

District Court, Larimer County, State of Colorado 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 494-3500	DATE FILED: October 1, 2018 CASE NUMBER: 2018CV125  <b>▲ COURT USE ONLY ▲</b>  Case No.: 2018CV125 Courtroom: 5A
<b>RORY HEATH,</b>  Plaintiff,  v.  <b>CITY OF FORT COLLINS CITY COUNCIL; CITY OF FORT COLLINS; RIPLEY DESIGN, INC.; ELIZABETH STREET CO. OWNER, LLC,</b>  Defendants.	
<b>ORDER GRANTING DEFENDANT’S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM</b>	

**I. INTRODUCTION**

This matter comes before the Court on the Motion to Dismiss for Failure to State a Claim Upon Which Relief May be Granted filed by Defendant Ripley Design, Inc (“Ripley”) on August 17, 2018 (“Motion”). Plaintiff Rory Heath, representing himself, filed his Response on September 11, 2018. Ripley filed its Reply on September 17, 2018. The Court has reviewed the Motion, Response, Reply, and the complete file.

**II. FACTS**

Mr. Heath alleges the following:

He is a City of Fort Collins resident with property in close proximity to the Union on Elizabeth proposed site (the “Project”). He spoke at a Fort Collins Planning and Zoning Board meeting regarding the Project and then filed an appeal and presented that appeal before the Fort Collins City Council (“City Council”) regarding the Planning and Zoning Board’s approval of the

Project. He now contests the City Council's decision. Mr. Heath alleges that the City Council did not follow its own established procedures outlined in the Fort Collins Municipal Code, exceeded its jurisdiction, and abused its discretion. He further alleges that the City Council failed to follow the Fort Collins Land Use Code.

In the First Amended Complaint, Mr. Heath alleges that Ripley is listed as the "Applicant" for the project, and is listed as such in the city documents and hearing agenda items for the meetings. He alleges that Elizabeth Street Co. Manager LLC is listed as the "Owner" for the project, and is listed as such in the city documents and hearing agenda items for the meetings.

Mr. Heath incorporates into his complaint all original or certified copies of all pleadings, applications, evidence, exhibits, and other papers presented to or considered by the City Council, among other records.

In the original Complaint, Mr. Heath sued only the Fort Collins City Council and the City of Fort Collins. In ruling upon these defendants' motion to dismiss for failure to join an indispensable party, the Court ordered Mr. Heath to join the "applicant owner" in the action, as required by Colorado cases applying C.R.C.P. 19(a) to actions seeking review of administrative decisions involving development projects. Accordingly, in an attempt to comply with this order, Mr. Heath filed the First Amended Complaint naming Ripley and Elizabeth Street Co. Manager LLC ("Elizabeth Street") as defendants, along with the original defendants.

### **III. LEGAL STANDARD**

Motions to dismiss under C.R.C.P. 12(b)(5) for failure to state a claim on which relief may be granted are viewed with disfavor. *Davidson v. Dill*, 503 P.2d 157 (Colo. 1972). Courts must accept as true all material facts alleged by the non-moving party and draw all inferences in the non-moving party's favor. *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001) (discussing C.R.C.P. 12(b)(5)). A motion to dismiss may not be granted unless it is clear, construing the complaint in favor of the nonmoving party that there is no set of facts that the nonmoving party can prove under which they would be entitled to a

judgment. In assessing the viability of a complaint, all doubts must be resolved against the party seeking the motion. *Walsenburg Sand & Gravel Co., Inc. v. City Council of Walsenburg*, 160 P.3d 279 (Colo. App. 2007). A complaint will survive a motion to dismiss if the complaint states a plausible, not merely speculative, claim for relief. *Warne v. Hall*, 373 P.3d 588, 595 (Colo. 2016) (adopting the federal standard).

#### **IV. ANALYSIS**

Ripley argues that Mr. Heath's claim should be dismissed because it is not the "applicant owner" of the project, as that term was used by the Court in its earlier order, and thus has neither the ability to provide any relief to Mr. Heath nor any interest or right to protect in this case. Mr. Heath, in response, seeks clarification of Ripley's interest and guidance in proceeding with this action.

The Court understands Mr. Heath's confusion in this matter. Often, the "applicant" and the "owner" in a development project are the same entity, and the terms are, in some cases, used interchangeably. However, in other cases, the "owner" may hire a third-party firm to facilitate the development review process and represent the owner before the relevant governmental entities. This third party may be referred to as the "applicant," presumably because it is the entity responsible for submitting the application. This role, however, does not create any independent interest in the project for the third party or convert it into an "owner."

In this case, upon review of the briefs and the documents incorporated by reference in the First Amended Complaint, the Court is satisfied that Ripley has established that it is not an "applicant owner," but rather is merely an agent of the actual owner of the project, Elizabeth Street. Therefore, Ripley has no interest to protect and is not an indispensable party. Moreover, dismissing Ripley from this action will not impair Mr. Heath's ability to obtain any relief to which he is entitled. Accordingly, there is simply no practical or legal reason to include Ripley in this case and the Court grants its motion.

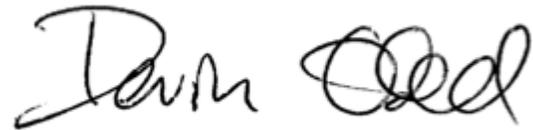
The Court sees no basis for an award of attorney fees to Ripley in relation to this motion. It is clear that Mr. Heath included Ripley in the First Amended Complaint in a good-faith attempt as a self-represented litigant to comply with the Court's earlier order, while wrestling with confusing terminology and an unfamiliar process. Accordingly, the Court denies Ripley's request for such an award. However, Ripley does appear to be entitled to an award of costs pursuant to C.R.S. § 13-16-105 and C.R.C.P. 54(d).

**V. CONCLUSION**

Accordingly, the Court GRANTS Defendant Ripley Design, Inc.'s motion to dismiss. Ripley shall file any Bill of Costs within 21 days.

Dated this 1st day of October, 2018.

BY THE COURT:

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

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Devin R. Odell  
District Court Judge