; and (3) a common law right that vests in land use based on a landowner's substantial actions taken in reliance, to her detriment, on representations and affirmative actions by the government. *See Jordan-Arapahoe, LLP*, 633 F.3d at 1026–32 (citing *Eason II*, 70 P.3d at 603–606).

9. Plaintiff's pleading, the facts alleged, and claims asserted therein, substantially mirrors and aligns with the vested property rights identified in *Jordan-Arapahoe* and *Eason II*. *See* Pl.'s Amended Complaint at ¶¶ 9–10, 17–23, 70–74. In fact, Plaintiff's amended complaint substantially relied upon those two cases and the law identified therein because of the obvious similarities. In *Eason II*, for example, the Colorado Court of Appeals found that a property owner had a protected interest in the use of his property under Colorado law because (1) the county had represented in a letter to him that his use of semitrailers for self-storage was permitted under its zoning ordinances and (2) the property owner relied on those representation to his detriment by paying for a building permit, installing over one hundred semitrailers on his property, and operating his self-storage business. *See Eason II*, 70 P.3d at 603, 605–06. There, the Colorado Court of Appeals held that the county had violated the property owner's rights to due

process of law when it subsequently informed the property owner that the county's policies regarding semitrailers had changed and the use of semitrailers for permanent storage was no longer permitted. *See id.* at 603, 605–610.

10. The facts in Plaintiff's case are almost identical to the relevant facts of *Eason II*:

- Plaintiff submitted a permit application to construct an accessory residential dwelling and guest house on her property to the Chaffee County Building Department. *See* Pl.'s Amended Complaint at ¶ 17.

- That permit application process required Plaintiff to describe her current and planned land use of the property as it related to the accessory residential dwelling and guest house, which directly involved and included review of her foxhunting activities and the foxhounds maintained on her property. *See id.* at ¶¶ 10, 17–19.

- Approval of the permit depended upon Plaintiff's current and planned land use of her property and her compliance with the Chaffee County zoning ordinances. *See id.* at ¶¶ 17–21.

- As part of that permitting process, Plaintiff had numerous communications with Chaffee County Planning Manager, Jon Roorda, regarding the use of her land and its compliance with Chaffee County zoning ordinances. *See id.*

- During those communications, when Mr. Roorda suggested that the plans in conjunction with the aggregate use of her property could be deemed "outfitting" and require a special use permit before issuance of a building permit, Plaintiff revised her plans so as to comply with the Chaffee County Land Use Code zoning ordinances as represented. *See id.* at ¶¶ 19–20.

- After Plaintiff's revisions, Mr. Roorda issued both a building permit that acknowledged Plaintiff's land use as compliant with the Chaffee County Land Use Code and a Certificate of Zoning Compliance as to that use. *See id.* at ¶¶ 20–21.

- In reliance on the representations made by Mr. Roorda, the building permit issued, *and* the Certificate of Zoning Compliance issued, Plaintiff commenced construction and continued land use of the property. *See id.* at ¶¶ 17–22.

- After months of construction, Mr. Roorda subsequently contacted Plaintiff to inform her that the county's assessment of her use of the property had changed; that she was now not compliant with Chaffee County Land Use Code zoning ordinances previously deemed compliant; and that the previously considered foxhounds were now classified as a kennel and the previously considered foxhunting and use of facilities were now classified as outfitting facilities and both now required a special use permit. *See id.* at ¶¶ 23–25.

- With this change in position, the County refused to issue Plaintiff a certificate of occupancy for the previously permitted accessory residential dwelling and guest house until she complied with Mr. Roorda's new interpretation of the Chaffee County Land Use Code zoning ordinances. *See id.* at ¶¶ 39, 41.

As in *Eason II*, Plaintiff has pleaded a protected property interest in the use of her property under Colorado law based on the substantial actions she has taken in reliance, to her detriment, on representations and affirmative actions by the government. *See Eason II*, 70 P.3d at 605–606. The Tenth Circuit in *Jordan-Arapahoe* expressly recognized the vested property rights identified in *Eason II* and the facts that gave rise to them—reliance *and* representations or affirmative actions by the government. *See Jordan-Arapahoe, LLP*, 633 F.3d at 1030–31. The Tenth Circuit also identified vested property rights acquired from issued building permits and reliance upon them, which Plaintiff has also pleaded. *See id.* at 1029–30. These legal bases for vested rights were fundamental to the Tenth Circuit's analysis in determining whether the property owner before it had established a claim. *See id.* at 1029–32.

11. Defendants' motion and reliance on *Jordan-Arapahoe* significantly misstates the issue before the Tenth Circuit and its holding. *See* Defs.' Mot. to Dismiss § IV(C). The issue in *Jordan-Arapahoe* was not detrimental reliance. *See Jordan-Arapahoe, LLP*, 633 F.3d at 1027–32. It was whether zoning ordinances alone were sufficient to constitute a representation or affirmative action by the

government. *See id.* at 1029-32. Unlike the facts of this case, the property owner in *Jordan-Arapahoe* did not have a building permit issued and did not assert any representations or affirmative actions made by the county, except for the promulgation of a zoning ordinance. *See id.* The Tenth Circuit found that a zoning ordinance itself was not sufficient to constitute a representation or affirmative act and, therefore, the property owner failed to establish a vested property right. *See id.* The facts of *Jordan-Arapahoe* are far from the facts here where Plaintiff has pleaded that there is a building permit at issue, a certificate of zoning compliance at issue, *and* representations and affirmative acts made by the government to Plaintiff regarding the permitted use of her property. *See* Pl.'s Amended Complaint at ¶¶ 9–10, 17–23, and 71–74.

12. Instead of addressing the applicable law and facts pleaded, Defendants' motion turns to general provisions under the Chaffee County Land Use Code and the International Residential Code (IRC), of which Defendants requested the Court take judicial notice. *See* Defs.' Mot. to Dismiss § IV(C) at 10–12. Plaintiff generally has no objection to judicial notice of these provisions or the Chaffee County Land Use Code and IRC as a whole, as they are regulations that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.[14] And judicial notice of these regulations alone has no real effect on the analysis here. However, Plaintiff does object to Defendants' misguided use of these general regulations.

13. Specifically, Defendants attempt to use the innocuous regulations in the Chaffee County Land Use Code and IRC to somehow impute facts for the Court to consider

[14] It is important to note, there are ordinances at issue that have since been amended and are not listed at the link Defendants provided. *See* Pl.'s Amended Complaint at ¶¶ 30–37. Plaintiff also expects the construction and application of ordinances under the Chaffee County Land Use Code to be at issue in this proceeding, which implicate facts not subject to judicial notice. *See* FED. R. CIV. P. 201.

and to challenge the facts Plaintiff has pleaded. *See* Defs.' Mot. to Dismiss § IV(C) at 10-12. Defendants attempt to use these general regulations to dispute facts pleaded regarding the *actual* functions, operations, application, and review process conducted by Chaffee County; facts related to the application Plaintiff submitted, and land use identified therein, that was ultimately reviewed and approved by Chaffee County; facts upon which Chaffee County issued the building permit and certificate of zoning compliance, and land use approved therein; and facts related to the substance of the County's representations to Dr. Brown.[15] Not only do these general regulations by their very nature not create such facts to support Defendants' argument,[16] but further, this argument fundamentally misapplies the 12(b)(6) analysis;[17] fundamentally misunderstands and misrepresents the facts and claims of this case;[18] and fundamentally ignores the vested rights identified in *Jordan-Arapahoe* and *Eason II*.[19] To be clear, Plaintiff is not claiming a vested right in a land use violation. *See* Pl.'s Amended Complaint at ¶¶ 9–10, 17–23, 70–74. Plaintiff is claiming a vested right in a land use that Chaffee County represented to her was lawful and then subsequently altered its position to determine it was a violation subject to a limited impact review. *See id.*

14. Defendants also attempt to limit the Court's factual analysis of Plaintiff's vested rights to two documents—the issued building permit and the Certificate of Zoning Compliance—and request the Court take judicial notice of these documents, suggesting

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[15] Compare Defs.' Mot. to Dismiss § IV(C), *with* Pl.'s Amended Complaint at ¶¶ 9–10, 17–23.

[16] *See* Chaffee County Land Use Code § 15.2; IRC §§ 105.4, 110.1.

[17] *See e.g.*, *Twombly*, 550 U.S. at 555–57; *Iqbal*, 556 U.S. at 678; *Jordan-Arapahoe, LLP*, 633 F.3d at 1025 (finding pleaded factual allegations must be accepted as true and viewed in the light most favorable to the plaintiff).

[18] *See* Pl.'s Amended Complaint at ¶¶ 9–10, 17–23, 70–74.

[19] *See Jordan-Arapahoe, LLP*, 633 F.3d at 1027–32; *Eason II*, 70 P.3d at 603–606.

they are central to and determinative of the sufficiency of Plaintiff's pleadings. *See* Defs.' Mot. to Dismiss §§ I, II, IV(A), (C). However, Plaintiff's pleading makes clear the factual allegations establishing her vested property rights extend well beyond these two documents and include but are not limited to facts regarding: (1) the complete application Plaintiff submitted and land use identified therein that were the subject of the County's review and upon which the building permit and Certificate of Zoning Compliance were issued; (2) the ongoing written and oral communications and representations made by Mr. Roorda on behalf of the County regarding Plaintiff's land use; and (3) the facts related to and establishing the County's review process. *See* Pl.'s Amended Complaint at ¶¶ 9-10, 17–23, 70–74. These documents are divorced from that context and as asserted mislead the Court as to the facts at issue. As such, Plaintiff objects to the County's attempt to argue the merits of this case on incomplete evidence and in disregard of the factual allegations Plaintiff has made related to that evidence. Plaintiff also objects to the County's mischaracterization of this evidence. This building permit form is not the complete application referred to by Plaintiff in her factual allegations. *Compare* Defs.' Mot. to Dismiss §§ I, IV(A) and (C), *with* Pl.'s Amended Complaint at ¶¶ 17–19. That application included detailed documentation identifying the proposed construction plans and related land use. *See* Pl.'s Amended Complaint at ¶¶ 17–19. And while both of these forms were initially submitted by Plaintiff as part of her application, they were ultimately completed, approved, and issued by Chaffee County as part of its review. *See* Defs.' Mot. to Dismiss at Ex. B (documenting the signatures of both applicant as well as zoning officials and building inspectors).

15. Under the applicable law and looking to the detailed facts alleged in the light most favorable to Plaintiff, Plaintiff has more than sufficiently pleaded that she was deprived of a federal right to property without due process of law.

C. Defendants ignore the factual allegations that support Plaintiff's class-of-one equal protection claim and, instead, attempt to raise factual disputes inappropriate to a 12(b)(6) analysis.

16. Plaintiff has asserted a class-of-one equal protection claim under the Fourteenth Amendment of the United States Constitution pursuant to 42 U.S.C section 1983. To adequately plead this claim for relief, a plaintiff must allege that she has been treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *See Kansas Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1216 (10th Cir. 2011). This requires a plaintiff to allege specific factual allegations that others who are similarly situated to a plaintiff in every material respect were treated differently. *See id.* Crucial to determining whether Plaintiff's amended complaint meets this pleading requirement is understanding what the material factors are for comparison. *See id.* Not all factors need to be similar; only those that are *material* in comparing the difference in treatment. *See id.*

17. Similar to Plaintiff's claim, the Tenth Circuit has recognized cases that have brought successful class-of-one claims arising from unfavorable zoning decisions. *See id.* (citing *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000), *Gerhart v. Lake Cnty. Mont.*, 637 F.3d 1013, 1023 (9th Cir. 2011), *Mimics, Inc. v. Vill. of Angel Fire*, 394 F.3d 836, 849 (10th Cir. 2005)). Looking to those cases, there were specific factors that were material in determining the difference in treatment, including:

a. property owners seeking a connection to the municipal water supply and the difference in length of easements conditioned upon granting those connections, *see Olech*, 528 U.S. at 565;

b. businesses in the village of Angel Fire and the selective regulatory enforcement of inspections and selective reporting of possible building code violations, *see Mimics, Inc.*, 394 F.3d at 848–49 and n.7; and

c. property owners on the same block who had built approaches to a county road and the selective permitting requirements for these approaches, *see Gerhart*, 637 F.3d at 1022-23.

Like the above cases, here the material factors for comparison involve rural properties in Chaffee County with improved structures and facilities related to guiding services for outdoor expeditions and whether Chaffee County required permits for this use. *See* Pl.'s Amended Complaint at ¶¶ 63, 65–68, 71, 76, 80–83, n.2; *see also* Chaffee County Land Use Code § 15.2 (defining the "Outfitting Facilities" ordinance). Unlike cases involving significant discretion or a wide array of factors, the characteristics for comparison here are easily identified, assessed, and determined—zoning, structure, use, and permit.[20] Any discretion as to use is further reduced given the expansive interpretation Chaffee County has applied to the definition of "outfitting facilities," which includes any property with improved structures or facilities used to provide services, housing, or safekeeping to animals or equipment that are used in conjunction with guiding services such as riding horses or hunting on public lands. *See* Pl.'s Amended Complaint at ¶ 63. This expansive interpretation[21] provides no distinction for commercial or personal use or the volume and

[20] In comparison, cases relied upon by Defendants involved substantial discretionary decision-making over an array of subjective, individualized assessments, and conclusory statements instead of factual allegations. *See Engquist v. Or. Dep't of Agric.*, 553 U.S. 591, 602–05 (2008) (subjective public employment determination); *Kansas Penn Gaming, LLC*, 656 F.3d at 1219–1220 (subjective public nuisance determination and failure to allege any facts), *Jicarilla Apache Nation v. Rio Arriba Cnty.*, 440 F.3d 1202, 1212–13 (10th Cir. 2006) (subjective valuation of property); *Jennings v. City of Stillwater*, 383 F.3d 1199, 1213–14 (10th Cir. 2004) (subjective determination as to criminal prosecution of rape case); *Glover v. Mabrey*, 384 F. App'x 763, 778 (10th Cir. 2010) (unpublished opinion finding failure to allege any facts).

[21] Although not addressed in Defendants' motion, Plaintiff has also raised constitutional challenges as to the overbreadth and unconstitutional vagueness of the relevant ordinances. *See* Pl.'s Amended Complaint at ¶¶ 65, 75–79.

scope of use, leading it to include "conduct that is as benign as a grandfather taking his grandson out for a horseback ride." *See* Pl.'s Amended Complaint at ¶¶ 63, 65, 76, 78, 81, n.2. The Chaffee County Commissioners themselves have recognized these issues and are currently considering amendment to this ordinance. *See* Pl.'s Amended Complaint at ¶¶ 67–68.

18. As to the material factors, Plaintiff sufficiently pleaded her class-of-one claim for relief. Plaintiff identified properties that all shared the same zoning classification; Plaintiff identified that these properties all performed guiding services for outdoor expeditions; and Plaintiff identified that of these similarly situated properties Chaffee County has only required her to obtain a permit. *See* Pl.'s Amended Complaint at ¶ 81. Further, Plaintiff also accurately identified that Chaffee County's interpretation of the zoning ordinance is expansive enough to implicate a significant portion of the Chaffee County population's personal uses; Plaintiff identified some of the many similarly situated residents in Chaffee County implicated by this interpretation; and Plaintiff identified that Chaffee County has again limited its selective enforcement to her personal use. *See id. at* ¶¶ 81 and n.2.

19. The material factors Plaintiff pleaded are substantially comparable to the factors identified in *Gerhart* and *Mimics*, again cases that the Tenth Circuit recognized as successfully asserting class-of-one claims. *See Gerhart*, 637 F.3d at 1022-23 (identifying selective permitting requirements between similarly situated property owners); *see also Mimics, Inc.*, 394 F.3d at 848–49 and n.7 (identifying selective regulatory enforcement between similarly situated businesses). These factors in conjunction with a long history of abuses by the Defendants towards Plaintiff—including, but not limited to, reversals in represented positions; complete denial of use of property based upon alleged land use

violations previously deemed compliant; amendment of an ordinance then being enforced against Plaintiff; immediate enforcement of that newly amended ordinance against Plaintiff without notice of its alleged violation and contrary to Chaffee County Land Use Code protections for non-conforming uses—cumulatively demonstrate Defendants' intent and abusive conduct. *See* Pl.'s Amended Complaint at ¶¶ 17–68, 81-82.

20. Further, these factors underlie not just Plaintiff's equal protection claim but also her claims as to the unconstitutional overbreadth and vagueness of Chaffee County's zoning ordinance for outfitting. *See* Pl.'s Amended Complaint at ¶¶ 65, 75–79. The issues with the scope of this ordinance are so far removed from "untruthful fearmongering" as to have been identified by the state magistrate judge in the permanent injunction Defendants have attached to their motion and requested the Court take judicial notice. *See* Pl.'s Amended Complaint at ¶ 65; *see also* Defs.' Mot. to Dismiss at Ex. A (Permanent Injunction). There are inherent and significant concerns with how Chaffee County has used this ordinance to selectively target Plaintiff. Instead of recognizing Plaintiff's very real claims for protection from deliberate and selective government overreach, Defendants abandon law and reason entirely to assert baseless accusations of "political opposition." These emotional appeals have no credibility or bearing on the sufficiency of Plaintiff's pleaded claims.

21. In fact, Defendants' motion provides no real legal argument or analysis challenging the sufficiency of Plaintiff's equal protection claim. *See* Defs.' Motion to Dismiss § IV(E). Except for some conclusory statements, Defendants' arguments are limited to attempts to raise factual disputes. *See id*. By doing this, Defendants still fail to recognize that this is a pleading sufficiency analysis where Plaintiff's factual allegations are accepted as true. Every instance where Defendants claim Plaintiff's factual allegations

are "untrue" or Defendants attempt to raise a dispute by alleging their own facts outside of the pleading reveals their ignorance of the 12(b)(6) analysis. *See id.* Under this analysis, Plaintiff is only required to allege the identity or characteristics of other similarly situated property owners and how those property owners were treated differently. *See Kansas Penn Gaming, LLC*, 656 F.3d at 1219–20. It is this difference in treatment from others who are similarly situated that indicates enforcement was arbitrary. *See id.* at 1220. And Plaintiff need only offer enough factual allegations to nudge her claims across the line from conceivable to plausible. *See id.* at 1219 (citing *Twombly*, 550 U.S. at 570). She is not required to rebut—*in her pleading*—every factual dispute Defendants have yet to raise. There are appropriate and available means for raising factual disputes, where both sides can put on evidence to support their claims and defenses. *See* FED. R. CIV. P. 56. A 12(b)(6) motion is not that place. Further, that dispute would require more than the specter of hypothetical issues Defendants attempt to assert here.[22]

22. Under the applicable law and looking to the facts alleged in the light most favorable to Plaintiff, Plaintiff has more than sufficiently pleaded that she has been treated differently from others similarly situated to her and that there is no rational basis for the difference in treatment.

D. Defendants misstate both the law and scope of preclusion.

23. Defendants fail to meet their burden to prove preclusion. *See* FED. R. CIV. P. 8(c) (identifying res judicata as an affirmative defense). Generally, a 12(b)(6) motion is ill-suited for arguing an affirmative defense because a defendant is limited to

[22] While Defendants speculate generally regarding grandfathered land uses, the County's review process, or complaints issued as a means of disputing Plaintiff's factual allegations, they make no attempt to actually allege any facts related to the specific properties or individuals identified in Plaintiff's pleading. *See* Defs.' Motion to Dismiss § IV(E).

establishing the defense with the factual allegations of a plaintiff's pleading. *See Jones v. Bock*, 549 U.S. 199, 215 (2007); *Fernandez v. Clean House, LLC*, 883 F.3d 1296, 1298-99 (10th Cir. 2018). And a plaintiff is not required to negate an affirmative defense within the pleading. *See Ghailani v. Sessions*, 859 F.3d 1295, 1305–06 (10th Cir. 2017) ("the burden of pleading [affirmative defenses] rests with the defendant . . . complaints need not anticipate affirmative defenses, neither *Iqbal* nor *Twombly* suggest otherwise") (citing *Gomez v. Toledo*, 446 U.S. 635, 640 (1980)). Here, Plaintiff's amended complaint does not support Defendants' affirmative defense.

24. 28 U.S.C. section 1738 requires federal courts to give preclusive effect to any state-court judgment that would have preclusive effect under the laws of the state in which the judgment was rendered. *San Remo Hotel, L.P. v. City and Cnty. of San Francisco*, 545 U.S. 323, 335–36 (2005). While Defendants recognizes that state law controls any determination of preclusion, inexplicably, instead of then turning to Colorado law, the Defendants rely on cases applying the law of Ohio, California, and Oklahoma. *See* Defs.' Mot. to Dismiss § IV(F) (citing *San Remo Hotel, L.P.*, 545 U.S. at 335 (applying the law of California); *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 81–84 (1984) (applying the law of Ohio); *Fox v. Maulding*, 112 F.3d 453, 456–57 (10th Cir. 1997) (applying the law of Oklahoma)). When looking to the applicable state law, Colorado courts do recognize that issue preclusion bars relitigation of legal or factual matters already decided in prior proceedings. *See In re Tonko*, 154 P.3d 397, 405–07 (Colo. 2007). However, that bar applies only when: (1) the issue sought to be precluded is identical to an issue actually and necessarily determined in a prior proceeding; (2) the party against whom preclusion is asserted was a party to or is in privity with a party to the prior proceeding; (3) there was a final judgment on the merits in the prior proceeding;

and (4) the party against whom preclusion is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *See id*. at 405.

25. Here, preclusion is not applicable because the issues Defendants seek to preclude—Plaintiff's constitutional claims—are not identical to the issues actually and necessarily determined in the prior proceeding.[23] That proceeding was limited to a declaratory judgment with requested injunctive relief asserted by Chaffee County as to the enforcement of its "outfitting facilities" ordinance.[24] It did not address or consider the kennel ordinance also at issue here. In fact, Chaffee County voluntarily dismissed claims related to that ordinance when the state court magistrate judge presiding over that proceeding expressly identified due process issues with their notice under the amended definition of kennel. Further, the state court magistrate judge expressly stated "no argument regarding the constitutionality of the zoning regulation has been raised by Defendant."[25] Even if such argument had been raised, the Colorado Rules of Magistrates expressly prohibit magistrate judges from determining any constitutional issues raised. *See* C.R.M. 5(f). As such, the constitutional issues asserted here were neither raised nor considered in that prior proceeding.

26. Defendants necessarily recognize Plaintiff's constitutional issues were not addressed in that proceeding and, instead, attempt to assert that Plaintiff was required to raise these constitutional issues in that proceeding. *See* Defs.' Mot. to Dismiss § IV(F) at 14 (citing *Fox v. Maulding* as to compulsory counterclaims). However, Defendants'

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[23] *Compare* Pl.'s Amended Complaint, *with* Defs.' Mot. to Dismiss at Ex. A attaching the Permanent Injunction issued May 9, 2018 by Magistrate Judge Amanda Hunter in *Bd. of Cnty. Comm'rs of Chaffee Cnty. v. Brown*, 2017 cv 30035, Chaffee County District Court, Colorado (Permanent Injunction).

[24] *See Bd. of Cnty. Comm'rs of Chaffee Cnty. v. Brown*, 2017 cv 30035, Chaffee County District Court, Colorado; *see also* Pl.'s Amended Complaint at ¶¶ 29, 63–65.

[25] *Permanent* Injunction at 2; *see also* Pl.'s Amended Complaint at ¶¶ 63–65.

reliance on *Fox* is misplaced. *See id.* That case is inapposite as it applies Oklahoma law, not Colorado law. *See Fox*, 112 F.3d at 456–57. And Colorado law does not require compulsory counterclaims to be raised in defense of claims for declaratory judgments. *See Eason v. Bd. of Cnty. Comm'rs of Cnty. of Boulder*, 961 P.2d 537, 539–40 (Colo. App. 1997) (hereinafter *Eason I*) (citing *Atchison v. City of Englewood*, 506 P.2d 140 (Colo. 1973)); *see also Khan v. New Frontier Media, Inc.*, 82 F. App'x 625, 627–28 (10th Cir. 2003) (an unpublished case applying *Eason I*).

27. Plaintiff's case also substantially aligns with the *Eason I* opinion. In *Eason I*, Boulder County brought a declaratory judgment and injunction against the property owner to enforce its zoning ordinances, and, although the property owner asserted the deprivation of his rights to due process as an affirmative defense, he did not affirmatively assert his constitutional claims as counterclaims in that proceeding. *See Eason I*, 961 P.2d at 538–39. Instead, like Plaintiff here, the property owner subsequently brought his constitutional claims in a separate proceeding. *See id.* at 539. In *Eason I*, the Colorado Court of Appeals found that the property owner was not required to assert his constitutional claims as counterclaims in response to the county's declaratory judgment claim and was permitted to subsequently assert those affirmative claims. *See id.* at 539–40. Plaintiff is similarly entitled to assert her constitutional claims here.

28. Under Colorado law, Plaintiff's claims are not precluded by the declaratory judgment proceeding previously brought by Chaffee County and the unrelated holding therein. Defendants' assertions of issue preclusion are unsupported under both law and fact.

E. Defendants fail to support their requested dismissal.

29. Defendants argue in their motion that the only proper party to this lawsuit is Chaffee County, which must be sued through its board of commissioners, and Plaintiff's suit against the various administrative units of Chaffee County are improper and must be dismissed. *See* Defs.' Mot. to Dismiss § IV(G). This argument ignores Colorado law expressly authorizing suits directly against county departments and administrative units.

30. State law determines the capacity in which a party may be sued in federal court. *See* FED. R. CIV. P. 17(b). Colorado appellate courts have recognized several statutes that authorize suits against county departments and county units—including counties by and through their board of commissioners, county sheriff departments, and county boards of adjustment. *See Wigger v. McKee*, 809 P.2d 999, 1003–1004 (Colo. App. 1990) (finding both the county and the county sheriff department were persons subject to section 1983 claims and authorizing suit against the county pursuant to C.R.S. § 30-11-105 and the county sheriff department pursuant to C.R.S. § 30-10-501); *see also Benes v. Jefferson Cnty. Bd. of Adjustment*, 537 P.2d 753, 753–54 (Colo. App. 1975) (authorizing suit against a board of adjustment).

31. In accordance with this law, Plaintiff sued the county and each of the county departments and administrative units that violated her constitutional rights: 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.[26] *See* Pl.'s Amended Complaint. at 1–3. Defendants do not dispute that Plaintiff properly asserted her claims against

[26] *See Will v. Mich. Dept. of State Police*, 491 U.S. 58, 71 (1989) (finding that suits against individuals in his or her official capacity are not suits against the officials but rather suits against the officials' office).

Chaffee County by asserting claims against its board of county commissioners. *See* C.R.S. § 30-11-105; *Wigger*, 809 P.2d at 1003–1004. Similarly, Plaintiff also sought to properly assert claims against the remaining Defendants. *See Benes*, 537 P.2d 753, 753–54. Looking to *Benes*, the court's authorization of a suit against the county board of adjustment there also suggests authorization for suit against the Chaffee County Planning Commission and the Chaffee County Board of Review. *See id.* Each of those departments and units exercise similar county-wide functions and their creation, powers, and operation are found in similar statutes. *Compare* C.R.S. § 30-28-117 (board of adjustment), *with* C.R.S. § 30-28-119 (planning commission) and C.R.S. § 30-28-206 (board of review).

32. Even assuming that Defendants are accurate and that Plaintiff's suit against the various county units is duplicative of what was already effectively pleaded—suit against Chaffee County—this duplication does not merit dismissal. *See Wigger*, 809 P.2d at 1003–04 (permitting claims against Arapahoe County with no issue raised or dismissal issued as to the duplication in pleading the county, its board of commissioners, and the officials of the county).

33. Dismissal is not appropriate or supported under the law, and Defendants' request should be denied.

III. CONCLUSION

34. Defendants deprived Plaintiff of her constitutional rights through a long, well-documented, and publicized pattern of conduct. Plaintiff pleaded with particularity these deprivations and did so in light of appellate opinions describing the elements, factors, and other requirements of Plaintiff's causes of action. But Defendants ignore that case law and the factual allegations in Plaintiff's amended complaint to argue that Plaintiff

failed to sufficiently state her claims. A cursory review of the law and the facts shows Plaintiff's lawsuit should proceed against the Defendants.

35. That Defendants have misstated, misapplied, or selectively applied the law in their motion to dismiss comes as no surprise. That type of conduct underpins the entirety of Plaintiff's amended complaint. For too long Defendants have abused their position of power and targeted one of their residents in violation of well-established constitutional law. Plaintiff asks this Court to allow her to proceed in her effort to hold them accountable for those abuses through this lawsuit.

IV. PRAYER

For these reasons Plaintiff Alison Brown respectfully prays this Court deny Defendants' Motion to Dismiss Amended Complaint and for such other further relief to which Plaintiff may be justly entitled to receive.

Respectfully submitted,

/s/ Charles J. Cain

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Response to Motion to Dismiss Amended Complaint has been served on all counsel on this 29th day of July 2019, using the CM/ECF system which will send notification of such filing to the following email addresses:

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/s/ Charles J. Cain
Charles J. Cain

Subject: Activity in Case 1:19-cv-01301-CMA-STV Brown v. Chaffee County et al Response to Motion
Date: Monday, July 29, 2019 at 4:20:08 PM Central Daylight Time
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District of Colorado

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