

<p>DISTRICT COURT, LARIMER COUNTY, COLORADO Larimer County Justice Center 201 Laporte Avenue, Suite 100 Fort Collins, CO 80521-2761</p>	<p>DATE FILED: April 10, 2018 2:32 PM FILING ID: 7226EF3C7F064 CASE NUMBER: 2018CV125</p>
<p>Plaintiff: RORY HEATH, as an individual plaintiff and on behalf of other concerned residents and parties,</p> <p>v.</p> <p>Defendants: CITY OF FORT COLLINS CITY COUNCIL, a municipal governing body; and the CITY OF FORT COLLINS.</p>	<p>COURT USE ONLY</p>
<p>Kimberly B. Schutt, #25947 WICK & TRAUTWEIN, LLC 323 South College Avenue, Suite 3 P.O. Box 2166, Fort Collins, CO 80522 Phone Number: (970) 482-4011 E-mail: kschutt@wicklaw.com FAX Number: (970) 482-8929</p> <p>John R. Duval, #10185 FORT COLLINS CITY ATTORNEY'S OFFICE P.O. Box 580 Fort Collins, CO 80522 Phone: (970) 221-6520 Email: jduval@fcgov.com</p>	<p>Case Number: 18CV125</p> <p>Courtroom: 5A</p>
<p style="text-align: center;">DEFENDANTS' MOTION TO DISMISS</p>	

COMES NOW the Defendants, City of Fort Collins City Council and the City of Fort Collins (collectively the "City"), by and through its counsel, WICK & TRAUTWEIN, LLC and the Fort Collins City Attorney's Office, and respectfully moves the Court to dismiss this action based upon Plaintiff's failure to join an indispensable party. In support hereof, the City states as follows:

1. **RULE 121 CERTIFICATION:** Undersigned counsel hereby advises the Court that she made concerted efforts to confer with plaintiff Rory Heath on these issues, in a good faith attempt to reach an agreement for him to voluntarily amend his complaint to address his failure to name an indispensable party. The attempts to confer included providing the same case law set forth below, which was also set forth in the City's motion for enlargement of time to file its responsive pleading. That legal authority was provided to him nine days ago. Plaintiff responded this morning on the day of the Defendants' extended answer deadline indicating he

does not understand the arguments without seeing the motion. Accordingly, given Plaintiff's failure to file an amended complaint or to otherwise agree to do so, the City brings this matter to the Court to resolve this critical legal issue.

2. Plaintiff has filed the above-captioned action against the City, seeking review under C.R.C.P. 106(a)(4) of the City Council's decision on of February 13, 2018, in which it upheld the City's Planning and Zoning Board approval of the Union on Elizabeth final development plan and denied the plaintiff's appeal of that approval.

3. Plaintiff has undisputedly not named as a defendant in this action the applicant owner behind the Union on Elizabeth development plan.

4. The Colorado appellate courts have repeatedly held that a zoning applicant is an indispensable party to a Rule 106(a)(4) action challenging that particular zoning decision made by a governmental body. *Black Canyon Citizens Coalition, Inc.*, 80 P.3d 932, 933 (Colo. App. 2003); *Thorne v. Bd. Of County Com'rs of Fremont County*, 638 P.2d 69, 71 (Colo. 1981); *Norby v. City of Boulder*, 577 P.2d 277, 280 (Colo. 1978); *Hidden Lake Development Co. v. District Court*, 515 P.2d 632, 635 (Colo. 1973); *Hennigh v. County Com'rs*, 450 P.2d 73 (Colo. 1969).¹

5. The applicant owner is an indispensable party, as a matter of law, because it has rights established by the zoning decision being challenged. *Hidden Lake Development Co.*, 515 P.2d at 635. "That right cannot be abrogated by judicial action unless the [applicant] is before the court to assert its defenses." *Id.* A judgment which adversely affects an indispensable party who is not joined is void, and thus "due process of law requires that those parties whose interests are at stake be before the court." *Id.*

6. Under Colorado law, failure to join an indispensable party is considered to be such an "egregious defect" that the court may dismiss the action on its own motion; *Id.*; *Hicks v. Joondeph*, 232 P.3d 248, 252 (Colo. App. 2009).

WHEREFORE, based upon the authority stated above, the City respectfully requests the Court dismiss this matter due to Plaintiff's failure to name the applicant as an indispensable party defendant.

¹ In fact, as reflected in these cited cases, it used to be that the applicant had to be named as a defendant within the former 30-day time period for filing a Rule 106(a)(4) challenge to a zoning decision, otherwise the action was subject to dismissal with prejudice for having been untimely perfected. However, Rule 106(b) has since been modified to avoid this trap, expressly authorizing amendments to add, dismiss or substitute parties, with such amendment relating back to the date of the filing of the original complaint. *Black Canyon Citizens Coalition, Inc.*, 80 P.3d at 933. The applicant is nevertheless considered an indispensable party, and failure to name it as a defendant or to take appropriate steps to add it as a party warrants dismissal.

DATED this 10th day of April, 2018.

WICK & TRAUTWEIN, LLC

This document was served electronically pursuant to C.R.C.P. 121 §1-26. The original pleading signed by Kimberly B. Schutt is on file at the offices of Wick & Trautwein, LLC

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And

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CERTIFICATE OF ELECTRONIC FILING

The undersigned hereby certifies that a true and correct copy of the foregoing Defendants' Motion to Dismiss was filed via Colorado Courts E-Filing System and served this 10th day of April, 2018, on the following:

Rory Heath
2831 Ridgelen Way
Colorado Springs, CO 80918
Via email to roryheath1@gmail.com

/s/ Jody L. Minch

[The original certificate of electronic filing signed by Jody L. Minch is on file with the law offices of Wick & Trautwein, LLC.]