

FORT COLLINS MUNICIPAL COURT 215 N. Mason Fort Collins, CO 80521 Phone (970) 221 6800	
Plaintiffs: Eric Sutherland, J & M Distributing, DBA Fort Collins Muffler and Automotive v. Defendant : 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. Indispensable party: Craig Russell, Applicant	▲ COURT USE ONLY ▲ Case Number: 2018civil01
<hr/> Parties without attorney Eric Sutherland 3520 Golden Currant Fort Collins, CO 80521 (970) 224 4509 sutherix@yahoo.om J & M Distributing, DBA Fort Collins Muffler and Automotive Brian Dwyer, President 2001 S. College Ave. Fort Collins, CO 80525 (970) 484 0866 bdwyer1199@gmail.com	
Plaintiff's Response to Defendant's Motion To Dismiss.	

Plaintiffs, Eric Sutherland and J & M Distributing, timely file this Response to Defendants Motion to Dismiss.

Simultaneously, we are filing an Amended Complaint and a combined Motion for Disqualification/Expansion of Time to amend this pleading.

As *pro se* litigants in this matter, the Plaintiffs herein use the plural pronouns (we, us, our) to refer to themselves. Unless otherwise noted, all references to the Plaintiffs in this pleading where a statement of position on any matter is made or inferred indicate a jointly adopted position agreed to by both individual plaintiffs.

INTRODUCTION

On April 25th, 2018, Defendants filed a Motion to Dismiss. Generally, the Motion to Dismiss alleged 1) a failure to name an indispensable party of unknown identity referred to only as the owner applicant, 2) a failure to allege all elements necessary to support a claim for injunctive relief, 3) a typo in the caption of the complaint, 4) improperly naming the Administrative Branch of the Fort Collins City Government as a defendant. We address each of these alleged deficiencies in turn.

1) A FAILURE TO NAME AN INDISPENSABLE PARTY OF UNKNOWN IDENTITY REFERRED TO ONLY AS THE OWNER APPLICANT,

Perplexingly, the Defendants have failed to identify who the “owner applicant” is. Additionally, the Defendants have failed to explain how the interests of this party differ in any way from the interests of the Defendants and how the rights of this unidentified part may be impaired if not properly named in this action. Because it is not understood how the rights of this unknown party may be impaired in the general sense, it is, of course, equally impossible to ascertain how the rights of this party may be impaired if the relief requested in the 6 individual claims is granted.

Consequently, the Defendants have not even begun an explanation of why this case should be dismissed.

Instead, Defendants have relied upon citations of case law that are completely inapposite in this circumstance. The authorities that have been cited by Defendants apply exclusively to zoning matters. There is no argument about the necessity of naming an owner of property subject to a contested zoning or rezoning application. There can be no question that such an owner may very well see his or her use of property impaired or abridged as a consequence of judicial review of a zoning decision. However, the matter currently before the court pertains to development

review, not zoning. In the absence of any explanation of why decisions on applications for zoning changes are similar to applications for development review of proposed construction projects, the binding effect of all authorities cited by the defendant simply does not exist.

As an alternative to simply dismissing the authorities as inapposite here, an examination of exactly what rights may be impacted by this action is appropriate. This examination certainly tells us that 1) an entity is in the process of applying for vested rights of development, 2) as a consequence of a decision of this court to grant the relief requested in the complaint, this entity may necessarily be obliged to participate on remand in further proceedings to define the specifications for development and future business activity required for the final attainment of the vested rights sought. If these two points 1) and 2) are correct, then this entity may only be said to experience a disadvantage by virtue of a more circuitous route to the objective of the application that was commenced. Such a disadvantage is not an impairment of rights. There certainly is no rational or logic for comparing this disadvantage to the impairment of rights to use property that is a possibility in decisions on zoning applications and there is also no rational or logic for comparing this disadvantage to the impairment of any other legally protected right.

Only two of the 6 claims made in the Complaint are exclusively “abuse of discretion” type claims under Rule 106. (claims 1 and 2). All other claims have a basis that is, at least in part, separate from the relief afforded by Rule 106. Consequently, it is even a further stretch than previously presented to presume that just because a cause of action arises within the arena of land use it is automatically subject to the requirements of indispensable parties that the Defendants have referenced with citations of authorities.

For the reasons stated above¹, we resolutely oppose that part of the Motion to Dismiss based upon a failure to name a party. However, litigation should never be about inflexibility that imperils the pursuit of justice. Consequently, we are amending our Complaint to name as an Indispensable party that person who was named in the Staff Report that preceded the review of the subject application before the Planning and Zoning Board. This Staff Report identifies two entities:

APPLICANT: Craig Russell, Russell + Mills Studios 506 S. College Ave, Suite A Fort Collins, CO 80524

OWNER: Next Chapter Properties - Patrick Quinn 1939 Waukegan Rd, Suite 105 Glenview, IL 60025

(See Page 1, Agenda Item #5, January 18, 2018 Planning and Zoning Board meeting.)

The Defendants have complained that the “owner applicant” was not named. Obviously, the OWNER and the APPLICANT are two different entities. Upon further investigation and review, the OWNER was eliminated from consideration as an indispensable party for two reasons: 1) the OWNER lists an Illinois address and it is not clear whether this court would have personal jurisdiction over the OWNER, and 2) the OWNER listed in the Staff Report does not match the owner listed in the public records of the Larimer County Assessor’s Office for the subject parcel of land and it is unclear whether or not the OWNER, Next Chapter Properties, has any possessory interest in the subject parcel of property.

2) A FAILURE TO ALLEGE ALL ELEMENTS NECESSARY TO SUPPORT A CLAIM FOR INJUNCTIVE RELIEF

¹ These reasons were explained multiple times in conference with Counsel for Defendant, yet no contrary reasoning was advanced in refutation of the perspective we present here or in defense of the rote notion that because zoning actions require the naming of an indispensable party, so must actions seeking to assure compliance in development review applications.

The Defendants are correct in this regard. The Complaint has been amended accordingly.

In addition to providing greater detail in our allegations as found in the Amended Complaint, we make note here that if the injunctive relief requested is not granted, the difficulty in time and expense that will accompany the ultimate favorable rulings we expect, whether in this court or on appeal, may disadvantage the Defendants and all other parties, (identified or otherwise), in the event that entitlements are errantly granted by the Defendants in the absence of a stay.

3) A TYPO IN THE CAPTION OF THE COMPLAINT

The Defendants are correct in this regard. The Complaint has been amended accordingly. We regret the error.

4) IMPROPERLY NAMING THE ADMINISTRATIVE BRANCH OF THE FORT COLLINS CITY GOVERNMENT AS A DEFENDANT.

In regards to the allegation that the Administrative Branch is improperly named in this action, we disagree. As a practical matter, lawsuits in state court that seek to join a municipal corporation do name the municipal corporation or the governing body of such in the complaint. However, this approach is unacceptable when the lawsuit is brought to the Municipal Court of the municipal corporation for the simple fact that the Municipal Court is a component unit of the municipal corporation. That is to say there is no way to sue the municipal corporation without also suing the Municipal Court that happens to be hearing the matter.

We confess to the difficulty and ambiguity that is presented by the practical reality of the situation. We would urge for legislation by City Council that would make this difficulty cease to exist. Indeed, Plaintiff Eric Sutherland has lobbied for such change and others as part of a general design to better facilitate resolution of disputes within the original jurisdiction of the Municipal Court. On a larger scale, it appears the such difficulties and others that follow from claim of original jurisdiction that is found in the Charters of many Home Rule cities in Colorado are

not well understood and certainly ill-addressed. This is one area where the Malcolm Baldrige award winning city organization might actually show some leadership.

The situation being what it is at the present time, we feel and we urge this Court to agree that naming the parties as we have done is acceptable. Certainly, it would be improper to dismiss this suit on this basis. Whether or not a component unit of the City that could not be named in a suit in state court may be named in Municipal Court is beside the point. The point is that the functions and activities of the Administrative branch of the municipal corporation are under the jurisdiction of this court regardless of whether the naming convention employed here meets everyone's satisfaction. Certainly, the Defendant does not seem to be arguing otherwise.

WHEREFOR, we respectfully request that this court deny the Motion to Dismiss and grant leave to file the Amended Complaint that is submitted with this Response, if such Leave of this Court is necessary, which does not appear to be necessary.

Respectfully submitted this 17th day of May, 2018.

Eric Sutherland

Eric Sutherland

Brian Dwyer

Brian Dwyer

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