FORT COLLINS MUNICIPAL COURT 214 N. Mason Fort Collins, CO 80521 Phone: (970) 221-6800	
Plaintiffs: Eric Sutherland; and J&M Distributing d/b/a Fort Collins Muffler and Automotive **v.** **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.**	COURT USE ONLY
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	Case Number: 2018-CIVIL01
MOTION TO DISMISS	

COMES NOW the City of Fort Collins ("the City"), on behalf of the City Council of the City of Fort Collins and the improperly named "Administration Branch of the City of Fort Collins," through its counsel, Kimberly B. Schutt of Wick & Trautwein, LLC, and respectfully submits the following motion to dismiss.

RULE 121 CERTIFICATION

Undersigned counsel first advises the Court that she attempted to confer with the plaintiffs about the relief requested in this motion, and had several email communications with "lead Plaintiff" Eric Sutherland in an attempt to address these issues. Bryan Dwyer, the representative for co-plaintiff J&M Distributing d/b/a Fort Collins Muffler and Automotive, was copied on those discussions but did not participate. As discussed in more detail below, and as is reflected in Exhibit 1 attached to this motion, the parties were unable to come to an agreement as to the legal problems outlined below. Therefore, the City is seeking relief from the Court.

I. INTRODUCTION

Plaintiffs have filed this action seeing relief under C.R.C.P. 106, requesting declaratory and injunctive relief related to the City's approval of the Preliminary Development Plan for the Johnson Drive Apartments Project, PDP #170034 ("the Project"). The action is before this Court after Plaintiff Eric Sutherland appealed the City's Planning and Zoning Board ("the Board") approval of the Project to the City Council, which heard the appeal on February 27, 2018. Following the hearing, the City Council denied the appeal and upheld the Board's approval of the Project, specifically finding 1) the Board did not fail to properly conduct a fair hearing and 2) the Board did not fail to properly interpret and apply certain sections of the City's Land Use Code. *See,* Resolution 2018-023, attached to the Complaint.

Plaintiffs have petitioned this Court for further review of the City Council's decision under C.R.C.P. 106. The Complaint makes numerous allegations that the City Council allegedly abused its discretion in approving the Project and rejecting the plaintiffs' grounds for appeal below, and seeks 1) to remand the matter back to the City Council, with instructions to remand the matter back to the Board, for various additional determinations related to the Project; and 2) to enjoin further administrative action for the Project, including approval of the Final Development Plan, and construction of any improvements for the Project. However, notwithstanding this requested relief which would clearly impact the progression of the Project and the rights of the owners of the property, Plaintiffs have not made the applicant owner a party to this action.

As set forth below, there are a number of legal problems with the Complaint which require dismissal, or, alternatively, at least further orders from this Court in order for this matter to properly proceed:

1) Plaintiffs have failed and refused to join an indispensable party, namely the applicant owner of the Project;
2) Plaintiffs have failed to allege all of the necessary elements to support a claim for injunctive relief under C.R.C.P. 65, requiring dismissal of the sixth claim for relief;
3) Plaintiffs' Complaint specifically seeks relief under C.R.C.P. 106(a)(2) which is in the nature of mandamus, but the Complaint repeatedly asserts abuses of discretion on the part of City Council, which are more properly brought under C.R.C.P. 106(a)(4). Though Plaintiff Eric Sutherland has acknowledged the error, he has not taken simple, appropriate action to amend the Complaint in this regard; an email to the municipal court clerk does not fulfill a party's obligations under the rules of procedure to ensure that claims are properly plead.
4) Plaintiffs have improperly named the Administrative Branch as a defendant, when it is a subdivision or branch of the municipal corporation under the City Charter and municipal code.

Wherefore, for these reasons discussed in more detail below, the City respectfully requests the Court dismiss this action.

II. ARGUMENT

A. Plaintiffs have failed to join an indispensable party under C.R.C.P. 19, as a matter of law.

As noted above, and as is reflected in the Complaint, the relief sought by the Plaintiffs in this action, if granted, would directly impact the progression of the Project. Plaintiffs seek to have this matter remanded back to the Board for further determinations regarding the design of the trash enclosure (first claim for relief), design of the right of way conveyance (second claim for relief), "Car Share" requirements related to the required parking spaces for the Project (third

and fifth claims for relief), and "Transit Pass" conditions related to the required parking spaces for the Project (fourth and fifth claim for relief). Plaintiffs in their sixth claim for relief also specifically ask the Court to enjoin any further administrative action that would further construction of improvements on the Project, and to enjoin approval of the Final Development Plan. Plaintiffs themselves within their Complaint allege that the development review process creates vested rights in property owners. Yet, the Plaintiffs have failed to join as parties to this action the very persons whose rights would be directly affected by the relief sought here.

The Colorado appellate courts have repeatedly held that a zoning applicant is an indispensable party under C.R.C.P. 19 in a Rule 106(a)(4) action challenging the 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] The applicant owner is an indispensable party, as a matter of law, because (as acknowledged by Plaintiffs' own Complaint) 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.*

[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.

This is especially true in this case, where the plaintiffs seek to enjoin the Project applicant from proceeding with construction of any improvements on its property, and for further administrative action on the Project, including approval of the Final Development Plan. Under C.R.C.P. 65, no injunctive relief can be issued without the plaintiffs being made to give adequate security for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. Here, the applicant owner would certainly have costs and damages which would need to be considered if the Project is prevented from proceeding, and presumably would wish to defend against the enjoining of the Project from continuing through the planning and zoning process. Therefore, to the extent the claim for injunctive relief is even properly plead (as discussed below), the applicant owner is most certainly an indispensable party who will be impacted by the relief sought here.

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.* Indeed, 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).

As noted above in the Rule 121 Certification and as is reflected in the attached Exhibit 1, undersigned counsel advised the Plaintiffs of the need to join the applicant owner as an indispensable party to this action more than a week ago, and they have failed and refused to take appropriate steps to do so. Accordingly, this Court may properly dismiss the action; under the legal authority discussed above, allowing it to proceed with the participation of the applicant owner would otherwise result in a void judgment.

B. Plaintiffs have failed to state a claim for injunctive relief under Rules 106 and 65, requiring dismissal of the sixth claim for relief.

As noted above, the Plaintiffs' sixth claim for relief specifically seeks to enjoin further administrative action on the Project, as well as construction of any improvements on it. To the extent the Plaintiffs are seeking relief under Rule 106(a)(4) rather than Rule 106(a)(2), as discussed further below, Rule 106(a)(4)(IV) allows for the proceeding or decision of the body being reviewed to be stayed, subject to C.R.C.P. 65. However, the Colorado appellate courts have emphasized that such injunctive relief should be "exercised sparingly and cautiously with a full conviction on the part of the trial court of its urgent necessity." *Board of County Com'rs , County of Eagle, State of Colo. V. Fixed Base Operators, Inc.,* 939 P.2d 464, 467 (Colo. App. 1997); *Rathke v. MacFarlane,* 648 P.2d 648, 654 (Colo. 1982). This is particularly true with regard to injunctive relief sought against another branch of government, in deference to the doctrine of separation of powers. *Fixed Base Operators, Inc.,* 939 P.2d at 466-67.

According to *Rathke, supra,* the granting of injunctive relief requires a plaintiff to establish certain prerequisites: (1) a reasonable probability of success on the merits; (2) a danger of real, immediate and irreparable injury which may be prevented by injunctive relief; (3) that there is no plain, speedy, and adequate remedy at law; and (4) that the granting of a preliminary injunction will not disserve the public interest. *Rathke,* 648 P.2d at 653-54. These criteria must all be satisfied prior to the granting of injunctive relief; if each criterion cannot be met, injunctive relief is not available. *Id.*

The Plaintiffs have not even alleged all of these necessary elements in seeking to enjoin continuation of the development process and construction of the Project, let alone established them. Plaintiffs allege only that they "are at risk of injury," but fail to allege or demonstrate any real, immediate and irreparable injury; in fact, the other allegations of the Complaint would

demonstrate otherwise. The other three prerequisites have likewise not been alleged. Accordingly, this claim must be dismissed under Rule 12(b)(5) for failure to state a claim for which relief can be granted, notwithstanding the necessary dismissal of the entire action for failure to join an indispensable party.

C. Plaintiffs' Complaint fails to state a claim for which relief can be granted under Rule 106(a)(2).

Plaintiffs' Complaint expressly states it is being brought under C.R.C.P. 106(a)(2). However, Rule 106(a)(2) provides for relief in the nature of mandamus. Colorado case law makes clear that this type of relief is narrowly interpreted to be used only for compelling a public official to perform an act which involves no exercise of discretion. *See, e.g., Brown v. Barnes,* 476 P.2d 295, 296 (Colo. App. 1970). Here, the Complaint specifically alleges that the City Council was acting in a quasi-judicial capacity, and that its decisions are subject to an abuse of discretion standard on review. The Complaint then goes on to allege in numerous instances that the City Council abused its discretion.

As noted in the email sent to the municipal court clerk, attached hereto as Exhibit 1, Plaintiff Eric Sutherland has acknowledged this error. However, the Plaintiffs have failed to take simple and appropriate steps to amend the Complaint, as requested by the City. The rules of procedure applicable to this Court do not allow amendment by email. Accordingly, for this additional reason, the Complaint fails to state a claim upon which relief can be granted as a matter of law and must be dismissed.

D. The Complaint has improperly named as a defendant the "Administrative Branch of the City of Fort Collins."

Finally, notwithstanding all of the other problems noted above, the Complaint has also named an improper defendant. The "Administrative Branch of the City" is not a legal entity capable of being sued separate and apart from the City of Fort Collins itself. All departments and branches of its government are part of the municipal corporation, such that the City itself is the proper defendant under the circumstances alleged, not the "Administrative Branch." *See,* City Charter IV, § 2 and City Code Chapter 2, Article V.

Wherefore, the Complaint must be dismissed as against this improperly named defendant for this additional reason.

III. CONCLUSION

Based upon all of the reasons and authority discussed above, the Court must conclude that this action cannot proceed as alleged by the Plaintiffs and must be dismissed as a matter of law.

WHEREFORE, the City respectfully requests, on behalf of the City Council and improperly named "Administrative Branch", that the Court dismiss this action, and grant any further relief the Court deems just and proper. Alternatively, the City respectfully requests the Court order the Plaintiffs to amend the Complaint by a date certain in order to address the legal deficiencies outlined above.

DATED this 25th day of April, 2018.

Respectfully submitted,

WICK & TRAUTWEIN, LLC

By: _____
Kimberly B. Schutt, #25947
Attorneys for the City

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing MOTION TO DISMISS and proposed ORDER RE: MOTION TO DISMISS was SERVED via email this 25th day of April, 2018, on the following:

Eric Sutherland
3520 Golden Currant
Fort Collins, CO 80521 *Via email to sutherix@yahoo.com*

Brian Dwyer
J&M Distributing, dba Fort Collins Muffler and Automotive
2001 S. College Avenue
Fort Collins, CO 80525 *bdwyer1199@gmail.com*

_____

kschutt@wicklaw.com

From:	Eric Sutherland <sutherix@yahoo.com>
Sent:	Friday, April 20, 2018 11:39 AM
To:	PNetherton@fcgov.com
Cc:	Brian Dwyer; K. Schutt; Carrie Daggett
Subject:	Fw: City of Fort Collins Municipal Action 2018 01

Ms. Netherton,

Please make note of a typographical error that appears in the caption of the complaint in Civil 2018 01, Sutherland v. City Council.

I mistakenly titled our complaint as seeking relief under C.R.C.P. Rule 106(a)(2). I meant 106(a)(4). I offer my apologies if this has created any difficulties for the court. I do not imagine that anyone was confused. We are not seeking relief in the form of mandamus. We are alleging abuse of discretion.

I would greatly appeciate it if the court could take notice of this error until such time as it may be perfected by further action by the plaintiffs. The emails, below, provide ample evidence that the defendants in the case are aware of our mistake and our confession as to the fact that a mistake was made.

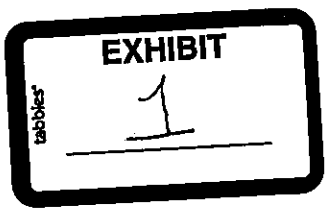
I make this request with some understanding that the procedures of the municipal court can be somewhat relaxed at times. An order, for example, made with the threat of citation for contempt for non-compliance, may be issued without any evidence that the presiding judge ever saw the order, let alone isssued it. Under the circumstances, I feel confident that all parties to the case and the court itself may look beyond my typographical error until such time as the complaint may be amended.

From what I gather, the defendants in this case will be motioning the court for disimissal prior to filing a responsive pleading. Ms. Schutt writes (below): "*in order to protect the responsive deadline pleading*". Perhaps she meant to say *"responsive pleading deadline"*. Mistakes happen. I think it is incumbent upon all of us in the pursuit of justice to accomodate and compensate for mistakes where they occur. Because a motion to dismiss may be forthcoming, I would like to reserve my right to motion the court for amendment of the complaint until such time as the motion to dismiss is filed.

By the way, do you know if the Chief Judge will be appointing someone to adjudicate this matter and when that might happen?

Eric Sutherland

----- Forwarded Message -----
From: "kschutt@wicklaw.com" <kschutt@wicklaw.com>
To: 'Eric Sutherland' <sutherix@yahoo.com>; bdwyer1199@gmail.com
Cc: CDAGGETT@fcgov.com; 'Cary Alton' <calton@fcgov.com>



Sent: Friday, April 20, 2018 10:16 AM
Subject: RE: City of Fort Collins Municipal Action 2018 01

Good morning, Mr. Sutherland and Mr. Dwyer –

I understood from our email exchange on Monday that you intended to file an amended complaint to at least address the erroneous reference to Rule 106(a)(2). However, as of this morning no such amended complaint has been received by my office or filed with the court.

Please take care of this amendment as soon as possible, given the approaching deadline for our responsive pleading. We are operating on the understanding that service occurred on April 4th, but please let me know immediately if you have a different understanding, since you have not filed a return of service with the Court either.

We are prepared to proceed with filing our motion to dismiss on all bases, in order to protect the responsive deadline pleading, if an amended complaint is not received by close of business on Monday. Again, please take care of this amendment immediately in order to allow for this matter to proceed in the most efficient manner possible.

Thank you for your prompt attention to this matter.

Kimberly B. Schutt, Esq.

WICK & TRAUTWEIN LLC
EST. 1972

Wick & Trautwein, LLC
323 S. College Avenue, Suite 3
Fort Collins, CO 80524
P: 970-482-4011 * 866-686-1410
F: 970-482-8929
http://www.wicklaw.com/

From: Eric Sutherland <sutherix@yahoo.com>
Sent: Monday, April 16, 2018 4:45 PM
To: kschutt@wicklaw.com; bdwyer1199@gmail.com

Cc: 'John Duval' <jduval@fcgov.com>; CDAGGETT@fcgov.com
Subject: Re: City of Fort Collins Municipal Action 2018 01

The applicant submits a application for a PDP. Much is uncertain. There is ample opportunity to revise the proposed design in response to staff concerns or the improved understanding of the requirements of the LUC.

When the application is submitted for a review hearing, the applicant understands that only a finding that all the applicable requirements of the LUC are met will result in approval ... and that approval is subject to appeal by a party in interest. "Appeal" means, of course, an initial appeal to City Council. However, there can be no expectation that a favorable decision by Council is the terminus of the appeal process. The jurisdiction of the municipal court simply is not limited in this way.

Now, failure of any interested party to file a Notice of Appeal with the City Clerk may unquestionably be construed to be a lapse of all rights of appeal. At that point, an applicant and the planning department may presume that rights to move forward with the process are unrestricted regardless of whether disputes regarding conformance with the LUC are still lingering. Alternatively, if an interested party files a Notice of Appeal, the march forward is halted pending the resolution of the allegations on appeal.

This is the part that I do not get ... you seem to be suggesting that despite the fact the next step in the appeal process has been taken, the applicant's rights or the defendant's rights to march forward and attain approval of an FDP should not be impaired as they were upon the filing of a Notice of Appeal. I don't understand the basis of this suggestion and find it counter to the legislative intent underlying the LUC and principles of due process.

I look at it two ways, which can be seen to unified in their purpose. 1.) your interpretation allows for steamrolling a deficient application through development review. There can be no arguing that this is, in fact, consistent with the operational paradigm of the planning department, but I object for various reasons. 2.) The operational principle underlying allowing participation of people besides the applicant is to ensure that a deficient application does not move forward.

I just don't read anything in Rule 19 or the case law that supports your position here. The current situation is, as I have already described, significantly different from a rezone or special use. You are painting with to broad a brush. It is understandable how rule 19 applies to the applicant in such a situation. The reversal of a zoning decision by a reviewing court could have significant impacts on both the municipal corporation and applicant, making the applicant indispensable.

The case law that you want to look at differentiates between inidispensability and right to intervene. The latter is clear here, but you have presented no argument for the former. Whoever the applicant is in this situation, and I will ask if Mr. Dwyer knows anything more about his, her or its identity than I do, he, she or it is not so situated that the disposition of this action in his, her or its absence will impair or impede any rights that might be claimed relating to the subject matter of this action. You do not seem to be implying otherwise. Rather, you are simply arguing that inapplicable case law is applicable and I have a sense of deja vu.

I would like to say here that I do have a message for whoever the applicant might be. I can't be to specific in this email but I can say that the message references the horse he, she or it rode in here on. I remember a party in opposition to the appeal making a statement that the subject parcel was chosen for development because it was situated close to various means of connection to the greater community: MAX, Mason Trail and Spring Creek Trail. Yet the carpetbagger was unwilling to make

any concessions toward completing the connections available in the area to provide for pedestrian and bicycle travel to the commercial areas to the south including vital connection to Spring Creek station.

Subject to change upon consultation with my co-plaintiff, I will not plan on amending the complaint to add an indispensable party. All I can ask here is that you please make any motion to dismiss for failure to name an indispensable party specific to one or more claims and identify which ones they are.

Eric Sutherland

From: "kschutt@wicklaw.com" <kschutt@wicklaw.com>
To: 'Eric Sutherland' <sutherix@yahoo.com>; bdwyer1199@gmail.com
Cc: 'John Duval' <jduval@fcgov.com>; CDAGGETT@fcgov.com
Sent: Monday, April 16, 2018 3:14 PM
Subject: RE: City of Fort Collins Municipal Action 2018 01

Good afternoon, Mr. Sutherland:

Thank you for your acknowledgment that your complaint sought relief under the wrong subsection of Rule 106. Based on your email, we understand that you will be filing an amended complaint to address that error. Please do so as soon as possible so that this matter can proceed in the most orderly fashion.

In that same spirit, I regret that my letter to you challenged your standing to bring this claim. An earlier draft of my letter was inadvertently sent to you this morning. Based on research done after that letter was originally written, the City had decided not to raise that issue and that paragraph was supposed to have been removed from the letter. I regret any confusion it may have caused.

With those issues conceded, however, we continue to disagree with your assessment of the indispensable party issue. Rule 19 of the Colorado Rules of Procedure states that an interested party who is properly subject to service shall be joined as a party. Again, the case law cited in my letter makes clear that an applicant is an indispensable party in Rule 106 actions such as this one, which seek court review of a planning and zoning decision impacting that applicant. Indeed, your email acknowledges that the applicant owner here has rights which may be negatively impacted by the court's determination of the issues you have raised. That party's identity and contact information is of public record in the planning documents presented at the City Council hearing. Accordingly, under Rule 19 and the relevant case law, the Court shall order the applicant to be made a party; if you fail to take appropriate steps to do so, then your case is subject to dismissal. It is not incumbent upon the applicant to file a motion to intervene.

Again, please amend your complaint as soon as possible to address these procedural issues so that we can move forward in the most efficient manner to have the Court address the substantive issues raised.

Thank you,

Kimberly B. Schutt, Esq.

WICK
&
TRAUTWEIN
LLC
EST. 1972

Wick & Trautwein, LLC
323 S. College Avenue, Suite 3
Fort Collins, CO 80524
P: 970-482-4011 * 866-686-1410
F: 970-482-8929
http://www.wicklaw.com/

From: Eric Sutherland <sutherix@yahoo.com>
Sent: Monday, April 16, 2018 12:09 PM
To: Jody Minch <jminch@wicklaw.com>; bdwyer1199@gmail.com; Carrie Daggett <cdaggett@fcgov.com>; Kim Schutt <kschutt@wicklaw.com>; John Duval <jduval@fcgov.com>
Cc: Cameron Gloss <cgloss@fcgov.com>; City Leaders <cityleaders@fcgov.com>; Laurie Kadrich <lkadrich@fcgov.com>; Tom Leeson <tleeson@fcgov.com>
Subject: Re: City of Fort Collins Municipal Action 2018 01

Hi Ms. Schutt,

Thanks for your letter. My co-plaintiff, J&M, and especially its president, Brian Dwyer, has experienced a very significant loss since the filing of the complaint. I am responding here without consultation of J & M for the sake of time and in consideration of the circumstances. Consequently, my responses here are subject to change upon consultation with my co-plaintiff.

You raise the following issues:

1) The complaint did, indeed, cite the wrong sub-section of Rule 106. I regret the error and agree that an amended complaint is in order.

2) Failure to name an indispensable party
PART ONE - in which I make general observations.
I do not agree that the action appealed in this case is a zoning decision. I do not dispute that the approval of a PDP can implicate zoning by way of a request for modification of standards, but the PDP appealed here did not. Whether or not a PDP that does not

I do not dispute that the applicant may have rights that may be negatively affected by a decision of the court. At this time, I have no reason to believe that a motion to intervene made by the applicant would be opposed for any reason other than the fact that there does not appear to be any difference whatsoever between the interests of the city and the interests of the applicant, which is, by itself, a defense of grounds for dismissal.

At the present time, I do not have any idea who the applicant is. I am sure he introduced himself at the appeal hearing and I would suspect that I could get some information from the Defendant City Administration. It is also possible that Brian Dwyer may have information in this regard.

With the exception of the Sixth claim for relief, it does not appear that the belief that the applicant is an indispensable party rests upon the substance of the claims being made. I do not dispute that a single claim made without naming an indispensable party is grounds for dismissal of that claim. I do not agree, however, that because a single claim may be so dismissed that all claims may be dismissed.

PART TWO - in which I make defense of the complaint as filed in regard to the absence of naming the applicant.

I do not agree that the applicant is an indispensable party in this action. The approval of an application for a PDP is an intermediate step in the process of attaining vested rights for the development of a property. Although an unchallenged PDP may be seen as a valuable attribute by a property owner and may even be viewed in the marketplace to increase the value of a property, it does not, by itself, represent a final action granting rights to the property owner other than a right to pursue further process towards attainment of vested rights. In this regard, the approval of a PDP departs substantially from the approval of a rezone or application for special use in a manner similar to *Hidden Lake, Norby , Hennigh,* etc.

Our request of certiorari review by the municipal court is not a review of rights that would otherwise be granted and held. Rather, it is an appeal of an intermediate process at the only point at which parties may request review in protection of their rights. Reliance on the authorities stated in your letter is misplaced. Certainly, the defendants have the right to seek dismissal on this ground, but such a request of the court needs to be be viewed as a matter of first impression.

With regard to the First and Second claims for relief, there are currently no obstacles that would bar the applicant from proceeding in the sequence of events towards the rights that he or she seeks. Frankly, this additional step of review by the Municipal Court should be viewed as an unwelcome departure from the path to an FDP and development agreement that the applicant could have traveled if the basic provisions of our laws had been respected. The applicant does, of course, have the option of refusing the amendment of his or her application to conform with the requirements of the LUC and thus abandoning his application, but that is his or her choice. Thus, this action represents merely a more circuitous route to attainment of rights, not a request for denial of rights. The distinction is significant.

With regard to the Third and Fourth claims for relief, it is not unimaginable that the unconsitutionally vague provisions of the Land Use Code could be accomodated by the application of conditions that adequately defined the meaning of 'car share' and 'transit passes' if such definitions could reasonably be construed to provide for the equivalent of the reduction in parking spaces that were allowed under these mitigation strategies. As in first two claims, this action represents merely a more circuitous route if the ambiguities noted in the appeal can be reasonably resolved.

Regarding the Fifth Claim for relief, the obstacle presented may be overcome by legislation that affects the rights of the defendant administrative branch to enforce provisions of a development agreement in municipal court. Municipal code already allows, for example, for the city to assert its rights under U+2 under civil action taken in the municipal court. The inability of the city to take similar actions when confronted with disregard of provisions of development agreements is a deficiency that renders enforcement of forward looking conditions applied to the grant of development

rights all but unenforceable. However, in the absence of ability to enforce forward looking conditions, the obstacle remains.

Looking at claims 3-5 as a whole, it must be viewed that defects in the codified development review process do not impair the rights of the applicant. Unquestionably, the applicant has a right to the approval of a PDP if ALL the requirements of the LUC are met. However, vague provisions and inability to enforce forward looking requirements are imperfections that prevent the ALL requirements of the LUC from being met. The fault here lies with the City, not the applicant. Thus it is proper to join the defendants and only the named defendants in claims 3-5.

Only with regard to the Sixth claim of relief do I find any argument alleging failure to name an indispensable party worthy of consideration. I am presuming that your argument would go something like "the applicant has a right to continue on his, her or it's path towards an FDP, your complaint seeks to stay abridge that right until this matter is resolved, the applicant has substantive rights that a require his, her or its participation in this proceeding under the Rules." In particular, you mention posting a bond to protect the interests of the applicant. I answer this argument, and excuse me if I have misapprehended your argument, by noting that the rights of all interested parties are protected by rights of appeal. Consideration of an application for a PDP is a quasi-judicial. No mystery there. (I don't know if I could have been clearer in the appeal before Council that anything other than a remand or satisfactory argument that defeated our allegations would result in the action that was taken.) Th.us, I don't believe that an applicant has a right to progress in development review until all rights of appeal of interested parties have lapsed. It is part of the process.

We can view this subject from a different perspective. What would the result be if the Sixth claim for relief were withdrawn or dismissed? This would create an absurd result where the applicant was marching forward toward the completion of a next step that was entirely dependent upon the unassailable completion of a previous step ... which is likely to be found deficient either in Municipal Court, (should we actually get that far this time) or in a superior couert.

In other words Ms. Schutt, our system has been designed to disallow the city tribunals from acting like the Kangaroo Courts that they have become. As a consequence of that design, an applicant's rights to participation in this appeal must be asserted by motion to intervene or not at all. If no motion to intervene is made, then the applicants has no more rights to participate in this appeal than Mr. Dwyer or I have to participate in the review of the FDP.

3) Sutherland has no standing.

Much of the argument to refute your position here can be borrowed from 2.) above. The broad standing bestowed upon citizens in appeals before Council survives into appeals of Council decisions. However, rather than simply rest on this general argument, an examination of standing under the *Wemberly* test is appropriate. Both prongs can be seen to be satisfied. By adopting the LUC the city has created legally protected rights to all persons who have interest that the community develops in conformance with standards that have been agreed to and codified. The LUC provides for a determination of the property rights of all citizens of Fort Collins, be they lease-hold rights that are distant from subject parcel(s) or a property ownership of the subject parcel(s) themselves.

In the instant case, injury-in-fact may be presumed to be sustained by Sutherland without correction of the deficiencies of the PDP that are realized by a failure to provide for adequate connectivity for pedestrian and bicycle travel, for example, or untenable aesthetics of trash enclosures for another. There simply is no rational basis to conclude that only owners of property proximate to the subject parcels have a legally protected right to be be free of such deficiencies. Rather, the right to ensure that the community develops in a manner consistent with the standards of the LUC as determined and controlled by the process defined in the LUC is a property right held in common by a very large group of people. The design of the system is such that an individual may assert his or her rights in connection with all other similarly situated people without the necessity of forming a class.

Once again, the legal process must be construed as providing a means for just resolution of disputes, not a means of perpetuating the practices of Kangaroo Courts.

No previous Council has ever seen it appropriate to limit the standing of anyone in such matters before the municipal court. There can be no question that Council is the only legislative body that might so limit standing.

Even though standing was the key issue in *Town of Frisco v. Baum,* there was no question of Baum's standing to appeal to some higher court based upon the *Wemberly* test, although the which higher court to appeal to did end up being a matter of some discussion. A review of the Baum's situation in that case reveals that his claimed injury could be reasonably seen to be shared by a very large group of people with interest in how Frisco developed.

In the event that the broad standing that is claimed above is not available, Sutherland is a property owner in the city of fort collins. The valuation of his property is impacted by the livability of the community that surrounds that property. That metric is influenced by market forces that are not disconnected from the application of the LUC. A tangible economic injury can reasonably be concluded to follow from the disregard of the provisions of the LUC in general and in the specific situations represented by the claims.

Furthermore, the broad standing bestowed on taxpayers may be presumed to grant standing in this case. See *Freedon from Religion v. Hickenlooper, Barber v. Ritter.* Whether or not development complies with the requirements of the LUC has a direct bearing on the use of tax dollars by the defendant administrative branch. Taxpayers have a right to ensure that inappropriate development does not drain public resources and may profess injury in the event that the LUC is disregarded.

4.) No rules or laws exist to define who can and can't be sued in municipal court. The difficulty of proceeding in this or any other legal action in municipal court is well understood at this time.

Although many factors influence a "best approach" decision about how to name defendants in this action, there is one inscrutable immutable. Naming the City as a whole as one would name the a defendant in state court would mean that the plaintiffs here were suing the municipal court that they are filing the suit into. (The municipal court is a component unit of the city. *See* Article XII of the City Charter.)

It is interesting to note that appeals of decisions of municipal courts in Colorado as allowed under the state rules for district courts often name the municipal court as a separate entity. I have not figured that one out.

But putting all of the arguments defending the approach taken aside, the fact remains that this is a moot point because naming the component units of the city as defined by provisions in the charter may be construed by the municipal court and all parties to have sufficiently named the defendants as component units or as the city as a whole.

CONCLUSION

With the exception of my careless error in using a '2' instead of a '4' in the caption of the complaint, I find all of your allegations to be groundless in that they are unsupported by persuasive argument.

That said, you should be aware that a motion to dismiss for any of your stated reasons, simply means an appeal if it is granted. Could this be yet another circuitous departure from the path that should have been taken here?

There is good cause for anyone to conclude that the Office of the City Attorney is more intent on litigating for 'wins' than for effecting optimal public policy that serves the interests of the citizens of Fort Collins. This, coupled with a deficient understanding of law, has created some bad outcomes and is likely to do the same here. I can't imagine that any applicant would not see a remand to P & Z as a vastly superior alternative than appeals into the judicial system.

I would like to see our development review process reformed to accomplish the following changes:
1.) A petition for rehearing a decision in a PDP application may be brought to the decision maker (Type 1 and Type 2) within 14 days of a decision. This would be analogous to the relief allowed litigants in our trial and appellate courts.

2.) The decision as to whether to grant a rehearing or not would be different for Type 1 and Type 2 hearings. In the case of Type 1 hearings, the decision would lie exclusively in the sound discretion of the Director and could not be delegated to others. If a petition for rehearing is granted by the Director, only the Director may be the decision maker.

In the case of the P & Z the decision would be made by the Board at its next regularly scheduled meeting or special meeting except that any single member of the P & Z could certify to the remainder of the Board that, in his or her opinion, a rehearing was warranted. In the latter case, the rehearing itself could be held at the next regularly scheduled meeting or special meeting.

3.) An appeal of a decision may still proceed directly to Council without need for a petition for rehearing being filed. However, Council may only hear allegations that are substantially similar to those made prior to or during the original hearing or were made in a petition for rehearing that was properly filed. Again, this would be analogous to the time-proven methodology of our civil justice system.

The above changes would dramatically reduce the burden on staff, council and the public. The above changes would dramatically improve the outcomes of the development review process.

I would urge the Office of the City Attorney to pursue these changes rather than opposing this appeal. The system has not evolved to remove deficiencies. No one in the City has the vision or insight necessary to make the present system work correctly or understand what is keeping that from happening.

Try making something better instead of making things worse.

Eric Sutherland

PS The attached file is now a public record subject to inspection by the public.

From: Jodn
y Minch <jminch@wicklaw.com>
To: sutherix@yahoo.com; bdwyer1199@gmail.com
Cc: Kim Schutt <kschutt@wicklaw.com>; John Duval <jduval@fcgov.com>; Carrie Daggett

<cdaggett@fcgov.com>
Sent: Monday, April 16, 2018 8:11 AM
Subject: City of Fort Collins Municipal Action 2018 01

Please see attached correspondence from Ms. Schutt regarding the referenced matter.

Jody L. Minch
Paralegal to Robin L. Wick, Kimberly B. Schutt
and Michael S. Samelson
Wick & Trautwein, LLC
P.O. Box 2166
Fort Collins, CO 80522
(970) 482-4011
Fax: (970) 482-8929