

<p>Fort Collins Municipal Court 215 N. Mason Fort Collins, CO 80521 (970) 221-6800</p> <hr/> <p>Plaintiffs: Erik Sutherland, J & M Distributing, DBA Fort Collins Muffler & Automotive</p> <p>v.</p> <p>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</p> <p>Proposed Intervenor: NEXT CHAPTER PROPERTIES, LLC, an Illinois limited liability company.</p>	<p>▲ COURT USE ONLY ▲</p>
<p>Jeffrey B. Cullers, No. 41969 Herms & Herrera, LLC Attorneys for Next Chapter Properties, LLC 3600 S. College Ave., Suite 204 Fort Collins, CO 80525 Phone Number: 970-498-9999 Fax Number: 970-472-5365 E-Mail: jeff@hhlawoffice.com</p>	<p>Case Number: 2018civil01</p>
<p>UNOPPOSED MOTION FOR LEAVE TO INTERVENE</p>	

Comes now Next Chapter Properties, LLC, (“Next Chapter”), by and through its attorney Jeffrey Cullers of the law firm Herms & Herrera, LLC, and moves to intervene in this matter pursuant to C.R.C.P. 24(a)(2), as follows:

Conferral

As required by C.R.C.P. 121, Section 1-15, undersigned counsel states that he conferred with counsel for the City of Fort Collins regarding this motion, who stated that for the reasons in the Motion to Dismiss filed April 25, 2018, the City of Fort Collins consents to the relief sought

in this Motion. Undersigned counsel conferred with Plaintiffs via email. Plaintiff Eric Sutherland stated in part the following: “In a nutshell, Mr. Dwyer and I have not held any objection to any party being joined in this action...” Undersigned counsel interprets this response as indicating that Mr. Sutherland and J&M Distributing do not oppose this motion.

MOTION

C.R.C.P. 24(a)(2) provides, in relevant part:

Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action [...] when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant’s interest is adequately represented by existing parties.

In this case, the “property or transaction” at issue is a development project known as the Johnson Drive Apartments Project Development Plan (the “Project”). The Project was approved by the City of Fort Collins Planning and Zoning Board on January 18, 2018. Plaintiff Eric Sutherland and another individual appealed such approval to the Fort Collins City Council. City Council considered the appeal on February 27, 2018 and on March 6, 2018 passed a resolution upholding the Planning and Zoning Board’s decision.

In this action, Plaintiff Eric Sutherland and Plaintiff J&M Distributing, Inc. have challenged the Project’s approval by City Council. Next Chapter is the owner of the Project. Next Chapter began conceptual review for the Project in January 2017 and, via its agent Craig Russell of Russell+Mills Studios, submitted the application for the Project on September 13, 2017.

The Colorado Court of Appeals has repeatedly held that an applicant/owner such as Next Chapter is an indispensable party under C.R.C.P. 19 when a zoning approval is challenged via a

Rule 106(a)(4) action. See *Black Canyon Citizens Coalition, Inc.*, 80 P.3d 932, 933 (Colo. App. 2003); *Thorne v. Bd. of County Comm'rs of Fremont County*, 637 P.2d 69, 71 (Colo. 1981); *Norby v. City of Boulder*, 577 P.2d 277, 280 (Colo. 1978). As the applicant for planning and zoning approval, Next Chapter has rights in this action that “cannot be abrogated by judicial action unless the [applicant] is before the court to assert its defenses.” *Hidden Lake Development Co. v. District Court*, 515 P.2d 632, 635 (Colo. 1973). Accordingly, Next Chapter is appropriately a party to this action and has an interest.

In addition to showing an interest in this matter, a potential intervenor must show that “disposition of the action may as a practical matter impair or impede his ability to protect that interest.” C.R.C.P. 24(a)(2). An intervenor's interest is impaired if the disposition of the action in which intervention is sought will prevent any future attempts by the applicant to pursue his interest. *Feigin v. Alexa Group, Ltd.*, 19 P.3d 23, 30 (Colo. 2001). In this matter, Plaintiffs seek an injunction halting all progress on the Project. Pursuit of such remedy will require that Plaintiffs post a significant bond pursuant to C.R.C.P. 65(c), which states in relevant part:

No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

If this matter proceeds without Next Chapter, Next Chapter will be unable to seek its right to obtain security for a wrongfully-granted injunction and will be unable to pursue such interest in any future proceeding. Accordingly, disposition of this matter will as a practical matter impair or impede Next Chapter's ability to protect its interests.

The final element for intervention under C.R.C.P. 24(a)(2) is a showing that the intervenor's interest is not “adequately represented by existing parties.” In this case, Next

Chapter's potential co-defendant the City of Fort Collins will defend the City Council's action that is the subject of the Rule 106 action, however, it will not adequately represent Next Chapter's interest in obtaining security pursuant to Rule 65(a). This is because an injunction prohibiting the City of Fort Collins from continuing the land approval process will have the effect of prohibiting Next Chapter from proceeding with the Project, but the City of Fort Collins will be unable to seek security in Next Chapter's favor because security is only available to protect a party in the action. *See* C.R.C.P. 65(c). Thus, Next Chapter's interest in obtaining security is not adequately represented by current parties in the case.

Intervention at this stage of the proceedings is timely because the case is not yet at issue. No party will be prejudiced by such intervention because such intervention will expedite this matter.

Under C.R.C.P. 24(c), a party seeking to intervene must submit a motion that is "accompanied by a pleading setting forth the claim or defenses for which intervention is sought." Next Chapter submits herewith a proposed pleading designated as "Exhibit A."

Accordingly, for the foregoing reasons, Next Chapter Properties, LLC prays that the Court permit it to intervene in this matter and deem the pleading submitted herewith to be filed on the date the Court grants this motion.

Respectfully submitted this 13th day of June, 2018

HERMS & HERRERA, LLC

/s/ Jeffrey B. Cullers [Signature on File]

Jeffrey B. Cullers, #41969

Attorney for Intervenors

E-Filed copy of document with original signature
maintained by the filing party

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 13th day of June, 2018 a true and correct copy of the above and foregoing was filed and served on all parties via email as follows:

Eric Sutherland
3520 Golden Currant
Fort Collins, CO 80521
sutherix@yahoo.com

Brian Dwyer
J&M Distributing, dba Fort Collins Muffler and Automotive
2001 S. College Ave.
Fort Collins, CO 80525
bdwyer1199@gmail.com

Kimberly Schutt
Wick & Trautwein
323 South College Avenue #3
Fort Collins, CO 80524
kschutt@wicklaw.com

/s/Jeffrey Cullers _____
Jeffery B. Cullers

E-Filed copy of document with original signature
maintained by the filing party