

DISTRICT COURT, CITY AND COUNTY OF  
DENVER, STATE OF COLORADO  
1437 Bannock Street, Rm. 256  
Denver, CO 80202

---

Plaintiffs:

DENVER DESERVES BETTER, a Colorado  
unincorporated nonprofit association;  
KEVIN REIDY;  
LEAH CAPRITTA;  
DAVID RODMAN; and  
ELLA RODMAN

v.

Defendants:

CITY AND COUNTY OF DENVER, COLORADO,  
acting by and through its BOARD OF ZONING  
ADJUSTMENT

---

Attorneys for Plaintiff:

PUBLIC TRUST INSTITUTE  
Daniel E. Burrows, #40284  
98 Wadsworth Blvd. #127-3071  
Lakewood, CO 80226  
Telephone: (720) 588-2008  
E-mail: [dburrows@publictrustinstitute.org](mailto:dburrows@publictrustinstitute.org)

SARAH J. BAKER P.C.  
Sarah Baker, # 32806  
P.O. Box 4551  
Eagle, CO 81631  
Telephone: (970) 331-0799  
E-Mail: [sbaker@sbakerpc.com](mailto:sbaker@sbakerpc.com)

DATE FILED: August 17, 2021 9:13 PM  
FILING ID: CE33B71219B1D  
CASE NUMBER: 2021CV32583

▲ COURT USE ONLY ▲

---

Case Number:

Div:

Ctrm:

**COMPLAINT FOR JUDICIAL REVIEW PURSUANT TO C.R.C.P. 106**

Plaintiffs, Denver Deserves Better, Kevin Reidy, Leah Capritta, and David Rodman, by and through undersigned counsel, submit this Complaint for Judicial Review Pursuant to C.R.C.P. 106.

### **SUMMARY OF THE CASE**

This case is about whether the Denver Zoning Administrator can abuse Denver’s zoning code to circumvent the legislative process, without public notice, without a hearing, and without the involvement of any accountable, elected official.

The Zoning Administrator is not elected. She’s not even appointed by anyone who is elected. Yet, in late 2020, after years of political debate over how Denver should deal with people experiencing homelessness, the Zoning Administrator suddenly decreed that she could allow homeless encampments anywhere in the City at any time, and that she could approve such camps at her whim, all through an administrative act called a “determination of unlisted use.” The Administrator claims she can approve such camps—which cater to the subset of Denver’s homeless population who are unwilling to use the services of the City’s many shelters—without notice or community involvement, even literally next to a preschool or within blocks of an elementary school.

Plaintiffs do not believe the Zoning Administrator has this power. Rather, she has engaged in legislation by administrative action. She does have authority to issue “determinations of unlisted use”—that is not at issue in this case. But she may do so only in limited circumstances and, even then, only subject to specific processes and after finding that certain legal criteria have been met. Here, however, the Zoning Administrator disregarded these limits on her authority. Along the way, she circumvented the legitimate political processes and denied residents and property owners their right to comment on a major zoning change that affects every person in the City.

In the hearings before the Denver Board of Zoning Adjustment (the “Zoning Board”) on the appeals below, the majority of the individual members of the Zoning Board recognized this fundamental problem, indicating that the Zoning Administrator’s determination was the wrong way to address zoning’s role in a solution for Denver’s homeless. Individual members of the Zoning Board urged that if campsites are going to be an allowed zoning use, that the Denver City Council should authorize that use through normal legislative channels and with strong rules in order to ensure compatibility with surrounding uses and protection of the health and safety of all Denver residents. Yet, through a quirk of the Zoning Board’s review process, even a majority of the board members were not able to stop the Zoning Administrator’s unlawful assumption of power.

Plaintiffs therefore ask the Court to right this wrong and overturn the Administrator’s illegal decree.

## **PARTIES**

1. Plaintiff Denver Deserves Better is a Colorado unincorporated nonprofit association.

2. Its organizational purposes include representing the broad rights of the citizens of the City of Denver as it relates to the City's management of the homeless population and those suffering from drug addiction and severe mental health issues that are contributing to the degradation of the City's living environment and safety.

3. One or more members of Denver Deserves Better were parties to the Determination Appeal and Permit Appeal (each defined below) and would have standing to assert the claims brought hereunder in their own right.

4. Plaintiffs Reidy, Capritta, and Rodman ("Individual Plaintiffs") are persons and/or taxpayers aggrieved by the Determination Decision and Permit Decision that are the subject of this appeal.

5. The Individual Plaintiffs all own property within the City and County of Denver, were parties to the Determination Appeal and Permit Appeal, and reside in the neighborhood where the Administrator granted the Park Hill Zoning Permit discussed below.

6. The City and County of Denver is a Colorado local government entity that acts by and through its Board of Zoning Adjustment.

7. Under the Denver Zoning Code ("DZC"), the Zoning Board is responsible for final action on appeals arising from administrative decisions.

8. On July 20, 2021 and August 3, 2021, the Zoning Board issued final decisions in the appeals that are the subject of this action.

## **GENERAL ALLEGATIONS**

### ***Denver Zoning***

9. In or about 2010, the Denver City Council adopted Ordinance No. 333-10 enacting the DZC and zoning map.

10. However, Ordinance 333-10 did not re-zone the entire city. Portions of Denver retained zoning designations under the former version of the zoning code, commonly referred to as "Former Chapter 59".

11. Former Chapter 59 remains the governing zoning for those lands in Denver that were not re-zoned under Ordinance 333-10.

12. As a result, zoning for all land in Denver is governed either under the DZC or Former Chapter 59.

### ***Unlisted Use Determinations Under DZC and Former Chapter 59 Zoning***

13. For both DZC lands and Former Chapter 59 lands, the Administrator has authority—under limited circumstances, subject to a specific review process, and subject to mandatory review criteria—to determine whether a specific unlisted primary, accessory, or temporary land use type may be permitted in one or more zone districts, and if so, what type of use review is required.

14. For lands in Denver that are governed by the DZC:

a. The Administrator may not issue a determination pursuant to § 12.4.6 to permit any specific use that is expressly prohibited in a zone district or by the DZC.

b. Any unlisted use determination must comply with the review process set forth in DZC §12.4.6.3.A through D.

c. When issuing a determination, the Administrator must employ the general rules of interpretation set forth in DZC § 12.4.6.3.F.

d. A determination of unlisted use may only issue when the Administrator applies all review criteria established by DZC § 12.4.6.4.A and B.

15. Similarly, for lands in Denver that are governed by Former Chapter 59:

a. Ordinance No. 0961-20 authorizes the Administrator to permit an unlisted temporary use on land retaining its zoning designation under Former Chapter 59.

b. This ordinance provides that unlisted use determinations on Former Chapter 59 lands may be issued upon a finding of three criteria. First, that the unlisted temporary use preserves and promotes the public health, safety and welfare of the inhabitants of the city, and of the public generally, and encourages and facilitates the orderly growth and expansion of the city; second, that the unlisted temporary use is consistent with the subject Former Chapter 59 zone district at issue; and, third, that the unlisted temporary use meets the requirements of DZC § 12.4.6.4.B.

### ***Determination of Unlisted Use for Temporary Managed Campsites***

16. On July 14, 2020, the Colorado Village Collaborative submitted a written request to the Administrator requesting a determination “that a temporary Safe Outdoor Space (SOS) is a permitted unlisted temporary use” under the Denver Zoning Code and Former Chapter 59.

17. On November 10, 2020, the Administrator first issued a “Unlisted Temporary Use Determination: Temporary Managed Campsites During Covid-19 Pandemic” (the “November Determination”). In the Determination, the Administrator introduced the use as “a temporary use providing safe occupancy spaces for homeless persons, either in temporary structures or parked motor vehicles” (the “Proposed Use”).

18. The November Determination finds that the Proposed Use (i) is consistent with the intent of the DZC and Former Chapter 59; (ii) is consistent with the intent of all applicable neighborhood contexts and zone districts; and (iii) is substantially similar in character and impact to other permitted primary, temporary, and accessory uses in all applicable zone districts.

19. The November Determination authorizes the Proposed Use as a temporary use, tied to the duration of the Covid-19 emergency public health orders issued by the State of Colorado and City of Denver.

20. On May 7, 2021, the Administrator issued an updated and extended “Unlisted Temporary Use Determination: Temporary Managed Campsites During Covid-19 Pandemic” (the “May Determination” and collectively with the November Determination, the “Determination”).

21. In the May Determination, the Administrator again found that the Proposed Use (i) is consistent with the intent of the DZC and Former Chapter 59; (ii) is consistent with the intent of all applicable neighborhood contexts and zone districts; and (iii) is substantially similar in character and impact to other permitted primary, temporary, and accessory uses in all applicable zone districts.

22. Based on the Administrator’s findings, she issued the Determination, which constitutes a final decision allowing the Proposed Use as an unlisted temporary use.

23. Under the May Determination, the Proposed Use is authorized (i) in Former Chapter 59 zone districts, until the expiration or rescission of all State of Colorado and City of Denver public health orders issued because of the Covid-19 pandemic, and (ii) in lands governed by the DZC, until December 31, 2023.

24. On information and belief, no public notice was given prior to and in connection with the Administrator’s issuance of the November Determination or the May Determination.

25. On information and belief, no public hearing was held prior to and in connection with the Administrator’s issuance of the November Determination or the May Determination.

26. The effect of the Determination is to make “Temporary Managed Campsites,” as defined in the Determination, a use-by-right in every DZC zone district and all Former Chapter 59 lands throughout the City, subject only to the issuance of a Zoning Permit.

27. Pursuant to DZC § 12.2.9, Zoning Permits are issued by the Administrator and are not subject to any requirement of public notice or any public hearing.

28. Issuance of a zoning permit is subject only to the review criteria established pursuant to DZC § 12.4.1.5.

29. In issuing the Permit, and because the Determination purports to make the Proposed Use a use-by-right in all zone districts, the Zoning Administrator is not required to and did not consider the impacts of the Proposed Use on adjacent properties.

30. The Zoning Administrator erred in issuing the Determination by, among other things, (1) failing to consider the preservation and promotion of the public health, safety and welfare of the inhabitants of the City, and of the public generally, (2) allowing a use that is expressly prohibited in certain DZC zone districts, and (3) failing to analyze the type and extent of impacts on adjacent properties created by the Proposed Use in comparison to impacts from other uses permitted in the zone districts in which the proposed use would be allowed.

31. The Board erred in upholding the Determination in spite of these errors by the Zoning Administrator.

### ***Application for Park Hill Zoning Permit***

32. On May 6, 2021, Colorado Village Collaborative filed an application for a zoning permit (“Permit Application”) for a temporary managed campsite—the use purportedly authorized by the Determination.

33. The Permit Application seeks approval of a “33 unit Safe Outdoor Space (SOS) to provide service for up to 40 unsheltered” individuals (“Campsite”).

34. The property on which the Permit Application seeks approval is governed by the DZC.

35. DZC Division 12.4 establishes certain zoning application and review procedures applicable to the Permit Application.

36. In addition to the requirements of DZC Division 12.4, the May Determination sets forth further criteria and requirements applicable to the Permit Application and issuance of any permit pursuant thereto.

37. On May 7, 2021—a mere one day after receiving the Permit Application and the very same day that she issued the May Determination—the Administrator issued Zoning Permit No. 2021-ZONE-0002026 (“Permit”).

38. The Permit authorizes the Campsite, serving 44 residents—ten percent (10%) more than the Permit Application requested—at the identified location until December 21, 2021.

39. The Zoning Administrator abused her discretion or exceeded her jurisdiction in issuing the Permit by, among other things, (1) failing to consider the preservation and promotion of the public health, safety and welfare of the inhabitants of the City, and of the public generally, (2) failing to ensure compliance with the standards and provisions of the DZC, while insuring development that is reflective of the goals, policies and strategies of the City’s Comprehensive Plan, and (3) failing to comply with the review process mandated by the Determination.

40. The Board erred in upholding the Permit in spite of these errors by the Zoning Administrator.

#### ***Administrative Appeal of the Determination***

41. Four appellant groups filed timely appeals of the Determination to the Zoning Board. These appeals were docketed as File Nos. 44-2021, 47-2021, 53-2021, and 60-2021 (collectively the “Determination Appeals”).

42. The Zoning Board held a consolidated public hearing on the Determination Appeals on July 20, 2021 (“Determination Hearing”). At the conclusion of the Determination Hearing, three members of the Zoning Board voted in favor of a motion to deny the Determination Appeals. Two members of the Zoning Board voted against the motion.

43. On July 20, 2021, the Zoning Board issued its written decision on the Determination Appeals, a true and correct copy of which are attached as Exhibit 1 (the “Determination Decision”).

#### ***Administrative Appeal of the Permit***

44. Three appellant groups filed timely appeals of the Permit to the Zoning Board. These appeals were docketed as File Nos. 48-2021, 49-2021, and 59-2021 (collectively the “Permit Appeals”).

45. The Zoning Board held a consolidated public hearing on the Permit Appeals on July 27, 2021 and August 3, 2021 (“Permit Hearing”).

46. At the conclusion of the Permit Hearing, three members of the Zoning Board voted in favor of a motion to approve the Permit Appeals. Two members of the Zoning Board voted against the motion. Pursuant to DZC § 12.2.6.9.A, four concurring votes were necessary to

approve the Permit Appeals. As a result of the failure to achieve a super-majority vote, the Permit Appeals were deemed denied.

47. On August 3, 2021, the Zoning Board issued its written decision on the Permit Appeals, a true and correct copy of which are attached as Exhibit 2 (the “Permit Decision”).

### **FIRST CLAIM FOR RELIEF**

#### **Judicial Appeal Under C.R.C.P. 106(a)(4) – Determination Decision**

48. Plaintiff incorporates all of the allegations stated above.

49. The Zoning Administrator acted in violation of the requirements of the Denver Zoning Code and Former Chapter 59 in issuing the Determination.

50. The Zoning Board exercised a quasi-judicial function when it reviewed the Determination Appeals and issued the Determination Decision.

51. The Zoning Board exceeded its jurisdiction, abused its discretion, and acted in an arbitrary and capricious manner when it affirmed the Determination and issued the Determination Decision.

52. The Zoning Board’s Determination Decision was contrary to the evidence in the record and/or otherwise devoid of evidentiary support.

53. The Zoning Board’s Determination Decision was contrary to the requirements of the Denver Zoning Code and Former Chapter 59.

54. The Zoning Board’s Determination Decision is unsupported by evidence that the DZC § 12.4.6.4 review criteria were satisfied.

55. The Zoning Board’s Determination Decision was contrary to Colorado law.

56. There is no other plain, speedy, and adequate remedy at law available to Plaintiff.

57. The Plaintiff is entitled to an order (i) overturning the Zoning Board’s Determination Decision affirming the Zoning Administrator’s Determination, and (ii) invalidating the Determination.

### **SECOND CLAIM FOR RELIEF**

#### **Judicial Appeal Under C.R.C.P. 106(a)(4) - Permit**

58. Plaintiff incorporates all of the allegations stated above.



59. The Zoning Administrator acted in violation of the requirements of the Denver Zoning Code and the Determination in issuing the Permit.

60. The Zoning Board exercised a quasi-judicial function when it reviewed the Permit Appeals and issued the Permit Decision.

61. The Zoning Board exceeded its jurisdiction, abused its discretion, and acted in an arbitrary and capricious manner when it affirmed the Permit and issued the Permit Decision.

62. The Zoning Board's Permit Decision was contrary to the evidence in the record and/or otherwise devoid of evidentiary support.

63. The Zoning Board's Permit Decision was contrary to the express language of the Denver Zoning Code and the Determination.

64. The Zoning Board's Permit Decision was contrary to Colorado law.

65. There is no other plain, speedy, and adequate remedy at law available to Plaintiff.

66. The Plaintiff is entitled to an order (i) overturning the Zoning Board's Permit Decision affirming the Administrator's issuance of the Permit, and (ii) invalidating the Permit.

### **JURISDICTION AND VENUE**

67. Pursuant to DZC § 12.2.6.10, persons or taxpayers aggrieved by a decision of the Board of Adjustment may appeal to the District Court in the manner provided by the Colorado Rules of Civil Procedure.

68. Jurisdiction is proper in this Court pursuant to C.R.C.P. 106.

69. Venue is proper under C.R.C.P. 98 because the Zoning Board is the applicable governing body of the City and County of Denver and because the Determination and the Permit concerns real property located in the City and County of Denver.

### **PRAYER FOR RELIEF**

WHEREFORE, Plaintiff respectfully requests that the Court grant the following relief:

A. An order overturning or invalidating the Board of Adjustment's Determination Decision and invalidating the Determination and rendering it null, void and of no effect;

B. An order overturning or invalidating the Board of Adjustment's Permit Determination and invalidating the Permit and rendering it null, void and of no effect;

C. An order awarding Plaintiff its costs and attorneys' fees as provided by law; and

D. An order awarding Plaintiff such further relief as this Court deems just and proper.

Respectfully submitted August 17, 2021.

PUBLIC TRUST INSTITUTE

*s/ Daniel E. Burrows*

\_\_\_\_\_  
Daniel E. Burrows, #40284

SARAH J. BAKER PC

*s/ Sarah J. Baker*

\_\_\_\_\_  
Sarah J. Baker, #32806

*Attorneys for Plaintiff*

Addresses of Plaintiffs:

Denver Deserves Better

\_\_\_\_\_  
Denver, CO \_\_\_\_\_

Kevin Reidy

\_\_\_\_\_  
Denver, CO \_\_\_\_\_

Leah Capritta

\_\_\_\_\_  
Denver, CO \_\_\_\_\_

David & Ella Rodman

\_\_\_\_\_  
Denver, CO \_\_\_\_\_