

FORT COLLINS MUNICIPAL COURT 215 N. Mason Fort Collins, CO 80521 Phone (970) 221 6800	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>Plaintiffs: Eric Sutherland, J & M Distributing, DBA Fort Collins Muffler and Automotive</p> <p>v.</p> <p>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.</p> <p>Indispensable party: Craig Russell, Applicant</p> <hr/> <p>Parties without attorney Eric Sutherland 3520 Golden Currant Fort Collins, CO 80521 (970) 224 4509 sutherix@yahoo.om</p> <p>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</p>	
Motion for Leave of the Court to Amend the Complaint and Motion for Expansion of Time for Filing Answers or Other Responsive Pleadings	

Pursuant to C.R.C.P. Rule, Plaintiffs, Eric Sutherland and J & M Distributing, request leave of the court for a second amendment to the complaint in this matter. We also request that this court expand the time available to the Defendants to file an answer or other responsive pleading rather than responding to the 1ST Amended Complaint.

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.

Certification of conference pursuant to Rule 121 section 1-15

Conference with Counsel for the Defendants regarding this Motion for Leave and Expansion of time was conducted via email with defendant's Counsel Kim Schutt.

Ms. Schutt has informed us that the relief requested here is not opposed.

BACKGROUND

On May 25th, this court issued an Order that deemed the 1st Amended Complaint in this matter to have been filed on May 29th, 2018. Since that time four significant events have occurred.

First, Craig Russell sent a letter to the Municipal Court that stated he did not wish to be part of the proceedings.

Second, the Defendant's finally identified who the mystery indispensable party that they had insisted should be named in this action. The identity of the party was revealed to be Next Chapter Properties and not Craig Russell who had been served with the 1st Amended Complaint. This identity was revealed by the Defendants on May 30th, 2018 after further inquiry had been made by the Plaintiffs. A further note on this subject is found in the next section.

Third, Next Chapter Properties, acting through an attorney, has filed with this Court a Motion to Intervene in this matter on June 13th, 2018.

Fourth, the Defendants, through their attorney Kim Schutt, has raised questions about the legality of Mr. Dwyer representing Plaintiff J & M Distributing in this matter. Specifically, Ms. Schutt questioned whether or not J & M Distribution was a closely held entity as defined by C.R.S. § 13-1-127 and, if it was not, whether it was lawful for Mr. Dwyer to represent the company before this court. Indeed, J & M Distributing has 5 owners. §13-1-127 states that closely held entity may have no more than 3 owners.

REGARDING THE IDENTITY OF ANY INDISPENSABLE PARTIES

There is no question that the proceedings to date have been characterized by some confusion. In the May 25th, 2018 Order of this Court, the confusion was described and adherence with the Rules of Procedure was urged on the parties.

However, the source of this confusion may have been misapprehended by this court. To put it simply, the Defendants have insisted since the very first communication received that an indispensable party must be named in this action. We have not agreed with this position and believe that the Defendants were relying exclusively on inapposite authority. An argument was never presented to show how the rights of any entity could be impaired as a possible result of the disposition of this court in this matter.¹ More importantly, the identity of the mystery indispensable party was never disclosed by the Defendants to the Plaintiffs. Rather, inquiries as to the identity of the party were met with statements explaining that the Defendants were not obliged to give us legal advice. Obviously, the identity of a party is a matter of fact, not a matter of law. As a practical matter, this Court may take notice of the fact that the Motion to Dismiss did not disclose the identity of the party despite seeking dismissal of this action for failure to name this mystery party.

This issue is important because we have no concerns whatsoever about who may oppose the relief we have requested. We would have named Mickey Mouse if the city had insisted he be named as an indispensable party. We wish for

¹ In the Motion to Intervene that has been filed with this Court by Next Chapter Properties, the proposed intervenor refers to itself as the owner of the project. It is entirely unclear how the owner of a project can be said to have any rights under the Fort Collins Land Use Code that would be impaired by a possible decision in this case. In this regard, the interests and rights of Next Chapter Properties or any other entity applying for development rights with the City of Fort Collins can not be construed to be similar in any way to the rights held by owners of property subject to zoning decisions such as the parties in all of the cases cited the Defendants and the proposed intervenor. The two situations, 1) development review and 2) determination of use-by-right are remarkably dissimilar.

adjudication of the claims we have brought on their merits and that our right under the Land Use Code of the City of Fort Collins be upheld by this court. We believe that the sooner this matter is resolved, the better for everyone involved.

The uncertainty as to who should be named as an indispensable party was the source of all delay and confusion that this Court encountered in the past. This uncertainty was entirely unnecessary. A reasonable person could easily characterize the failure to disclose an essential fact that was only at issue because of the Defendant's actions as subterfuge. The identity of the mystery indispensable party was only disclosed by a second attorney for the Defendants, Andrew Callahan, who was filling in for Ms. Schutt while she was out of town. Even then, the identity was only disclosed after forcefully written inquiries were submitted to the Defendants and only after being rebuffed.

The failure of the Defendants to disclose a fact that was crucial to an argument supporting a motion to dismiss this case should not go without notice or mention. This type of behavior is typical. It is why we describe the Planning and Zoning Board hearings and appeals before City Council as kangaroo courts.

AMENDMENTS OF THE PROPOSED 2nd AMENDEND COMPLAINT

The proposed 2nd Amended Complaint in this action departs from the 1st Amended Complaint in the following ways.

First, J & M distributing is eliminated as a Plaintiff in this action.

Second, Brian Dwyer is named as a Plaintiff in this action. Mr. Dwyer's interests in this matter are described.

Third, the Sixth Claim for Relief, ¶'s 58-65, is eliminated.

Fourth, the descriptive narrative preceding the Complaint has been modified to eliminate any reference to vested rights accruing from approval of a PDP by the Planning and Zoning Board. This segment of the narrative was inaccurate.

WHEREFOR, we respectfully request that this court grant leave to the Plaintiffs to file the 2nd Amended Complaint in this matter and Order that the attached Exhibit be deemed filed and served.

We also respectfully request that this Court expand the time available to the Defendants to file an Answer or other response to a date 21 days from the filing of this 2nd Amended Complaint and that this be allowed in lieu of an Answer or other response to the 1st Amended Complaint.

Respectfully submitted this 15th day of June, 2018.

Eric Sutherland

Eric Sutherland

Address of Lead Plaintiff
3520 Golden Currant
Fort Collins, CO 80521

Brian Dwyer

Brian Dwyer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing MOTION FOR LEAVE OF THE COURT TO AMEND THE COMPLAINT AND MOTION FOR EXPANSION OF TIME FOR FILING ANSWERS OR OTHER RESPONSIVE PLEADINGS along with the proposed 2nd Amended Complaint attached as an exhibit and proposed ORDER RE: MOTION FOR LEAVE OF THE COURT TO AMEND THE COMPLAINT AND MOTION FOR EXPANSION OF TIME FOR FILING ANSWERS OR OTHER RESPONSIVE PLEADINGS was served via electronic mail on June 15, 2018 on the following :

Kimberly B. Schutt, Wick and Trautwein, 323 S. College Ave, Fort Collins, CO [kschutt @wicklaw.com](mailto:kschutt@wicklaw.com)

Craig Russell, Russell-Mills, Fort Collins, CO [crussell @russellmillsstudios.com](mailto:crussell@russellmillsstudios.com)

Eric Sutherland

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