District Court, Larimer County, State of Colorado 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 494-3500	DATE FILED: January 26, 2021 12:28 PM CASE NUMBER: 2020CV30833
THE CITY OF FORT COLLINS, COLORADO, a Colorado home rule city and municipal corporation, Plaintiff, v. **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,** Defendants.	▲ **COURT USE ONLY** ▲ Case No.: 2020 CV 30833 Courtroom: 3B
ORDER DENYING MOTION TO DISMISS	

Plaintiff City of Fort Collins ("City") filed a complaint for declaratory and injunctive relief against Planning Action to Transform Hughes Sustainably ("PATHS") and other individuals, seeking to exclude certain provisions of a citizens' initiative submitted to the City Council. Generally, the City seeks declarations that the citizen-initiated initiative at issue contains provisions that are administrative rather than legislative and, as such, shouldn't be placed on a ballot to go before the City's electors.

I. INTRODUCTION.

PATHS, a nonprofit corporation, is organized "for the purpose of organizing and representing Fort Collins area residents who are aligned in 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')." Compl. ¶ 1. As readers of this Order may know,

Colorado State University ("CSU") owns the property where Hughes Stadium used to be; that land is presently vacant. The City has annexed the Hughes Stadium Property and neither CSU nor the City agrees on how the property should be zoned. So, PATHS decided to take advantage of their rights under Colo. Const. art. V § 1, and under the City's Charter, art. X § 1(a), and submitted a proposed ordinance to the City Council. The City Counsel chose to refer PATHS' initiated ordinance to the City's voters. In general, the initiated ordinance seeks to mandate rezoning of the Hughes Stadium Property and to require the City to make "good faith" attempts to purchase it.

The initiated ordinance consists of eight sections and provides as follows:

> Section 1. That the City hereby makes and adopts the determinations and findings contained in the recitals set forth above.
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> Section 2. That the City shall acquire the Hughes Stadium property, a 164.56-acre parcel of land legally described in Section 3 of Fort Collins Ordinance No. 123 (2018) ("Annexing the Property Known as the Hughes Stadium Property Annexation to the City of Fort Collins, Colorado") at its fair market value for the purpose of using it for parks, recreation and open lands, natural areas, and wildlife rescue and education.
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> Section 3. That notwithstanding any contrary designation in the April 2019 City Plan or any action taken by the Council subsequent to its annexation of the Hughes Stadium property but before the passage of this Ordinance, the City shall rezone the Hughes Stadium property as Public Open Lands (P-O-L) zoning district pursuant to Division 4.13 of the City of Fort Collins land use code immediately upon passage of this Ordinance.
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> Section 4. That the City shall not de-annex, cease acquisition efforts, or subsequently rezone 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.
>
> Section 5. That to acquire the Hughes Stadium property, the City shall seek funding from existing sources or future partnerships, including but not limited to the Fort Collins Open Space -3- Yes! sales tax fund, Certificates of Participation, the City's general fund, Great Outdoors Colorado and other 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.
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> Section 6. That the City Council may 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 this Ordinance.

Section 7. That the City shall expeditiously, but no later than two years from the passage of this Ordinance, use best efforts in good faith to acquire the Hughes Stadium property utilizing the financial mechanisms described in Sections 5 and 6.

Section 8. That this Ordinance shall take effect immediately upon passage by the majority of the voters of Fort Collins during the first available regular city election, and any registered voter in Fort Collins has legal standing to petition for injunctive and/or declaratory relief related to City noncompliance with the provisions of this Ordinance.

Compl., Ex. B.

The City doesn't believe that several of the above provisions are "legislative" and thus it argues that they're inappropriate for inclusion on the initiated ordinance. In particular, the City asserts that sections 1, 2, 4,[1] 5, 6, 7, and "the next-to-last recital" of the initiated ordinance "are in fact *administrative* matters not subject to the initiative powers of the registered electors of home rule cities under Article V, Sections 1(2) and 1(9) of the Colorado Constitution and under the City's Charter Article X, Section 1(a)." Compl. ¶ 51. It, however, agrees that sections 3 and 4 of the initiated ordinance "are properly characterized as 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)." *Id.* ¶ 57.

The City seeks very specific relief. As to sections 1, 2, 4, 5, 6, 7, and in the next-to-last recital, it seeks a declaration that those provisions "are administrative matters not 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)." Compl., Prayer for Relief ¶ A. Then, it requests injunctive relief, in the form of an order directing that the "Ballot Initiative and Ballot Measure to exclude and sever from them the provisions in Sections 1, 2, 4, 5, 6 and 7 and in the

[1] The Court perceives the City's objection to section 4 to be to the extent that it requires the City to "cease acquisition efforts" to purchase the Hughes Stadium Property.

next-to-last recital…." *Id.* ¶ C.

Conversely, as to sections 3 and 4, the City seeks a declaration 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 legislative matters …." *Id.* ¶ B.

Time is of the essence and there's a need to promptly adjudicate the questions presented by the City to enable the parties to proceed accordingly. But PATHS doesn't believe that everyone who should be a party to this action is involved as a party. So, PATHS filed a motion under Colo. R. Civ. P. 12(b)(6), seeking dismissal of the City's complaint because it didn't join an indispensable party—the CSU Board of Trustees. The City opposes the motion, noting that CSU isn't indispensable in this action, which seeks adjudication of legally narrow issues. Further, the remedy PATHS seeks—dismissal—seems drastic because, assuming it's right, the Court could simply order that CSU be joined as a party.

As more fully explained below, PATHS' motion to dismiss is denied. The CSU Board of Trustees is not an indispensable party and need not be joined in this action, which deals with very narrow legal questions.

II. APPLICABLE LEGAL STANDARDS.

A party may seek dismissal of a complaint for the "failure to join a party under C.R.C.P. 19." Colo. R. Civ. P. 12(b)(6). In turn, Rule 19(a), which governs compulsory joinder, provides that a person may be joined to an action if several conditions apply:

> (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.

Colo. R. Civ. P. 19(a).

Determining whether a party is indispensable depends on the facts of each case and is a mixed question of law and fact. C*ruz-Cesario v. Don Carlos Mexican Foods*, 122 P.3d 1078, 1080 (Colo. App. 2005). The principal question the Court must ask is whether "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). As the Court of Appeals later put it, "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, LLC*, 318 P.3d 65, 69 (Colo. App. 2008).

The Court of Appeals also has noted that if an indispensable party hasn't been joined in a suit, dismissal isn't the appropriate remedy: "If there has been a failure to join a necessary party, the court should not dismiss the action, but rather should join that necessary party or allow plaintiff an opportunity to do so." *B.C., Ltd. v. Krinhop*, 815 P.2d 1016, 1018–19 (Colo. App. 1991).

III. DISCUSSION.

As the City correctly notes in its response to the motion to dismiss, the Supreme Court has decided the precise issue presented here. And it's done so contrary to the position that PATHS takes

on its motion.[2] In *Margolis v. District Court*, 638 P.2d 297 (Colo. 1981), the Supreme Court addressed the issue of whether property owners should've been joined as indispensable parties to an action to determine whether a proposed municipal ordinance was subject to the initiative provisions of Colo. Const. art. V § 1 and that city's charter. *Id.* at 299, 301.

Answering that question in the negative, the Supreme Court concluded that the individual landowners were neither necessary nor indispensable under Colo. R. Civ. P. 19. It reasoned that the relief sought in the action—a determination "whether zoning and rezoning are legislative and thus subject to the referendum and initiative powers reserved to the people"—"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." *Margolis*, 638 P.2d at 301.

As in *Margolis*, the CSU Board isn't an indispensable or necessary party to this action. The

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[2] PATHS' failure to substantively address *Margolis* on its motion, save by oblique "but see" and "compare" *Blue Book* citations, is concerning. Under Colo. R. Prof'l. Cond. 3.3(a)(2), "a lawyer shall not knowingly … fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." As the comment to the Rule 3.3 further explains, "although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false." *Id.* comment 2. PATHS' motion barely passes muster on this count.

PATHS cites *Norby v. City of Boulder*, 577 P.2d 277 (Colo. 1978), for the proposition that "[c]ourts have held applicants for zoning, rezoning, and zoning variances to be indispensable parties." Mtn. to Dismiss at 11. It then contends—with a but-see citation—that *Margolis* stands for a contrary proposition. That's misleading. *Norby* and *Margolis* are completely inapposite. To begin with, *Norby* dealt, in relevant part, with whether a "failure to join all indispensable parties in a Rule 106 action [for judicial review of a quasi-judicial decision by a city] within the time limit prescribed by the rule is a jurisdictional defect which requires dismissal of the action." *Norby*, 577 P.2d at 279. *Margolis* didn't deal with a Rule 106 action, but with whether landowners were indispensable parties in an action to compel a municipality to refer proposed zoning ordinances to the electors of that city. 638 P.2d at 299. Moreover, PATHS failed to note that *Norby* was *overruled* on the very point it cited the decision because three years after it, Colo. R. Civ. P. 106 was amended. *See Thorne v. Board of County Com'rs of Fremont County*, 638 P.2d 69, 71 n.4 (Colo. 1981) (recognizing Rule 106 amendment). The Court expects counsel to be forthright and provide accurate propositions for the decisions they cite.

relief that the City seeks is quite narrow, dealing solely with whether several provisions of the initiated ordinance are administrative and thus not subject to the initiative powers reserved to the people. *Id.* It's true that, as PATHS notes, if the Court were to grant the relief the City seeks, the Hughes Stadium Property would be "zoned only for Public Open Lands," and the City wouldn't be "bound to use best efforts at fair market value to acquire it." Mtn. to Dismiss at 12. And, if that came to pass, it would "affect the consummation of the purchase-sale agreement" between the CSU Board and a developer. *Id.*

But the Supreme Court thinks that's an indirect interest in property, which doesn't make the CSU Board an indispensable party: "While the [CSU Board's] 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." *Margolis*, 638 P.2d at 301. Thus, given *Margolis*, PATHS' motion to dismiss must be denied.

IV. CONCLUSION.

For the reasons set forth above, PATHS' motion to dismiss is denied.

SO ORDERED on this 26th day of January, 2021.

BY THE COURT:

JUAN G. VILLASEÑOR
District Court Judge