| | |
|---|---|
| **DISTRICT COURT, CITY AND COUNTY OF LARIMER, COLORADO**<br>Larimer County Justice Center<br>201 Laporte Avenue, Suite 100<br>Fort Collins, Colorado 80521<br>(970) 498-6100 | **▲COURT USE ONLY▲** |
| **PLAINTIFF:** THE CITY OF FORT COLLINS, COLORADO, a Colorado home rule city and municipal corporation,<br><br>vs.<br><br>**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**<br><br>Div.: 3B |
| *Attorney for the Defendants:*<br><br>Michael Foote, #34358<br>Foote Law Firm, LLC<br>357 S. McCaslin Blvd. Suite 200<br>Louisville, Colorado 80027<br>Phone: (303) 519-2183<br>Fax: (888) 804-8679<br>mjbfoote@gmail.com | |
| **DEFENDANTS' RESPONSE AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** | |

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, and pursuant to C.R.C.P. 56, hereby move this Court to deny the Plaintiff's Motion for Summary Judgment. In support of this Response, Defendants state as follows:

## I. INTRODUCTION

Article V, Section 1 of the Colorado Constitution states, "[a]ll political power is vested in and derived from the people; all government, of right, originates from the people, is founded upon their will only, and is instituted solely for the good of the whole." Defendants Planning Action to Transform Hughes Sustainably ("PATHS"), many of its members long-time advocates of more open space within the City of Fort Collins ("City"), have brought a collective voice to land use decisions with important implications for the City. Defendants' advocacy to turn the Hughes property into a natural lands area enjoys widespread support from Fort Collins residents but has hit numerous roadblocks from city staff and Council. *See* Def. Mot. to Dismiss at 2-6. "The registered electors of the city shall have the power 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." Article X, Section 1 of the Fort Collins Charter. PATHS simply seeks to exercise that power.

Despite the Defendants' attempt to exercise their fundamental rights as enshrined in the Colorado Constitution and Fort Collins Charter by putting their proposal to a city-wide vote, the idiom "you can't fight city hall" continues to define the response by the City. Instead of allowing its citizens to vote on the matter, the City asks this Court to exclude provisions from consideration by the citizens altogether. The City argues certain provisions of the initiated ordinance are administrative rather than legislative and therefore improper for the People to consider. The City's argument fails, and its Motion for Summary Judgment should be denied, for the reasons outlined in this Response.

First, the City's Motion should be denied because the People's right to determine how government acts on their behalf is fundamental. *McKee v. City of Louisville*, 616 P.2d 969

(Colo. 1980). The People's power to use initiatives and referenda to affect the operation of government is liberally construed and exceptions to the use of that power are narrow. *Margolis v. District Court of County of Arapahoe*, 638 P.2d 297 (Colo. 1981).

Second, because exceptions to the power of initiative must be narrowly construed, there is no case law precedent with similar facts mandating the exclusion of certain provisions from consideration by the voters. Even the case most relied upon by the City, *Vagneur v. City of Aspen*, 295 P.3d 493 (Colo. 2013), considered an initiative much more complex and multi-jurisdictional than the PATHS initiated ordinance. Annexation of a specific property is a legislative function. *McKee* at 975. Zoning and rezoning of a specific property is legislative. *Margolis* at 304. Even the "rezoning of a 'relatively small' parcel, especially when done by initiative, may well signify a fundamental change in city land-use policy." *Id*. It follows that direction to city staff to acquire a large parcel of real property with significant policy ramifications is also legislative. The acquisition of the Hughes property would constitute a public policy of general applicability and be legislative in nature.

Third, historic precedents show clear parallels between the PATHS initiated ordinance and traditional exercise of legislative power by Colorado General Assembly and the City. In its Motion, the City concedes the property rezoning sections of the initiated ordinance are legislative but argues the sections of the initiated ordinance addressing acquisition are administrative. Pl. Mot. for Sum. Judg. at 9. However, the City does not mention its own history of exercising legislative power to acquire real properties. An initiative "that finds longstanding parallels in statutes enacted by legislative bodies, for example, may be deemed legislative on that basis…" *Vagneur* at 507. At the very least, how the City has historically distinguished between its use of

legislative and administrative power is a genuine issue of material fact that should lead to a denial of its Motion for Summary Judgment.

## II. RESPONSE TO STATEMENT OF UNDISPUTED MATERIAL FACTS

1. The Defendants do not dispute the material facts in Plaintiff's ¶ 1.
2. The Defendants do not dispute the material facts in Plaintiff's ¶ 2.
3. The Defendants do not dispute the material facts in Plaintiff's ¶ 3.
4. The Defendants do not dispute the material facts in Plaintiff's ¶ 4.
5. The Defendants do not dispute the material facts in Plaintiff's ¶ 5.
6. The Defendants do not dispute the material facts in Plaintiff's ¶ 6.
7. The Defendants do not dispute the material facts in Plaintiff's ¶ 7.
8. The Defendants do not dispute the material facts in Plaintiff's ¶ 8.
9. The Defendants do not dispute the material facts in Plaintiff's ¶ 9.
10. The Defendants do not dispute the material facts in Plaintiff's ¶ 10.
11. The Defendants do not dispute the material facts in Plaintiff's ¶ 11.
12. The Defendants do not dispute the material facts in Plaintiff's ¶ 12.
13. The Defendants do not dispute the material facts in Plaintiff's ¶ 13.
14. The Defendants do not dispute the material facts in Plaintiff's ¶ 14.
15. The Defendants do not dispute the material facts in Plaintiff's ¶ 15.
16. The Defendants do not dispute the material facts in Plaintiff's ¶ 16.
17. The Defendants do not dispute the material facts in Plaintiff's ¶ 17.
18. The Defendants do not dispute the material facts in Plaintiff's ¶ 18.
19. The Defendants do not dispute the information contained in the affidavit of Tawnya Ernst establishes evidence of due diligence and expertise used to acquire real property in the City of Fort Collins, but dispute the evidence submitted establishes those procedures

apply to other Colorado municipalities.

## III. STATEMENT OF ADDITIONAL UNDISPUTED (OR DISPUTED) MATERIAL FACTS

1. The Colorado General Assembly has passed legislative acts regarding the acquisition, conveyance, and appropriation for real property. Def. Response at 19-21.
2. The Fort Collins City Council has passed legislative ordinances and resolutions regarding the acquisition and conveyance of real property. Def. Response at 22-24.

## IV. STANDARD OF REVIEW

Defendants do not dispute the standard of review statement in the Plaintiff's Motion for Summary Judgment.

## V. ARGUMENT

### A. The reservation of legislative power to the People should be interpreted broadly with only narrowly construed exceptions

Article V, Section 1 of the Colorado Constitution vests the legislative power of the state in the General Assembly, but it reserves the powers of initiative and referendum to the People. Those same powers extend to the registered electors of every city and town. Article V, Section 1(9). "This right is of the first order; it is not a grant to the people but a reservation by them for themselves." *McKee v. Louisville*, 616 P.2d 969, 972 (Colo. 1980). That reservation of power is to be liberally construed in favor of those who seek to exercise that right, and any limitations on the power must be strictly construed. *Margolis v. District Court of County of Arapahoe*, 638 P.2d 297 (Colo. 1981). "[T]he power to call referendum and initiative elections is a direct check on the exercise or non-exercise of legislative power by elected officials." *Id.* at 303. When an

elected body – like the Fort Collins City Council – fails to act on a legislative issue of importance to the people of Fort Collins, those electors have the right to call the question by submitting an initiative petition. Article X, Section 1 of the Fort Collins charter. "Indeed, a heightened community sensitivity to the quality of the living environment and an increased skepticism of the judgment of elected officials provide much of the impetus for the voters' exercise of the power of referenda and initiative in the zoning context." *Margolis* at 303. That observation, written in 1981, applies equally to the current day and to the PATHS initiated ordinance. As explained below, the acquisition of Hughes property can be a legislative policy of general applicability for the same reasons as the annexation and zoning of the property is legislative policy of general applicability. The PATHS initiated ordinance does not fit within narrowly construed exceptions to the power of initiative established by the courts, and the broad power reserved to the People should be applied in the present case.

**B. <u>The acquisition of an individual property can be a policy of general applicability and legislative in nature like the annexation and zoning of an individual property</u>.**

Bright-line distinctions between legislative and administrative functions in ballot measures have proven to be difficult with a few exceptions. *Vagneur* is the latest Colorado Supreme Court case to examine the question, but even the *Vagneur* opinion admits the nebulous, fact-specific nature of the inquiry:

> 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, that seem more like traditional executive acts may be deemed to fall on that side of the line.

*Vagneur* at 507 (citation and quotation omitted).

In that vein, it is instructive to review historical examples from Colorado cases addressing the issue and their implications to the PATHS initiated ordinance. The cases show the annexation and zoning of individual properties are legislative in nature, provisions attempting to amend the execution of previously enunciated legislative policies are administrative, and the classification of other provisions depend on whether they are public policies of general applicability.

**1. *Aurora v. Zwerdlinger*, 571 P.2d 1074 (Colo. 1977).** In *Zwerdlinger*, Aurora citizens attempted to put a referendum on the ballot which would reverse a previously enacted water utility rate increase. The Court held that utility rate ordinances are administrative in character. In supporting its holding, the Court indicated:

> The successful operation of a public utility is a business proposition involving the exercise of discretion and good judgment in management. Expenses incident and essential to proper operation are necessary based on the cost of labor, material and other facts at the time the services are rendered. They are of such a fluctuating nature, due to economic and other temporary conditions, as to make it impractical, if not impossible, for the general public to appraise them in the absence of specific data, facts and information necessary to arrive at a fair and accurate judgment upon the subject. The changing expense factor goes to the very heart of the operation.

*Id.* at 1077 (citation omitted).

The Court noted that subjecting every ordinance, including those of an administrative nature, to the referendum power could lead to chaos and "bringing the machinery of government to a halt." *Id.* at 1076. Ballot measures affecting the day-to-day operations of utilities were among administrative matters which could hinder government operations should they be subject to initiative or referendum power. While *Zwerdlinger* provided a useful analysis of the distinction between legislative and administrative initiative topics, the PATHS initiated ordinance addresses the zoning and acquisition of a large property rather than new rules for an

existing governmental operation. The setting of a new policy by acquiring a unique property within the City would not implicate the *Zwerdlinger* Court's concern about "bringing the machinery of government to a halt."

**2. *McKee v. City of Louisville*, 616 P.2d 969 (Colo. 1980).** The Louisville City Council passed an ordinance annexing a single 1407-acre parcel of land owned by a development consortium and intended for development of residences and a shopping center. Some citizens objected and filed a measure designed to repeal the annexation ordinance. The Court found this single property annexation ballot measure should go before the voters. "The uniquely local subject matter of the initiated measure, its clearly legislative character, and the timely filing of the initiative petitions prior to the effective date of annexation ordinance 637, place the electors' claim to an initiative election within the broad powers of Article V, Section 1 of the Colorado Constitution." *Id.* at 974 (citation omitted).

While *McKee* addressed annexation of a single piece of property rather than zoning or acquisition, its analysis is germane to the PATHS initiated ordinance. Like *McKee*, the PATHS ballot measure addresses a "uniquely local subject matter" that has been the subject of considerable local debate, and its ultimate zoning and acquisition will represent the proclamation of a policy with widespread ramifications for the City and its open space.

**3. *Margolis v. District Court of County of Arapahoe*, 638 P.2d 297 (Colo. 1981).** Three municipal zoning and rezoning ordinances, each applying to a single property, were enacted by the city councils of Greenwood Village, Lakewood and Arvada. In the Greenwood Village case, its city council annexed 31 parcels of undeveloped land equaling approximately 90 acres and subsequently passed a zoning ordinance applicable to those 90 acres. In Lakewood, the city council passed a rezoning ordinance applicable to properties around an existing shopping

mall. The Arvada city council rezoned a single three-acre piece of property to allow for the construction of a professional office building. Citizens submitted petitions to reverse the zoning and rezoning decisions in all three cases. *Id.* at 299-300. The Court held zoning and rezoning ordinances were legislative in nature, thus the petitions at issue should be submitted to a vote. *Id.* at 306.

The Court indicated a "rezoning of a 'relatively small' parcel, especially when done by initiative, may well signify a fundamental change in city land-use policy." *Id.* at 304 (citation omitted). This is because while "decisions on 'small' rezonings may directly affect only a few people, such decisions may more properly be seen as the setting of policy for the future." *Id.* The zoning or rezoning of one particular property may have effects on nearby residents, the housing market, and the future character of the entire community. *Id.* These types of general effects on a community, even though they may originate by an action related to one property, makes a zoning or rezoning ordinance legislative in nature. The Court noted:

> [T]he power to call referendum and initiative elections is a direct check on the exercise or non-exercise of legislative power by elected officials. Indeed, a heightened community sensitivity to the quality of the living environment and an increased skepticism of the judgment of elected officials provide much of the impetus for the voters' exercise of the powers of referenda and initiative in the zoning context.
>
> *Id.* at 303.

The cities argued that allowing ballot measures addressing zoning and rezoning matters to go forward would lead to a bevy of land use related initiatives or referenda, causing the kind of chaos in government warned against in *Zwerdlinger*. The Court rejected that argument and wrote, "We do not agree. We note that the requirements for placing an issue before the voters of a city are significant." *Id.* at 305. In addition, "[m]inor zoning and rezoning decisions which do not affect the broad base of the citizens of a community will be unlikely to generate the

magnitude of opposition necessary to place such an issue before the voters in referendum or initiative form." *Id.*

Like zoning acts at issue in *Margolis*, the ultimate legislative decision regarding zoning and acquisition of the Hughes property will have far-reaching effects on the future character of Fort Collins. Residents know this and have been particularly involved in the policy decision regarding the future of the Hughes property. Def. Mot. to Dismiss at 3-6. The PATHS initiated ordinance validates the Colorado Supreme Court's prediction about the low frequency of zoning related ballot measures. The PATHS initiated ordinance is the first known ballot measure in Fort Collins to ask residents to vote on a real property zoning or acquisition matter. Its petition received over 8,300 signatures despite the severe limitations presented by the COVID-19 pandemic and the Cameron Peak wildfire. Def. Ex A (Lopez aff.) ¶ 11. The amount of public interest shown during prior city council and zoning board proceedings as well as the thousands of petition signatures show the Hughes property matter rises to the level of a generally applicable policy issue like the *Margolis* opinion contemplated. *See* Def. Mot. to Dismiss at 4-6.

**4. *Witcher v. Canon City*, 716 P.2d 445 (Colo. 1986).** The *Witcher* case ruled upon a ballot measure proposed to change the terms of a lease between Cañon City and the owners of the Royal Gorge Bridge. Two city-wide elections determined the legislative policy of Cañon City was to lease the bridge rather than purchase or operate it. Cañon City and the bridge owners agreed to seven revisions of the lease between 1967 and 1981. The parties agreed to an eighth amendment shortly thereafter but that action was challenged by Cañon City residents who sought to refer a referendum repealing the eighth amendment. The City Council refused to submit the referendum for a city-wide vote because it dealt with an administrative matter and the Court agreed. *Id.* at 447-48. The Court held that lease amendments were temporary administrative

actions in furtherance of a legislative policy already specified; in this case, the lease was by definition not of a permanent nature, nor did it set a new public policy. The policy of leasing the bridge rather than owning or operating it had been set by two elections over a twenty-year period. *Id.* at 451-52. "Since we conclude that the Lease itself merely carried out the previously established policy of transferring all operational and maintenance responsibilities for the bridge to a private company, and is therefore administrative in character, it is clear that the eighth amendment is also administrative…" *Id.* at 451. The Court's distinction between the execution of prior legislative decisions and enunciation of new legislative policies is relevant to the PATHS initiative analysis as well. The PATHS initiated ordinance does not seek to modify administrative actions in furtherance of an existing policy; instead, it would put a new zoning and acquisition policy in place.

**5. *Idaho Springs v. Blackwell*, 731 P.2d 1250 (Colo. 1987).** The Idaho Springs City Council enacted an ordinance which was then approved by the voters in 1977 to raise local sales and use taxes to fund capital improvements for water infrastructure and a new city hall. In January 1984, the city council approved a motion to purchase property for the new city hall. It intended to move an existing schoolhouse building to its newly purchased land and renovate it for the new city hall. The city entered into a contract to purchase the property in February of 1984. Citizens filed two initiative petitions with the city a month later to overturn those decisions. The first initiative would have repealed any measure authorizing the movement of the schoolhouse or the purchase of any land for the purpose of a new location for the schoolhouse. The second initiative was designed to prohibit the city from using the sales and use tax revenues approved in 1977 to move the schoolhouse or acquire land for the purpose of moving the schoolhouse. *Id*. at 1250-52.

The Court held the initiatives were administrative rather than legislative for two reasons: (1) unlike annexation and zoning ordinances, the Idaho Springs initiatives did not address a policy of general applicability; and (2) the act of determining a location and structure for the new city hall was an administrative decision based upon legislative policy previously decided in the city's 1977 ordinance and election. The Court explained "[t]he people have reserved the right to legislate, not to determine how previously enacted public policies will be administered or executed." *Id.* at 1253. Similar to *Witcher*, *infra*, the continued distinction between the execution of prior legislative decisions and enunciation of new legislative policies provides an applicable framework for the PATHS initiated ordinance. The acquisition of the Hughes property in the PATHS initiated ordinance is more analogous to the enunciation of a new legislative policy than the execution of a previous legislative decision.

**6. *Colorado Springs v. Bull*, 143 P.3d 1127 (Colo. App. 2006).** Another examination of the differences between executing prior policy and setting new policy occurred in *Bull*, this time differentiating between the two categories within the same ballot measure. Citizen activists filed two initiated ordinances in Colorado Springs, one to enact revenue limitations and the other to curtail certain types of spending processes. Each initiative contained multiple sections, some of which were held to be legislative and others administrative. The Court of Appeals severed the administrative portions from the initiatives but left the legislative sections intact. *Id.* at 1137-1139.

The text of the revenue limitation initiative was as follows (with added italicized bracketed language indicating legislative versus administrative findings):

> [1] [*legislative*] The property tax in tax year 2006 shall be four mills, and thereafter phased out one mill or more yearly. [2] [*administrative*] All street light charges after 2002 shall be refunded by March 1, 2006 and shall end by that date. [3] [*legislative*] Starting January 1, 2008, the 2% general sales tax shall adjust to 1.75% in five equal

> yearly steps. [4] [*legislative*] All excess revenue shall be refunded to taxpayers yearly. [5] [*legislative*] This ordinance shall be strictly enforced. These voter-approved revenue changes shall be in addition to any other tax cut or revenue reduction or refund, and may be delayed only as needed for current general fund revenue to increase yearly by future inflation. This ordinance shall be amended, superseded, or repealed only at a November election by voter-approved petitions. All relevant current provisions of section 7-90 of the city charter and Article X, section 20 of the state constitution shall apply to this ordinance.

*Id.* at 1134.

All but one of the clauses in the revenue limitation ordinance were found to be legislative. The second clause dealing with street light charges was found to be administrative because it pertained to the day-to-day operation of a utility (citing *Zwerdlinger*) and "an initiative that is retrospective in nature, and calls for a refund of revenues collected by a utility in prior fiscal years, is not a declaration of public policy of general applicability." *Id.* at 1135.

The spending initiative reads as follows (with added italicized bracketed language indicating legislative versus administrative findings):

> [1] [*legislative*] Future non-enterprise city financial obligations that continue after the year created shall not exceed ten years. Each shall require voter approval of a separate petition at a November election. Total payments due during all such future financial obligations shall not exceed ten percent of the taxable valuation for assessment of taxable real property in the city. [2] [*administrative*] Starting January 2006, all current certificates of participation shall be paid off in no more than five equal yearly payments. [3] [*legislative*] Starting January 2007, and without using intergovernmental revenue, the city shall reserve yearly three percent or more of its fiscal year spending in an interest-bearing fund, with principal and interest to be used only to buy city capital improvements for cash. The city shall fully deplete that fund before incurring such future financial obligations…[1]

*Id.* at 1135-36.

The Court found the second section of the spending initiative administrative because the mandate to pay off all current certificates of participation that existed at the time did not create a

[1] The remainder of the proposed initiative contained definitions of some of the terms within the initiative.

new permanent policy going forward. *Id.* at 1137. The other provisions were found to be legislative.

**7. *Vagneur v. City of Aspen*, 295 P.3d 493 (Colo. 2013).** Modification of the highway entrance to the City of Aspen had been the subject of public debate since the 1960's, but the City of Aspen in conjunction with the Colorado Department of Transportation and the Federal Highway Administration formally began a redesign process in 1994 by starting the extensive Environment Impact Statement ("EIS") process pursuant to the National Environmental Policy Act ("NEPA"). The next twenty-three years saw two successful city council referred ballot measures required by the city charter related to the repurposing of open space, a Memorandum of Understanding between Aspen, the state, and federal agencies, and the development of the "preferred option" for the highway modification and concurrent rejection of several other options. In 2007, a citizens group submitted two initiatives which would adopt one of the administratively rejected development options instead of the "preferred option" as approved by the intergovernmental process.

The initiatives were substantially similar to each other, and both were extensive and detailed. *See* Def. Ex. B (Aspen initiative #1) and Ex. C (Aspen initiative #2).[2] For example, the initiatives mandated the adoption of one of the previously rejected options for the road, prescribed specifications for lane alignment and the transit envelope, ordered light rail compatibility, and required seven separate "environmental and historic resource mitigation measures" including the avoidance of a community garden and a hang gliding landing zone.

[2] Attached as exhibits to Petitioners' Memorandum of Law in Support of Petition for Review in *Vagneur, Curtis et al v. Koch, Kathryn et al*, Pitkin County case number 2007CV175.

The Court held the initiatives to be administrative in nature. In short, the Court appropriately held that building highways was not a legislative function, but instead a culmination of administrative tasks.

> We conclude that these initiatives impermissibly intrude on the administrative power of the City to manage City-owned open space in cooperation with state and federal government agencies. Because the proposed initiatives seek to circumvent a complex and multi-layered administrative process for the approval of the location and design of a state highway, their subject matter is administrative and therefore lies outside the initiative power.
>
> *Id.* at 511.

The Court's discussion of the longstanding process, the interlapping jurisdiction of different levels of government, and the granular detail of the proposed initiatives provide a useful example of administrative functions in a proposed ballot measure. In contrast, the PATHS initiated ordinance has none of those characteristics. The Hughes property has sat vacant since 2017 and remains in the typically temporary Transition zone. Def. Mot. to Dismiss at 4. Its status has not gone through an intergovernmental process like the intersection at issue in *Vagneur*, nor would it need to because the City legislatively annexed the property in 2018. Def. Mot. to Dismiss at 3. The PATHS initiated ordinance also does not mandate the many specifics of rezoning or acquisition, instead leaving the discretion of how to execute the policy to the City's administrative staff.

**8**. ***Friends of Denver Parks v. City and County of Denver*, 372 P.3d 311 (Colo. App. 2013).** Denver passed an ordinance in 2013 to swap land between the City and the local school district. Citizens attempted to file a referendum repealing the ordinance, arguing the city property was parkland and could not be transferred under other provisions of the city code. The city clerk rejected the referendum because it sought to repeal previous administrative decisions. The trial court rejected the citizens' motion for a preliminary injunction to reverse the clerk's

decision and the Court of Appeals found no abuse of discretion. Regarding the administrative issue, the Court of Appeals rejected the citizens' argument that the transfer of a single piece of property was the same as a generally applicable zoning change. "We reject [the] suggestion that proposing a permanent change in the use of a specific parcel of [c]ity-owned open space is equivalent to modifying a zoning plan and that such a proposed change in use is therefore legislative." *Id.* at 320-21, (quoting *Vagneur* at 510).

The *Friends of Denver Parks* administrative finding is not applicable to the PATHS initiated ordinance because the Defendants do not argue the acquisition of the Hughes property would be the equivalent of a legislative zoning change. The PATHS initiated ordinance rezones the Hughes property and it is not necessary for its acquisition provisions to be the equivalent of a zoning change in order to be legislative. Rather, the acquisition provisions of the PATHS initiative are a policy of general applicability within the meaning of *McKee* and *Margolis*.

**8. Case summary conclusions.** The distinction between legislative and administrative matters continues to be a case-by-case analysis with many shades of gray. Published appellate opinions analyzing the issue show certain ballot measure provisions are undoubtedly legislative and others are admittedly administrative. *Zwerdlinger* held initiatives regarding the operation of a utility were administrative. 571 P.2d at 1077. Initiatives attempting to overturn executive actions that occurred in furtherance of a previously approved legislative policy are administrative as outlined in *Blackwell*. 731 P.2d at 1254. *Vagneur* found initiatives that intruded on the power of the city to manage property it already owned and interfered with a layered and complex multi-agency process to change its use were administrative in nature. 295 P.3d at 511. On the other hand, *McKee* found an initiative to reverse an annexation decision of a specific property was legislative. 616 P.2d at 975. *Margolis* held that zoning and rezoning decisions of specific

properties were also legislative. 638 P.2d at 303-04. The *Bull* and *Witcher* opinions were mixed between legislative and administrative determinations. *Bull* found an initiative provision regarding the operation of a utility was administrative and held a provision addressing the operation of a spending policy previously enunciated was administrative. *Bull* found other initiative provisions related to revenue collection and spending were legislative and left those initiative sections intact. 143 P.3d at 1138-39. *Witcher* held leasing provisions for a bridge were administrative, but also noted the original decision whether to purchase or lease the bridge was legislative. 716 P.2d at 450. The PATHS initiated ordinance significantly differs from the administrative portions of initiatives discussed above. The PATHS initiated ordinance does not address the operation of a utility, it does not merely implement previously legislated policies like the initiatives in *Blackwell*, *Witcher* and *Bull*, and does not seek to overturn a twenty year multi-agency administrative process like the *Vagneur* initiatives. Instead, the PATHS initiated ordinance enacts a new City policy – to rezone and acquire an important parcel of land with generally applicable policy implications throughout the City.

*Vagneur* bears particular mention here because discussion of that case constituted the majority of the City's summary judgment argument and because it was the most recent Colorado case attempting to broadly delineate between legislative and administrative matters. In particular, the City cites the following language from *Vagneur* to support its claim that some provisions of the PATHS' initiated ordinance is administrative: "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 individual parties and, accordingly, lie beyond the bounds of legislative power." Pl. Mot. Sum. Judg. at 15.

However, the City's argument excluded an essential observation. The *Vagneur* principle cited by the City does not harmonize with the Supreme Court's previous holdings regarding specific pieces of property in *McKee* and *Margolis*. *McKee* held that a ballot measure regarding the annexation of a specific piece of property was "clearly legislative." *Id*. at 975. *Margolis* held that zoning or rezoning a specific piece of land was also legislative in nature. *Id*. at 304. This was because the annexation or rezoning of one piece of land within a municipality can have profound effects on its residents and therefore require the kind of weighing of competing policy perspectives inherent in legislative actions. *Margolis* further explained this point in detail:

> It cannot be disputed that large rezonings…are general and permanent in character and involve the setting of a general rule or policy….the rezoning of a 'relatively small' parcel, especially when done by initiative, may well signify a fundamental change in city land-use policy….While decisions on "small" rezonings may directly affect only a few people, such decisions may more properly be seen as the setting of policy for the future.
>
> *Id.* (citations omitted).

Left unanswered in the *Vagneur* opinion is whether the acquisition of a particular piece of property can be a legislative act just like the annexation and zoning of a particular piece of property is legislative. The reasoning of the *Margolis* opinion – which was not overruled, distinguished, or limited by the *Vagneur* decision – leads to the conclusion that the acquisition of a specific piece of property can be legislative if that acquisition has the effect of "setting a general rule or policy" like zoning and rezoning of real property. *Margolis* at 304.

The acquisition of the Hughes property would present an example of setting a general rule or policy as contemplated by *Margolis*. As outlined in the Defendant's Motion to Dismiss, the debate about the future of the Hughes property and its implications for the City have been intense. Def. Mtn. to Dismiss at 3-7. The Hughes property is located in a highly sought area on the western side of Fort Collins and its development or lack of development will "have long

lasting effects on Fort Collins." Def. Ex. A ¶ 9. This realization is reflected in the participation of hundreds of residents who commented in the various public hearings on the subject as well as the thousands who signed the petition at issue in this action. The City's action or inaction on the Hughes property will have implications far beyond the borders of the property.

Additionally, the current campaign to zone and acquire the Hughes property as open space is part of a larger ongoing general public policy discussion regarding the future of the City's natural areas / open spaces. Fort Collins residents have traditionally shown "strong support to preserve and provide open space, natural areas, community separators, wildlife habitat, and trails for today and for the future." Def. Ex. D (initiated ordinance) at 1. However, many residents recognize the existing open spaces and natural areas are being "loved to death" as Fort Collins continues to grow. Def. Ex. E (Friedman aff.) ¶¶ 5-6. Current existing open space properties are overcrowded and the overuse pressures far outstrip the currently number of acres available. Def. Ex. A ¶ 5. As stated in the PATHS initiated ordinance, "conserved open space and natural areas help make Fort Collins a highly desirable place to live, work, and visit." Def. Ex. D at 3. However, the number of large properties available to expand the City's natural areas is rapidly dwindling. Def. Ex. A ¶ 5. "[T]he Hughes Stadium property would represent a crown jewel acquisition for Fort Collins open space," one that would help alleviate the current overcrowding of current open space resources. Def. Ex. D at 2. Residents who have historically advocated for expanded open space believe Hughes is one of the best ways to add to those open spaces. Def. Ex. A ¶ 8; Def. Ex. E ¶¶ 7, 11. While the rezoning and acquisition of the Hughes property is significant enough to affect the character of the City as an annexation or zoning, its potential implications also make the rezoning and acquisition of the property a matter of

generally applicable open space policy. "[T]he conversion of the Hughes property to public open space will be one way to achieve that increasingly important policy goal." Def. Ex. A ¶ 12.

### C. Colorado General Assembly Acts and Fort Collins precedent shows the acquisition of real property can be a legislative function.

As the Colorado Supreme Court stated in *Vagneur*, "…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, that seem more like traditional executive acts may be deemed to fall on that side of the line." 295 P.3d at 507. Historical examples of legislative acts involving the acquisition of property by the General Assembly and the City of Fort Collins abound. The PATHS initiated ordinance triggers the legislative function the City Council has often exercised in the past.

#### 1. The Colorado General Assembly

"The legislative power of the state shall be vested in the general assembly consisting of a senate and house of representatives…" Colorado Constitution Art. V, Sec. 1. "In broad outline, it is the province of the general assembly to enact legislation and the province of the executive to see that the laws are faithfully executed." *Anderson v. Lamm*, 579 P.2d 620, 624 (Colo. 1978). The legislature may delegate its authority to an administrative agency to execute a law if standards exist to prevent the abuse of the delegated power. *Cottrell v. City and County of Denver*, 636 P.2d 703 (Colo. 1981). Acquiring property, conveying property, and appropriations for those acts have a long precedent in legislative actions passed by the General Assembly. Examples of bills passed by a majority vote in both legislative chambers in recent years regarding the acquisition or disposition of real property include:

- House Bill 20-1082, "Concerning the Authority of the State Historical Society to Dispose of Real Property in Georgetown, Colorado." The relevant part of the Act conveys legislative approval to the State Historical Society to sell a single parcel of land:

> SECTION 2. **State historical society authority to dispose of real property.** (1) The state of Colorado, acting by and through the state historical society, is authorized to dispose of real property with the following legal description: "Subdivision: GEORGETOWN Block: 20 Lot: L6; E2 L7; S2 L5, SURV #247705 786/115–116".
> (2) The state controller and the office of the state architect must approve all agreements relating to the disposition of the real property prior to closing.
> (3) The proceeds of the disposition of the real property described in subsection (1) of this section must be credited to the state museum cash fund created in section 24–80–214, Colorado Revised Statutes, to be used for capital outlay as defined in section 24–75–112(1), Colorado Revised Statutes, capital construction as defined in section 24–30–1301(2), Colorado Revised Statutes, or controlled maintenance as defined in section 24–30–1301(4), Colorado Revised Statutes, at museums statewide.

2020 Colo. Legis. Serv. Ch. 111 (H.B. 20-1082).

- House Bill 19-1062, "Concerning the Grand Junction Regional Center Campus" amended the conditions by which the Department of Human Services could convey one of its regional centers for persons with developmental disabilities (amendments in capital letters).

> **27–10.5–312. Grand Junction regional center campus—vacating and sale—legislative declaration—definition—repeal.** (3)(a) No later than July 1, 2018, or as soon as each person receiving services on June 10, 2016, at the Grand Junction regional center campus is transitioned to nonregional center campus residences, if such transition occurs before July 1, 2018, the department shall vacate the Grand Junction regional center campus and shall EITHER list ALL OR A PORTION OF the campus for sale OR ENTER INTO A CONTRACT TO TRANSFER ALL OR A PORTION OF THE CAMPUS TO A STATE INSTITUTION OF HIGHER EDUCATION, A LOCAL GOVERNMENT, OR A STATE AGENCY THAT IS INTERESTED IN ITS ACQUISITION.

2019 Colo. Legis. Serv. Ch. 20 (H.B. 19-1062).

- House Bill 15-1310, "An Act Concerning the Authority of the Division of Parks and Wildlife to Acquire Real Property For Their Garfield County Administrative Office and Public Service Center, and in Connection Therewith, Making an Appropriation" authorized the purchase of a single parcel of real property for a specific dollar amount and under certain conditions.

> SECTION 2. **Division of parks and wildlife authority to acquire real property.** (1) The state of Colorado, acting by and through the division of parks and wildlife, is authorized to purchase real property located on the southerly side of Interstate 70 Exit 109, in Garfield county, being a 3.792 acres tract in Section 35, Township 5 South, Range 90 West of the 6th Principal Meridian. The real property will be acquired by the division of parks and wildlife for the division's administrative office and public service center.
> (2) The real property may be acquired by the division of parks and wildlife for the sum of five hundred fifty-two thousand five hundred dollars ($552,500).
> (3) The real property may not be subject to any restrictive covenants, contracts, or zoning requirements that restrict public access to the property or restrict any alternative state use of the property.
> (4) The state controller must approve all agreements relating to the purchase of the real property prior to closing.
> (5) Any title to real property received by the division of parks and wildlife will be held by the state for the benefit and use of the division of parks and wildlife.

2015 Colo. Legis. Serv. Ch. 335 (H.B. 15-1310)

- House Bill 14-1387, "Concerning Revisions of Capital Related Statutes in the Colorado Revised Statutes, and, in Connection Therewith, Amending or Repealing Obsolete, Inconsistent, and Conflicting Provisions of Law and Clarifying Language to Reflect Legislative Intent and Current Application of the Law" included one section dedicated to the acquisition of a single parcel of land.

> SECTION 2. **Department of public safety authority to acquire real property.** (1) The state of Colorado, acting by and through the department of public safety, is authorized to purchase real property located in

> Jefferson county in the Marshall Office Park 2 in the city of Arvada, the legal description of which is Lot 1 B Sigman Industrial Park Minor Subdivision 2nd amendment, Jefferson county, for the Colorado bureau of investigation's regional Denver forensic laboratory.

2014 Colo. Legis. Serv. Ch. 378 (H.B. 14-1387)

Each of the above examples show the historical exercise of the General Assembly's legislative power includes the acquisition or disposition of real property. Not specifically cited here, but still relevant to the issue at bar, are property acquisitions funded in the annual budget and related appropriations bills, all of which squarely fit within legislative power. *Colo. General Assembly v. Lamm*, 700 P.2d 508 (Colo. 1985) (the legislative power over appropriations is absolute). "The legislative and executive departments have their functions and their exclusive powers, including the 'purse' and the 'sword'." *Smith v. Miller*, 384 P.2d 738, 741 (Colo. 1963). However, the legislature "cannot administer the appropriation once it has been made. When the appropriation is made, its work is complete and the executive authority takes over to administer the appropriation to accomplish its purpose, subject to the limitations imposed." *Anderson v. Lamm*, 569 P.2d at 624 (citation omitted).

The PATHS initiated ordinance follows these separation of powers principles. Section 1 adopts a declaration of legislative intent regarding the Hughes property. Section 2 of the initiated ordinance legislatively authorizes the City to acquire the property. Section 3 rezones the property, which the City concedes is a proper legislative function. Section 4 requires legislative approval before actions related to de-annexing, ceasing acquisition efforts, or rezoning occur. Section 5 provides legislative direction regarding funding but delegates the details of the property acquisition to administrative agents. Sections 6 and 7 likewise outline legislative direction related to appropriations for the property. Section 8 mandates the effective

date of the legislation and its inclusion is not contested by the City. Def. Ex. D at 2-3; Pl. Mot. for Sum. Judg. at 20.

**2. City of Fort Collins precedent**

Consistent with Colorado General Assembly practice, the Fort Collins City Council has decades of precedent in passing ordinances and resolutions regarding the acquisition or conveyance of real property. Those ordinances and resolutions covered a variety of topics related to the acquisition or conveyance of property with some including a large amount of detail. All of the resolutions or ordinances required administrative actions to negotiate or put into effect, yet the City Council acted in a legislative fashion to pass each of these matters by a majority vote. Again, by example and not an exhaustive list of those legislative acts include the following:[3]

- Resolution 2020-009 authorized the mayor to enter into a previously negotiated intergovernmental agreement with Larimer County to purchase open space.
- Ordinance 2020-013 authorized the acquisition of property by eminent domain, and included a clause for the city representatives to "negotiate in good faith for the acquisition of the Property Rights from the owners."
- Resolution 2017-068 approved the assignment of a property on West Horsetooth Road from the Fort Collins Housing Authority to a private company for development.
- Ordinance 2016-025 outlined the legislative criteria for the conveyance of City land and declared one of the three submitted options was best for the conveyance of the West Horsetooth Road property.

[3] Primary documents are available by clicking the Ordinance or Resolution number in this Response and at the City's website located at https://citydocs.fcgov.com/

- Resolution 2015-025 approved the sale of a parcel from the Pineridge Natural Area to private homeowners abutting the Natural Area.
- Resolution 2010-012 authorized the purchase of 128 acres of land to be used for water storage and Natural Areas for no more than $4,425,000 after the "City Council...determined that the purchase price is fair and reasonable and that the acquisition of the property is in the best interests of the City."
- Resolution 2009-081 approved the purchase of 128 acres of land to be used for water storage and Natural Areas for no more than $5.8 million. This resolution was later superseded by Resolution 2010-012, *supra*, when the seller of the property later withdrew from the contract.
- Resolution 2002-013 revoked the right of first refusal previously granted to the Fort Collins Housing Authority on a 168-acre parcel of land acquired by the city in 1999, and required the City Manager to determine if the entire 168-acre parcel of land was suitable for a Natural Area.
- Resolution 2000-081 directed the City Manager to pursue acquisition of structures and real property from willing sellers in a floodway.
- Resolution 99-133 authorized the acquisition of 168 acres of land to be divided between a Natural Area and land available to the Fort Collins Housing Authority.
- Resolution 98-87 authorized the acquisition of a 17-acre parcel of land for Natural Areas and a two year occupancy lease with mobile home owners who occupied the land at the time of acquisition.
- Resolution 96-155 authorized the purchase of 31 acres of real property and water rights to be used "solely for the purposes of a public natural area, and in the event

that the City Council subsequently determines that it is in the best interests of the City to sell or otherwise dispose of…the Property, the proceeds of such sale shall be dedicated to the acquisition or maintenance of other public natural areas."

Each of these Ordinances and Resolutions represent a legislative determination within the meaning of the Colorado Constitution, the Fort Collins charter, and the case law summarized above. Many of them approved previously conducted administrative tasks or directed future administrative tasks. Setting policy and then directing the executive to carry it out fits squarely within a legislative function.

The Court may look to historical examples to inform its judgment about legislative and administrative contents in ballot measures. *Vagneur*, 295 P.3d at 507. The City did not mention these historical examples in its Motion for Summary Judgment, but they are material to how the City itself has traditionally navigated between its legislative and administrative functions – at least until it objected to the PATHS initiated ordinance that followed the same historical pattern. It is not known whether the City will challenge Defendants' characterization of its previous ordinances and resolutions as legislative, but any denial would create a dispute of material facts demonstrating a genuine issue for trial. *Griswold v. National Federation of Independent Business*, 449 P.3d 373, 378-79 (Colo. 2019).

## VI. CONCLUSION

The People's right to determine how government acts on their behalf is fundamental. The People's reserved legislative initiative power should be construed broadly with narrow exceptions. The entire PATHS initiated ordinance is generally applicable policy that would replace the inaction of the current City Council and implement important improvements to the City's open spaces. The City has previously passed analogous legislative measures, and the

City's current disagreement with the policies represented in the PATHS initiated ordinance should not determine which legislative measures affecting real property pass and which are not considered.

Fort Collins residents, through their community advocacy organization PATHS and thousands of petition signatures, respectfully ask this Court to preserve their reserved initiative power and deny the City's Motion for Summary Judgment.

Respectfully submitted on this 27th day of January, 2021.

/s/ *Michael Foote*
Michael Foote #34358
Foote Law Firm, LLC
Attorney for the Defendants

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 27th day of January, 2021, a true and correct copy of this DEFENDANTS' RESPONSE AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT was filed via the Colorado courts e-filing system and served to the following parties:

Carrie M. Daggett #23316 – City Attorney
John R. Duval #10185 – Deputy City Attorney
Fort Collins City Attorney's Office
300 Laporte Avenue
P.O. Box 500
Fort Collins, Colorado 80522
(970) 221-6520
cdaggett@fcgov.com, jduval@fcgov.com

Andrew D. Ringel #24762
Hall & Evans, L.L.C.
1001 17th Street, Suite 300
Denver, Colorado 80202
(303) 628-3300
ringela@hallevans.com

Attorneys for the Plaintiff

*/s/ Michael Foote*