

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

THIS MATTER, having come before the Court on the motion of the named Defendants, City of Fort Collins City Council and the City of Fort Collins (collectively the "City"), and the Court being duly advised in the premises, hereby FINDS AND ORDERS as follows:

1. 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.
2. Plaintiff has undisputedly not named as a defendant in this action the applicant owner behind the Union on Elizabeth development plan.

3. 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).<sup>1</sup>

4. 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.*

5. Under Colorado law, failure to join an indispensable party is considered to be such an "egregious defect" that the court may even 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 Court dismisses this action without prejudice due to Plaintiff's failure to name the applicant as an indispensable party defendant.

DONE this \_\_\_\_ day of April, 2018.

BY THE COURT:

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DISTRICT COURT JUDGE

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<sup>1</sup> 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.