

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

AFFIDAVIT OF TAWNYA ERNST

AFFIANT, being duly sworn upon oath, states:

1. My name is Tawnya Ernst. I am over the age of 18 and I have personal knowledge of the matters set forth in this Affidavit.
2. I am employed by the City of Fort Collins (the "City") as a "Senior Specialist, Real Estate" within the Real Estate Division of the City's Operation Services Department, a position I have held since September 2012.
3. In my current employment with the City, I am primarily assigned to provide support to the City's Natural Areas Department in identifying, evaluating, negotiating and closing on the City's purchase of land and conservation easements and leasing of land to be included in and used for the City's natural areas program, which program I describe in paragraph 7 below.
4. Before being employed by the City, I was employed from August 2008 to March 2012 as a real estate specialist for Jefferson County, Colorado, in its Open Space Department ("JCOSD"), and from August 2006 to August 2008, I was employed as a project manager and conservation fellow by the Colorado Cattlemen's Agricultural Land Trust ("CCALT"), a private land trust established in 1995 to protect productive agricultural land while also conserving Colorado's natural resources.
5. At JCOSD my duties included identifying, evaluating, negotiating and closing on the acquisition of land in fee title and conservation easements to use for open space. At CCALT, I preformed the same tasks, but only for the acquisition of conservation easements to accomplish CCALT's purposes of protecting agricultural land and conserving Colorado's natural resources.

6. I have a bachelor-of-arts degree from Kansas State University and in 2006 I received a Master-of-Science degree in Parks and Protected Areas Management from Colorado State University.

7. The City established its natural areas program in 1992 and the City's electors approved at the City's special election on November 3, 1992, a quarter-cent sales tax to fund the program, currently being operated by the Natural Areas Department under the City's "Natural Areas Master Plan" dated October 7, 2014, which the Fort Collins City Council (the "Council") adopted on October 7, 2014, in its Resolution 2014-089 (the "Natural Areas Program" or "Program").

8. For use in the Natural Areas Program, the City currently owns in fee title approximately 38,802 acres of land, has approximately 7,134 acres of land under conservation easements and leases approximately 897 acres of land.

9. In my duties as Senior Specialist, Real Estate for the City in the past 8 years, I have been directly involved in more than forty real property transactions for the Natural Areas Program consisting of about twenty-eight fee title transactions and about twelve conservation easement transactions, resulting in approximately 5,427 acres being added to the City's land inventory for the Program.

10. Through my education and my experience at the City, JCOSD and CCALT, I have gained considerable knowledge in the prudent and customary steps to be taken in the exercise of due diligence before an organization, such as the City, takes title to an interest in real property to use as a natural area or open space.

11. Based on this knowledge, I have prepared and used in past City transactions a written outline that identifies the key steps to be taken, or at least considered, before closing on the transaction, a copy of which outline is attached as Exhibit A (the “Acquisition Outline”).

12. I am aware of the above-captioned action filed by the City against the above-named defendants and I have reviewed the “Complaint for Declaratory Relief Pursuant to C.R.C.P. 57 and the Uniform Declaratory Judgments Law” filed on December 7, 2020, in Larimer County District Court Case No. 2020CV30833 (the “Complaint”). I understand the Complaint asks the Larimer County District Court (the “Court”) to determine whether the “Initiated Ordinance,” as described in the Complaint, (the “Initiated Ordinance”) includes certain administrative matters not subject to a citizen initiative as provided in the Colorado Constitution and the City Charter, including the provisions requiring the City to “acquire” the former Hughes Stadium property to use “for parks, recreation and open lands, natural areas, and wildlife rescue and education.”

13. I have also reviewed the “Plaintiff’s Motion for Summary Judgment” to be filed by the City in the above-captioned action (“the Motion”), including the Exhibit 12 described in paragraph 17 of the Motion’s “Statement of Undisputed Material Facts,” which is a written motion adopted on October 9, 2020, by the Board of Governors of the Colorado State University System (the “CSU Board”) that pertains to the “Hughes Stadium Property” as such property is identified in the Motion (the “Hughes Stadium Property”).

14. I have reviewed the CSU Board’s website and found the written motion the CSU Board adopted on October 9, 2020, pertaining to the Hughes Stadium Property (the “CSU Board Motion”) and I can attest that Exhibit 12 is a true and correct copy of the CSU Board Motion as found on the CSU Board’s website.

15. I have also reviewed the records of the Larimer County Assessor and the Larimer County Clerk and Recorder and from those records it appears the CSU Board is the current owner of the Hughes Stadium Property.

16. I also have personal knowledge of the Hughes Stadium Property and earlier this year I participated, along with other City officials, in evaluating the Property for possible acquisition by the City to use as a natural area.

17. Based on my experience at the City, JCOSD and CCALT, and my personal knowledge of the Hughes Stadium Property, if the City intended to acquire the Property to use as a natural area under its Natural Areas Program, it would be prudent and in the best interest of the City to exercise due diligence by at least taking the following key steps before closing on the transaction, most of which steps are also listed in the Acquisition Outline attached as Exhibit A: (a) order from a title company a title commitment for the Property and review the commitment to confirm ownership and identify any title issues with any needed assistance from the City Attorney's Office; (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 City's intended uses of the Property; (d) consult with the City's Chief Financial Officer and other relevant City staff to determine the City's available sources for funding the purchase; (e) negotiate with the CSU Board to see if an agreement can be reached on the purchase price and other terms of the transaction; (f) work with the City Attorney's Office to prepare the written purchase and sale agreement needed for the transaction; (g) hire an engineering firm to 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) hire a surveying firm to survey the Property to confirm its legal description and identify any encroachments on it; and (i) work with the City Attorney's Office

and the title company handling the closing to prepare and review the needed deed and other documents required for closing the transaction.

18. In my opinion, and based on my education and experience, an organization's decision to acquire fee title to real property to use as a natural area or open space involves many discretionary decisions and judgments which, as a matter of prudence and in the exercise of due diligence, should be considered and made before the organization enters into a purchase and sale agreement and closes on it. These decisions and judgments are illustrated by the steps described in paragraph 17 above. For example, if in the process of completing these steps the City discovers an issue with the Hughes Stadium Property that diminishes its value or impairs the City's ability to use it for the intended uses, a decision and judgment may need to be made whether the City should continue with its acquisition of the Property. In addition, such decisions and judgments often require careful study and special expertise, including the expertise provided by title companies, real estate appraisers, engineers, surveyors, lawyers, financial experts, and subject matter experts on the acquisition of land for natural areas and open space, such as myself, in order for an organization like the City to make an informed and rational choice in reaching its decisions and judgments.

19. If the City were to acquire the Hughes Stadium Property to use "for parks, recreation and open lands, natural areas, and wildlife rescue and education," it has also been my experience and observation in past natural area acquisitions by the City, that the City would then need to proceed to evaluate and study the Property in detail using a team of landscape architects, urban planners, engineers, natural resource specialists, financial experts and other similar experts led by the City's Natural Areas Department to determine: (a) the best uses of the Property; (b) the design of any needed site work and improvements to the Property for those uses, (c) how such site work and improvements will be funded; (d) how the operation and maintenance of the improvements and uses on the Property

General Natural Areas Land Acquisition Steps

- 1) Determine potential acquisition target (Site Identification)
 - a. Staff initiated considerations: The 2014 Natural Areas Master Plan (prepared with public input) establishes conservation focus areas and general land acquisition priorities.
 - i. Natural Areas Department (NAD) and Real Estate Services (RES) staff identify confidential conservation priority parcels guided by the plan.
 - ii. Staff seeks regular input from the Land Conservation and Stewardship Board.
 - b. Public initiated considerations: Consider public inquiries on specific parcels.
 - c. **Special Notes:**
 - i. **Natural Areas does not use eminent domain in any situation to acquire land. Land is acquired from willing landowners only.**
 - ii. **City Council Resolution 2005-136 requires Natural Areas to consult with the City Council whenever a proposed land or water acquisition is expected to:**
 1. **Cost in excess of Two Million Dollars (\$2,000,000);**
 2. **Potentially raise significant policy considerations related to the Natural Areas Department, the Master plan, or the use of Open Space, Yes! Or Help Preserve Open Space dedicated funds.**
- 2) Contact landowner to arrange a meeting and/or site visit
- 3) Conduct a site visit with landowner
- 4) Prepare a land evaluation form (template) and maps of the property
- 5) Discuss the potential acquisition with the Natural Areas' Core Management Team and Land Conservation Stewardship Board
- 6) Order and review title commitment
- 7) Negotiations
 - a. Appraisal/Valuation
 - i. The City has four appraisal companies under contract – Associated Value Consultants, Bonnie Roerig, CBRE (Jon Vaughn) and Foster Valuation (West Foster)
 - ii. If staff is interested in obtaining an appraisal from an outside party (someone not under contract), NAD and/or RES must enter into a sole source contract with that appraiser and provide justification as to why we are electing to use someone outside the four companies listed in above. Sole source must be approved by the Purchasing Department.
 - iii. Sometimes staff will conduct an in-house valuation rather than obtain an appraisal – particularly if there are recently purchased comparable properties in the area. This valuation is typically completed by RES with help from NAD staff. Comparable sales information is found on IREsis, CoStar and the County Assessor's website.
 - iv. NAD usually pays for the appraisal. Occasionally, NAD and the landowner will agree to share in the cost of an appraisal and jointly select the appraiser. In this case, NAD will reimburse the landowner for their portion of the appraisal costs at closing. If the property is not purchased, the landowner will not be reimbursed.
 - b. Offer letter submitted. Counter-offers are sometimes made at which point multiple offer letters may be submitted until an agreement is reached.
- 8) Draft a Purchase and Sale Agreement once initial terms are agreed upon (Agreement is prepared by Real Estate Staff, reviewed by NAD staff, the RES Manager and the City Attorney's Office prior to being sent to the landowner and their representative). Once all parties are comfortable with the agreement's language, the Purchase and Sale Agreement (P&S) is executed by the City Manager.
- 9) Additional due diligence performed after P&S Agreement is signed:

- a. Phase I Environmental Report
 - b. Survey (not conducted 100% of the time but strongly recommended when possible encroachments or other boundary issues exist)
 - i. For conservation easements additional due diligence includes:
 1. Baseline Inventory Report
 2. Mineral Report
- 10) Additional document drafting (RES responsibility)– warranty deeds, conservation easement, trail easements, etc....
- a. All initial drafts of documents (warranty deeds, easements, etc. must be reviewed by the City Attorney’s Office before being sent to the landowner. RES staff prepare the initial drafts, send to NAD staff and attorney for review. Then the document is sent to the landowner and their representative for review.
- 11) Schedule closing and request settlement statements and arrange for a wire transfer – payments are processed through the Natural Areas Financial Coordinator, approved by the Natural Areas Manager or Director. Fund transfer wires are handled by Accounting and Treasury.
- 12) Prepare final copies of documents (deeds, easements) and route for City signatures prior to closing (documents are sent through the City Attorney’s Office to the Mayor or City Manager and then the Clerk’s Office. The documents are accompanied by a brief memo explaining the transaction.)
- 13) Attend closing
- 14) Obtain recorded documents
- 15) Send out distribution memo to NAD staff and City Attorney’s Office.
- 16) If water rights are acquired, additional documentation and stock certificates are sent to the Clerk’s Office and Utilities’ Water Resources Office.
- 17) Note – Confidential quarterly land conservation reports (including map) are sent to the City Manager, City Council and the Land Conservation and Stewardship Board. The reports briefly describe the active NAD acquisition projects.