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DISTRICT COURT, COUNTY OF LARIMER, COLORADO
Larimer County Justice Center
201 Laporte Avenue, Suite 100
Fort Collins, Colorado 80521-2762
(970) 498-6100

Plaintiff: THE CITY OF FORT COLLINS, COLORADO, a Colorado home rule city and municipal corporation,

v.

Defendants: PLANNING ACTION TO TRANSFORM HUGHES STADIUM 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

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Case Number: 2020 CV 30833

Division: 3B

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PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff City of Fort Collins, Colorado, (the "City") by and through its attorneys, Carrie M. Daggett, Esq., City Attorney, and John R. Duval, Esq., Deputy City Attorney, both of the Fort Collins

City Attorney's Office, and Andrew D. Ringel, Esq., of Hall & Evans, L.L.C., respectfully submits this Motion for Summary Judgment pursuant to C.R.C.P. 56 (this "Motion"):[1]

I. INTRODUCTION

Defendant Planning Action to Transform Hughes Sustainably Corp ("PATHS") is a Colorado nonprofit corporation established for the purpose of organizing and representing Fort Collins area residents having the objective of conserving as open space and for other similar uses the property on which Colorado State University's Hughes Stadium was formerly located (the "Hughes Stadium Property"). In pursuit of this objective, PATHS organized, commenced and completed an effort to circulate a petition for a citizen-initiated ordinance concerning the Hughes Stadium Property to be placed on the ballot at the City's next regular election on April 6, 2021.

Defendants Elena M. Lopez, Melissa Rosas and Paul Patterson, as representatives of PATHS and the named petition representatives, (collectively, the "Petition Representatives") followed the City's procedures in Article X of the City's Home Rule Charter (the "Charter") for giving notice of intent to circulate a petition to and obtaining approval of the petition form from the Fort Collins City Clerk (the "Clerk"). The petition approved by the Clerk calls for the City's electorate to consider at the City's next regular election approval of an ordinance directing two different and distinct actions: (1) the Fort Collins City Council rezone the Hughes Stadium Property to the City's Public Open Lands District; and (2) the City to "use best efforts in good faith to acquire the Hughes Stadium property" at "fair market value," with $10 million "as a starting point in its negotiations to acquire the property at fair market value," to use "for parks, recreation and open lands, natural areas, and wildlife rescue

[1] Prior to filing this Motion, counsel for the Plaintiff conferred with counsel for the Defendants pursuant to C.R.C.P. 121(1-15)(8), who indicated Defendants oppose this Motion.

and education" and to do so using certain funding sources and mechanisms (the "Initiated Ordinance").

On November 2, 2020, Petition Representative Melissa Rosas submitted the signed petition to the Clerk and, after examining the petition's signatures, the Clerk certified it as containing more than the 3,280 valid signatures required for the Initiated Ordinance to be placed on the ballot at the City's upcoming April 6, 2021, regular election.

The Clerk presented the certified petition, as required by the Charter, to the Fort Collins City Council (the "Council") at its next regular meeting on November 17, 2020. The Council adopted Resolution 2020-105 (the "Resolution") at that meeting provisionally and conditionally submitting in Section 2 of the Resolution, subject to this declaratory action, the Initiated Ordinance to a vote of the City's registered electors at the City's April 6, 2021, regular election. The Council also provisionally and conditionally set in Section 3 of the Resolution, again subject to this declaratory action, the ballot title and submission clause to be submitted to the City's electors for the Initiated Ordinance at the City's April 6, 2021, regular election, as required in the Charter (the "Ballot Measure").

The Council further directed the Fort Collins City Attorney in Section 4 of the Resolution to file this declaratory judgment action to seek a judicial determination as to which matters in the Initiated Ordinance and Ballot Measure are a ***legislative*** matter appropriate for a citizen initiative under Article V, Sections 1(2) and 1(9) of the Colorado Constitution and Charter Article X, Section 1(a), and which are an ***administrative*** matter ***not*** appropriate for a citizen initiative under the Colorado Constitution and the Charter.

The City contends the provisions in the Initiated Ordinance and Ballot Measure requiring the City to "use best efforts in good faith to acquire the Hughes Stadium property" at "fair market value" to use "for parks, recreation and open lands, natural areas, and wildlife rescue and education" and to

do so using certain funding sources and mechanisms, are ***administrative*** and ***not legislative*** matters and, therefore, under the Colorado Constitution and the Charter are not a proper subject of an citizen-initiated ordinance. Although the City believes that under existing Colorado case law the provisions in the Initiated Ordinance and Ballot Measure requiring the Council to rezone the Hughes Stadium Property to the City's Public Open Lands District are a ***legislative*** matter properly subject to the initiative power of the City's electors, the City nevertheless seeks a judicial determination from the Court confirming the City's conclusion.

Therefore, the City asks this Court to sever the ***administrative*** matters from the ***legislative*** matters in the Initiated Ordinance and Ballot Measure to allow ***only*** the ***legislative*** matters to be placed on the City's April 6, 2021, regular election ballot. The City also respectfully asks the Court to expedite its ruling in this action since the Council has a February 16, 2021, deadline to submit a final version of the Initiated Ordinance and Ballot Measure to the City's electors in time for the City's regular election on April 6, 2021.

II. STATEMENT OF UNDISPUTED MATERIAL FACTS

As evidence supporting the following numbered and undisputed material facts, attached are **Exhibit 1** and **Exhibit 2**, respectfully: (i) the Affidavit of Delynn Coldiron signed January 6, 2021, the Fort Collins City Clerk ("Coldiron Aff."); and (ii) the Affidavit of Tawnya Ernst signed January 6, 2021 ("Ernst Aff."), City Senior Specialist, Real Estate:

1. On August 27, 2020, the Petition Representatives submitted to the Clerk a "Notice of Intent to Circulate an Initiative Petition related to the Hughes Stadium Property" dated August 27, 2020, attached as **Exhibit 3** (the "Notice of Intent to Circulate"). [Ex. 1, Coldiron Aff. ¶ 9.][2]

[2] All the exhibits to the City Clerk's Affidavit were previously attached to the Complaint for Declaratory Relief as exhibits. [*See* Complaint for Declaratory Relief, Exhibits A-F and H-J.]

2. On September 3, 2020, the Petition Representatives submitted to the Clerk the form of the petition for the Initiated Ordinance to be circulated for signing by the City's registered electors, attached as **Exhibit 4** (the "Petition"). [Ex. 1, Coldiron Aff. ¶ 10.]

3. On September 4, 2020, the Clerk approved the form of the Petition in the "Petition Form Approval" dated September 4, 2020, signed by Chief Deputy City Clerk Rita Knoll, attached as **Exhibit 5** (the "Petition Approval"). [Ex. 1, Coldiron Aff. ¶ 11.]

4. On November 2, 2020, the Petition Representative Melissa Rosas submitted the signed Petition to the Clerk as evidenced by the "Petition Receipt," a copy of which is attached as **Exhibit 6**. [Ex. 1, Coldiron Aff. ¶ 12]

5. After examining the signatures in the signed Petition, the Clerk issued on November 5, 2020, her "Statement of Initiative Petition Sufficiency" dated November 5, 2020, attached as **Exhibit 7** (the "Statement of Sufficiency"). [Ex. 1, Coldiron Aff. ¶ 13.]

6. The Clerk certified in the Statement of Sufficiency that the Petition contained more than the 3,280 valid signatures required for the Initiated Ordinance to be placed on the ballot of the City's April 6, 2021, regular election. [Ex. 1, Coldiron Aff. ¶ 14.]

7. The form and wording of the Initiated Ordinance in the Petition for which the Clerk issued her Statement of Sufficiency is attached as **Exhibit 8**. [Ex. 1, Coldiron Aff. ¶ 15.]

8. The Clerk presented the Statement of Sufficiency to the Council at its regular meeting on November 17, 2020, the Council's next regular meeting after the Clerk issued the Statement of Sufficiency. [Ex. 1, Coldiron Aff. ¶ 16.]

9. At its November 17, 2020, meeting, the Council adopted Resolution 2020-105 provisionally and conditionally submitting in Section 2 of Resolution 2020-105, subject to this declaratory action, the Initiated Ordinance to a vote of the City's registered electors at the City's April

6, 2021, regular election. The Resolution is attached as **Exhibit 9** (the "Resolution"). [Ex. 1, Coldiron Aff. ¶ 17.]

10. The Council also provisionally and conditionally adopted in Section 3 of the Resolution, subject to this declaratory action, the ballot title and submission clause for the Initiated Ordinance to be submitted to the City's registered electors on the ballot at the City's April 6, 2021, regular election (the "Ballot Measure"). [Ex. 1, Coldiron Aff. ¶ 18.]

11. Defendants Elena M. Lopez, Melissa Rosas and Paul Patterson are the City registered electors designated as the "petition representatives" in the Notice of Intent to Circulate and the Petition for the Initiated Ordinance as required by Charter Article X, Section 5(e) for citizen-initiated ordinances. [Ex. 1, Coldiron Aff. ¶ 19.]

12. The City is organized and existing as a home rule municipality under Article XX of the Colorado Constitution. [Ex. 1, Coldiron Aff. ¶ 20.]

13. The Hughes Stadium Property was annexed into the City's boundaries in 2018 by the Council's adoption of Ordinance No. 123, 2018, and its subsequent recording in the records of the Larimer County Clerk and Recorder on October 30, 2018, at Reception #20180066468, a copy of which recorded Ordinance is attached as **Exhibit 10** (the "Annexation Ordinance"). [Ex.1, Coldiron Aff. ¶¶ 6 and 7.]

14. The Hughes Stadium Property is a 164.554-acre parcel legally described in Section 3 of the Annexation Ordinance. [Ex. 1, Coldiron Aff. ¶¶ 6 and 7.]

15. When the Council annexed the Hughes Stadium Property it also adopted Ordinance No. 124, 2018, to zone the Hughes Stadium Property as being included in the City's Transition District. Ordinance No. 124, 2018 is attached as **Exhibit 11** (the "Zoning Ordinance"). [Ex. 1, Coldiron Aff. ¶¶ 6 and 7.]

16. The Hughes Stadium Property is owned by the Board of Governors of the Colorado State University System (the "CSU Board"). [Ex. 2, Ernst Aff. ¶ 15.]

17. On October 9, 2020, the CSU Board adopted a written motion, with an attached "Site Plan," expressing and detailing the CSU Board's intended future use of the Hughes Stadium Property, attached as **Exhibit 12** (the "CSU Board Motion"). [Ex. 2, Ernst Aff. ¶¶ 13 and 14.]

18. A true and complete copy of the City Charter is attached as **Exhibit 14**. [Ex. 1, Coldiron Aff. ¶ 21.]

19. In order for a Colorado municipality to make the rational decisions and judgments needed when considering and entering into a contract to acquire real property to use as a natural area or open space, the following due diligence and expertise is required: (a) order a title commitment for the property from a title company and review the title commitment to confirm ownership and identify any title issues, with any needed assistance from the municipality's lawyer; (b) retain a real estate appraiser to provide a written appraisal of the property's market value; (c) identify if any water rights will be conveyed with the property and determine if such water rights will be sufficient for the municipality's intended uses of the property; (d) consult with the municipality's finance staff and other relevant municipal officials to determine the available sources for funding the purchase; (e) negotiate with the seller to see if an agreement can be reached on the purchase price and the other terms of the purchase; (f) work with the municipality's lawyer to prepare the written purchase and sale agreement needed for the transaction; (g) have an engineer conduct at least a phase one environmental audit of the property to determine if there are any environmental conditions on it requiring remediation or affecting the property's value or use; (h) have a surveyor survey the property to confirm its legal description and identify any encroachments on it; and (i) have the municipality's lawyer and the title

company handling the closing prepare the needed deed and other documents required for closing the transaction. [Ex. 2, Ernst Aff. ¶¶ 17 and 18.]

III. STANDARD OF REVIEW

The standard of review for a motion for summary judgment is well-established by the courts and commonly used in granting summary judgment in declaratory judgment actions. *Cotter Corporation v. American Empire Surplus Lines Insurance Company*, 90 P.3d 814, 819-20 (Colo. 2004) (summary judgment granted and affirmed on appeal in declaratory judgment action); *City of Colorado Springs v. Bull*, 143 P.3d 1127 (Colo. App. 2006) (summary judgment granted to home rule city in its pre-election declaratory judgment action challenging two citizen-initiated ordinances on the ground they included matters that were ***administrative*** not ***legislative*** and, therefore, not a proper subject of a citizen initiative.)

The Colorado Supreme Court recently described in *Griswold v. National Federation of Independent Business*, 449 P.3d 373, 378-79 (Colo. 2019), the standard of review for a motion for summary judgment:

> Summary judgment is proper only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with [supporting and opposing] affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The party moving for summary judgment may satisfy this burden by demonstrating that there is an absence of evidence in the record to support the nonmoving party's case.
>
> Once the moving party clears this initial evidentiary hurdle, the burden shifts to the nonmoving party to show a triable issue of fact. The nonmoving party may not rest on mere allegations or demands in its pleadings but must provide specific facts demonstrating a genuine issue for trial. In determining whether summary judgment is proper, the nonmoving party is entitled to the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts, and all doubts must be resolved against the moving party. (Internal quotations and cites omitted.)

The Supreme Court has also said that "[w]hether a particular citizen initiative is administrative or

legislative in character, and therefore a proper exercise of the initiative power, is a legal issue" reviewed de novo. *Vagneur v. City of Aspen*, 295 P.3d 493, 503 (Colo. 2013).

The City believes it has met its initial burden in this Motion of demonstrating, under the undisputed material facts set forth above and as argued below, that it is entitled to a judgment as a matter of law as requested in this Motion. The burden is therefore shifted to the Defendants to show a triable issue of fact.

IV. ARGUMENT

A. Introduction

No material facts in dispute in this action prevent the Court from deciding, as a matter of law, that the provisions in Sections 1, 2, 4, 5, 6 and 7 of the Initiated Ordinance requiring the City to "use best efforts in good faith to acquire the Hughes Stadium property" at "fair market value," with $10 million "as a starting point in its negotiations to acquire the property at fair market value," to use "for parks, recreation and open lands, natural areas, and wildlife rescue and education" and to do so using certain funding sources and mechanisms, are ***administrative*** and ***not legislative*** matters and, therefore, under the Colorado Constitution and the Charter are not a proper subject of a citizen-initiated ordinance.

However, the City does not dispute that the provisions in Sections 3 and 4 and related recitals of the Initiated Ordinance requiring the City Council, immediately upon passage of the Initiated Ordinance, to rezone the Hughes Stadium Property to the Public Open Lands District pursuant to Division 4.13 of the City's Land Use Code and prohibiting the City from de-annexing or subsequently rezoning the Hughes Stadium Property "to any designation other than Public Open Lands without voter approval of a separate initiative referred to the voters by City Council," are properly

characterized as ***legislative*** matters subject to the initiative powers the City's registered electors have under the Colorado Constitution and the Charter. The Colorado Supreme Court has held a home rule city's rezoning of real property is a ***legislative*** matter subject to the initiative and referendum powers reserved to its registered electors in Article V, Section 1 of the Colorado Constitution and as they may also be reserved in its home rule charter. *Margolis v. District Court*, 638 P.2d 297, 304-05 (Colo. 1981).

B. Court's Jurisdiction to Consider Pre-election Challenge to Initiated Ordinance

As a preliminary matter, the Colorado Supreme Court holds district courts have jurisdiction to consider a pre-election declaratory judgment action as an appropriate means for home rule cities to obtain a judicial determination whether matters proposed in a citizen-initiated ordinance are ***legislative*** matters appropriate for a citizen-initiated measure or ***administrative*** matters ***not*** appropriate for a citizen-initiated measure. *City of Idaho Springs v. Blackwell*, 731 P.2d 1250, 1253 (Colo. 1987).

C. Article V, Sections 1(2) and 1(9) of the Colorado Constitution

Article V, Section 1(1) of the Colorado Constitution vests the legislative power of the state in the General Assembly, but in Sections 1(2) and 1(3) of Article V there is reserved "to the people the twin powers of initiative and referendum – that is, the power to propose laws independent of the general assembly and to enact or reject the same by vote, and the corollary power to approve or reject by vote an act of the general assembly." *Vagneur,* 295 P.3d at 504. Section 1(2), which is the reserved initiative power, reads:

> The first power hereby reserved by the people is the initiative, and signatures by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election shall be required to propose any measure by petition, and every such petition shall include the full text of the measure so proposed. Initiative petitions for state legislation and amendments to the

> constitution, in such form as may be prescribed pursuant to law, shall be addressed to and filed with the secretary of state at least three months before the general election at which they are to be voted upon.

Colo. Const. Art. V, § 1(2). This initiative power reserved to the state's registered electors is extended, along with the referendum power, in Section 1(9) of Article V to the registered electors of all municipalities, and reads:

> The initiative and referendum powers reserved to the people by this section are hereby further reserved to the registered electors of every city, town, and municipality as to all local, special, and municipal legislation of every character in or for their respective municipalities. The manner of exercising said powers shall be prescribed by general laws; except that cities, towns, and municipalities may provide for the manner of exercising the initiative and referendum powers as to their municipal legislation. Not more than ten percent of the registered electors may be required to order the referendum, nor more than fifteen percent to propose any measure by the initiative in any city, town, or municipality.

Colo. Const. Art. V, § 1(9).

The Colorado Supreme Court consistently holds the initiative and referendum powers of the people in Article V, Section 1 of the Colorado Constitution apply ***only*** to ***legislative*** matters and ***not*** to ***administrative*** matters. *See, City of Aurora v. Zwerdlinger*, 571 P.2d 1074, 1075-76 (Colo. 1977) (city council ordinance setting rates and charges for city water service was administrative and not subject to the referendum power); *Witcher v. Canon City*, 716 P.2d 445, 449-51 (Colo. 1986) (resolution approving amendment to an existing real property lease was administrative and not subject to referendum power); *Blackwell*, 731 P.2d at 1254 (city council's decisions to purchase certain real property and to move to the property a historic school house to be renovated for use as the city hall were administrative matters not subject to the initiative power); *Vagneur*, 295 P.3d at 507-08 (two citizen-initiated ordinances requiring the construction of alternative highway designs across city open space for the entrance to the city were administrative matters not subject to the initiative power).

The Colorado Supreme Court has also considered whether a home rule municipality, like the City, can extend in its charter the initiative and referendum powers granted in Article V, Section 1 to administrative matters in addition to legislative matters. In *Witcher*, the Court concluded a home rule municipality can, but only if there is a "clear statement" in its charter doing so, reasoning:

> In *Zwerdlinger,* we held that while the Aurora City Charter provided that the referendum power applies to 'all ordinances,' except listed exemptions, the charter reserved the referendum power only as to "all legislative ordinances." 571 P.2d at 1076–77. That conclusion was based on the recognition that the extension of the referendum right to administrative actions could result in chaos for local governments. *Id.* We believe that the reasoning set forth in *Zwerdlinger* applies equally here, and hold that, **absent a specific charter provision to the contrary**, a reservation of the referendum as to 'measures' applies only to those measures that are legislative in character. Thus, while a city charter may extend the referendum power to matters that are purely administrative in character, the burden such an extension would place on the operation of local government makes us unwilling to read such an extension into a city charter, absent a clear statement in the charter. Contrary to plaintiffs' assertion, we do not find such a statement present here.

Witcher, 716 P.2d at 452-53 (some emphasis added.)

More recently, in *Vagneur* the Court concluded a broader reservation of the referendum power must be "expressly stated in a charter" and extending the referendum power to administrative matters could result in chaos for the municipality and bring its machinery of government to a halt. *Vagneur*, 295 P.3d at 504, fn. 8 (*citing Zwerdinger* and *Witcher*). This reasoning equally applies in deciding whether the initiative power in a home rule charter has been extended to administrative matters. *Vagneur* considered this reasoning in concluding two citizen-initiated ordinances requiring the construction of alternative highway designs across city open space for the entrance to the city were administrative matters not subject to the initiative power under Article V, Section 1. *Id.* at 505.

D. Charter Article X, Section 1(a)

The initiative power is granted to the City's registered electors in Charter Article X, Section 1(a), which reads:

> The registered electors of the city shall have the power at their option to propose ordinances or resolutions to the Council, and, if the Council fails to adopt a measure so proposed, to adopt or reject such ordinance or resolution at the polls. The procedure for initiative shall be as provided in this Article.

Charter, Art. X, § 1(a). Section 1(a) clearly neither allows for nor contemplates citizen-initiatives pertaining to administrative matters. As such, a petition for a citizen-initiative under the City Charter only can pertain to legislative matters and not administrative matters as the express statement required by the Colorado Supreme Court is absent from the Charter.

E. <u>Legislative Versus Administrative Matters</u>

In *Vagneur*, the Colorado Supreme Court has most recently and comprehensively discussed the tests and principles courts use to determine whether the subject matter of a citizen initiative is legislative or administrative. In doing so, the Court first observed Article III of the Colorado Constitution provides:

> The powers of the government of this state are divided into three distinct departments,—the legislative, executive and judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this constitution expressly directed or permitted.

Colo. Const. Art. III. It then concluded when the initiative and referendum powers under Article V, Section 1 of the Colorado Constitution are considered in light of Article III:

> . . . the people are prohibited by article III from exercising administrative (i.e., "executive") or judicial power. Consequently, the powers of initiative and referendum do not encompass the right to petition for an election on administrative matters. In short, a voter initiative must be a valid exercise of legislative power, rather than executive or judicial power.

Vagneur, 295 P.3d at 504 (citations omitted).

However, the Court also recognized distinguishing between legislative and administrative matters is difficult, particularly "at the municipal level because the governing body of a municipality often wields both legislative and executive powers and frequently acts in an administrative as well as

a legislative capacity by the passage of resolutions and ordinances." *Id.* The Court therefore concluded it must review its prior case law to identify and discuss the principles underlying its legislative-versus-administrative analysis. *Id.*

After conducting an in-depth review and analysis of its prior decisions, including *Zwerdlinger*, *Witcher* and *Blackwell*, the Court determined its past tests "have attempted to establish guideposts to aid in determining the overall character of a proposed initiative," but acknowledges these tests have been "somewhat elusive" and resulted in largely ad hoc determinations. *Vagneur,* 295 P.3d at 506. The Court further acknowledged it has never explained in its past decisions "the interrelation between the tests or articulated whether a particular matter must be examined under more than one test to reach a determination." *Id.* However, the Court observed at their core its past tests have been "rooted in fundamental principles of separation of powers" and have sought "to discern whether a particular initiative exceeds the proper sphere of legislation and instead attempts to exercise administrative or executive powers." *Id.* (Citations and internal quotation marks omitted.)

Having identified its past tests and principles, and acknowledged their weaknesses, the Court borrowed from a 2012 Utah Supreme Court decision to provide a clearer approach for Colorado courts to follow to decide whether the subject matter of a citizen initiative is administrative or legislative. The Court describes its approach as follows:

> As recently discussed by the Utah Supreme Court in *Carter v. Lehi City,* 2012 UT 2, 269 P.3d 141, [t]he true limit on voter initiatives ... is that they must be a valid exercise of legislative rather than executive or judicial power. [Cite omitted.] There, the court acknowledged that it is not possible to mark the precise boundaries of legislative power with bright lines, but that it is possible to describe the essential hallmarks of legislative power, as distinguished from executive power. [Cite omitted.] Legislative power is defined by the work product it generates, namely, the promulgation of laws of general applicability; when the government legislates, it establishes a generally applicable rule that sets the governing standard for all cases coming within its terms. [Cite omitted]; *see also Margolis,* 638 P.2d at 304 (observing that a zoning act is legislative in character because it "involves a general rule or policy"). Legislative power is also defined by the nature of legislative decision-making. When a government legislates, it weighs

> broad, competing policy considerations, not the specific facts of individual cases. [Cite omitted.] Accordingly, although in *Zwerdlinger* we considered a legislative act to be permanent or general as opposed to temporary in operation or effect, 194 Colo. at 196, 571 P.2d at 1077, we clarified in *Blackwell* that our use of the term 'permanent' did not hinge on the duration of legislation or the anticipated useful life of a municipal improvement, but rather, whether the act represented a declaration of public policy of general applicability, 731 P.2d at 1254.
>
> By contrast, executive acts typically are not based on broad policy grounds, but rather, on individualized, case-specific considerations. [Cite omitted.] That is, executive decisions often involve case-specific evaluation—not the policy-based promulgation of the rules to be applied. [Cite omitted.] Accordingly, decisions that require specialized training and experience or intimate knowledge of the fiscal or other affairs of government to make a rational choice may be properly characterized as administrative. [Cites omitted.] Our discussion in *Zwerdlinger* likewise reveals that while executive acts may be necessary to implement the general rules established by legislation, administrative decisions often concern matters involving specific data, facts and information necessary to arrive at a fair and accurate judgment upon the subject. 194 Colo. at 196–97, 571 P.2d at 1077. Thus, decisions that require careful study and specialized expertise, as well as discretionary judgment, generally are administrative in nature. ***Additionally, government decisions to enter into a contract with a specific entity are not legislative decisions because they do not involve the adoption of generally applicable rules in the implementation of public policy. Instead, such decisions are executive acts involving specific individual parties and, accordingly, lie beyond the bounds of legislative power***. [Cite omitted]; *see also Witcher,* 716 P.2d at 450 (reasoning that negotiation of leases and amendments thereto between the city and bridge operators were administrative acts not subject to referendum).
>
> Whether a proposed initiative is legislative or administrative remains a case-by-case inquiry. Although we give consideration to each of the tests we have described, no single test is necessarily controlling; rather, the principles underlying those tests must guide the overall determination of whether a proposed initiative is legislative or administrative. Finally, in a close case, a court's decision may be informed by historical examples. That is, [a]n initiative that finds longstanding parallels in statutes enacted by legislative bodies, for example, may be deemed legislative on that basis, while initiatives that seem more like traditional executive acts may be deemed to fall on that side of the line. [Cite omitted.]

Vagneur, 295 P.3d at 506-07 (some internal quotation marks omitted, cites omitted as noted and some emphasis added).

Therefore, as distilled from the immediately preceding quote from *Vagnuer,* the tests for determining whether a citizen initiative is seeking to exercise the legislative or administrative power are:

- Legislative power is defined by the work product it generates, namely the promulgation of laws of general applicability, establishing a generally applicable rule that sets the standard for all cases coming within its terms, or an act representing a declaration of public policy of general applicability.

- Legislative power is also defined by the nature of legislative decision-making which involves a governing body weighing broad, competing policy considerations and not the specific facts of individual cases.

- Administrative acts typically are not based on broad policy grounds, but rather, on individualized, case-specific considerations and involve case-specific evaluations—not the policy-based promulgation of the rules to be applied.

- Administrative acts usually require specialized training and experience or intimate knowledge of the fiscal or other affairs of government to make a rational choice and involve decisions that require careful study and specialized expertise, as well as discretionary judgment.

- Government decisions to enter into a contract with a specific entity are not legislative decisions because they do not involve the adoption of generally applicable rules in the implementation of public policy, but instead are administrative acts involving specific individual parties.

- Deciding whether a proposed initiative is legislative or administrative is a case-by-case inquiry in which the courts are to give consideration to each of the above-described tests, with no single test necessarily controlling, but the principles underlying these tests must guide the overall determination of whether a proposed initiative is legislative or administrative.

- In a close case, a court's decision may be informed by historical examples, so proposed initiative that have longstanding parallels in statutes enacted by legislative bodies should be deemed legislative, while initiatives that seem more like traditional executive acts should be deemed administrative.

When these tests and their underlying principles are applied to the Initiated Ordinance, the provisions in Sections 1, 2, 4, 5, 6 and 7 of the Initiated Ordinance requiring the City to acquire the Hughes Stadium Property using the funding sources, future partnerships and financial mechanisms as designated in Sections 5 and 6 are ***administrative***.

F. <u>Application of Tests and Principles to Initiated Ordinance</u>

Section 2 of the Initiated Ordinance states the City "shall acquire" the Hughes Stadium Property "at its fair market value for the purpose of using it for parks, recreation and open lands, natural areas, and wildlife rescue and education" [Ex. 8, p. 2]. Section 1 of the Initiated Ordinance states the City hereby makes and adopts the determinations and findings contained in the recitals" of the Initiated Ordinance, which includes the next-to-last recital requiring the City to use $10 million "as a starting point in its negotiations to acquire the property at fair market value" [Ex. 8, p. 2]. Section 4 of the Initiated Ordinance prohibits the City from ceasing efforts to acquire the Hughes Stadium Property "without voter approval of a separate initiative referred to the voters by City Council" [Ex.8, p. 3].

Section 5 of the Initiated Ordinance requires the City to seek funding for its acquisition of the Hughes Stadium Property from certain identified funding sources or future partnerships including, without limitation, those listed in Section 5 [Ex. 8, p. 3]. Section 6 of the Initiated Ordinance allows the Council to "refer ballot measures to the voters for the purpose of seeking additional funding only if existing sources of funding or future partnerships are insufficient for the preservation of the Hughes Stadium property as described in" the Initiated Ordinance [Ex. 8, p. 3].

Finally, Section 7 of the Initiated Ordinance requires the City to "expeditiously, but no later than two years from the passage" of the Initiated Ordinance, "use best efforts in good faith to acquire the Hughes Stadium property using the financial mechanisms described in Sections 5 and 6" of the Initiated Ordinance [Ex. 8, p. 3].

These sections of the Initiated Ordinance, when read together, unambiguously require the City to begin negotiations with the CSU Board, at an opening offer of $10 million, to purchase the Hughes Stadium Property from the CSU Board, which necessarily means the City and the CSU Board will

need to enter into a written contract to effect this real property transaction.[3] It also means City officials will need to make decisions about the terms and conditions of that contract, such as the type of deed to be used, the legal description of the Property, how to address any title issues affecting the Property, and how to address any existing environmental conditions on the Property [Ex. 2, Ernst Aff. ¶¶ 16-18]. These decisions often require specialized training and experience in law or engineering in order to make a rational choice, may require careful study and usually involve the exercise of discretionary judgment. [Ex. 2, Ernst Aff. ¶¶ 16-18].

As directed in Section 5 of the Initiated Ordinance, City officials and the Council will also be required to make any number of decisions as to how to fund its purchase of the Hughes Stadium Property, whether from existing City sources or, as Section 5 states, from "future partnerships" like "third party organizations providing open space or other types of recreational or land conservation grants, and/or partnerships with other entities such as Larimer County" [Ex. 8, p. 3]. Section 5 also provides the funds may be raised from "Certificates of Participation," a form of financing used by Colorado governments [*Id.*].[4] If these funding sources are insufficient, Section 6 authorizes the Council to refer a ballot measure to the voters for additional funding [*Id.*]. All these decisions about funding the purchase and any agreements needed to implement them, will also require specialized training and experience in law, engineering or finance in order to make a rational choice, will require

[3] Under C.R.S. § 38-10-108, "[e]very contract . . . for the sale of any lands or any interest in lands is void unless the contract or some note or memorandum thereof expressing the consideration is in writing and subscribed by the party by whom the . . . sale is to be made."

[4] *See, In re Great Outdoors Colorado Trust Fund*, 913 P.2d 533, 536 (Colo. 1996) (state financed various capital construction projects through issuance of certificates of participation [COPs], which were sold to investors and proceeds used to pay construction costs of projects; state then entered into lease-purchase agreements with the COP holders, who held title to the project properties, and state paid rent for the use of the properties; rent money then used to pay principal and interest on the COPs, with state holding title to properties when the debt payments completed).

intimate knowledge of the City's fiscal affairs, may require careful study, and involve the exercise of discretionary judgment. [Ex. 2, Ernst Aff. ¶¶ 17 and 18.]

Then, once the Hughes Stadium Property is acquired from the CSU Board, Section 2 of the Initiated Ordinance requires the City to use the Property "for parks, recreation and open lands, natural areas, ***and*** wildlife rescue and education" [Ex. 8, p. 2] (emphasis added). Needless to say, the steps and actions the Council and City officials would need to take to make all this happen will require specialized training and experience in urban planning, engineering, law and finance in order to make rational choices, will require intimate knowledge of the City's fiscal affairs, may require careful study, and involve the exercise of discretionary judgment. [Ex. 2, Ernst Aff. ¶¶ 16 and 18].

What these aspects of the Initiated Ordinance do not do is generate any law of general applicability, establish a generally applicable rule setting the standard for all cases coming within its terms, or constitute a declaration of public policy of general applicability. Nor are these components of the Initiated Ordinance like legislative decision-making involving a governing body weighing broad, competing policy considerations and not the specific facts of individual cases. The Initiated Ordinance instead requires the City and Council to make decisions involving individualized, case-specific considerations and case-specific evaluations related ***only*** to the Hughes Stadium Property. These decisions require specialized training and experience to make rational choices, intimate knowledge of the City's fiscal affairs, require careful study and specialized expertise, and the exercise of discretionary judgment.

For these reasons alone, this Court should conclude the provisions in Sections 1, 2, 4, 5, 6 and 7 of the Initiated Ordinance are administrative not legislative matters and, therefore, not a proper subject for a citizen initiative. But if there is any remaining doubt, *Vagnuer* provides one concrete example of an administrative matter closing the door on this doubt, stating: "Additionally, government

decisions to enter into a contract with a specific entity are not legislative decisions because they do not involve the adoption of generally applicable rules in the implementation of public policy. Instead, such decisions are executive acts involving specific individual parties and, accordingly, lie beyond the bounds of legislative power." *Vagneur,* 295 P.3d at 507; *see also, Friends of Denver Parks, Inc. v. City and County of Denver*, 327 P.3d 311, 320 ¶68 (Colo. App. 2013) (relying on this quote from *Vagneur*, Court of Appeals decided city council's ordinance approving the transfer of real property to a school district was administrative in character and, therefore, not subject to the referendum power). These sections of the Initiated Ordinance constitute a decision to enter into at least one contract, the purchase contract with the CSU Board, and likely others to obtain the funding for the purchase of the Hughes Stadium Property and to use the Property as required by the Initiated Ordinance. As such, they are improper administrative matters under *Vagneur* and its progeny not subject to citizen initiative.

G. <u>Requested Remedies</u>

In addition to seeking a declaration and order from this Court holding the provisions in Sections 1, 2, 4, 5, 6, and 7 of the Initiated Ordinance discussed above are administrative matters not subject to the initiative powers of the City's registered electors under Article V, Sections 1(2) and 1(9) of the Colorado Constitution and Charter Article X, Section 1(a), the City asks the Court to sever the administrative matters from these sections and their related recitals in the Initiated Ordinance and to rewrite the Ballot Measure as needed to eliminate references to these administrative matters. The City has provided proposed revised versions of the Initiated Ordinance and Ballot Measure for this Court's consideration as **Exhibit 15** and **Exhibit 16**, respectively, with the revisions shown in redline.

However, as previously indicated, the City does not dispute that the provisions in Sections 3 and 4 of the Initiated Ordinance requiring the City Council, immediately upon passage of the Initiated Ordinance, to rezone the Hughes Stadium Property to the Public Open Lands District pursuant to

Division 4.13 of the City's Land Use Code and prohibiting the City from de-annexing or subsequently rezoning the Hughes Stadium Property "to any designation other than Public Open Lands without voter approval of a separate initiative referred to the voters by City Council," are properly considered legislative matters subject to the initiative powers the City's registered electors have under Article V, Sections 1(2) and 1(9) of the Colorado Constitution and under Charter Article X, Section 1(a). Therefore, these provisions need not be severed from the Initiated Ordinance and references to them should remain in the Ballot Measure. Nevertheless, the City requests a declaration and order from this Court that the provisions in Sections 3 and 4 of the Initiated Ordinance are proper legislative matters subject to the initiative powers of the City's registered electors under the Colorado Constitution and the City's Charter. *Margolis*, 638 P.2d at 302-05 (zoning and rezoning by municipalities are legislative in character and, therefore, subject to the initiative and referendum powers of the Colorado Constitution).

In *City of Colorado Springs v. Bull*, 143 P.3d 1127 (Colo. App. 2006), the Colorado Court of Appeals found certain provisions in two citizen-initiated ordinances were administrative matters not subject to the initiative power under the Colorado Constitution and Colorado Spring's charter, but other provisions in the initiated ordinances were appropriate legislative matters. In reaching this conclusion, the Court of Appeals held it had the authority and it was the appropriate remedy to severe the administrative matters from the initiated ordinances because: (i) standing alone, the remaining legislative matters in them could be given legal effect; (ii) deleting the administrative matters would not substantially change the spirit of the initiated ordinances; (iii) and it was evident from the content of the initiated ordinances and the circumstances surrounding their proposal that the sponsors and subscribers of the ordinances would prefer them to stand as altered rather than see them invalidated in their entirety. *Bull,* 143 P.3d at 1138-39.

These factors all also apply here and justify this Court severing the administrative matters from the Initiated Ordinance and the Ballot Measure but allowing the legislative matters to move forward to the City's April 6, 2021, election. Defendant PATHS, the Petition Representatives, and the registered electors signing the Petition would presumably prefer the Initiated Ordinance to stand as altered and put forward to a vote of the City's registered electors, rather than have it invalidated in its entirety.

V. CONCLUSION

In conclusion, for the foregoing reasons, the City respectfully requests the Court to grant it summary judgment and order the remedies requested above in Section IV.G. However, if the Court determines a hearing on this Motion is needed, the City asks the Court to exercise its power under C.R.C.P. 57(m) to order a speedy hearing and advance any such hearing on the Court's calendar in time for the City Council to meet its February 16, 2021, deadline to place the final versions of the Initiated Ordinance and the Ballot Measure on the City's April 6, 2021, regular election ballot.

Dated this 6th day of January, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned herby certifies that on the 6th day of January, 2021, a true and correct copy of this Motion for Summary Judgment was filed via the Colorado Courts e-filing system and served to the following parties:

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