

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WISCONSIN**

---

MARGARET and STEVE GERHARD,

Plaintiffs,

vs.

Case No. 1:15-CV-00836-WCG

CITY OF GREEN BAY and  
TONY FEITZER, in his official capacity  
as Manager of the City of Green Bay  
Department of Public Works,

Defendants.

---

**ANSWER AND AFFIRMATIVE DEFENSES**

---

Defendants, City of Green Bay and Tony Fietzer, by their attorneys, Gunta Law Offices, S.C., submit the following Answer and Affirmative Defenses to the Plaintiffs, Margaret and Steve Gerhard's Complaint:

***Introduction***

1. Answering Paragraph 1, admit that the Plaintiffs in this case are husband and wife. Further answering Paragraph 1, deny that they spent two decades improving the landscape of their property in the City of Green Bay (hereinafter the "City") as therein alleged. Further answering Paragraph 1, admit that the City entered onto Plaintiffs' property without a warrant and without consent, and affirmatively allege that the City needed no warrant or Plaintiffs' consent. Further answering Paragraph 1, deny all further factual allegations and legal conclusions stated therein.

*Parties*

2. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 2, and therefore deny the same.

3. Admit.

4. Admit and clarify Tony Fietzer is the correct spelling of said Defendant, and he is the Street Superintendent of the City of Green Bay, not the Manager as therein alleged.

*Jurisdiction and Venue*

5. Paragraph 5 is a statement of Plaintiffs' legal positions and legal conclusions, and therefore, requires no response.

6. Deny.

*Section 8.11 - Green Bay's "Noxious Weed Ordinance"*

7. Answering Paragraph 7, admit that Section 8.11 has been amended since the facts of this case occurred. Further answering Paragraph 7, deny that Section 8.11 is frequently referred to as "Noxious Weed Ordinance," and affirmatively allege that it is referred to by City employees as the "Long Grass Ordinance."

8. Answering Paragraph 8, admit that Section 8.11 empowers City officials and employees to enter onto a citizen's property without a warrant and without consent if they have violated the ordinance. Further answering Paragraph 8, admit that the ordinance allows City officials to determine violations of Section 8.11. Further answering Paragraph 8, affirmatively allege that Section 8.11 was followed by City officials in regard to the Plaintiffs' property. Further answering Paragraph 8, deny all other material allegations contained therein.

9. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 9, and therefore deny the same.

10. Admit.

11. Deny and affirmatively allege that the “Weed Commissioner” does not have “full subjective judgment” and the ordinance lists specific objective factors to be used in determining a violation of Section 8.11. Further answering Paragraph 11, deny all other material allegations.

12. Deny.

***The Gerhards’ Property***

13. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 13, and therefore deny the same.

14. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 14, and therefore deny the same.

15. Deny.

16. Deny.

17. Deny.

18. Deny.

***First Entry, Seizure, and Destruction, July, 2009***

19. Deny.

20. Deny. Further answering Paragraph 20, affirmatively allege that the Gerhards’ weed removal notice contained a 5 day time period not a 24 hour time period.

21. Deny.

22. Deny.

23. Admit. Further answering Paragraph 23, affirmatively allege that City officials were under no obligation to compensate the Gerhards for the results of their violation of Section 8.11.

24. Deny.

***Second Entry, Seizure, and Destruction, August 2011***

25. Admit.

26. Admit that on or about August 11, 2011 Plaintiff, Margaret Gerhard, called the DPW and had a conversation with Superintendent Tony Fietzer, and deny that during this telephone conversation Margaret Gerhard stated that she had a planned, natural and attractive landscape. Further answering Paragraph 26, deny that Mr. Fietzer gave Margaret Gerhard any assurances that he would not enforce the ordinance while she sought a variance. However, he did tell her that he would take no action until she had spoken with her Alderman. Further answering Paragraph 26, deny all other material allegations.

27. Admit that Margaret Gerhard met with her Alderman, but deny that she was making progress within the system to obtain a variance.

28. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 28, and therefore deny the same.

29. Admit that on or about August 24, 2011 City workers, acting pursuant to Section 8.11, entered the Gerhards' property without a warrant (because none was required) and without consent (because none was required). Further answering Paragraph 29, deny all further allegations contained therein.

30. Deny.

31. Admit that Margaret Gerhard called Mr. Fietzer, and Mr. Fietzer explained to her that he was acting pursuant to the ordinance and after speaking with her Alderman. Further answering Paragraph 31, deny all other material allegations contained therein.

32. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 32, and therefore deny the same.

33. Deny.

***Ordinance Amendment and Aftermath***

34. Lack knowledge and information sufficient to form a belief as to the truth or falsity of Paragraph 34, and therefore deny the same. Further answering Paragraph 34, admit that Margaret Gerhard was consulted by the City regarding amending Section 8.11.

35. Deny.

36. Deny.

***Allegations Common to All Claims***

37. Paragraph 37 is a statement of Plaintiffs' legal positions and conclusions, and therefore, requires no response.

38. Paragraph 38 is a statement of Plaintiffs' legal positions and conclusions, and therefore, requires no response.

39. Deny.

40. Deny.

41. Deny.

42. Deny.

43. Deny.

44. Deny.

45. Deny.

46. Deny.

47. Deny.

48. Deny.

**First Claim for Relief  
Deprivation of Fourteenth Amendment Right to Due Process of Law**

49. Defendants reallege and incorporate Paragraphs 1 through 48 of this Answer.

50. Paragraph 50 is a statement of Plaintiffs' legal positions and legal conclusions, and therefore, requires no response.

51. Deny.

52. Deny.

53. Paragraph 53 is a statement of Plaintiffs' legal positions and legal conclusions, and therefore, requires no response.

54. Paragraph 54 is a statement of Plaintiffs' legal positions and legal conclusions, and therefore, requires no response.

55. Deny.

56. Deny.

57. Deny.

58. Paragraph 58 is a statement of Plaintiffs' legal positions and legal conclusions, and therefore, requires no response.

59. Paragraph 59 is a statement of Plaintiffs' legal positions and legal conclusions, and

therefore, requires no response.

60. Deny.

61. Deny.

62. Deny.

63. Deny.

64. Deny.

65. Deny.

66. Deny.

67. Paragraph 67 is a statement of Plaintiffs' legal positions and legal conclusions, and therefore, requires no response.

68. Deny that the Defendants were required to provide any hearings as alleged therein, and affirmatively allege that the Gerhards had full access to both the state and federal court systems, which would have provided them with remedies, both pre and post incidents. Further answering Paragraph 68, deny that the Gerhards took advantage of either the state or federal court system that was available to them.

69. Deny.

70. Deny.

**Second Claim for Relief  
Deprivation of Fourth Amendment Right to Be Free From  
Unreasonable Searches and Seizures**

71. Defendants reallege and incorporate Paragraphs 1 through 70 of this Answer.

72. Paragraph 72 is a statement of Plaintiffs' legal positions and legal conclusions, and therefore, requires no response.

73. Paragraph 73 is a statement of Plaintiffs' legal positions and legal conclusions, and therefore, requires no response.

74. Paragraph 74 is a statement of Plaintiffs' legal positions and legal conclusions, and therefore, requires no response.

75. Deny.

76. Deny.

77. Deny.

78. Deny.

79. Deny.

80. Deny.

81. Deny.

#### **AFFIRMATIVE DEFENSES**

1. Plaintiffs' Complaint fails to state a claim upon which relief can be granted.
2. Plaintiffs' state law claims, if any, are subject to the procedural prerequisites for bringing or maintaining a cause of action under § 893.80(1)(a) and (1)(b), Wis. Stats., and the exclusions, immunities and limitations on liability set forth in § 893.80, Wis. Stats.
3. Any injuries or damages suffered by the Plaintiffs were caused by the conduct of Margaret and Steve Gerhard, and through no fault or negligence or unconstitutional conduct on the part of the Defendants.
4. The Plaintiffs may have failed to mitigate their damages.
5. Defendant, Tony Fietzer is entitled to qualified immunity.
6. Defendant, Tony Fietzer is entitled to discretionary act immunity.

7. Defendant, Tony Fietzer's conduct was privileged and constitutional.

8. Plaintiffs' Complaint fails to state a cause of action against the City of Green Bay pursuant to Monell v. Department of Social Services of the City of New York, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) since there can not be recovery for a federal civil rights violation where there is no constitutional deprivation occurring pursuant to government policy, custom, or practice.

9. All City ordinances cited by Plaintiffs in their Complaint, were and are, at all relevant times constitutional, and all actions of the Defendants were done pursuant to an ordinance that had not been declared unconstitutional at any time by a state or federal court.

10. Plaintiffs are not entitled to either compensatory or punitive damages.

**WHEREFORE**, Defendants demand judgment dismissing this matter and awarding them their costs and reasonable attorney fees.

Dated at Wauwatosa, Wisconsin, this 18th day of August, 2015.

GUNTA LAW OFFICES, S.C.  
Attorneys for Defendant City of Green Bay  
and Tony Fietzer

By: /s/ Gregg J. Gunta  
Gregg J. Gunta, WI Bar No. 1004322  
John A. Wolfgang, WI Bar No. 1045325  
Ann C. Wirth, WI Bar No. 1002469  
9898 West Bluemound Road, Suite 2  
Wauwatosa, Wisconsin 53226-4319  
Telephone: (414) 291-7979  
Facsimile: (414) 291-7960  
Emails: [gjg@guntalaw.com](mailto:gjg@guntalaw.com)  
[jaw@guntalaw.com](mailto:jaw@guntalaw.com)  
[acw@guntalaw.com](mailto:acw@guntalaw.com)