

DISTRICT COURT, EL PASO COUNTY, COLORADO  
270 South Tejon, Colorado Springs, CO 80903  
Telephone: 719-448-7650

**The City of Colorado Springs, a Home Rule Municipality,**

*Plaintiff,*

v.

**Mr. Holger Christensen, individually and as agent and officer of 1221  
North Cascade Avenue, LLC and 1221 North Cascade Avenue, LLC,**

*Defendants and Counterclaimants;*

and

**Sally Christiansen,**

*Third-Party Plaintiff,*

v.

**The City of Colorado Springs, a Home Rule Municipality,**

*Counterclaim/Third-Party Defendant*

▲ COURT USE ONLY ▲

Case No.: 2008CV4869

Division: 13

**Attorneys for Defendants and Third-Party Plaintiff**

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**ANSWER, COUNTERCLAIM,  
THIRD-PARTY COMPLAINT  
AND JURY DEMAND**

Defendants Holger Christiansen, individually and as agent and officer of 1221 North Cascade Avenue, LLC and 1221 North Cascade Avenue, LLC (collectively "Defendants"), through their undersigned attorneys, answer Plaintiff's Complaint as follows:

**Answer**

1. Defendants admit paragraphs 1 – 7, 9, 12, 15, 16, 20 and 22.
2. Defendants deny paragraphs 11, 23, and 25 – 29.
3. Paragraph 8 is admitted in that Defendants commenced construction of their wall in July, 2007. The balance of this paragraph is denied.
4. Paragraph 14 is admitted in that the City approved construction of the wall to a height of six feet eleven inches in its present location. Denied that this approval was conditioned upon compliance with any other Code provisions.
5. Paragraph 17 is admitted that, pursuant to the City’s request, Defendants requested a revocable permit. Denied that this acknowledged trespass, since the new wall merely replaced a previous wooden wall which had been at the same location for over thirty years.
6. Paragraph 19 is admitted that the Notices and Orders have not been complied with, but deny there are any violations of City Code.
7. All other paragraphs are denied.

**Affirmative Defenses**

1. Plaintiff’s action is barred by the statute of limitations contained in C.R.S. §38-41-119.
2. Plaintiff’s action is barred by the doctrine of unclean hands.

**Counterclaim / Third-Party Plaintiff**  
(Civil Rights - Substantive Due Process)

Holger Christiansen, Sally Christiansen and 1221 North Cascade Avenue, LLC (collectively “Christiansens”), through their undersigned attorneys, hereby file their counterclaim and third-party complaint against the City of Colorado Springs (“City”) as follows:

1. Holger and Sally Christiansen reside at, and 1221 North Cascade Avenue, LLC holds record title to, property known as 1221-1225 North Cascade Avenue in the City (the “Property”).
2. The Christiansens’ Property, being near a very busy intersection and along a busy street, experiences considerable traffic noise. In early 2007, the Christiansens decided to remove

existing hedges (standing approximately eleven feet high) and replace them with a brick masonry wall which would act as a sound barrier (the "Wall").

3. The Christiansens designed the Wall to be six feet in height above a planned "English Garden" planter with the planter height approximating the pre-existing level of the ground under the eleven foot high hedges. The City Code does not require permits for walls or fences up to six feet in height.

4. The Christiansens also planned to install decorative palasters and ornamentation on the Wall, which City Code allows provided they do not exceed the height limitation of the base zone by more than five feet.

5. The Christiansens commenced construction of the Wall in July 2007 and by September 10, 2007, the south portion of the Wall was complete.

6. About this time, several "citizen activists" from the "Old North End" started complaining about the Wall to various City officials, claiming the Wall was not compatible with the historic character of the Old North End.

7. The complaints by these activists led to the City posting a violation notice on October 12, 2007, claiming "a fence over 6' needs permit and inspection."

8. In response to this notice, the Christiansens called Steve Tuck, the City's Senior Planner, and asked that he meet with them on-site. Mr. Tuck and Erin McCauley met with Mr. Christiansen on-site that day and told them they could not re-establish the old pre-existing grade which was under the removed hedges, and that for purposes of the zoning ordinances, the adjacent sidewalk established the "natural grade" (even though that term is not defined in the City Code) and that consequently, the Wall exceeded six feet in height. Mr. Tuck then told Mr. Christiansen the City "was going to waterboard" him for having built the Wall and a "long, painful and time consuming process" was in store for him. Mr. Tuck's determination that the undefined "natural grade" was not the level of the ground which had previously been under the recently removed hedges for decades was arbitrary and capricious.

9. On November 9, 2007, the Christiansens met with Dick Anderwald and Erin McCauley from the City's Land Use Review Department to discuss the Wall. Rather than disputing Mr. Tuck's determination of "natural grade", the City representatives suggested the Christiansens apply for "Administrative Relief," allowing a six foot eleven inch Wall as measured from the adjacent City sidewalk, which the Christiansens subsequently did.

10. On November 15, 2007, the City approved the Administrative Relief "to allow a fence / wall height of 83" where 72" is allowed by City Code." The City also stamped the plans for the Wall as "Approved" and the Pikes Peak Regional Building Department then stamped the plans "Released For Permit." These approvals were unconditional.

11. At the City's request, and notwithstanding the City's November 15, 2007 approval, the Christiansens also applied for a "Report of Acceptability" to the North End Historical Preservation Board Minor Works Committee on November 18, 2007. At the November 27, 2007 meeting of the "Minor Work Committee" of the North End Historic District, chaired by Tim Scanlon, Senior City Planner, the Christiansens' request was perfunctory referred to the full board of the North End Historic District.

12. By this time, the Christiansens' Wall had become a hot political topic, with newspaper articles, editorials and letters to the editor all being written about it. In addition, several "North End" activists had started organizing neighborhood opposition and were putting intense pressure on City officials to have them require the Christiansens to remove the Wall.

13. On December 3, 2007, the "North End" Historical Preservation Board met. Mr. Scanlon chaired the meeting and refused to allow a letter in support of the Wall written by J. Mark Nelson, who co-authored the North End Historic Guidelines which were adopted by the City and under which the Wall was supposed to be reviewed, from being considered. This was in spite of the fact that Patricia Parish, Senior Planner with the City, had forwarded the letter to the Historic Preservation Board "for their review." The board denied the Christiansens' request. Mr. Scanlon's actions at this meeting displayed obvious bias against the Christiansens. Contrary to applicable City policy, there is apparently no recorded transcript of this hearing.

14. On December 10, 2007, and pursuant to an agreement reached at a meeting on December 7, 2007 with the Christiansens, Mr. Scanlon, the Christiansens' attorneys and the City's attorneys, the Christiansens withdrew their request for a Report of Acceptability.

15. In response to continuing intense pressure from neighborhood activists, the City informed the Christiansens that the only way they would be allowed to complete the Wall was to apply for three separate variances – one each for the north, south and west portions of the Wall - despite the fact that the City had already unconditionally approved the Wall at six feet eleven inches at its existing location, and marked the plans "Released For Permit." These variances were for palasters and ornamental decoration, and to waive setback requirements.

16. The City's requirement that the Christiansens obtain zoning variances for ornamental finishes and set backs for the Wall is arbitrary and capricious, and singles the Christiansens out for arbitrary administration of zoning regulations as a "class of one." The City has not required any such variances for over twenty-two other walls and fences, all over six feet in height and many with ornamental features well in excess of that, all within a few blocks of the Property. By applying these ordinances to the Christiansens in a manner inconsistent with virtually all other similar walls and fences in the immediate area, the City was improperly acting under color of law to void the validly issued and unconditional November 15, 2007 approval for the Wall and to deprive the Christiansens of their right to build the Wall pursuant to that approval. The City took this selective action with the intent to discriminate against the Christiansens in response to intense political opposition, media publicity and distaste of certain "North End" activists over the Christiansens' Wall based on private biases of those activists.

17. In preparation for the June 5, 2008 Planning Commission hearing on the variance requests, the Christiansens submitted twelve letters of support from neighbors to Erin McCauley on May 28, 2008 and requested they be made part of the application and be delivered to the Planning Commission. Ms. McCauley's subsequent staff report to the Planning Commission did not include any of these letters and falsely stated only one email expressing support had been received, but listed all emails in opposition. In light of the obvious bias displayed in the report, and the unequal application of the City Code being applied against the Christiansens, the applications for variances the City required the Christiansens to file were withdrawn, since the Wall is in compliance with the Code as it has been applied to all similar structures in the immediate area, and thus no variances are necessary.

18. About this same time, the City surveyed the six foot high brick wall the Christiansens built on the east side of their property adjacent to the alley, which replaced, and was in exactly the same location, as a prior wooden fence which had been there for over thirty years. The City found the brick wall encroached into the twenty-foot alley right-of-way seventeen to twenty-four inches.

19. City representatives told the Christiansens they needed to apply for a revocable permit to permit the encroachment of the rear wall into the alley. The City routinely grants such permits within a two week time frame.

20. On July 8, 2008, the Christiansens submitted their application for a revocable permit for the rear wall.

21. On August 6, 2008, almost a month after submitting their application, Sue Matz, the City's revocable permit coordinator, finally responded, stating traffic engineering recommended denial citing "concerns about an approximate 2' overlap into a narrow alley." However, on April 3, 2008, Erin McCauley of the City Land Use Review Department, confirmed in an email to Mr. Christiansen that "all traffic issues [pertaining to the rear wall] have been resolved."

22. Ms. Matz's August 6, 2008 response also went on to state:

"You question the timing for the revocable permit decision. A two-week turnaround for routine cases is normal. This is not a routine case – there are significant outstanding and unresolved code violations relating to the perimeter fence – it will take longer than normal to issue a decision. I am advised by Senior Management that the decision on the revocable permit has been placed on hold until a determination is made on the steps to be taken to resolve the code violations."

23. The City's refusal to grant the revocable permit was arbitrary and capricious, singled the Christiansens out as a "class of one" for different treatment than others similarly

situated, and is a clear attempt to use withholding of the permit for the rear wall to extort the Christiansens into capitulating to the City's illegal treatment of the Christiansens with respect to the unrelated issues concerning the height and location of the north, south and west Wall.

24. Within the three block stretch of the alley behind the Christiansens' Property, there are ten buildings, walls or fences encroaching one to two feet into the alley. The City has never objected to any of these encroachments, or requested any of these property owners to apply for revocable permits. The City itself has several permanent utility poles within the alley, many of which are well over two feet into the alley, and which present considerably greater constraints to traffic than the Christiansens', or any of the others', existing encroachments. Additionally, the Christiansens had a wooden fence in exactly the same location as the current rear wall for over thirty years with no objections or complaints by the City. Thus, the City, under color of law, has singled the Christiansens out for separate, arbitrary treatment in an attempt to extort them into giving up their right to build the Wall as granted by the November 15, 2007 approval.

25. As a result of the City's actions, the Christiansens have suffered damages in excess of \$100,000 in an amount to be proven at trial including, but not limited to, increased construction costs and delays, and severe emotional distress which has put a severe strain on their marriage.

26. The above actions of the City have deprived the Christiansens of their rights, privileges and immunities secured by the Constitution of the United States under color of the City's ordinances and regulations in violation of Title 42, Chapter 21, Section 1983 of the United States Code (the "Civil Rights Act.")

#### **Prayer for Relief**

WHEREFORE, the Christiansens pray for damages against the City for the following relief:

A. A judgment against the City for compensatory damages as permitted under the Civil Rights Act, together with all the Christiansens' costs.

B. A judgment against the City for all the Christiansens' reasonable attorneys fees and expert fees, as provided for in Section 1988 of the Civil Rights Act.

C. A determination that the Wall, with decorative palasters and ornamentation not exceeding the height limitation of the base zone by more than five feet, is in compliance with all applicable City ordinances.

**Notice of Intent to Seek Punitive Damages**

The Christiansens believe the City's conduct was done willfully and wantonly and hereby give notice pursuant to C.R.S. §13-21-102(1.5), as well as pursuant to the Civil Rights Act, that after disclosures are complete under Rule 26, they will seek to amend this Complaint by seeking assessment of punitive or exemplary damages.

**Jury Demand**

The Christiansens request that all issues properly triable by a jury be so tried .

Dated October 20, 2008

By: s/ Bruce M. Wright  
Bruce M. Wright (#5347)  
Flynn Wright & Fredman, LLC

By: s/ J. Gregory Walta  
J. Gregory Walta, #1867  
J. GREGORY WALTA, P.C.

**CERTIFICATE OF SERVICE**

I certify that on October 20, 2008, a true and correct copy of this document was sent via Justice Link to the following:

Gregory Garland, Esq.  
City of Colorado Springs  
City Attorney's Office  
30 South Nevada Avenue  
Colorado Springs, CO 80903

/s/ Gail Deal  
Gail Deal, Legal Assistant

In accordance with C.R.C.P. 121 § 1-26(9), a printed copy of this document with original signatures is being maintained by the filing party and will be made available for inspection by other parties or the Court upon request.