

<p>FORT COLLINS MUNICIPAL COURT 215 N. Mason Fort Collins, CO 80521 Phone: (970) 221-6800</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Plaintiffs: COLLEEN HOFFMAN, RICK HOFFMAN, and ANN HUNT</p> <p>v.</p> <p>Defendants: THE CITY COUNCIL OF THE CITY OF FORT COLLINS, the governing body of a Colorado municipal corporation; and THE ADMINISTRATION BRANCH OF THE CITY OF FORT COLLINS, by and through its City Manager, Darin Atteberry.</p>	
<p>Attorneys for Defendant-Intervenor:</p> <p>Martha L. Fitzgerald, #14078 Carolynne C. White, #23437 Gina L. Tincher, #48479 BROWNSTEIN HYATT FARBER SCHRECK, LLP 410 Seventeenth Street, Suite 2200 Denver, CO 80202-4432 Phone: 303.223.1100 Fax: 303.223.1111 Emails: mfitzgerald@bhfs.com; cwhite@bhfs.com; gtincher@bhfs.com</p>	<p>Case Number: 2017CV01</p> <p>Division:</p>
<p>SUMMIT MANAGEMENT SERVICES, INC.'S MOTION TO INTERVENE</p>	

Summit Management Services, Inc. ("Summit"), respectfully moves the Court to permit its intervention as a party defendant into the above-captioned case and to accept for filing Summit's Answer, attached here as **Exhibit A**.

As grounds for its motion, Summit states as follows:

Certification of Conferral. The undersigned certifies that, pursuant to C.R.C.P. 121, § 1-15(8), she conferred in good faith with the Plaintiffs, who indicated that they oppose the relief requested, and counsel for Defendants, who indicated the City does not oppose the relief requested.

1. On March 7, 2017, Plaintiffs filed a Complaint and Request for Injunctive Relief (“Complaint”) challenging the City of Fort Collins’ City Council’s (“Council”) approval of the Landmark Apartments Expansion Project Development Plan (the “PDP” or “Project”). Summit was the applicant that submitted the PDP for Council review and approval in this case.

2. Under C.R.C.P. 24(a),¹ a party is permitted to intervene as a right “when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.” All three elements of the rule, *i.e.*, an interest related to the property or transaction, an impairment of its ability to protect the interest, and inadequate representation, must be present in order to intervene. In addition, timeliness, as a threshold question, must be determined. *See Diamond Lumber, Inc. v. H.C.M.C., Ltd.*, 746 P.2d 76, 78 (Colo. App. 1987). As discussed below, Summit meets all of the requirements for intervention as a matter of right under C.R.C.P. 24(a)(2).

3. Regarding the first element for intervention as a matter of right (an interest relating to the property or transaction at issue in this matter), Summit is the owner of the real

¹ Summit references the Colorado Rules of Civil Procedure throughout this motion. The Fort Collins City Council has recently adopted the Colorado Rules of Civil Procedure for actions such as this, and those rules are effective as of April 28, 2017. *See* City of Fort Collins Ordinance 52.

property that is the subject of the land use approvals and is the applicant on the PDP that was approved by Council and that Plaintiffs challenge in their Complaint. Therefore, Summit has an interest relating to the property or transaction at issue in this matter.

4. As to the second and third elements for intervention (impaired ability to protect its interests and inadequate representation by the existing defendants), if the Court finds for the Plaintiffs in this action, the land use approvals will be revoked and Summit will be unable to construct its Project. The existing Defendants have no direct interest in whether the land use approvals are upheld or overturned; they may be more interested in resolving a controversy in a way that would protect their governmental interests (such as resolving the dispute at minimal cost regardless of the results or avoiding bad publicity), than with protecting Summit's rights to construct its Project in a timely manner or at all. Consequently, the existing Defendants may not adequately represent Summit's interests in this matter, and if Summit is not a party it will be unable to protect its interests. Therefore, Summit's intervention in this matter is appropriate.

5. Finally, Summit's motion to intervene is timely. Plaintiffs filed their Complaint on March 7, 2017. On March 27, 2017, the City filed a Motion to Stay the proceedings pending the adoption of Colo. R. Civ. P. 106 by the City Council as the governing rule for actions such as this one proceeding before the Municipal Court.² The Court granted that motion, and stayed these proceedings until April 28th, when the stay expired. The City has not yet filed its Answer in this case. Further, the Record has not been compiled or certified (indeed Plaintiffs have not even filed a motion to certify the Record as of the filing of this motion), and the matter has not progressed to briefing. However, even if all of these events had already occurred, the "point of

² As stated above, City of Fort Collins Ordinance 52, effective April 28, 2017, adopted Colorado Rule of Civil Procedure 106 to govern actions such as this.

progress in the lawsuit is only one factor to be considered and is not, in itself, determinative; the timeliness of the attempted intervention is to be gathered from all the circumstances in the case.” *Diamond Lumber, Inc.*, 746 P.2d at 78 (holding that an intervenor’s application to intervene was timely despite being filed a full 16 months into the litigation). In the present case, this is in all practicality the earliest that Summit could intervene in the case considering the time required to become acquainted with the action and draft the necessary pleadings. Therefore, Summit’s motion to intervene is timely.

6. Colorado courts have determined that land use applicants, including applicants who are owners of the subject real property, are indispensable parties to Rule 106 proceedings that challenge the approval of the applicant’s entitlements. *See Neighbors for a Better Approach v. Nepa*, 770 P.2d 1390, 1391 (Colo. App. 1989) (citing *Thorne v. Bd. of Cty. Comm’rs*, 638 P.2d 69, 71 (Colo. 1981) (an applicant for a use permit, like an applicant for a rezoning permit, is an indispensable party to a proceeding challenging the grant of the applications); *see also Bd. of Cty. Comm’rs v. Carter*, 564 P.2d 421, 422 (Colo. 1977) (“The person whose rezoning application is challenged is an indispensable party to that proceeding.”); *Dillon Cos. v. Boulder*, 515 P.2d 627, 629 (Colo. 1973) (“The rule . . . does not require ‘an interest in the property’ but an ‘interest relating to the property.’”). Therefore, Summit is an indispensable party to this action and should be permitted to intervene.

7. In summary, Plaintiffs’ Complaint seeks to overturn the Council’s approval of Summit’s entitlements and prevent Summit from exercising its rights under the approved entitlements to develop the real property. Thus, the disposition of the action will dramatically affect Summit’s substantial interests in the real property and may impede its ability to protect

those interests. The existing Defendants do not have the same interests as Summit, nor will they adequately represent Summit's interests in this matter. Pursuant to Colo. R. Civ. P. 24 and applicable Colorado case law, Summit is entitled to intervene in this action.

8. In accordance, with Colo. R. Civ. P. 24(c), Summit has submitted with this motion its Answer to the Complaint.

9. In the alternative, Summit should be permitted to intervene under Colo. R. Civ. P. 24(b), as its defense is inextricably intertwined with the parties' dispute.

WHEREFORE, Summit Management Services, Inc. respectfully requests the Court to permit it to intervene as party defendant in the above-captioned case and to accept for filing Summit's Answer.

DATED: May 18, 2017.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: s/Martha L. Fitzgerald
Martha L. Fitzgerald, #14078
Carolynne C. White, #23437
Gina L. Tincher, #48479

ATTORNEYS FOR DEFENDANT-INTERVENOR
SUMMIT MANAGEMENT SERVICES, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of May, 2017, a true and correct copy of the foregoing **SUMMIT MANAGEMENT SERVICES, INC.'S MOTION TO INTERVENE** was filed with the Court via email, and served via U.S. Mail, postage prepaid, upon the following (courtesy copies served by email):

Colleen Hoffman, *Pro Se*
1804 Wallenberg Drive
Fort Collins, CO 80526
(970) 484-8723
cohoff@comcast.net

John R. Duval, Esq.
City of Fort Collins City Attorney's Office
P.O. Box 580
Fort Collins, CO 80522
(970) 221-6520
jduval@fcgov.com

Rick Hoffman, *Pro Se*
1804 Wallenberg Drive
Fort Collins, CO 80526
(970) 484-5154
rick-hoffman@comcast.net

Kimberley B. Schutt, Esq.
Wick & Trautwein, LLC
323 S. College Ave., Suite 3
P.O. Box 2166
Fort Collins, CO 80522
(970) 482-4011
kschutt@wicklaw.com
*Attorneys for Defendants City of Fort
Collins*

Ann Hunt, *Pro Se*
1800 Wallenberg Drive
Fort Collins, CO 80526
(970) 484-5242
arh4@comcast.net
Plaintiffs

s/Shirley Newman
Shirley Newman, Paralegal

EXHIBIT A

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<p style="text-align: center;">SUMMIT MANAGEMENT SERVICES, INC.'S ANSWER</p>	

Summit Management Services, Inc. ("Summit"), respectfully submits its Answer to Plaintiffs' Complaint and Request for Injunctive Relief ("Complaint"). Summit admits, denies, and avers as follows:

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Parties

1. Summit admits Fort Collins is a home rule municipality with its own Charter, located in Larimer County, Colorado. Summit further admits the City Manager is Darin Atteberry and that the City conducts proceedings to review various types of development and land use applications and plans. Summit avers that the City's Charter speaks for itself. To the extent the remaining allegations in Paragraph 1 require a response, Summit denies the same.

2. Summit avers that the City's Charter speaks for itself. Summit denies any allegation in Paragraph 2 that is inconsistent with the Charter.

3. Summit is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first three sentences in Paragraph 3. Summit admits that Plaintiffs Ann Hunt and Colleen Hoffman appealed the decision of the Planning and Zoning Board to approve the Project.

Venue and Jurisdiction

4. Summit admits venue is proper in this Court. Summit denies all remaining allegations in Paragraph 4.

5. Summit admits this Court has subject matter jurisdiction over this dispute. The remaining allegations in Paragraph 5 are legal conclusions to which no response is required. To the extent a response is required, Summit denies the same.

6. Summit admits this Court has personal jurisdiction over the Defendants, including Summit. The remaining allegations in Paragraph 6 are legal conclusions to which no response is required. To the extent a response is required, Summit denies the same.

7. Summit admits this Court has personal jurisdiction over the Defendants, including Summit. The remaining allegations in Paragraph 7 are legal conclusions to which no response is required. To the extent a response is required, Summit denies the same.

General Allegations

8. Summit admits that the Planning and Zoning Board reviewed and approved the PDP on November 10, 2016. Summit denies the remaining allegations in Paragraph 8.

9. Summit admits that Per Hogestad and Colleen Hoffman/Ann Hunt appealed the Planning and Zoning Board's approval of the PDP. Summit is without sufficient information to form a belief as to the truth of the remaining allegations in Paragraph 9 and therefore denies the same.

EXHIBIT A

10. Summit avers that the documents submitted in the two appeals described in Paragraph 9 speak for themselves. Summit denies any allegation in Paragraph 10 that is inconsistent with such information and documents.

11. Summit admits that the City Council heard the consolidated appeals on January 31, 2017, including testimony from the appellants and Summit. Summit admits that testimony by the City's Planning Department was also offered during the hearing. Summit denies the remaining allegations in Paragraph 11.

12. Summit denies the allegations in Paragraph 12.

13. Summit admits that one of the issues Plaintiffs raised in their appeals was the requirement for a 50 foot buffer under Section 3.4.1 of the Land Use Code. Summit denies the remaining allegations in Paragraph 13.

14. Summit admits that Plaintiffs asserted that the Project would result in a higher density than the existing Landmark Apartment complex, but denies that this is an accurate interpretation by Plaintiffs. The remaining allegations in Paragraph 14 constitute legal conclusions to which no response is required. To the extent a response is required, Summit denies the same.

15. Summit denies the allegations in Paragraph 15.

16. Upon information and belief, Summit admits the City reviewed an Ecological Characterization Study during its decision-making process, but denies that the study was insufficient in any way. Further, Summit avers that the Land Use Code speaks for itself and denies any characterization that is inconsistent with the same. Summit denies the remaining allegations in Paragraph 16.

17. Summit admits the allegations in Paragraph 17.

First claim for relief

18. Summit incorporates its responses above as if fully set forth here.

19. Summits affirmatively states that Resolution 2017-011 speaks for itself and any allegation in Paragraph 19 that is inconsistent therewith is hereby denied.

20. Summits affirmatively states that Resolution 2017-011 speaks for itself and any allegation in Paragraph 20 that is inconsistent therewith is hereby denied.

21. Summit denies the allegations in Paragraph 21.

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Second claim for relief

22. Summit incorporates its responses above as if fully set forth here.

23. Summit denies the allegations in Paragraph 23.

24. Summit affirmatively states that the Land Use Code speaks for itself, and any allegation in Paragraph 24 inconsistent with such is hereby denied. The remaining allegations in Paragraph 24 constitute legal conclusions to which no response is required. To the extent a response is required, Summit denies the same.

Third claim for relief

25. Summit incorporates its responses above as if fully set forth here.

26. Summit denies the allegations in Paragraph 26.

27. Summit affirmatively states that the Land Use Code speaks for itself and any allegations in Paragraph 27 that are inconsistent therewith are hereby denied. The remaining allegations in Paragraph 27 constitute legal conclusions to which no response is required. To the extent a response is required, Summit denies the same.

Fourth claim for relief

28. Summit incorporates its responses above as if fully set forth here.

29. Summit admits the Project is an expansion of the existing Landmark Apartments. Summit denies the remaining allegations in Paragraph 29.

30. Summit denies the allegations in Paragraph 30.

Fifth claim for relief

31. Summit incorporates its responses above as if fully set forth here.

32. Summit admits that Plaintiffs asserted the ECS was insufficient. Summit denies the remaining allegations in Paragraph 32.

33. Summit denies the allegations in Paragraph 33.

Sixth claim for relief

34. Summit incorporates its responses above as if fully set forth here.

EXHIBIT A

35. Summit denies the allegations in Paragraph 35.

36. Summit denies the allegations in Paragraph 36.

Prayer for relief

Summit denies all allegations that may be contained in Plaintiffs' Prayer for Relief and further denies Plaintiffs are entitled to any relief whatsoever from Defendants.

GENERAL DENIAL

Summit denies any remaining allegations contained in the Plaintiffs' Complaint to the extent they have not been addressed above.

AFFIRMATIVE DEFENSES

1. Plaintiffs' Complaint fails to state a claim upon which relief may be granted.
2. Plaintiffs' claims are barred in whole or in part by Plaintiffs' failure to mitigate their damages.
3. Plaintiffs' claims are barred in whole or in part by their failure to exhaust all administrative remedies.

Summit reserves its right to amend its Answer to assert further defenses and affirmative defenses that may be discovered or become known through discovery or otherwise.

DATED: May 18, 2017.

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: s/Martha L. Fitzgerald
Martha L. Fitzgerald, #14078
Carolynne C. White, #23437
Gina L. Tincher, #48749

ATTORNEYS FOR DEFENDANT-INTERVENOR
SUMMIT MANAGEMENT SERVICES, INC.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of May, 2017, a true and correct copy of the foregoing **SUMMIT MANAGEMENT SERVICES, INC.'S ANSWER** was filed with the Court via email, and served via U.S. Mail, postage prepaid, upon the following (courtesy copies served by email):

Colleen Hoffman, *Pro Se*
1804 Wallenberg Drive
Fort Collins, CO 80526
(970) 484-8723
cohoff@comcast.net

John R. Duval, Esq.
City of Fort Collins City Attorney's Office
P.O. Box 580
Fort Collins, CO 80522
(970) 221-6520
jduval@fcgov.com

Rick Hoffman, *Pro Se*
1804 Wallenberg Drive
Fort Collins, CO 80526
(970) 484-5154
rick-hoffman@comcast.net

Kimberley B. Schutt, Esq.
Wick & Trautwein, LLC
323 S. College Ave., Suite 3
P.O. Box 2166
Fort Collins, CO 80522
(970) 482-4011
kschutt@wicklaw.com
*Attorneys for Defendants City of Fort
Collins*

Ann Hunt, *Pro Se*
1800 Wallenberg Drive
Fort Collins, CO 80526
(970) 484-5242
arh4@comcast.net
Plaintiffs

s/Shirley Newman
Shirley Newman, Paralegal

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(PROPOSED) ORDER GRANTING SUMMIT MANAGEMENT SERVICES, INC.'S MOTION TO INTERVENE	

THE COURT, having reviewed Summit Management Service, Inc.'s ("Summit") Motion to Intervene, and being fully advised in the premises,

ORDERS that the Motion is hereby GRANTED. Summit's Answer is hereby accepted for filing.

Dated: _____, 2017.

BY THE COURT:

 Municipal Court Judge