

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

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

1. Plaintiffs have filed this action seeking 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.

2. 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.

3. The City, on behalf of the named defendants, has filed a motion to dismiss this action on several different grounds. The Court has weighed the arguments and considered the applicable legal authority, and concluded that dismissal of the action is proper for the following reasons:

- a) Plaintiffs have failed to join the applicant owner of the Project as a party to this action, and under Colorado law, the applicant owner is clearly an indispensable party. *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). That is particularly true here given the nature of the relief sought in the Complaint; the granting of such relief would most certainly impact the rights of the applicant owner for this Project, such that any judgment rendered in its absence would be void as a matter of law. Plaintiffs have refused to voluntarily amend their complaint to name the applicant owner as a defendant, thus dismissal at this juncture is proper.
- b) Plaintiffs have failed to allege all of the necessary elements to support a claim for injunctive relief under C.R.C.P. 106 and C.R.C.P. 65, namely (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 v. MacFarlane*, 648 P.2d 648, 654 (Colo. 1982). Therefore, notwithstanding the dismissal of the action for failure to name an indispensable party, the sixth claim for relief must be dismissed for this reason as well.
- c) 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, the Plaintiffs have 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. Therefore, because the allegations of the Complaint cannot sustain a claim under C.R.C.P. 106(a)(2) as a matter of law, dismissal of the action is proper for this reason too;
- d) 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. Accordingly, any all claims against this improperly named defendant are dismissed for this additional reason.

WHEREFORE, for these reasons set forth above, the Court dismisses this action in its entirety without prejudice.

DONE THIS \_\_\_\_ day of May, 2018.

BY THE COURT:

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Municipal Court Judge