DISTRICT COURT, LARIMER COUNTY, COLORADO Larimer County Justice Center 201 Laporte Avenue, Suite 100 Fort Collins, CO 80521-2761 **Plaintiff: RORY HEATH, as an individual plaintiff and on behalf of other concerned residents and parties,** **v.** **Defendants: CITY OF FORT COLLINS CITY COUNCIL, a municipal governing body; and the CITY OF FORT COLLINS.**	DATE FILED: May 8, 2018 10:20 AM FILING ID: 4A8D979F31605 CASE NUMBER: 2018CV125 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 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	Case Number: 18CV125 Courtroom: 5A

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

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 submits its Reply in support of its motion to dismiss this action due to Plaintiff's failure to join an indispensable party. In support hereof, the City states as follows:

1. Plaintiff 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. Plaintiff did not name as a defendant the applicant owner behind the Union on Elizabeth development plan and did not take appropriate steps to amend his Complaint to join the applicant owner as a party defendant after reasonable efforts were made to confer with Plaintiff about the need to do so. Accordingly, the City filed a motion to dismiss the action.

2. Plaintiff's response to that motion focuses largely on disputing defense counsel's good faith efforts to confer with him prior to the filing of the motion. Suffice it to say that the defendants disagree with his characterizations, and attach to this Reply copies of the multiple emails exchanged between undersigned counsel and Plaintiff. *See, Exhibits 1-7.* Those emails, which speak for themselves, reflect that extensive, reasonable attempts were made to notify the Plaintiff of the legal problem with his complaint, that defense counsel provided him case law supporting the City's position as he requested, and the City also agreed to an enlargement of the responsive pleading deadline to give the Plaintiff additional time to review this legal authority and voluntarily amend his Complaint. When Plaintiff finally responded the morning of the City's extended responsive pleading deadline and it was clear he was not conceding the problem, the Rule 12(b) motion was filed as the City's timely responsive pleading. No misrepresentations were made to the Plaintiff, as he asserts, and his focus on making accusations rather than discussing the substance of the matter is not helpful to this Court's resolution of this critical legal issue.

3. Turning then to the substance of this issue, the fact remains that Plaintiff still has not named the applicant owner for the Union on Elizabeth project as a defendant to this Rule 106 action, though he specifically seeks review and reversal of the City Council's decision upholding approval of the Final Development Plan for the project. Accordingly, the relief Plaintiff is seeking in this action directly impacts further development of the underlying project.

4. It is for this reason, as set forth in the well-established and still valid legal authority cited in the City's motion, that the applicant owner has vested rights established by the planning and zoning decision for which the Plaintiff seeks review and reversal, making it an indispensable party as a matter of law. *Hidden Lake Development Co. v. District Court,* 515 P.2d 632, 635 (Colo. 1973). Again, "that right cannot be abrogated by judicial action unless the [applicant] is before the court to assert its defenses." *Id.* That legal authority puts the burden on the plaintiff bringing the action to include the party affected as an additional defendant to the action; it does not put the burden on the affected party to intervene in the action, as suggested by the Plaintiff.

5. Plaintiff has not provided any legal authority that supports a contrary conclusion. The only case he cites is *Tri-State Generation & Transmission Co. v. City of Thornton,* 647 P.2d 670 (Colo. 1982), referencing a footnote from the case in support of his argument that the Court need not dismiss this case. However, Plaintiff apparently misunderstands the meaning of that footnote. That is, as was discussed in the City's motion to dismiss (see footnote 1), 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 932, 933 (Colo. App. 2003). While failure to include the zoning applicant as a party within that 30-day time period is no longer a fatal jurisdictional defect, the applicant nevertheless remains an indispensable party and dismissal is still the appropriate remedy if (as is the case here) the plaintiff fails to take appropriate steps to join that indispensable party. The changes in the statute did not change this legal principle.

6. Here, Plaintiff was apprised of this problem two weeks prior to the filing of the motion to dismiss and failed to take appropriate action to join the applicant owner as a party to the case. Even now, his response to the motion to dismiss denies the need to do so and indicates no intent to join the indispensable party. Therefore, dismissal is indeed an appropriate remedy under the legal authority cited in the City's motion. If the Court decides to give him additional time to join the applicant owner prior to dismissing, that is the Court's prerogative, but the matter cannot legitimately proceed unless and until the applicant owner is joined as a party to this action, and it is the Plaintiff's burden to take appropriate steps to do so.

7. Finally, while the Plaintiff complains that "defense counsel did not specifically state the name of whom should be added as a party to the action," that is a factual and legal determination for the Plaintiff to make based upon readily available public information from the planning and zoning application and other materials. Plaintiff has chosen to represent himself in this legal action, and therefore is held to the same standards and obligations as an attorney. It is not up to the City or its counsel to do that investigation for the Plaintiff, or to give him legal advice regarding the proper party to be sued.

WHEREFORE, based upon the authority stated above, the City again respectfully requests the Court dismiss this matter due to Plaintiff's failure to name the applicant owner as an indispensable party defendant, or grant whatever further relief the Court deems just and proper.

DATED this 8th day of May, 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' Reply In Support of Motion to Dismiss was filed via Colorado Courts E-Filing System and served this 8th day of May, 2018, on the following:

Rory Heath
2831 Ridgeglen 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.]