DISTRICT COURT, COUNTY OF LARIMER, COLORADO
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DATE FILED: January 19, 2021 3:39 PM
FILING ID: 87EAB79A8C716
CASE NUMBER: 2020CV30833

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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▲COURT USE ONLY ▲

Case Number: 2020 CV 30833

Division: 3B

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PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS UNDER C.R.C.P. 12(b)(6)

Plaintiff City of Fort Collins, Colorado, ("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., hereby respectfully submits its Response to Defendants' "Motion to Dismiss Complaint for Declaratory Relief Pursuant to C.R.C.P. 12(b)(6)" ("Motion"):

I. INTRODUCTION

Defendants Planning Action to Transform Hughes Sustainability Corp. ("PATHS"), Elena M. Lopez, Melissa Rosas and Paul Paterson (collectively, "Defendants") ask this Court to dismiss this action because the City has not named the Board of Governors of the Colorado State University System ("CSU Board") as a party. Defendants argue the CSU Board, as owner of the real property on which the Hughes Stadium was formerly located ("Property"), is an indispensable party pursuant to C.R.C.P. 19(a).[1] And, since the City has failed to do so, the Court should dismiss this lawsuit. Defendants are wrong on both accounts.

The CSU Board is not an indispensable party in this action as squarely decided in *Margolis v. District Court*, 638 P.2d 297 (Colo. 1981). And, even if the Court determines the CSU Board is an indispensable party, dismissal of this lawsuit is not the proper remedy. Instead, Rule 19(a) requires that "the court shall order" the CSU Board to be made a party to this suit.

[1] Rule 19(a) is applicable to indispensable parties whose joinder is feasible, meaning the party is "properly subject to service of process" in the action. While the City contends in this Response the CSU Board is not an indispensable party under Rule 19(a), it does agree the CSU Board's joinder would be feasible since it is certainly subject to service of process in this action.

II. BACKGROUND AND FACTS

Defendants' acknowledge the City's Complaint "accurately outlines the procedural history of the PATHS ballot measure," but they state it does "not summarize important context of the initiative at issue." [Motion, pg. 2.] In about seven of the fourteen pages making up the Motion, Defendants present their version of this "context" supported by five City records (Motion Exhibits A-D and Exhibit J), three *Coloradoan* news articles (Motion Exhibits E-G), an October 9, 2020, resolution adopted by the CSU Board (Motion Exhibit I), and the "Tenth Amendment to Purchase and Sale Agreement [Hughes Stadium Redevelopment]" dated October 12, 2020, between the CSU Board and Lennar Colorado, LLC (Motion Exhibit K). Defendants do not provide, however, an affidavit authenticating these documents or supporting any of the other "facts" alleged in the Motion.

While the City does not contest the authenticity of these documents, the documents speak for themselves and, therefore, the City does not accept or concede Defendants' interpretation of them is accurate. Nor does the City necessarily accept or concede the accuracy of the other factual allegations in the Motion unsupported by the exhibits. Even so, most of the allegations concerning the context of the Defendants' initiated ordinance are irrelevant to the question of whether the CSU Board is an indispensable party to this action.

For example, Defendants describe: (a) the CSU Board's desire to redevelop the Property for residential uses; (b) the public outreach conducted by CSU and City staff concerning the Property's redevelopment; (c) the response to that outreach from many in the public that the Property not be redeveloped for residential or commercial use but be used for open space or recreational uses; (d) the CSU Board's desire to continue its efforts to redevelop the Property for residential uses despite the input received from the public outreach; (e) the history of the CSU Board's failed effort under the City's zoning process before the City Planning and Zoning Board and City Council to rezone the

Property for residential use; and (f) the CSU Board's recent direction given to the CSU Chancellor to submit an application to the City for a "site plan advisory review" ("SPAR") of its proposed residential redevelopment of the Property under the City's SPAR process in Section 2.1.3(E) of the City's Land Use Code (Motion Exhibit J) and the SPAR process in C.R.S. § 31-23-209 (Motion Exhibit I). While these descriptions of what has occurred concerning the CSU Board's efforts to redevelop the Property may be accurate, they are irrelevant to deciding whether the CSU Board is an indispensable party.

The relevant facts for this question under Rule 19(a) are the CSU Board is the owner of the Property and the initiated ordinance requires the City Council to rezone the Property and for the City to acquire the Property from the CSU Board. The City accepts as true these facts. Another key and relevant fact in deciding the Motion is the only issue the Court is asked to address in this declaratory action is whether the requirements in the initiated ordinance for the rezoning and acquisition of the Property are legislative matters properly the subject of a citizen initiative under the Colorado Constitution Article V, Sections 1(2), (9) and City Charter X, Section 1(a).

III. STANDARD OF REVIEW

The City agrees with the Defendants' characterization of the Court's standard of review for deciding if the CSU Board is an indispensable party under Rule 19(a). The Court's decision is a mixed question of fact and law turning on the facts of each case and the Defendants, as the moving party, have the burden to show the CSU Board is an indispensable party to this action.

Additionally, it may be necessary for Defendants to present affidavits of persons having knowledge of the CSU Board's interests to meet their burden and the Court should accept all factual allegations in the City's Complaint as true and draw inferences in favor of the City. *See, Citizen Band of Potawatomi Indian Tribe of Oklahoma v. Collier*, 17 F.3d 1292, 1293 (10th Cir. 1994); 5C Wright & Miller,

Federal Practice and Procedure § 1359 (3d ed.) (October 2020 Update).[2] Further, the courts are reluctant to grant motions to dismiss for failure to name an indispensable party particularly where the non-party's interest is not a present, substantial interest, but instead an indirect, speculative, vaguely possible or future contingent interest. *See, Thorne v. Board of County Commissioners*, 638 P.2d 69, 73 (Colo. 1981); *Game and Fish Commission v. Feast*, 402 P.2d 169, 172 (Colo. 1965); 5C Wright & Miller, *Federal Practice and Procedure* § 1359 (3d ed.) (October 2020 Update). Indeed, a mere interest in an action, even if substantial, may be insufficient to warrant a determination of indispensability. *Gold Hill Development Company, LP v. TSG Ski & Golf, LLC*, 378 P.2d 816, 831 (Colo. App. 2015); *Williamson v. Downs*, 829 P.2d 498, 500 (Colo. App. 1992).

Finally, a district court's determination of a joinder issue under Rule 19 will not be overturned on appeal absent a showing of an abuse of discretion. *Makeen v. Hailey*, 381 P.3d 337, 347 (Colo. App. 2015).

IV. ARGUMENT

A. Introduction

Defendants argue the declaratory relief the City seeks in this action "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." [Motion pgs. 8-9.] That mechanism being the requirement in the initiated ordinance the City make a good faith effort to purchase the Property at fair market value which, if absent from the initiated ordinance, "will significantly diminish the property's sale value to another buyer," (presumably Lennar Homes). [Motion pg. 9.] Defendants

[2] Colorado Rules 12(b)(6) and 19(a) are essentially identical to Federal Rules 12(b)(7) and 19(a)(1), (2). When a Colorado rule of civil procedure is similar to a Federal rule of civil procedure, it is appropriate for Colorado courts to look to federal authority and commentators in construing the Colorado rule. *Antero Resources Corporation v. Strudley*, 347 P.3d 149, 155 (Colo. 2015); *Benton v. Adams*, 56 P.3d 81, 86 (Colo. 2002).

then conclude, "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," followed by the cite: "*Compare Margolis v. District Court*." [Motion pg. 13.]

This is the Defendants' second cite to *Margolis v. District Court*. Its first cite is on page 11 of the Motion, which reads:

> 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)**. (Bold added.)

[Motion pg. 11.] Defendants provide the Court with no further discussion addressing the Colorado Supreme Court's holding in *Margolis*.

B. *Margolis v. District Court*

The Colorado Supreme Court in *Margolis* addressed in three consolidated cases whether a municipality's actions in zoning and rezoning real property are "legislative in character and thus subject to the referendum and initiative powers reserved to the people under Colo. Const. art. V, sec. 1" *Margolis*, 638 P.2d at 298. In one of the consolidated cases, which the Court identifies as "the Greenwood Village Case," it also squarely addressed the question raised here by Defendants' Motion: Is the owner of the real property subject to a citizen-initiated ordinance to be submitted to a home rule city's electors an indispensable party under Rule 19(a) in an action deciding only whether the initiated ordinance is properly considered a legislative matter subject to the initiative powers under the Colorado Constitution and the city's charter? 638 P.2d at 301. The Supreme Court in *Margolis* answered "no" to this second question. *Id.*

In *Margolis*, the council for the City of Greenwood Village ("Greenwood Village"), a home rule city, annexed 90 acres of land and adopted an ordinance approving the land's zoning. 638 P.2d

at 299 and fn. 2. Soon after, a petition was filed with Greenwood Village to refer the zoning ordinance to the electors and a second petition was filed for an initiated ordinance to be submitted to the electors to rezone the land to a different zoning. 638 P.2d at 299. Greenwood Village's council refused to act on the petitions believing they were not legislative in character and, therefore, not subject to referendum and initiative under Colorado Constitution Article V, Section 1 and Greenwood Village's charter.

The petitioning electors filed an action in district court seeking an order to compel the Greenwood Village council to either repeal the referred zoning ordinance or submit it to the electors, and to compel the council to either adopt the initiated rezoning ordinance or submit it to the electors. *Id.* The petitioning electors also joined as defendants in their lawsuit two of the owners of the affected land and two other owners of the land moved to intervene. *Id.* The district court dismissed the two named landowners from the suit and denied the other two landowners' motion to intervene. *Id.* The district court ultimately granted Greenwood Village's motion to dismiss the lawsuit concluding the referred and initiated ordinances, as zoning and rezoning decisions, were quasi-judicial decisions not subject to referendum and initiative under the Colorado Constitution and Greenwood Village's charter. *Id.* The petitioning electors appealed to the Colorado Supreme Court in an original proceeding under C.A.R. 21. *Id.*

Before addressing whether the Greenwood Village referred and initiated zoning and rezoning ordinances were legislative matters properly subject to referendum and initiative under the Colorado Constitution and Greenwood Village's charter,[3] the Supreme Court addressed whether the owners of

[3] The Supreme Court ultimately concluded in *Margolis* that zoning and rezoning decisions are legislative in character and, therefore, subject to the citizen referendum and initiative powers in Colorado Constitution Article V, Section 1. 638 P.2d at 305.

the subject land were indispensable parties under Rule 19 who should have been joined in the lawsuit.

In concluding they were not indispensable parties, the Court stated:

> In this case, Greenwood Village argues that the individual landowners of the zoned plots should have been joined since the owners had a "direct and substantial interest in the outcome of this suit." Two individual landowners had originally been joined as defendants, as "representatives" of their class, and two other landowners sought intervention of right under C.R.C.P. 24(a). The district court dismissed the claims against the two landowners originally joined and refused to grant the motion to intervene submitted by the other landowners.
>
> We hold that the individual landowners are not indispensable parties to this action under C.R.C.P. 19(b), nor are they necessary parties whom the district court should have joined under C.R.C.P. 19(a). **The relief sought can be granted in the absence of the landowners, and the relief neither impairs nor impedes the landowners' ability to protect their interests, and does not lead to the risk of multiple inconsistent obligations. *The issues to be determined in this case are whether zoning and rezoning are legislative and thus subject to the referendum and initiative powers reserved to the people.* While the landowners' interests may be indirectly affected by the decision resulting from referendum and initiative elections, the resolution of the issues in dispute in no way affects the landowners of the subject property any more than it affects other landowners of the city**. *See Talbott Farms v. County Commissioners*, 43 Colo. App. 131, 602 P.2d 886 (1979). Therefore, the landowners are not necessary parties and a fortiori they were not indispensable parties. C.R.C.P. 19(b).

638 P.2d at 301 (emphases added and footnote omitted).

This decision in *Margolis* is entirely consistent with the wording of Rule 19(a), which reads:

> **(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. (Some bolding and emphasis added.)

The "subject of the action" in this lawsuit is not to determine the legality of the initiated ordinance's proposed rezoning of the Property or to directly impair the CSU Board's ownership of the Property

or impede its ability to develop or sell the Property as it wishes. Rather, it is to decide the sole question of whether the matters addressed in the initiated ordinance are legislative matters properly subject to the citizen initiative power under the Colorado Constitution and the City's Charter. The same issue addressed by the Supreme Court in *Margolis*. Accordingly, *Margolis* is controlling here.

C. <u>CSU Board has Other Recourses to Protect its Interests in the Property</u>

While the Colorado Supreme Court has recognized the courts have jurisdiction to hear pre-election judicial actions to determine whether a citizen-initiated measure is properly a legislative matter subject to the initiative power under the Colorado Constitution and applicable home rule city charters, *City of Idaho Springs v. Blackwell*, 731 P.2d 1250, 1253 (Colo. 1987), the Supreme Court has been clear this jurisdiction does not extend to courts considering pre-election actions challenging the validity, legality or constitutionality of the substance of a citizen-initiated measure. *McKee v. City of Louisville*, 616 P.2d 969, 972-73 (Colo. 1980). Instead, the substance of a citizen initiative is to be presumed valid and "its actual validity may be considered by the court[s] only if and when it is adopted into law by the electorate." 616 P.2d at 973. Once adopted, any party affected by the initiated measure may then pursue the judicial process to protect any interests abridged by the measure. *Id.* at 972-73.

Therefore, if the CSU Board has any interests to protect because of the substance of the Defendants' initiated ordinance, the CSU Board is not precluded from protecting those interests in a later judicial action if the electors approve the ordinance, regardless of the form of the ordinance presented to the electors. And, even if the CSU Board was to be joined now as a party to this declaratory action, this Court would not have the jurisdiction to consider any claim by the CSU Board seeking to protect its interests in the Property. Instead, the CSU Board must wait to see if the initiated ordinance is adopted by the City's electors before pursuing its claims in the courts. *Id.* at 972-73.

Another example of property owners not being considered an indispensable party under Rule

19(a) because of other possible recourse to protect their interests is found in *Hygiene Fire Protection District v. Board of County Commissioners*, 205 P.3d 487 (Colo. App. 2008), judgment aff'd, 221 P.3d 1063 (Colo. 2009). The Hygiene Fire Protection District ("District") sought to build a new fire station in its service area on privately owned land zoned by Boulder County ("County") as a planned urban development ("PUD"). 205 P.3d at 488. The District submitted its application to the County for approval of the station under a "Location and Extent Review" pursuant to C.R.S. Section 30-28-110. *Id.* The County refused to accept that application and informed the District an amendment to the PUD would be required. 205 P.3d at 488-89. The District sued the County asking the district court to require the County to accept its Location and Extent Review application and to declare an amendment to the PUD was not required. *Id.* The County responded by asking the court to dismiss the lawsuit arguing, in part, the District had failed under Rule 19 to name an indispensable party, the owner of the land on which the District proposed to build its new station. 205 P.3d at 498. The district court denied the motion. *Id.*

On appeal, the Court of Appeals in *Hygiene Fire Protection District* agreed with the district court, stating:

> Here, the relief that the District sought in its complaint was narrow. The District asked the court to find, among other things, that the Land Use Department had exceeded its jurisdiction and abused its discretion in refusing to accept the District's application and in taking the position that the proposed project could not be completed absent an amendment to the PUD. A finding that the Land Use Department abused its discretion by refusing to perform the ministerial task of accepting the District's application in no way implicated the landowners' interests so as to make them indispensable parties. Nor did the District's request for a declaration that the project could proceed absent amendment to the PUD. At root, the question presented involved which process the District was required to employ in order to build its fire station. This determination did not impair the landowners' ability to protect their interests because, whether the court required a Location and Extent Review, as the District sought, or an amendment to the PUD, which the County believed to be required, the landowners would have had the opportunity to be heard and protect their interests through the applicable statutory processes. *See, e.g.,* § 24–67–106(3), C.R.S.2008 (requiring public hearing); §§ 38–1–101 to –122, C.R.S.2008 (procedures for eminent domain); . . . .

205 P.3d at 489.

The same is true here, this Court's narrow determination whether the Defendants' initiated ordinance properly addresses only legislative subject matters or improperly addresses administrative matters that should be severed from the ordinance, does not impair or impede the CSU Board's ability to protect its interests in the Property in post-election litigation if the electors adopt the ordinance. The CSU Board will have recourse in the courts if the Defendants' initiated ordinance is adopted by the electors.

D. Remedy

Defendants seem to argue in the Motion this lawsuit should be dismissed outright under Rule 19(a). However, if this Court determines the CSU Board should be joined as an indispensable party, the appropriate remedy is for the Court to issue an order requiring the CSU Board's joinder as a party as clearly stated and required in Rule 19(a): "the court shall order that he be made a party." *Cruz-Cesario v. Don Carlos Mexican Foods*, 122 P.3d 1078, 1081 (Colo. App. 2005) (generally, if the joinder of the indispensable party is feasible, the court should not dismiss the action, but should order the party joined or allow the plaintiff the opportunity to do so).

V. CONCLUSION

In conclusion, as decided by the Colorado Supreme Court in *Margolis v. District Court* and for the other reasons argued above, the City respectfully requests the Court to deny the Defendants' Motion. If, however, the Court rules the CSU Board is an indispensable party, to order it joined as a party defendant. Also, if the Court determines a hearing on the 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 Defendants' initiated ordinance and the City Council's ballot question on the City's April 6, 2021, regular election ballot.

Dated this 19th day of January, 2021.

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFF
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CERTIFICATE OF SERVICE

The undersigned herby certifies that on the 19th 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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