

DISTRICT COURT, CITY AND COUNTY OF LARIMER, COLORADO Larimer County Justice Center 201 Laporte Avenue, Suite 100 Fort Collins, Colorado 80521 (970) 498-6100	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
PLAINTIFF: THE CITY OF FORT COLLINS, COLORADO, a Colorado home rule city and municipal corporation, vs. DEFENDANTS: PLANNING ACTION TO TRANSFORM HUGHES SUSTAINABLY CORP., a Colorado nonprofit corporation; and ELENA M. LOPEZ, MELISSA ROSAS, AND PAUL PATTERSON, each in their official capacity as a petition representative of the persons signing the petition for a citizen-initiated ordinance relating to the City of Fort Collins rezoning and acquiring certain real property	<p style="text-align: center;">Case Number: 2020CV30833</p> <p style="text-align: center;">Div.: 3B</p>
<i>Attorney for the Defendants:</i> Michael Foote, #34358 Foote Law Firm, LLC 357 S. McCaslin Blvd. Suite 200 Louisville, Colorado 80027 Phone: (303) 519-2183 Fax: (888) 804-8679 mjbfoote@gmail.com	
<p style="text-align: center;">MOTION TO DISMISS COMPLAINT FOR DECLARATORY RELIEF PURSUANT TO C.R.C.P. 12(B)(6)</p>	

Defendants, Planning Action to Transform Hughes Sustainably Corp. (“PATHS”), Elena M. Lopez, Melissa Rosas, and Paul Patterson in their official capacities as petition representatives (collectively, “Defendants”), through their undersigned attorney, and pursuant to C.R.C.P. 12(b)(6), hereby move the Court for an order dismissing all claims set forth in the Plaintiff’s Complaint for Declaratory Relief. In support of this Motion, Defendants state as follows:

CERTIFICATION

Pursuant to C.R.C.P. § 121, 1-15(8), counsel for Defendants certifies that he has conferred with counsel for Plaintiff, and Plaintiff opposes the relief requested herein.

I. INTRODUCTION

On December 7, 2020, Plaintiff City of Fort Collins filed a Complaint for declaratory relief asking this Court to exclude certain provisions of a citizens' initiative submitted to City Council. If passed by the voters of Fort Collins during the next general election as submitted, the initiative would require the City to rezone property currently owned by Colorado State University as Public Open Lands and for the City to make good faith efforts to acquire the property at fair market value. Plaintiffs did not join Colorado State University ("CSU") to its Complaint despite CSU's ownership of the property and likelihood that the declaratory relief sought would substantially impair CSU's property interest. The Complaint should be dismissed pursuant to C.R.C.P. 12(b)(6) and C.R.C.P. 19.

II. BACKGROUND AND FACTS

Defendant Planning Action to Transform Hughes Sustainably ("PATHS") is a nonprofit corporation of Fort Collins residents dedicated to conserving as open space the property formerly known as the Hughes Stadium.

The Plaintiff's Complaint accurately outlines the procedural history of the PATHS ballot measure. *Compl.* at ¶¶ 1-12. However, the Complaint did not summarize important context of the initiative at issue in this action.

The Hughes Stadium property is a 164.55-acre parcel of land previously owned by the federal government until it was gifted to the Colorado Board of Agriculture in 1957. Most of the parcel sat vacant until CSU constructed the Hughes Stadium in 1967. Between 1967 and 2017, the Hughes Stadium was used for college football games, rodeos, Ag Days, concerts, and other miscellaneous events. CSU opened a new stadium for such uses in a different location in 2017. Demolition of the Hughes Stadium was completed by November of 2018 and the land currently sits vacant again. *See* Def. Ex. A (November 5, 2019 City Council agenda) at 1.

The redevelopment of the Hughes property became a matter of considerable public interest several years prior to the stadium's closure. For example, CSU hosted two listening sessions to gather public input about the pending redevelopment in September and October 2017, and hosted a website to take comments related to the redevelopment. Over 700 comments were logged through those listening sessions and the website between September of 2018 and August of 2018, the majority of which favored open space, recreational uses, or some kind of preservation of the land from commercial or residential development. Def. Ex. B (August 21, 2018 City Council agenda) at 3, 12-33, 45-77. The City of Fort Collins also held outreach events and hosted a webpage dedicated to the Hughes redevelopment, with the majority of comments favoring purchase of the land by the City for open space or some similar preservation from development. *See, e.g.* City of Fort Collins, "Hughes Redevelopment Ideas" at https://ourcity.fcgov.com/hughes_stadium_redevelopment/brainstormers/welcome-to-ideas-gatherin .

Upon request by CSU, and with approval of the City Council, the City annexed the Hughes property on October 16, 2018. *See* Pl. Ex. I (Ordinance 2018-123). In its written request for the City to annex the Hughes property, CSU indicated "the most likely scenario for

development is believed to be a mix of residential uses with potentially some neighborhood commercial, if feasible.” Def. Ex. B at 4.

Concurrently, without objection from CSU, the City zoned the Hughes property as a Transition zoning district. *See* Pl. Ex. J (Ordinance 2018-124). “The Transition District is intended for properties for which there are no specific and immediate plans for development.” Pl. Ex. K (Division 4.12 of the Land Use Code). The owner of a property in a Transition zoning district may petition the City to place the property into another zoning district at any time. *Id.*

On July 16, 2019, City Council adopted Resolution 2019-084 to begin the process of rezoning the Hughes property from the Transition district to a different zoning district. Def. Ex. C (Resolution 2019-084). In the Resolution, the City acknowledged that CSU is “under contract to sell the Hughes Stadium Annexation property so that it may be developed.” *Id.* at 1. The Resolution outlined the next steps in the rezoning process, including community notice, public input, and receiving the Planning and Zoning Board recommendation. *Id.* at 1-2.

On August 8, 2019, City staff members led a “rezoning neighborhood meeting” to hear public input about the Hughes rezoning process. The staff presented five possible scenarios for the Hughes property. Def. Ex. A at 62-67. The scenarios presented various combinations of Residential Foothills (“RF”) (low density housing on 2.29 acre lots), Low Density Mixed Use (“LMN”) (typical single-family home suburban development), Medium Density Mixed Use Neighborhood (“MMN”) (concentrated housing), and Urban Estate (“UE”) (low density and large lot housing). The city staff recommended Scenario 1, which split the Hughes property between the RF zone on the western half and the LMN zone on the eastern half. *Id.* at 56-58.

City staff noted during its presentation of its five scenarios that “CSU has been clear that it wishes to monetize the site, and its focus has been the recruitment of a residential development

firm. The property is currently under contract to Lennar Homes.” *Id.* at 68. City staff collected approximately 500 comments from 265 attendees at its rezoning neighborhood meeting. *Id.* at 62. In order to understand the attendees’ preferred site zoning after a presentation of the five scenarios, the staff encouraged the attendees to draw their preferred site zoning on pieces of paper and turn them in.

As summarized later for the City Council, “[m]any drawings indicated a desire for ‘Public Open Lands’ or POL across the entire site; several other drawings indicated a preference for some development on the site with a protective or open space buffer along the western edge of the site.” *Id.* at 15. Many of the attendees’ comments included preference for their own “6th scenario” which was to zone the entire Hughes site as Public Open Lands. *Id.*

The City’s Planning and Zoning Board held a hearing on September 8, 2019 to decide its rezoning recommendation for the Hughes property. The vast majority of comments to the Planning and Zoning Board before and during the hearing were opposed to residential or commercial development of the Hughes site, with many of those comments affirmatively advocating the area be zoned for open space. *Id.* at 741-744. The Board voted to reject the city staff’s recommendation of half-RF and half-LMN. Instead, the majority of the Board voted that the entire site be rezoned as RF, with the residential development to be clustered on the eastern side of the property while leaving the western side as open space. *Id.* at 746. PATHS members supported this recommendation as an appropriate compromise.

The City Council met on November 5, 2019 to consider the first reading of Ordinance 2019-138, which would adopt the city staff’s continued recommendation to split the Hughes site between RF and LMN zoning. *See* Def. Ex. D (Ordinance 2019-138). The hearing was contentious. As reported by the *Fort Collins Coloradoan*, CSU reiterated its intention to sell the

Hughes property to Lennar for residential development during the hearing. Nearly four dozen members of the public addressed the Council, and all but three supported either low residential or all open space zoning for the property. Nevertheless, at the end of the hearing the majority of Council voted to support Ordinance 2019-138 on first reading. Def. Ex. E (November 6, 2019 *Coloradoan* article). That vote represented a rare rebuke of a Planning and Zoning Board recommendation and a continued disregard for public sentiment related to the property.

Second reading and final adoption of Ordinance 2019-138 was scheduled for November 19, 2019, but consideration was delayed several times due to the COVID-19 shutdown and multiple ethics complaints against council members who were set to decide the future of the Hughes property while employed by CSU. City Council eventually took up the matter on May 19, 2020 in a virtual hearing. Over forty members of the public commented during the hearing, and all but one – a CSU spokesman – opposed the RF-LMN zoning proposal outlined in Ordinance 2019-138. “Speaker after speaker called on council to keep the land as open space, or as a last resort to support the lowest housing density possible. Others called for the land to be used for a new wildlife rehabilitation center.” Def. Ex. F (May 20, 2020 *Coloradoan* article). During the discussion, the City Manager noted CSU was not interested in donating the Hughes property for open space. Because one council member who supported Ordinance 2019-138 on first reading recused herself during the second reading consideration, Council deadlocked on two separate motions and did not pass Ordinance 2019-138. *Id.*

Throughout the summer and early fall of 2020, neither city staff nor Council publicly indicated any subsequent direction for the Hughes property rezoning matter. Def. Ex. G (July 6, 2020 *Coloradoan* article). Defendants decided to exercise their rights as outlined in Article X, Section 1(e) of the Charter of the City of Fort Collins to submit an initiated ballot measure (or

“petition”) calling for the City’s fair-market purchase of the Hughes property and designation of the entire property as Public Open Lands. Defendants submitted the form of the petition on September 3, 2020 and the form was approved by the Deputy City Clerk on September 4, 2020. Pl. Compl. ¶¶ 5-6. On November 2, 2020, despite the profound logistical challenges presented by the pandemic and the effects of the Cameron Peak wildfire, Defendants submitted more than twice the number of signatures required and the City Clerk deemed the petition sufficient. Pl. Compl. ¶¶ 8-9, *see also* Def. Ex. H (November 18, 2020 *Coloradoan* article).

In between the Defendants’ submission of its form of the petition and the petition’s approval, CSU initiated an improper attempt to bypass the City’s rezoning procedures altogether. On October 9, 2020, CSU’s Board of Governors adopted a resolution authorizing CSU representatives to submit a Hughes property site plan application to the City’s Planning and Zoning Board for the Board’s review. However, the Board of Governors resolved to go forward with its site plan regardless of whether the City’s Planning and Zoning Board approves it, claiming it can do so under the City’s Site Plan Advisory Review (“SPAR”) process as outlined in the City’s Land Use Code and C.R.S. § 31-23-209. Def. Ex. I (Board of Governors Resolution); *see also* Def. Ex. J (Land Use Code Division 2.1.3(E) outlining SPAR). As of the date of this Motion, CSU has not publicly explained how its plan to sell the unimproved Hughes property to a third-party for private residential development is allegedly consistent with the SPAR requirement that the development occur only on “parcels owned or operated by public entities” or the C.R.S. § 31-23-209 requirement that the procedure only be used for the development of a “public building or structure.” The City has also not yet publicly indicated a formal position on CSU’s attempted misuse of the SPAR process, although an assistant city

attorney indicated in 2019 his belief that property developed by non-public entities would not be suitable to go through the SPAR process. Def. Ex. A at 746.

Pursuant to Article X, Section 1(e) of the City Charter, city staff presented the Defendants' approved petition to City Council on November 17, 2020. City Council declined to adopt the petition. City Council, through its passage of Resolution 2020-105, voted to submit the petition to the voters during the next general election subject to any judicial modification. *See* Pl. Ex. H. The City subsequently filed the above-captioned action asking the Court to approve only the sections of the petition that mandate rezoning but sever and exclude the provisions requiring the City to make good faith attempts to purchase the property at fair market value. Compl. ¶¶ 16-18, 50-61. It did so even though at least two city council members previously acknowledged the possibility of a reducing the value of CSU's property by simply zoning it as Public Open Lands. Def. Ex. G at 6-7. Plaintiff's complaint does not include CSU and/or the Board of Governors despite their current status as owners of the Hughes property. The Complaint does not state why CSU and/or the Board of Governors was not joined as a party pursuant to C.R.C.P. 19(c).

III. ARGUMENT

- a. **Colorado State University is an indispensable party because it owns the Hughes property and its interests will be negatively affected should Plaintiff's prayer for relief be granted.**

The Plaintiff filed a declaratory action against the Defendants regarding Defendants' initiative; however, Plaintiff failed to include an indispensable party in its filing. Colorado State University owns the Hughes property and has consistently expressed its policy to generate a financial return commensurate with the value of the property. *See e.g.* Def. Ex. I at 1. The declaratory relief sought by Plaintiff would materially impede CSU's property interest by

rezoning its property as Public Open Lands without a mechanism to provide for any financial return for that property. The current Purchase-Sale Agreement between CSU and Lennar Homes presumes Lennar will profit by building hundreds of houses in a residential area. *See* Def. Ex. E at 4. The severed initiative as requested by Plaintiff will make such an arrangement impossible. The absence of a duty by the Plaintiffs to make good faith efforts at purchasing the property at fair market value will significantly diminish the property's sale value to another buyer. Therefore, because CSU's absence from the Complaint materially impedes its ability to protect the value of its property interest, CSU is an indispensable party and the Complaint must be dismissed pursuant to C.R.C.P. 12(b)(6) unless CSU is joined as a party.

b. Standard of Review for indispensable parties

Whether a person or entity is indispensable is a mixed question of fact and law and turns on the facts of each case. *Makeen v. Hailey*, 381 P.3d 387 (Colo. App. 2015). The party making the motion has the burden to show another party is indispensable. *Balkind v. Telluride Mt. Title Co.*, 8 P.3d 581 (Colo. App. 2000).

c. Indispensable parties generally

C.R.C.P. 57(j) and C.R.S. § 13-51-115 state:

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding...

C.R.C.P. 19(a) reads:

Joinder of Persons Needed for Just Adjudication.

(a) Persons to be Joined if Feasible. A person who is properly subject to service of process in the action shall be joined as a party in the action if: (1) In his absence complete relief cannot be accorded among those already parties; or (2) 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) As a practical matter impair or impede his ability to protect that interest** or (B) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.

C.R.C.P. 12(b)(6) allows for the “failure to join a party under C.R.C.P. 19” to be asserted in a responsive pleading.

Whether a party is indispensable depends on the facts of each case. *Jorgenson v. City of Aurora*, 767 P.2d 756 (Colo. App. 1988). When determining whether a nonjoined party is indispensable, courts first ask the following question: “[i]s the absent person's interest in the subject matter of the litigation such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the right of such absent person?” *Woodco v. Lindhal*, 380 P.2d 234, 238 (Colo. 1963).

An 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 interests or leaving the controversy in such a situation that its final determination may be inequitable to the nonparty. *Bittle v. CAM-Colorado*, 318 P.3d 65, 69 (Colo. App. 2008) (citing *Woodco*).

A party with a substantial interest in the subject matter of litigation is not necessarily an indispensable party. *Woodco* at 238. Rather, an indispensable party is one that has such an interest in the litigation “that a final decree...cannot be made without affecting their interest or leaving controversy in such situation that its final determination may be inequitable.” *Id.*

“As a general matter, all parties who have an interest in property at issue in the litigation must be joined.” *Bittle* at 69-70; *see also Clubhouse at Fairway Pines, L.L.C. v. Fairway Pines*

Estates Owners Ass'n, 214 P.3d 451 (Colo. App. 2008); *Scott v. Scott*, 428 P.3d 626 (Colo. App. 2018). Courts have held applicants for zoning, rezoning, and zoning variances to be indispensable parties. *Norby v. City of Boulder*, 577 P.2d 277 (Colo. 1978). *But see Margolis v. District Court of County of Arapahoe*, 638 P.2d 297 (Colo. 1981) (property owners of land subject to rezoning were not indispensable because relief sought by plaintiffs did not impair or impede landowners' ability to protect their interests). “[J]oinder will be insisted upon if the action might detrimentally affect . . . the absentee's ability to protect his property or to prosecute or defend any subsequent litigation in which he might become involved.” *Potts v. Gordon*, 525 P.2d 500, 503 (Colo. App. 1974) (citation omitted).

d. Plaintiff failed to join an indispensable party in its Complaint

It is undisputed that CSU currently owns the Hughes property. *See e.g.* Def. Ex. A at 1, Def. Ex. I. The property was annexed – upon CSU’s request – into the City on October 16, 2018. Pl. Ex. I; Def. Ex. B at 4-9. The City concurrently rezoned the Hughes property into a Transition district, meaning there was no specific and immediate plans for development, but an application for rezoning to another district could be filed at any time. Pl. Ex. K. City Council subsequently considered rezoning the property into Low Density Mixed Use and/or Residential Foothills but failed due to tie votes on two separate motions on May 19, 2020. Def. Ex. F. City Council has not considered further rezoning action since that date. Therefore, the Hughes property remains in the Transition district and, absent a subsequent majority vote by City Council, Lennar cannot develop the land as contemplated by the purchase-sale agreement. CSU’s current purchase-sale agreement with Lennar includes a feasibility period and was recently amended to include a closing date of June 11, 2021. Def. Ex. K (Tenth amendment to the purchase-sale agreement). The purchase-sale agreement contemplates the sale of the Hughes

property by CSU to Lennar for \$10 million plus additional compensation if the property is split into more than 625 residential lots. Def. Ex. E at 4.

Consistent with the vast majority of public opinion expressed to CSU and the City since 2017, the PATHS initiative seeks to rezone the Hughes property into Public Open Lands to be used for parks, recreation and open space, and wildlife rescue and education. Pl. Ex. B. To achieve that policy goal, the initiative is roughly divided into two parts: rezoning and the acquisition of the property. City Council must implement both of the parts of the initiative for it to achieve its policy goal and for CSU to receive a fair market value compensation for the property. Immediately upon the passage of the initiative, the property must be rezoned into the Public Open Lands category and the City may not rezone into a different category without referring a subsequent ballot measure. Pl. Ex. B at §§ 3-4. After the zoning into Public Open Lands, the City must use its best efforts in good faith to acquire the Hughes property at its fair market value. Id. at §§ 1,2, 5-8. In its Complaint, the City seeks to sever the ballot measure by excluding Sections 1, 2, 4, and 5-8 from voter consideration based upon the argument that those sections are administrative in nature and not properly before the voters.¹ Compl. ¶¶ 55-62.

If the City's prayer for relief is granted, the initiative will retain only provisions related to the rezoning of the property and exclude any duty for the City to purchase the property from CSU. Should the modified initiative pass, it will mean the Hughes property is zoned only for Public Open Lands but the City is not bound to use best efforts at fair market value to acquire it. The City's new zoning will exclude the residential development currently contemplated in the CSU-Lennar Purchase-Sale Agreement. Def. Ex. K at 4. The new zoning will undoubtedly affect the consummation of the purchase-sale agreement.

¹ Section 4 of the initiative contains two provisions the City concedes are properly before the voters and one provision that it believes should be stricken. Compl. at ¶¶ 57-60.

CSU has an interest in the property at issue in this litigation. *Bittle* at 69. The declaratory relief sought in the City’s Complaint – that only the rezoning provisions of the initiative be submitted for a vote – “cannot be made without affecting [CSU’s] interest or leaving controversy in such situation that its final determination may be inequitable.” *Woodco* at 238 (bracketed language added). CSU’s absence will “detrimentally affect . . . the absentee’s ability to protect his property or to prosecute or defend any subsequent litigation in which he might become involved.” *Potts* at 503. CSU’s continued absence from the current action will impair and impede its ability to protect its interest in the Hughes property from the relief requested by the City. *Compare Margolis v. District Court*. The City has failed to join an indispensable party to its Complaint. As such, the Complaint must be dismissed unless CSU can be joined as a party.

IV. CONCLUSION

WHEREFORE, Defendants respectfully ask for **oral argument** in this matter, and upon conclusion therewith request the Court to enter an order **dismissing** the Complaint in its entirety. A proposed Order granting this Motion to Dismiss is filed herewith.

Respectfully submitted on this 28th day of December, 2020.

/s/ Michael Foote
Michael Foote #34358
Foote Law Firm, LLC
Attorney for the Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 28th day of December, 2020, a true and correct copy of this MOTION TO DISMISS was filed via the Colorado courts e-filing system and served to the following parties:

Carrie M. Daggett #23316 – City Attorney
John R. Duval #10185 – Deputy City Attorney
Fort Collins City Attorney’s Office
300 Laporte Avenue
P.O. Box 500
Fort Collins, Colorado 80522
(970) 221-6520
cdaggett@fcgov.com, jduval@fcgov.com

Andrew D. Ringel #24762
Hall & Evans, L.L.C.
1001 17th Street, Suite 300
Denver, Colorado 80202
(303) 628-3300
ringela@hallevans.com

Attorneys for the Plaintiff

/s/ Michael Foote