

DISTRICT COURT, CITY AND COUNTY OF LARIMER, COLORADO Larimer County Justice Center 201 Laporte Avenue, Suite 100 Fort Collins, Colorado 80521 (970) 498-6100	DATE FILED: January 26, 2021 11:51 AM FILING ID: 3134C97ED123F CASE NUMBER: 2020CV30833 ▲ COURT USE ONLY ▲
PLAINTIFF: THE CITY OF FORT COLLINS, COLORADO, a Colorado home rule city and municipal corporation, vs. DEFENDANTS: PLANNING ACTION TO TRANSFORM HUGHES SUSTAINABLY CORP., a Colorado nonprofit corporation; and ELENA M. LOPEZ, MELISSA ROSAS, AND PAUL PATTERSON, each in their official capacity as a petition representative of the persons signing the petition for a citizen-initiated ordinance relating to the City of Fort Collins rezoning and acquiring certain real property	Case Number: 2020CV30833 Div.: 3B
<i>Attorney for the Defendants:</i> Michael Foote, #34358 Foote Law Firm, LLC 357 S. McCaslin Blvd. Suite 200 Louisville, Colorado 80027 Phone: (303) 519-2183 Fax: (888) 804-8679 mjbfoote@gmail.com	
DEFENDANTS’ REPLY TO PLAINTIFF’S RESPONSE TO DEFENDANTS’ MOTION TO DISMISS PURSUANT TO C.R.C.P. 12(B)(6)	

I. INTRODUCTION

Defendants, Planning Action to Transform Hughes Sustainably Corp. (“PATHS”), Elena M. Lopez, Melissa Rosas, and Paul Patterson in their official capacities as petition representatives (collectively, “Defendants”), through their undersigned attorney, move this Court to grant Defendants’ Motion to Dismiss (“Motion”) against the Plaintiff, the City of

Fort Collins (“City”) because they City failed to include an indispensable party in its Complaint for Declaratory Relief. The City did not include Colorado State University (“CSU”) in its Complaint even though CSU is the sole owner of the Hughes Stadium property (“the Property”) and would be materially affected by the relief sought by the City. In its Response to Defendant’s Motion to Dismiss (“Response”), the City attempts to limit the relevant information about the Property considered by the Court, seeks to have one case rejecting indispensability dispositive of the present matter, and argues the indispensability issue necessarily requires judicial intervention on substantive ballot measure questions. All of those arguments should be rejected by this Court and the Defendants’ Motion should be granted.

II. LEGAL STANDARD

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

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

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

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....

Whether a party is indispensable depends on the facts of each case. *Jorgenson v. City of Aurora*, 767 P.2d 756 (Colo. App. 1988). When determining whether a nonjoined party is

indispensable, courts ask the following question: “[i]s the absent person's interest in the subject matter of the litigation such that no decree can be entered in the case which will do justice between the parties actually before the court without injuriously affecting the right of such absent person?” *Woodco v. Lindhal*, 380 P.2d 234, 238 (Colo. 1963). Whether a party is indispensable is a mixed question of fact and law. *Prutch Brothers Television & Music Systems, Inc. v. Crow Watson No. 8*, 732 P.2d 241 (Colo. App. 1986).

III. ARGUMENT

A. CSU actions related to the Property are relevant

The Defendants’ Motion to Dismiss outlined important and relevant information about CSU’s current plans to sell the Property to a third party for the purpose of residential development. The information paints a clear picture of CSU’s intent to sell the Property to a third party for residential development, something it cannot do if the PATHS initiative as amended by City’s declaratory request passes.

In its Response, the City alleges a substantial amount of the information outlined in the Defendants’ Motion is irrelevant. The City claims, “[w]hile 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.” Pl. Resp. at 4. Further, the City argues:

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 property the subject of a citizen initiative under the Colorado Constitution Article V, Sections 1(2),(9) and City Charter X, Section 1(a).

Id.

The City presents an overly restrictive interpretation of which facts in this matter are relevant and attempts to narrow its version of relevant facts to only those helpful to its position. In essence, the City's position is like an athletic team that puts its players on the field and then claims the opponents' players are irrelevant to the game. CSU's plans to sell the property to a third party for the purpose of residential development puts CSU directly at odds with the rezoning clauses of the initiative and even more affected if the rezoning clauses pass without any mandate for the City to acquire the property. A developer's subsequent inability to build any residential structures on the Property combined with a lack of a buyer for the Property is relevant to deciding whether the City's declaratory request "cannot be made without affecting [CSU's] interest or leaving controversy in such situation that its final determination may be inequitable." *Woodco* at 238.

B. CSU is an indispensable party based upon the unique circumstances of this action

Whether a party is indispensable is analyzed on a case-by-case basis and no single case is dispositive. *Jorgenson*. The City argues *Margolis v. District Court of County of Arapahoe*, 638 P.2d 297 (Colo. 1981) is "controlling" in the present case. Pl. Resp. at 9. However, *Margolis* is one of many cases that analyzed party indispensability on a case-by-case basis. The *Margolis* opinion held that landowners in a Greenwood Village zoning referendum at issue in the case were not indispensable but did not outline the nature of the zoning change at issue or analyze how any specific facts led to the Court's conclusion. The Defendants do not dispute some property related matters can be litigated "without injuriously affecting the right of such absent

person.” *Woodco* at 238. That was the case in three opinions finding no indispensable parties cited by the City in its Response: *Thorne v. Board of County Commissioners*, 638 P.2d 69, 73 (Colo. 1981) (“the interests of the absent landowners are indirect and speculative”); *Gold Hill Development Company, LP v. TSG Ski & Golf, LLC*, 378 P.3d 816, 831 (Colo. App. 2015) (plaintiff cited no evidence that the entity it sought to join as an indispensable party had a “legal cognizable interest in the subject properties”); and *Williamson v. Downs*, 829 P.2d 498, 500 (Colo. App. 1992) (no evidence that non-party landowners claimed an interest in the property at issue). In the present action, the pleadings before the Court establish CSU has a property interest and its property interest is neither indirect nor speculative.

On the other hand, many examples also exist of cases where the court determined a property owner was indispensable to the action. *Potts v. Gordon*, 525 P.2d 500, 503 (Colo. App. 1974) held owners of residences built on contaminated land were indispensable parties, reasoning that “joinder will be insisted upon if the action might detrimentally affect...the absentee’s Ability to protect his property or to prosecute or defend any subsequent litigation in which he might become involved.” (citation omitted). *Dunne v. Shenandoah Homeowners Ass’n, Inc.* 12 P.3d 340, 344 (Colo. App. 2000) held individuals property owners were indispensable parties in an action to enforce restrictive covenants even though the homeowners’ association was already a named defendant because of the possibility of conflicting interests between the parties. In *Bittle v. CAM-Colo., LLC*, 318 P.3d 65, 69 (Colo. App. 2012), the court held a county was indispensable in determining whether the plaintiffs had obtained an adverse possession right to three roadways.

“Whether a party is indispensable within the meaning of C.R.C.P. 19 depends on the context of the particular litigation.” *Jacobucci v. District Court*, 541 P.2d 667, 674 (Colo. 1975).

The unique circumstances of the present case make CSU an indispensable party. First, CSU has a present interest as the sole owner of the Hughes Property. Any successful ballot measure affecting the Property will immediately affect CSU, so the CSU interest in the present action is not indirect, vague, or speculative. Second, the City's declaratory relief would negatively affect CSU and its interest in the Property. CSU has publicly announced that it plans to sell the Property to a third party for the purpose of residential development for approximately \$14 million. The PATHS initiative currently requires the rezoning of the Property into Public Open Lands and a subsequent good faith effort for the City to acquire the property at fair market value. A modified initiative would only require the rezoning without a concurrent requirement for the City to acquire the land. The City's declaratory relief will keep the rezoning of the Property to Public Open Lands intact while virtually eliminating the possibility of a private purchaser. No developer will buy the Property for the current asking price without an ability to profit from it, and the City will have no obligation to pursue purchasing the property either. The relief sought by the City would, if successful, 'injuriously affect the right of an absent party.' *Woodco*.

C. The existence of other remedies does not preclude the finding of indispensability

The City claims CSU is not an indispensable party because it could seek redress for any damages as a result of the modified ballot measure at a later date. Pl. Resp. at 9. It is true CSU could seek damages if the modified initiative passes, but that fact is not dispositive of whether CSU is an indispensable party in this action. If it were, no party would ever be indispensable if it could file a subsequent action for damages. Each party found indispensable in cases cited in the previous section could have sought redress in a subsequent action if necessary. *See, e.g. Potts*, 525 P.2d at 503. Rather, the salient question is whether the absent party's interest in the subject

matter of the current litigation is such that no decree can be entered in the case without injuriously affecting the right of an absent party. *Woodco* at 238. It is not whether the injured absent party can seek damages at a later date.

The City again attempts to narrow the scope of relevant information before the Court by arguing party indispensability necessarily implicates a substantive matter outside of the Court's current jurisdiction. Pl. Resp. at 9. The Defendants do not seek a Court ruling on the substance of its initiative, nor do the Defendants seek joinder of CSU so CSU can opine on the substance of the initiative. Defendants believe CSU will be materially affected by the City's declaratory judgment request and should state its argument regarding administrative versus legislative matters before the Court. If CSU agrees with the City's position, it should so state. If it disagrees, it should make its own arguments while the issue is ripe. The City's reliance on *Blackwell*, *McKee*, and *Hygiene* to reject CSU indispensability is misplaced because CSU's indispensability is unrelated to substantive arguments about the initiative.

D. The Court can order an indispensable party to be joined

Defendants agree with the City that this Court may order CSU to be a joined party pursuant to C.R.C.P. 19(a). Pl. Resp. at 11.

IV. CONCLUSION

WHEREFORE, Defendants respectfully ask for **oral argument** in this matter, and upon conclusion therewith request the Court to enter an order **dismissing** the Plaintiff's Complaint or other relief as deemed appropriate.

Respectfully submitted on this 26th day of January, 2021.

/s/ Michael Foote
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Attorney for the Defendants

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 26th day of January, 2021, a true and correct copy of this REPLY TO PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO DISMISS was filed via the Colorado courts e-filing system and served to the following parties:

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