

District Court, Boulder County, State of Colorado 1777 Sixth Street, Boulder, Colorado 80302 (303) 441-3750	DATE FILED: September 14, 2023 2:52 PM CASE NUMBER: 2022CV30341
<p><b>Plaintiffs:</b> FEET FORWARD – PEER SUPPORTIVE SERVICES AND OUTREACH d/b/a FEET FORWARD, a nonprofit corporation; JENNIFER SHURLEY, JORDAN WHITTEN, and SHAWN RHOADES</p> <p><b>Intervenor Plaintiffs:</b> ERIC BUDD, MARY FALTYNSKI, and JOHN CARLSON</p> <p>v.</p> <p><b>Defendants:</b> CITY OF BOULDER and MARIS HEROLD, Chief of Police for the City of Boulder</p>	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
	Case Number: 2022CV30341 Division 2 Courtroom I
<p><b>ORDER RE PLAINTIFFS’ MOTION FOR PARTIAL JUDGMENT ON THE PLEADINGS</b></p>	

This matter comes before the Court on Plaintiffs’ *Motion for Partial Judgment on the Pleadings* (“Motion” or “Plaintiffs’ Motion”). Having carefully considered the Motion, Response, Reply, file, and applicable law, the Court finds and orders as follows.

**I. BACKGROUND**

Plaintiffs<sup>1</sup> filed a Complaint on May 26, 2022, asserting three claims for relief against the City of Boulder and Maris Herold, in her capacity as Chief of Police for the City of Boulder (collectively “Defendants” or “City”). Defendants moved to dismiss the Complaint.

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<sup>1</sup> The original Plaintiffs were Jennifer Shurley, Joran Whitten, and Shawn Rhoades (collectively “Individual Plaintiffs”); Feet Forward; Jennifer Livovich, and Lisa Sweeney Miran. Original taxpayer plaintiffs Jennifer Livovich and Lisa Sweeney Miran have since been dismissed or

Following extensive briefing, the Court issued an Order granting in part and denying in part Defendants' Motion to Dismiss on February 23, 2023 ("February 23 Order"). As to the first claim for relief, the February 23 Order granted the Motion to Dismiss as to the Tent Ban and denied the Motion to Dismiss as to the Blanket Ban.<sup>2</sup> The February 23 Order granted Defendants' Motion to Dismiss the second and third claims for relief as to both the Blanket Ban and Tent Ban. Thus, the sole remaining claim for relief is Plaintiffs' first claim for relief as to the constitutionality of the Blanket Ban. Defendants filed their Answer on March 23, 2023.

On April 21, 2023, Plaintiffs filed the Motion for Partial Judgment on the Pleadings. Through the Motion, Plaintiffs request that the Court enter judgment on their first claim for relief, under Colo. Const. article II, section 20 and C.R.S. § 13-21-131, for declaratory and injunctive relief against Defendants. Based on the February 23 Order and Defendants' admissions in the Answer, Plaintiffs contend they are entitled to judgment on the pleadings under C.R.C.P. 12(c). In particular, Plaintiffs request the Court:

(1) declare that when unhoused individuals cannot access indoor shelter, the Blanket Ban, B.R.C. § 5-6-10, amounts to cruel and unusual punishment prohibited by article II, section 20 of the Colorado Constitution;

(2) enter a permanent injunction prohibiting Defendants, and all persons and entities acting under their direction or on their behalf, from enforcing the Blanket Ban against unhoused individuals when they cannot access indoor shelter; and

(3) award reasonable attorney fees and costs pursuant to C.R.S. § 13-21-131(1).

Motion, p. 16

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withdrawn and replaced with Intervenor Plaintiffs Mary Faltynski, Eric Budd, and John Carlson (collectively "Taxpayer Plaintiffs").

<sup>2</sup> The Blanket Ban is set forth in B.R.C. § 5-6-10 and the Tent Ban is set forth in B.R.C. § 8-3-21(a).

Defendants oppose this request. They maintain that Plaintiffs seek greater relief through the Motion than they sought in the Complaint, and that Plaintiffs are not entitled to judgment on the pleadings because Defendants denied key material allegations.

Judgment on the pleadings is to be granted only when the material facts are undisputed and the moving party is entitled to judgment as a matter of law. Here, Plaintiffs' Motion is denied because (1) it seeks relief greater in scope than Plaintiffs requested in the Complaint, and (2) there are disputed material facts relating to the first claim for relief.

## **II. STANDARD OF REVIEW**

Pursuant to C.R.C.P. 12(c), a party may, "after the pleadings are closed but within such time as not to delay the trial," move for judgment on the pleadings. "In considering a motion for judgment on the pleadings pursuant to C.R.C.P. 12(c), the trial court must construe the allegations in the pleadings strictly against the movant, must consider the allegations of the opposing parties' pleadings as true, and should not grant the motion unless the pleadings themselves show that the matter can be determined on the pleadings." *Redd Iron, Inc. v. International Sales & Service Corp.*, 200 P.3d 1133, 1135 (Colo. App. 2008). Entry of judgment on the pleadings is proper only if the material facts are undisputed and the movant is entitled to judgment as a matter of law. *Sterenbuch v. Goss*, 266 P.3d 428, 432 (Colo. App. 2011). To justify granting a motion for judgment on the pleadings, the court must determine "in the light of the controlling law and undisputed facts, that the matter could finally be resolved at that stage." *City & County of Denver v. Qwest Corp.*, 18 P.3d 748, 754 (Colo. 2001).

Thus, as Defendants note, the standard of review for this Motion is the opposite of the standard of review for the Motion to Dismiss. In deciding Defendants' Motion to Dismiss, the Court was required to accept all material allegations of the Complaint as true and draw all

reasonable inferences in favor of Plaintiffs. Here, the Court must construe the allegations in the pleadings against Plaintiffs and consider the allegations in Defendants' Answer as true.

### III. ANALYSIS & RULING

#### A. Authority to Grant a Partial Judgment on the Pleadings

In their Response, relying on the language of C.R.C.P. 12(c), Defendants argue a court cannot enter judgment on the pleadings on only part of a claim, thereby making Plaintiffs' Motion for *Partial* Judgment on the Pleadings inappropriate. Response, p. 3. Defendants contend that Plaintiffs' Motion can be denied on this basis alone.

As to this threshold issue, the Court concludes, as argued by Plaintiffs in Reply, that Colorado appellate courts have held that trial courts have authority to grant a partial judgment on the pleadings. *See, e.g., Abts v Board of Education of School Dist. Re-1 Valley in Logan County*, 622 P.2d 518, 522 (Colo. 1980) (holding that "the trial court properly granted partial judgment on the pleadings"); *Ferrer v. Okbamicael*, 2017 CO 14M, ¶ 50 (superseded by statute) (the trial court did not err in granting defendants' motion for partial judgment on the pleadings). Defendants' legal authority on this issue is limited to federal case law and appears to be at odds with Colorado precedential authority. Further, nothing in C.R.C.P. 12(c) precludes affirmative relief on claims for injunctive or declaratory relief. *See, e.g., Seaton Mountain Electric Light, Heat & Power Co. v. Idaho Springs Investment Co.*, 111 P. 834, 837 (Colo. 1910) (holding that entry of an injunction based on motion for judgment on the pleadings is appropriate).

Accordingly, the Court decides the Motion on its merits.

#### B. Standing

Much of the parties' briefing centers on standing issues. In the Response, Defendants contend that Feet Forward and the Taxpayer Plaintiffs may not assert cruel and unusual

punishment claims on behalf of nonparties, and that the February 23 Order limited Feet Forward's and the Taxpayer Plaintiffs' standing because they maintained the same claims as the Individual Plaintiffs. Defendants further maintain that the Court cannot resolve the standing question in the context of the Motion, because Defendants have denied key jurisdictional allegations. Additionally, if the standing issue is revisited, Defendants urge that the Feet Forward and Taxpayer Plaintiffs' injuries are not within the zone of interests protected by the cruel and unusual punishment clause.

Plaintiffs respond that based on the February 23 Order and Defendants' admissions, Feet Forward and the Taxpayer Plaintiffs have standing to pursue this relief on behalf of unhoused individuals in the City of Boulder, and that they have suffered an injury to a legally protected interest sufficient to confer standing.

Initially, the Court notes that the February 23 Order observed that the Taxpayer Plaintiffs and Feet Forward maintained the same claims as the Individual Plaintiffs, with the exception that the Individual Plaintiffs also asserted claims for individual nominal damages. Order, p. 9 (citing to Complaint and Prayer for Relief). Therefore, under *Lobato v. People*, 218 P.3d 358, 368 (Colo. 2009), the Taxpayer Plaintiffs and Feet Forward may continue as plaintiffs because their role is similar to permissive intervenors, and they do not require standing independently because the Individual Plaintiffs have standing. Order, pp. 9-10.

The February 23 Order, however, further concluded that the Taxpayer Plaintiffs have standing based on their status as City of Boulder taxpayers. Order, pp. 10-12. Similarly, Feet Forward has organizational standing under *Havens*. Order, pp. 12-13. These conclusions were premised on the allegations of the Complaint, which were accepted as true for purposes of the Motion to Dismiss.

While Defendants' Answer includes significant admissions regarding the standing allegations, as noted by Defendants, many of the allegations upon which the Court found Feet Forward had sufficiently alleged facts supporting standing were denied for lack of sufficient information to admit or deny. Response, pp. 5 & 8. With respect to allegations pertaining to Taxpayer Plaintiffs, although the City admits it allocated \$2.7 million to compliance efforts, the enforcement related to not only the Blanket Ban and Tent Ban, but also encampment removal and clean-up. Answer, ¶ 127. When the allegations and responses are read in light most favorable to Defendants, as they must be for this Motion, there are disputed facts regarding taxpayer standing. For instance, Defendants are entitled to establish that funds spent writing tickets for enforcement of the Blanket Ban are nominal in the context of overall spending. Response, p. 9.

In sum, the Court agrees with Defendants that it may not conclusively resolve the organizational and taxpayer standing issues within the context of the Motion for Partial Judgment on the Pleadings. It is therefore unnecessary to reach the issue of whether the injuries need to be within the zone of interests protected by the cruel and unusual punishment clause or merely whether the interest is entitled, as a matter of law, to legal protection.

### **C. Scope of Relief Sought**

In addition to standing, the parties offer competing observations of the relief sought through this litigation. Plaintiffs maintain that they challenge the City's enforcement of the Blanket Ban against persons who cannot access indoor shelter. They seek a declaratory judgment and injunctive relief ordering Defendants to refrain from enforcing the ban in these circumstances against individuals who lack a realistic and safe alternative to surviving outside. Complaint, ¶ 6.

However, as pointed out by Defendants, the Complaint’s Prayer for Relief seeks narrower relief. Specifically, in relevant part, the Prayer for Relief requests the Court grant the following relief:

A. To declare that, as applied to the Individual Plaintiffs when they cannot access indoor shelter, the Blanket Ban, B.R.C. § 5-6-10, amounts to cruel and unusual punishment prohibited by article II, section 20 of the Colorado Constitution; . . .

C. To declare that Defendants, under color of law, subjected or caused the Individual Plaintiffs to be subjected to the deprivation of individual rights secured by article II of the Colorado Constitution;

D. To enter a permanent injunction prohibiting Defendants, and all persons and entities acting under their direction or on their behalf, from enforcing the Cover Bans against the Individual Plaintiffs when they cannot access indoor shelter;

E. To award the Individual Plaintiffs nominal damages pursuant to C.R.S. § 13-21-131(1);

F. To award reasonable attorney fees and costs pursuant to C.R.S. § 13-21-131(1); and

G. To award such further and different relief as the Court may deem just and proper.

By its express terms, the Prayer for Relief seeks a declaration that the Blanket Ban, “as applied to the Individual Plaintiffs when they cannot access indoor shelter,” violates article II, section 20 of the Colorado Constitution. Likewise, the request for injunctive relief requests an Order enjoining Defendants from enforcing the Blanket Ban against the Individual Plaintiffs when they cannot access indoor shelter.

Additionally, according to both the Complaint and Plaintiffs’ briefing on the Motion to Dismiss, they are bringing an “as-applied” constitutional challenge. February 23 Order, p. 23;

Plaintiffs’ supplemental briefing p. 6, n.4. In the supplemental briefing regarding standing, Plaintiffs argued that the taxpayer plaintiffs and Feet Forward “raise the same claims as the individual plaintiff[s]”, with the exception of the claims for nominal individual damages. October 21, 2022 supplemental briefing, p. 7. Moreover, the Court notes that while certain allegations within the first claim for relief are directed at Boulder’s unhoused population, many of the allegations are focused specifically on the Individual Plaintiffs, given that this is an as-applied challenge. Complaint, ¶¶ 182-85.

Accordingly, the Motion seeks broader relief than what Plaintiffs requested in the Complaint. Even in the absence of disputed facts pertaining to key material allegations (section D below), Plaintiffs would not be entitled to greater relief than what was sought in the Complaint on a Motion for Partial Judgment on the Pleadings.

Therefore, based on the Motion and the pleadings alone, Plaintiffs are not entitled to an injunction or declaratory relief as to Boulder’s unhoused population.

**D. Key Allegations of the Complaint are Denied**

For Plaintiffs to prevail on their Motion, they must show that admissions made by the Defendants in the Answer concede all key elements of the claim. They have not done so. As set forth above, Plaintiffs are bringing an as-applied challenge to the City’s ordinances. Plaintiffs allege that indoor shelter in the City is inadequate to support the population of people experiencing homelessness, including the Individual Plaintiffs; the Plaintiffs have no choice but to sleep outdoors in the City’s public spaces; and when the Blanket Ban is enforced against the Plaintiffs when they cannot obtain indoor shelter, the Ban punishes them for being homeless in violation of article II, § 20 of the Colorado Constitution. Complaint, ¶¶ 175-87.



Plaintiffs maintain that Defendants admitted key facts in their Answer, which establish a claim based on the Court's conclusion that Plaintiffs stated a plausible claim for relief on the constitutionality of the Blanket Ban. Motion, at pp. 2-3. Through the Motion, Plaintiffs urge that such admissions now entitle them to a partial judgment on the pleadings and request that the Court enter judgment on their first claim for relief, for declaratory and injunctive relief against Defendants.

Defendants respond that key allegations of the Complaint are denied and that Plaintiffs "inaccurately portray the Answer as having conceded the elements of a claim, not actually asserted in the Complaint." Response, at p. 4. Defendants request that the Court deny the Motion in full.

In determining whether there are material facts in dispute based on the pleadings, the Court focuses on each element of Plaintiffs' first claim for relief and whether Defendants have admitted or denied those elements in their Answer.

- The indoor shelter available in the City is inadequate to support the population of people experiencing unsheltered homelessness in the City, including the Individual Plaintiffs. Complaint, ¶ 177.
  - Defendants admit there have been days when the indoor shelters are full and unable to accept all persons who may be seeking shelter. Defendants deny the remainder of the paragraph. Answer, ¶ 177.
- The indoor overnight shelter available in the City does not have enough beds to accommodate the number of people experiencing unsheltered homelessness in the City. Rules, restrictions, and structural realities at the shelter make it impossible,

impracticable, unreasonable, and and/or unsafe for many unhoused residents, including the Individual Plaintiffs, to stay there. Complaint, ¶ 178.

- Defendants deny that there are unhoused residents of the City for whom sheltering at BSH is not realistic or safe. Answer, ¶ 49.
- Defendants admit that on some nights there are not enough overnight shelter beds for the number of people experiencing homelessness in the City. Answer, ¶ 29.
- Defendants deny that “for every unhoused person in the City, there is some risk on any given night that they will not be able to get a bed at BSH. The person will not know whether they will receive a bed prior to making the long journey to BSH’s facility on the edge of town and waiting to see: (a) if they have a “reserved bed,” whether there are enough beds for everyone with a “reserved bed,” and if not, whether they will still receive a bed based on “individual criteria,” or (b) if they do not have a “reserved bed,” whether they win a spot through the lottery.” Answer, ¶ 32. Defendants qualified their Answer by stating that BSH does not reserve beds they do not have and always holds beds to use as standby, and that during this time period, no person in the reserved bed program was denied a bed due to capacity. Answer, ¶ 32.
- Defendants denied that BSH “turns people away on days when exposure to the weather is dangerous to human health and safety.” Answer, ¶ 33.
- Defendants admit that there is a 90-night per year limit at BSH but qualify their answer that the 90-day limit does not apply to critical weather nights and

that anytime during that 90 days individuals can elect to participate in the reserved bed program to be allowed additional nights. Answer, ¶ 50.

- Defendants admit that there have been days when indoor shelters are full and unable to accept all persons who may be seeking shelter. The City further admits that the Individual Plaintiffs may not be able to access shelter due to their own choices. Defendants denied the remaining allegations of ¶ 178. Answer, ¶ 178.

➤ The City has extremely limited capacity for indoor daytime sheltering even on the coldest and windiest days of the year, when being outside during the day unsheltered for lengthy periods of time is unsafe. (Complaint, ¶ 179)

- Defendants admit there is not currently a daytime shelter. Answer, ¶ 179.

➤ A portion of the City's unhoused residents, including the Individual Plaintiffs, therefore have no choice but to sleep and spend their days outdoors in the City's public spaces. (Complaint, ¶ 180).

- Defendants deny. Answer, ¶ 180.

➤ The Tent and Blanket Bans make it a crime for these residents to carry out the most basic functions of survival, including sleeping and staying dry and warm. (Complaint, ¶ 181).

- Defendants deny. Answer, ¶ 181.

➤ When enforced by the City against the Individual Plaintiffs when they cannot obtain indoor shelter, B.R.C. § 5-6-10 punishes the Individual Plaintiffs by virtue of their homelessness. (Complaint, ¶ 182).

- Defendants deny. Answer, ¶ 182.

- Defendants have subjected or caused the Individual Plaintiffs to be subjected to the deprivation of their rights secured under article II of the Colorado Constitution to be free from cruel and unusual punishments. Without this Court’s intervention, Defendants will continue to subject or cause the Individual Plaintiffs to be subjected to the deprivation of their article II rights. (Complaint, ¶ 184).
  - Defendants deny. Answer, ¶ 184.

Accordingly, Defendants have denied key allegations of the Complaint related to the first claim for relief. Additionally, as noted by Defendants on pp. 4-6 of the Response, Defendants denied other material allegations of the Complaint, including:

- Denying that at any given time, approximately 30 homeless people are suspended from BSH, and that the reasons for suspensions are “disproportionately punitive.” Answer, ¶¶ 33-34.
- Denying that “on any given day or night, many unhoused residents are left with no access to indoor shelter in the City.” Answer, ¶ 24.
- Denying that Defendants enforced the Blanket Ban on many nights when, or mornings after, BSH was full and had turned people away. Answer, ¶ 94.
- Denying that the Chief’s Directive on Camping Violations prevents officers from considering whether a person has access to alternative shelter at the time a ticket is written. Answer, ¶ 91.
- Denying that because of the Directive, officers do not inquire about a person’s ability to access shelter or the potential danger of remaining in the elements when they enforce the Blanket Ban. Answer, ¶¶ 92-93.

- Based on lack of sufficient information, denying certain allegations regarding the Individual Plaintiffs (Answer, ¶¶ 132, 143-45, 155-57, 169-70), Feet Forward (Answer, ¶¶ 108-121), and the Taxpayer Plaintiffs (Answer, ¶¶ 125 & 127).

In short, while Defendants made key admissions in accordance with C.R.C.P. 8 (Motion, pp. 3-11), there are considerable material facts in dispute, making a judgment on the pleadings inappropriate.

**E. Vagueness and Attorney Fees**

Based on the rulings above, it is unnecessary to address Defendants’ argument that the proposed injunction is too vague under C.R.C.P. 65(d). Due to the denial of the Motion, Plaintiffs have not demonstrated an entitlement to attorney fees under C.R.S. § 13-21-131(1).

**IV. CONCLUSION**

For the foregoing reasons, the Court denies Plaintiffs’ Motion for Partial Judgment on the Pleadings. The Motion seeks relief greater than that set forth in the Complaint, and Defendants have denied material factual allegations that preclude judgment for Plaintiffs on the pleadings. By October 5, 2023, the parties shall file a proposed Case Management Order and contact Division 2 to schedule a Case Management Conference. A trial date will be set at the CMC.

SO ORDERED this 14th day of September, 2023.

BY THE COURT:

*/s/ Robert R. Gunning*  
Robert R. Gunning  
District Court Judge