DISTRICT COURT, COUNTY OF LARIMER, COLORADO Larimer County Justice Center 201 Laporte Avenue, Suite 100 Fort Collins, Colorado 80521-2762 (970) 498-6100 **Plaintiff:** THE CITY OF FORT COLLINS, COLORADO, a Colorado home rule city and municipal corporation, v. **Defendants:** PLANNING ACTION TO TRANSFORM HUGHES STADIUM SUSTAINABLY CORP, a Colorado nonprofit corporation; and ELENA M. LOPEZ, MELISSA ROSAS, AND PAUL PATTERSON, each in their official capacity as a petition representative of the persons signing the petition for a citizen-initiated ordinance relating to the City of Fort Collins rezoning and acquiring certain real property	▲COURT USE ONLY ▲ Case Number: 2020 CV 30833 Division: 3B
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REPLY TO DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff City of Fort Collins, Colorado, (the "City"), by and through its undersigned attorneys, respectfully submits this Reply to "Defendants' Response and Opposition to Plaintiff's Motion for Summary Judgment" ("Response"), as follows:

I. INTRODUCTION

Defendant Planning Action to Transform Hughes Sustainably Corp ("PATHS") and Defendants Elena M. Lopez, Melissa Rosas and Paul Patterson (collectively, "Defendants") argue in their Response that their initiated ordinance requiring the Fort Collins City Council ("Council") to rezone the Hughes Stadium property ("Property") to the City's Public Open Lands District and the City to "acquire" the Hughes Stadium Property (the "Initiated Ordinance") includes only legislative and no administrative matters. As the City states in Plaintiff's Motion for Summary Judgment ("Motion"), the City agrees the rezoning requirement in the Initiated Ordinance is a legislative matter properly subject to the citizen-initiative power in the Colorado Constitution and the City's Charter [Motion pp. 9-10]. The City does ***not*** agree, however, that the acquisition-related requirements in the Initiated Ordinance are legislative matters. They are instead administrative matters not the proper subject of a citizen initiative under the Colorado Constitution and the City's Charter.

Consequently, the parties' disagreement concerns only the Initiated Ordinance's property-acquisition provisions and related recitals the City has identified in the Motion and proposed in Exhibit 15 of the Motion to be severed from the Initiated Ordinance.[1]

II. STATEMENT OF UNDISPUTED FACTS

Defendants do not dispute any of the material facts the City has presented in Section II of the Motion, except for the City's statement in paragraph 19. [Response, pp. 4-5.] While the Defendants do not dispute that the information in Tawnya Ernst's affidavit [Motion, Ex. 2] "establishes evidence

[1] The City has also provided the Court in Exhibit 16 of its Motion with the City's proposed revisions to sever the administrative matters from the Ballot Measure for the Initiated Ordinance.

of due diligence and expertise used to acquire real property in the City of Fort Collins," they dispute Ms. Ernst's affidavit establishes these same procedures apply to other Colorado municipalities. However, Defendants present no admissible specific facts to contest paragraph 19 leaving it undisputed.

The Defendants include two new statements of fact. They state the Colorado General Assembly has passed "***legislative*** acts regarding the acquisition, conveyance, and appropriation for real property," and the Council "has passed ***legislative*** ordinances and resolutions regarding the acquisition and conveyance of real property." [Response, p. 5.] (Emphases added.) The City does not dispute the General Assembly has, by the adoption of bills, authorized the acquisition and conveyance of real property and the Council has done the same by the adoption of resolutions and ordinances. However, the City disputes these actions were "legislative" actions by the Council. Instead, they were, as a matter of law, administrative actions for the reasons discussed below in Section IV.C.

III. DEFENDANTS' ARGUMENTS

Defendants' Response presents three arguments to support Defendants' contention the acquisition provisions in the Initiated Ordinance address legislative and not administrative matters. First, the people's reservation of the initiative and referendum powers in the Colorado Constitution is to "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." [Defendants' Response, pp. 5-6.] Second, a citizen initiative concerning the acquisition of a single parcel of land, like an initiative concerning the annexation or rezoning of a single parcel of land, can be a "policy of general applicability" and, therefore, a legislative matter. [Defendants' Response, pp. 6-20.] And third, certain cited Colorado General Assembly bills and Council resolutions and ordinances provide precedent that "the acquisition of real property can be a legislative function." [Defendants' Response, pp. 20-26.] The City addresses each argument in turn.

IV. PLAINTIFF'S REPLY TO DEFENDANTS' ARGUMENTS

A. People's Reservation of Legislative Power Broadly Interpreted and Limitations on it Strictly Construed

Defendants are correct that in *Margolis v. District Court*, 638 P.2d 297 (Colo. 1981), the Colorado Supreme Court observed it has held the people's power of initiative in the Colorado Constitution is to be liberally interpreted in favor the people to exercise it and limitations on it are to be strictly construed. *Margolis*, 638 P.2d at 302. However, Defendants ignore more recent Supreme Court comments on this standard. For example, In *City of Idaho Springs v. Blackwell*, 731 P.1250 (Colo. 1987), the Court observed:

> The powers of initiative and referendum, although broadly construed, are not unlimited. In *City of Aurora v. Zwerdlinger,* 194 Colo. 192, 195, 571 P.2d 1074, 1076 (1977), we held that the right of referendum applies only to legislative actions of a governing authority. *See also Witcher v. Canon City,* 716 P.2d 445, 449 (Colo.1986). The same limitation is applicable to the power of initiative. *Margolis v. District Court,* 638 P.2d 297, 303 (Colo.1981). Neither the referendum nor initiative powers guaranteed by the Colorado Constitution grant the people the right to petition for an election on administrative matters. [Cites omitted.] 731 P.2d at 1253.

Even more recently, the Court in *Vagneur v. City of Aspen*, 295 P.3d 493 (Colo. 2013), added that the people's legislative power under Article V, Section 1 of the Colorado Constitution is also limited by the separation-of-powers provision in Article III of the Colorado Constitution[2] which "reflects the explicit and strict separation of powers" between the legislative, executive and judicial branches of government. *Id.* at 503-04. *Vagneur* further stated:

> Indeed, in exercising this legislative power, the people are prohibited by article III from exercising administrative (i.e., "executive") or judicial power. Consequently, the powers of initiative and referendum do not encompass the right to petition for an election on administrative matters. *Blackwell,* 731 P.2d at 1253. In short, a voter initiative must be a valid exercise of legislative power, rather than executive or judicial power. [Cite omitted.] *Id.* at 504.

[2] "The powers of the government of this state are divided into three distinct departments, —the Legislative, Executive and Judicial; and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any power properly belonging to either of the others, except as in this Constitution expressly directed or permitted." Colorado Constitution Article III.

Consequently, the Supreme Court has developed and applied in a series of decisions beginning with *City of Aurora* v. *Zwerdlinger*, 571 P.2d 1074 (Colo. 1977), and most recently in *Vagneur*, tests to be followed by the courts in deciding the issue here. Those decisions apply the tests to actual factual situations and give examples (as later described below) that compare closely to the facts of this case supporting the City's challenge to the acquisition provisions in the Initiated Ordinance as being administrative and not legislative matters.

B. Acquisition of a Single Property Not a Policy of General Applicability or a Legislative Matter Like the Annexation and Zoning of a Single Property

Defendants argue that because the Supreme Court has held the zoning and annexation of a single parcel of land are legislative matters subject to the citizen-initiative power under the Colorado Constitution, by analogy and in the circumstances of this action, the acquisition provisions in the Initiated Ordinance constitute a "policy of general applicability" and, therefore, a legislative matter. This argument fails in three respects.

First, the Supreme Court's holding in *Margolis* that an ordinance zoning or rezoning a single parcel of land is a legislative matter and its holding in *McKee v. City of Louisville*, 616 P.2d 969 (Colo. 1980), that an ordinance annexing a single parcel of land is also legislative, are not analogous to an ordinance requiring acquisition of a specific parcel of land.

Second, Defendants fail in their Response to apply the Supreme Court's now well-established tests for distinguishing between legislative and administrative matters to the Initiated Ordinance's acquisition provisions. Instead, they start with the premise that because the Property's future has become the subject of an "intense" public debate, acquisition of it is "an example of setting a general rule or policy" and "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," so acquisition of the Property is "a matter of generally applicable open space policy." [Response, pp. 18-20.]

Third, Defendants are wrong in their assertion that the Supreme Court's clear statement in *Vagneur* that "government decisions to enter into a contract with a specific entity are not legislative decisions" but executive or administrative acts, *Vagneur* 295 P.3d at 507, is not controlling in this case because of the Court's decisions in *Margolis* and *McKee*.

1. *Margolis* and *McKee* Not Analogous

Defendants correctly argue that *Margolis* observed that "small" rezonings "may more properly be seen as the setting of policy for the future," *Margolis*, 638 P.2d at 304, but it did so only after using the following reasoning to hold that all zonings and rezonings, regardless of size, are legislative matters for the purpose of citizen initiatives and referendums:

> It is quite clear under the tests set forth in Zwerdlinger, supra, that original zoning decisions are legislative in character since the act of original zoning is of a general and permanent character and involves a general rule or policy. See Snyder, supra. Therefore, being legislative in character, it is subject to the referendum and initiative provisions of the Colorado Constitution.
>
> We do not believe that, for the purposes of determining whether it is subject to referendum and initiative, rezoning may be characterized as other than a legislative decision subject to referendum and initiative. It seems entirely inconsistent to hold that an original act of general zoning is legislative, whereas an amendment to that act is not legislative. It appears only logical that since the original act of zoning is legislative, the amendatory act of rezoning is likewise legislative even though the procedures may entail notice and hearing which characterize a quasi-judicial proceeding. Essentially, the city council ultimately amends the zoning ordinance or denies the amendment, a legislative function. (Citations omitted.) *Id.* at 303-04.

Confirming this was the controlling reasoning in *Margolis*, the Supreme Court explains in *Vagneur*:

> Some years later, in *Margolis v. District Court,* 638 P.2d 297 (Colo.1981), we expanded on these general tests to include a presumption that where an original act is legislative, an amendment to that act is likewise legislative. In *Margolis* we examined three municipal zoning and rezoning ordinances. We concluded that under the tests set forth in *Zwerdlinger,* an original act of zoning is legislative because it is of a general and permanent character and involves a general rule or policy. *Id.* at 303–04. We then reasoned that, as a matter of logic, the act of amending the zoning ordinance is likewise legislative. *Id.* at 304. We therefore concluded that zoning and rezoning decisions, **no matter the size or number of properties involved**, are legislative and

> thus subject to the powers of initiative and referendum. *Id.* at 305. (Bolding added.) *Vagneur*, 295 P.3d at 505.

Margolis cannot, therefore, be relied on to argue the Initiated Ordinance's mandate that the City acquire the Property is a "policy of general applicability," and therefore a legislative matter, unless such mandate represents the amendment of an existing government decision that itself satisfies the Supreme Court's tests for being a legislative matter. No such evidence exists here.

McKee in 1980 determined that the Louisville city council's ordinance annexing a 1,407-acre parcel of land was of a "legislative character" and, therefore, subject to a citizen referendum. *McKee*, 616 P.2d at 975. However, *McKee* provided little analysis supporting this determination and did not rely on the two tests the Supreme Court used two years earlier in *Zwerdlinger* to determine an Aurora city council ordinance setting water rates and charges was an administrative matter not subject to a citizen referendum.[3] *Zwerdlinger*, 571 P.2d at 1077. *McKee* instead provided the following analysis:

> In terms of subject matter, the initiated measure in this case relates exclusively to a matter of local interest and concern-the 1,407 acres of property annexed to the city of Louisville. There is no statewide interest in this particular land. Admittedly, the state does have a general interest in matters of annexation and disconnection. That interest, however, centers essentially on procedural uniformity as it relates to the orderly growth of urban communities. The initiated measure here does not facially contravene or usurp any interest of the state. *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 reserved to the people by Article V, Section 1, of the Colorado Constitution. [Citations omitted.] *McKee*, P.2d at 975. (Emphasis added.)

McKee is clearly not helpful in shedding any light on the present issue. The Court in *Vagneur* seems to recognize this reality by citing *McKee* only once for the proposition that petitioners for a citizen initiative concerning a legislative matter have a constitutional right to have their initiative submitted to the electorate. In contrast, *Vagneur* repeatedly cites and discusses in detail its decisions in *Zwerdlinger*, *Margolis*, *Blackwell* and *Witcher v. Canon City*, 716 P.2d 445 (Colo. 1986).

[3] *Zwerdlinger* is cited in *McKee* but only once in the dissenting opinion. 616 P.2d at 976.

Defendants' reliance on *Margolis* and *McKee* is misplaced and these decisions do not provide a valid analogy for this Court to rely on to conclude the acquisition-related requirements in the Initiated Ordinance are legislative matters.

2. Defendants Fail to Apply Supreme Court's Tests

As the City presents in its Motion, the Supreme Court has provided in *Vagneur* its most recent and comprehensive discussion of the controlling tests and principles courts are to use to determine whether the subject matter of a citizen initiative is legislative or administrative. [Motion, pp. 13-16.] Defendants' Response never squarely addresses these tests or applies them to either the undisputed facts or the words of the Initiated Ordinance. Defendants also never directly respond to the City's application of these tests in its Motion. [Motion, pp. 16-20.]

Instead, Defendants attempt to distinguish the facts and circumstances here from those in *Zwerdlinger*, *Witcher*, *Blackwell* and *Vagneur*, and in the Court of Appeals' decisions in *Colorado Springs v. Bull*, 143 P.3d 1127 (Colo. App. 2006) and *Friends of Denver Parks, Inc. v. City and County of Denver*, 327 P.3d 311 (Colo. App. 2013). [Response, pp. 6-8 and 10-18.] Then, without referencing or applying the applicable Supreme Court's tests, Defendants contend the holdings in *Margolis* and *McKee* support these statements from the Response:

- "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." [Response, p.8.] (Bold added.)

- "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." [Response, p. 10.]

- "Rather, the acquisition provisions of the PATHS initiative are a policy of general applicability within the meaning of *McKee* and *Margolis*." [Response, p. 16.]

None of these statements, however, are actually supported by *Margolis* or *McKee* for the reasons discussed above in Section IV.B.1. And more important, they are not supported by *Witcher*, *Blackwell*, *Vagneur* and *Friends of Denver Parks*, all of which addressed citizen ballot measures involving specific parcels of land and all of which found these measures to be administrative matters not subject to citizen initiative or referendum under the Colorado Constitution.

Witcher address an amendment to a lease Cañon City had entered into to lease a portion of its park land near the Royal Gorge to a company who would own and operated the bridge built over the Royal Gorge, rather than Cañon City directly owning and operating the bridge. *Witcher*, 716 P.2d at 447. Before entering into the lease, Cañon City's voters indicated in two elections their policy preference Cañon City not own and operate the bridge. The amendment was entered into by Cañon City and the company after it was determined the bridge needed to be modernized. *Id.* Shortly after the amendment was approved by Cañon City's council, citizens petitioned to refer council's approval of the amendment to the electors. *Id.* at 448. The council declined to do so on the basis the referendum was an administrative matter. *Id.* The citizens sued Cañon City to compel placement of the referred matter on the ballot. *Id.* In upholding the council's decision, the Supreme Court provided the following relevant guidance:

> On a day-to-day basis, elected city officials are required to make decisions on administrative functions facing the city, **such as purchase of city vehicles**, establishment of parking fees, and the proper maintenance of city-owned lands and buildings. In *Zwerdlinger,* we concluded that to subject each such decision to referendum would result in chaos and bring the machinery of government to a halt. *Id.* at 449. (Citations omitted and bold added.)
> . . .
>
> Similarly, the decisions of this Court, holding that zoning decisions are permanent or general in nature, *see, e.g., Margolis,* are not analogous to the amendment of a lease. *Id.* at 450.
> . . .
>
> The question of approval of the specific terms and conditions of the lease is not a matter of public policy. The negotiation of the leases and the amendments thereto are administrative acts, undertaken to carry out the policy decision to lease, rather than operate, the bridge. *Id.* at 450.

Defendants distinguish the *Witcher* holding and facts from the facts here arguing that while the lease and its amendment were administrative matters executing the policy decision made by Cañon City's voters in the two prior elections, "[t]he 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" (emphasis added). [Response, p. 11.] However, this ignores the City's currently established policies concerning its natural areas program as identified and referenced by Tawnya Ernst in her affidavit attached as Exhibit 2 to the Motion.

In paragraphs 7, 8 and 9 of her affidavit, Ms. Ernst describes the City's natural areas program and her involvement in it, the program's establishment by the voters in 1992 approving a quarter-cent sales tax for the program, and Council's adoption of its most recent policy statement concerning that program in Resolution 2014-089, which Resolution is attached as **Exhibit 17**. [Motion Ex. 2, p.3.] Attached as **Exhibits 18, 19 and 20**, respectfully, are: (i) the "Citizen Initiated Ordinance" the City's voters approved in 1992 for the quarter-cent sales tax for the program; (ii) Council-initiated Ordinance No. 29, 1997, voters approved in 1997 extending the tax through 2005; and (iii) Citizen-Initiated Ordinance No. 1, 2002, voters approved in 2002 extending the tax through 2030. Therefore, it is more accurate to describe the Property acquisition requirements in the Initiated Ordinance as an administrative action in furtherance of the City's existing policies as previously established by the City's voters and Council in the natural areas program.

In *Blackwell*, the Idaho Springs voters approved in 1977 a council-initiated ordinance for a 3% sales and use tax to fund certain projects, including a new city hall. *Blackwell*, 731 P.2d at 1251. In 1984, the Idaho Springs council approved a motion to purchase the land for the city hall and to move a historic schoolhouse to it to be renovated as the city hall. *Id.* Idaho Springs entered into a contract to purchase the land. *Id.* Citizens petitioned the council submitting two initiatives, one to repeal the

council's approval of the land purchase and the moving of the schoolhouse to the land, and the other to prohibit Idaho Springs using any funds to purchase the land or move the schoolhouse. *Id.* at 1251-52. Idaho Springs filed a declaratory action asking the district court to declare the petitions improper because they addressed administrative and not legislative matters. In holding the two petitions addressed administrative matters not subject to the citizen initiative powers under the Colorado Constitution, the Supreme Court provided the following relevant guidance:

> When viewed under the first guideline, the initiated ordinances prohibiting the purchase of the Skaff-Sweet property and the relocation of the schoolhouse are administrative. The only declared public policy of general applicability, the decision to build the new city hall in the first instance, was made in 1977 when the 3% sales and use taxes were imposed for particular purposes. *The ordinances proposed by the appellants only exclude one parcel of real estate (the Skaff-Sweet property) and one type of structure (the Grass Valley Schoolhouse) from the range of choices available to the Council to implement the previously declared policy of securing a city hall.* The concerns addressed by the ordinances do not relate to policy declarations of general applicability, and the initiative proposals therefore do not address matters of a permanent or general nature. (Emphasis added.) *Id.* at 1254-55.
> . . .
>
> The proposed initiated ordinances also must be classified as administrative matters when viewed under the second "test." The choice of location and structure for the new city hall is an act "necessary to carry out" the existing legislative policy to build a new city hall. [Cites omitted.] The decision to raise tax revenues to be used in part for city hall construction was made in 1977 and approved by the majority of Idaho Springs voters in a special election. Implementation of the 1977 policy decision in the ordinance is administrative or executive and is not a proper subject for an initiated ordinance. *Id.* at 1255.

Like they do for *Witcher*, Defendants distinguish the holding and facts in *Blackwell* from the facts here arguing: "[t]he 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." However, as demonstrated above in addressing *Witcher*, previous actions of the City's voters and Council in establishing the natural areas program is the legislative action and the Defendants' attempt in the Initiated Ordinance to direct the City to purchase one specific parcel of land, is clearly an administrative action under the Court's reasoning in *Witcher* and *Blackwell*.

The Supreme Court in *Vagneur* admittedly addresses a complex set of facts, but a short version of them, as applicable here, are: (i) the City of Aspen for many years explored and engaged in local debate over whether and how to modify the design of its highway entrance; (ii) to make modifications, Aspen would need to cooperate with Federal ("FHWA") and Colorado ("CDOT") transportation agencies; (iii) in 1996, Aspen's voters were asked to allow some of Aspen's open space to be conveyed to CDOT for a two-lane design, which voters approved; (iv) in 1998, Aspen, FHWA and CDOT agreed on a preferred design for a two-lane parkway; (v) in 2007, two citizen-initiated petitions were submitted to Aspen to enact ordinances to require the highway to following one of two alternative four-lane designs; (vi) the initiated ordinances would also rescind the voters' 1996 approval for the sale of the open space to CDOT; and (vii) after an Aspen hearing officer determined the initiatives were administrative matters not subject to a citizen initiative, the proponents of the initiatives appealed to the courts. *Vagneur*, 295 P.3d at 496-502. In upholding the hearing officer's decision, the Supreme Court provided the following relevant guidance:

> The initiatives do not propose new laws or rules of general applicability that set a governing standard for all cases coming within their terms. Rather, the proposed initiatives seek to mandate via municipal ordinance a specific proposal for the location, design, and construction of a state highway corridor. *Id.* at 508, ¶ 51.
> . . .
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> Despite Proponents' characterization of the initiatives as establishing a "new strategic concept" and an "alternate policy" for the transportation corridor, the initiatives are not, in fact, legislative in character because they do not propose to establish a law of general applicability or a rule that sets a governing standard. As such, the initiatives do not represent the exercise of legislative power. *Id.* at 509, ¶ 58.
> . . .
>
> The determination of the type or scope of a right-of-way easement conveyed to another party across a specific parcel of city-owned property reflects the kind of administrative decision related to the management of municipal infrastructure addressed in *Witcher* and *Blackwell. See Witcher,* 716 P.2d at 449; *Blackwell,* 731 P.2d at 1254. *Id.* at 510, ¶ 60.

Before attempting to distinguish the holdings and facts in *Vagneur* from the facts here, Defendants make the following concession about the *Vagneur* holding: "[t]he [Supreme] Court held

that 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." [Response, p. 15.] Yet, Defendants here argue purchasing a specific parcel of land to use for parks, recreation and open lands, natural areas, and wildlife rescue and education is legislative.

Defendants argue Vagneur is not applicable here because the Initiated Ordinance does not have all the complexities of the Aspen initiatives and "[t]he PATHS initiated ordinance 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." [Response, p. 15.] Defendants downplay the complexities in the Initiated Ordinance as outlined in the Motion [Motion, pp. 16-20] and ignore its clear administrative mandates. The Initiated Ordinance states the City: (i) "shall acquire" the Property at its fair market value and use it for parks, recreation and open lands, natural areas, and wildlife rescue and education; (ii) "should use" $10 million as starting point in purchase negotiations; (iii) "shall not" cease acquisition efforts without voter approval; (iv) "shall seek funding" from certain designated sources; (v) may seek additional funding from voters but "only" if other designated sources insufficient; and (vi) "shall expeditiously" use best efforts in good faith to acquire the Property.[4] [Motion Ex. 8, pp. 1-3.] *Vagneur*, *Witcher* and *Blackwell* make it clear, these provisions in the Initiated Ordinance are administrative matters.

3. Entering into a Contract is an Administrative Decision

Vagneur states: "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 specific

[4] Fort Collins Municipal Code § 1-2 provides, in part, that in the construction of nontechnical words used in all City ordinances, they "shall be construed according to the common and approved usage of the language." The commonly accepted meaning of the word "shall" indicates the Initiated Ordinance provisions using this word are mandatory. *See*, *Skruch v. Highlands Ranch Metropolitan Districts Nos. 3 and 4*, 107 P.3d 1140, 1143 (Colo. App. 2004).

individual parties and, accordingly, lie beyond the bounds of legislative power." *See also, Friends of Denver Parks*, 327 P.3d at 320-21 (Court of Appeals held, quoting this from *Vagneur*, that Denver's ordinance approving the conveyance of land to a school district was an administrative matter not subject to a citizen referendum). The Supreme Court also says in *Vagneur*:

> We have held that a city's *negotiation of contracts* to which it is a party, and amendments to those contracts, are administrative matters not subject to the power of initiative. *See Witcher,* 716 P.2d at 450. (Emphasis added.) *Vagneur*, 295 P.3d at 509, ¶ 56.
> . . .
>
> The administrative decisions and actions taken by the City in furtherance of this administrative process are akin to the *negotiation and amendment of contractual obligations* related to the "maintenance of city-owned lands and buildings" discussed in *Witcher,* 716 P.2d at 449, and the "choice of the location and structure" for a municipal building in *Blackwell,* 731 P.2d at 1254. Because the initiatives seek to modify or replace an essentially administrative decision, the initiatives are likewise administrative in character. *See Witcher,* 716 P.2d at 451. (Emphasis added.) *Id.* at 509, ¶ 59.

In distinguishing this clear and concrete example of an administrative action, Defendants argue this principle from *Vagneur* "does not harmonize with the Supreme Court's previous holdings regarding specific pieces of property in *McKee* and *Margolis*." [Response, p. 18.] Defendants conclude: "[t]he 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." [Response, p. 18.] This, however, is not true. The Court states in *Vagneur*:

> We reject Proponents' suggestion that proposing a permanent change in use of a specific parcel of City-owned open space is equivalent to modifying a zoning plan and that such a proposed change in use is therefore legislative. *See Margolis,* 638 P.2d at 304–05 . . . . *Moreover, the sale, exchange, conveyance, disposition, or change in use of a particular parcel of city-owned property cannot be analogized to the development of a city-wide zoning plan of general applicability*. Such case-specific actions generally do not reflect the exercise of legislative power because they do not necessarily entail the enactment of a zoning ordinance that sets a governing standard for all properties coming within its terms, nor do they necessarily amend any existing zoning ordinance of general applicability. The proposed initiatives at issue here do not establish or amend any zoning laws. (Emphasis added.) *Vagneur*, 295 P.3d at 510, ¶

Therefore, as argued above in Section IV.B.1. and here clarified in *Vagneur*, Defendants cannot rely on *McKee* and *Margolis* to argue the acquisition provisions of the Initiated Ordinance are the "setting a general rule or policy" and, therefore, a legislative matter. In addition, *Vagneur*, *Blackwell*, *Witcher* and *Friends of Denver Parks* all make it clear that requiring the City to enter into a contract with Colorado State University to purchase the Property is an administrative matter.

C. General Assembly Bills and City Resolutions and Ordinances Not Precedent for Property Acquisition Being a Legislative Matter

Defendants cite the Supreme Court's statement in *Vagneur* that in a "close case" a court's decision can be informed by historical examples as found in statues enacted by legislative bodies. [Response, p. 20.] Defendants then cite several General Assembly bills and several City resolutions and ordinances in which the acquisition of real property is authorized. [Response, pp. 21-26.] Defendants argue these were all "legislative" actions and they lend support to this Court concluding the acquisition provisions in the Initiated Ordinance are legislative matters. This argument fails for three reasons.

First, for all the reasons discussed above in this Reply, this is not a "close case" for which the Court needs to consider these bills, resolutions and ordinances.

Second, in *Vagneur* the Supreme Court recognizes the reality the governing body of a municipality "often wields both legislative and executive powers and frequently acts in an administrative as well as a legislative capacity by the passage of resolutions and ordinances," *Vagneur*, 295 P.3d at 504, so the fact that the Fort Collins Council has adopted resolutions and ordinances to approve the purchase of real property does not mean that such actions were legislative. As the Supreme Court has made very clear in *Vagneur* and the other cases discussed above whether a matter is legislative or administrative depends on the nature of the action. Whether the General Assembly acts in both legislative and administrative capacities is not clear from the existing case law, but what

kind of actions it takes in its bills is not relevant to the City since the Supreme Court recognizes that municipal governing bodies ***do*** act in both capacities.

And third, we have the clear example in *Blackwell* where the Idaho Springs adopted a motion to approve the purchase of the land for its new city hall, which action was considered by the Supreme Court to be an administrative matter. *Blackwell*, 731 P.2d at 1254-55. More recently, in *Friends of Denver Parks*, the Court of Appeals concluded a Denver city council ordinance approving the transfer of land to a school district was also an administrative matter. *Friends of Denver Parks*, 327 P.3d at 320-21.

Accordingly, the Court need not and should not rely on the General Assembly bills or the City resolutions and ordinances in its analysis of the City's Motion.

CONCLUSION

Therefore, for the reasons argued above and, in the Motion, the City asks the Court to grant the City's Motion by severing the administrative matters from the legislative matters in the Initiated Ordinance and Ballot Measure as proposed in Exhibits 15 and 16 attached to the Motion so that ***only*** the legislative matters in them will be submitted to City's electors at the City's April 6, 2020, regular election, and for such other relief as the Court deems just and proper.

Dated this 1st day of February, 2021.

Respectfully submitted,

/s/John R. Duval
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CERTIFICATE OF SERVICE

The undersigned herby certifies that on the 1st day of February, 2021, a true and correct copy of this Reply to Response to Motion for Summary Judgment was filed via the Colorado Courts e-filing system and served to the following parties:

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