

District Court, Larimer County, State of Colorado 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 494-3500	DATE FILED: May 14, 2018 CASE NUMBER: 2018CV125
<p>ROY HEATH,</p> <p>Plaintiff,</p> <p>v.</p> <p>CITY OF FORT COLLINS CITY COUNCIL and CITY OF FORT COLLINS,</p> <p>Defendants.</p>	<p>▲ COURT USE ONLY ▲</p> <hr/> <p>Case No.: 2018CV125</p> <p>Courtroom: 5A</p>
<p>ORDER REGARDING DEFENDANTS' MOTION TO DISMISS</p>	

I. INTRODUCTION

This matter comes before the Court on Defendants', City of Fort Collins City Council and City of Fort Collins, Motion to Dismiss ("Motion"). Plaintiff, Roy Heath, filed his Complaint on March 13, 2018. Plaintiff contends City of Fort Collins City Council exceeded its jurisdiction and abused its discretion when it upheld the decision of the Fort Collins Planning and Zoning Board regarding the Union on Elizabeth proposed project. Defendants filed this Motion on April 10, 2018. Defendants argue that the case should be dismissed due to Plaintiff's failure to include an indispensable party, the zoning applicant. Plaintiff filed his Response on May 1, 2018. Defendants filed their Reply on May 8, 2018. The Court has reviewed the Motion, Response, Reply and the complete file.

II. LEGAL STANDARD

"[A]n indispensable party has such an interest in the controversy's subject matter that a final decree between the parties cannot be made without affecting the nonparty's interested or leaving the controversy in such a

situation that its final determination may be inequitable to the nonparty.” *Bittle v. CAM-Colorado, LLC*, 2012 COA 93, ¶ 14. “A person who is properly subject to service of process in the action shall be joined as a party in the actions if...he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may...[a]s a practical matter impair or impede his ability to protect that interest.” C.R.C.P. 19(a). In proceedings to review an administrative decision granting a rezoning, zoning variance, or special use permit, the applicant must be joined along with the tribunal whose acts are to be reviewed. *Thorne v. Board of County Com’rs of Fremont County*, 638 P.2d 69, 71 (Colo. 1981).

III. ANALYSIS

Defendants argue that Plaintiff’s claim should be dismissed due to his failure to join an indispensable party. The Court agrees with the Defendants that Colorado case law clearly demonstrates that the applicant owner of the project is an indispensable party to this action. That applicant owner has a right to protect its interest in the decision being challenged by Plaintiff.

However, the Court does not believe dismissing this action is the proper response to Plaintiff’s failure to join an indispensable party in this case. Colorado appellate courts have held that if there has been a failure to join a necessary party, the court may allow plaintiff an opportunity to join that party instead of dismissing the action. *B.C., Ltd. V. Krinhop*, 815 P.2d 1016, 1018 (Colo. App. 1991).

To address a couple of the points raised by the Plaintiff, the Court agrees with the Defendant that the burden is on Plaintiff to include all the appropriate parties affected in this action under C.R.C.P. 19, rather than on non-parties to file a motion under C.R.C.P. 24 to intervene. The identity of the applicant owner can be found from readily available public information from the planning and zoning application itself, as well as news reports.

Additionally, Plaintiff’s reliance on footnote 6 of *Tri-State Generation & Transmission Co. v. City of Thornton*, 647 P.2d 670 (Colo. 1982) is misplaced. That footnote simply explains the amendment to C.R.C.P. 106 in 1981 that

eliminated the requirement that a case be dismissed for failure to join indispensable parties within the 30-day (now 28-day) time limit due to a fatal jurisdictional defect. The footnote does not apply to the general timeline of a civil action, as Plaintiff suggests.

IV. CONCLUSION

Accordingly, the Court DENIES the motion to dismiss and ORDERS Plaintiff to join the applicant owner in this action within **twenty-one (21)** days. Failure to comply will result in an order to show cause why this case should not be dismissed.

Dated this 14th day of May, 2018.

BY THE COURT:

A handwritten signature in black ink, appearing to read "Devin Odell". The signature is written in a cursive, flowing style.

Devin R. Odell
District Court Judge