District Court, Larimer County, State of Colorado 201 LaPorte Avenue, Suite 100 Fort Collins, CO 80521-2761 (970) 494-3500	DATE FILED: February 3, 2021 12:32 PM CASE NUMBER: 2020CV30833
THE CITY OF FORT COLLINS, COLORADO, a Colorado home rule city and municipal corporation, Plaintiff, v. **PLANNING ACTION TO TRANSFORM HUGHES STADIUM SUSTAINABLY CORP., a Colorado nonprofit corporation; and ELENA M. LOPEZ; MELISSA ROSAS; and PAUL PATTERSON, each in their official capacity as a petition representative of the persons signing the petition for a citizen-initiated ordinance relating to the City of Fort Collins rezoning and acquiring certain real property,** Defendants.	**▲ COURT USE ONLY ▲** Case No.: 2020 CV 30833 Courtroom: 3B

ORDER DENYING IN PART AND GRANTING IN PART MOTIONS FOR SUMMARY JUDGMENT

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

The City has moved for summary judgment under Colo. R. Civ. P. 56 requesting that the Court rule, as a matter of law, that certain provisions in Sections 1, 2, 5, 6, and 7 of the Initiated Ordinance are administrative and not legislative matters and, as such, under the Colorado Constitution and the City of Fort Collins Charter, are not proper subjects of a citizen-initiated

ordinance. PATHS opposes Plaintiff's motion for summary judgment, contending that the entire Initiated Ordinance is legislative.

The Court held a hearing regarding this matter on February 2, 2021. At the hearing, PATHS also made an oral motion for summary judgment, asking the Court to enter judgment that all matters on the Initiated Ordinance are legislative. The City didn't oppose the timing or form of the motion. The Court will construe defendants' response to the City's motion as its brief in support of the oral motion, and will construe the City's motion, conversely, also as its response in opposition to the same.

As more fully explained below, the Court concludes that Sections 1 through 4 and 8 of the Initiated Ordinance are legislative in nature and thus are proper subjects of the reserved powers by the people under Article V, § 1 of the Colorado Constitution and its counterpart in the City Charter. The Court also concludes that Sections 5 through 7 are administrative in nature and thus fall outside the people's reserved power. Lastly, exercising its discretion, the Court will sever Sections 5 through 7 and allow the City's electors to vote on Sections 1 through 4, and 8.

I. INTRODUCTION.

PATHS, a nonprofit corporation, is organized "for the purpose of organizing and representing Fort Collins area residents who are aligned in the objective of conserving as open space and for other similar uses the property on which Colorado State University's Hughes Stadium was formerly located (the 'Hughes Stadium Property')." Compl. ¶ 1. As readers of this Order may know, Colorado State University ("CSU") owns the property where Hughes Stadium used to be; that land is presently vacant. The City has annexed the Hughes Stadium Property and neither CSU nor the City agrees on how the property should be zoned. So, PATHS decided to take advantage of their rights under Colo. Const. art. V § 1, and under the City's Charter, art. X § 1(a), and submitted a proposed ordinance to the City Council. The City Council chose to refer PATHS' initiated

ordinance to the City's voters. In general, the initiated ordinance seeks to mandate rezoning of the Hughes Stadium Property and to require the City to make "good faith" attempts to purchase it.

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

The City seeks very specific relief. As to sections 1, 2, 4, 5, 6, 7, and in the next-to-last recital, it seeks a declaration that those provisions "are administrative matters not subject to the initiative powers the City's registered electors have under Article V, Sections 1(2) and 1(9) of the Colorado Constitution and under Charter Article X, Section 1(a)." Compl., Prayer for Relief ¶ A. Then, it requests injunctive relief, in the form of an order directing that the "Ballot Initiative and Ballot Measure to exclude and sever from them the provisions in Sections 1, 2, 4, 5, 6 and 7 and in the next-to-last recital…." *Id.* ¶ C. (The Court notes that, at oral argument, the City modified its request for relief because now it believes that Section 4 is legislative and because it doesn't object to the recitals being part of the Initiated Ordinance subject to their having no legal effect. Defendants' didn't object to such a declaration either.)

Conversely, as to sections 3 and 4, the City seeks a declaration that "the provisions in Sections 3 and 4 of the Initiated Ordinance requiring the City Council, immediately upon passage of the Initiated Ordinance, to rezone the Hughes Stadium Property to the Public Open Lands District

pursuant to Division 4.13 of the City's Land Use Code and prohibiting the City from de-annexing or subsequently rezoning the Hughes Stadium Property "to any designation other than Public Open Lands without voter approval of a separate initiative referred to the voters by City Council," are legislative matters …." *Id.* ¶ B.

I. UNDISPUTED MATERIAL FACTS.

The following facts are undisputed, unless the Court notes otherwise. On August 27, 2020, the Petition Representatives submitted to the City Clerk a "Notice of Intent to Circulate an Initiative Petition related to the Hughes Stadium Property." Ex. 3. To Plaintiff's Motion. They also submitted to the Clerk the form of the petition for the Initiated Ordinance to be circulated for signing by the City's register's electors. Ex. 4. The Clerk approved the form of the petition. Ex. 5.

On November 2, 2020, Petition Representative Melissa Rosas submitted the signed Petition to the City Clerk. Ex. 6. Three days later, the City Clerk issued a Statement of Initiative Petition Sufficiency, certifying that the Petition contained more than the 3,280 valid signatures required for the initiated Ordinance to be placed on the ballot of the City's April 6, 2021, regular election. Ex. J. The Initiated Ordinance consists of eight sections and provides as follows:

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

subsequently rezone the Hughes Stadium property to any designation other than Public Open Lands without voter approval of a separate initiative referred to the voters by City Council.

Section 5. That to acquire the Hughes Stadium property, the City shall seek funding from existing sources or future partnerships, including but not limited to the Fort Collins Open Space -3- Yes! sales tax fund, Certificates of Participation, the City's general fund, Great Outdoors Colorado and other third party organizations providing open space or other types of recreational or land conservation grants, and/or partnerships with other entities such as Larimer County.

Section 6. That the City Council may refer ballot measures to the voters for the purpose of seeking additional funding only if existing sources of funding or future partnerships are insufficient for the preservation of the Hughes Stadium property as described in this Ordinance.

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

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

Ex. 8. To Plaintiff's Motion.

On November 17, 2020, the City Clerk presented the Statement of Sufficiency to the Council at its regular meeting. The City Council adopted Resolution 2020-105, which provisionally and conditionally submitted in Section 2 and Section 3 of the Resolution 2020-105, subject to this declaratory action, the Initiated Ordinance to a vote of the City's registered electors at the City's April 6, 2021, regular election. Ex. 9.

The City is a home-rule municipality under Article XX of the Colorado Constitution. The Hughes Stadium Property, which is a 164.554-acre parcel, was annexed by the City in 2018. Ex. 10. When the City Council annexed the Hughes Stadium Property, it also adopted Ordinance No. 124, 2018, to zone the Hughes Stadium Property in the City's Transition District. Ex. 11 ("Zoning Ordinance").

The Hughes Stadium Property is owned by the Board of Governors of the Colorado State University System ("CSU Board"). On October 9, 2020, the CSU Board adopted a written motion, with an attached "Site Plan," expressing and detailing its intended future use of the Hughes Stadium Property. Ex. 12 ("CSU Board Motion").

Acquiring real property by the City requires carrying out certain due diligence and possessing expertise on the subject matter. The City details what that due diligence entails and the expertise required to acquire real property. Ex. 2, Ernst Aff. ¶¶ 17 and 18.

It's also undisputed that the Colorado General Assembly has passed legislative acts regarding the acquisition, conveyance, and appropriation for real property. Def.'s Resp. To Pl.'s Summ. J. Mot. 5. Likewise, the City Council has passed legislative ordinances and resolutions regarding the acquisition and conveyance of real property. *Id.*

II. APPLICABLE LEGAL STANDARDS.

Under Colo. R. Civ. P. 56(c), summary judgment is proper only where "there is no genuine issue as to any material fact and … the moving party is entitled to a judgment as a matter of law." A factual dispute is "material" if it is one that would affect the outcome of the case. *W. Innovations, Inc. v. Sonitrol Corp.*, 187 P.3d 1155, 1158 (Colo. App. 2008).

A party seeking summary judgment bears the initial burden of establishing that there's no dispute regarding material facts. *Pueblo W. Metro. Dist. v. Se. Colo. Water Conservancy Dist.*, 689 P.2d 594, 600 (Colo. 1984). To meet that burden, the moving party may rely on "pleadings, depositions, answers to interrogatories, … admissions on file, [and] affidavits." Colo. R. Civ. P. 56(c). While "the form of the evidence, such as an affidavit, need not be admissible at trial, the content or substance of the evidence must be admissible." *People ex rel S.N. v. S.N.*, 329 P.3d 276, 282 (Colo. 2014). Further, evidence introduced to defeat or support a motion for summary judgment must be sworn, competent, based on personal knowledge, and set forth facts that would be admissible at trial. Colo.

R. Civ. P. 56(e). "[T]he trial court may not assess the weight of the evidence or credibility of witnesses in determining a motion for summary judgment ...." *Kaiser Found. Health Plan v. Sharp*, 741 P.2d 714, 718 (Colo. 1987).

The moving party may satisfy its burden by showing the absence of evidence in the record to support the nonmoving party's case. *Id.* If the moving party demonstrates no disputed material facts exist, the burden shifts to the nonmoving party to demonstrate the existence of a disputed material fact. *Id.* The Court must give the nonmoving party all favorable inferences that reasonably may be drawn from the evidence. *Id.* But the nonmoving party can't use "pretense, or apparent formal controversy," to avoid summary judgment. *Id.* Nor may a "genuine issue" be raised "simply by means of argument." *Sullivan v. Davis*, 347 P.3d 606, 611 (Colo. 2015).

III. DISCUSSION.

The City seeks summary judgment and declarations that Sections 1, 2, 5, 6, and 7 of the Initiated Ordinance are administrative and not legislative matters and aren't a proper subject of a citizen-initiated ordinance to be submitted to the electorate on April 6, 2021.[1]

The Court concludes that Sections 1, 2, 3, 4, and 8 are legislative in nature and thus may properly be included on the Initiated Ordinance submitted to the electorate. On the other hand, the Court holds that Sections 5, 6, and 7 are administrative matters, which can't be included in the Initiated Ordinance. The Court further concludes that Sections 5 through 7 will be severed from the Initiated Ordinance.

[1] The Court has subject-matter jurisdiction to consider this pre-election declaratory judgment action to determine whether the proposed initiative covers legislative matters subject to Article V, § 1. *City of Idaho Springs v. Blackwell*, 731 P.2d 1250, 1253 (Colo. 1987).

A. The Colorado Constitution and the City Charter Preserve the Right of the People to Legislate through an Initiative Process.

The Court begins with first principles, which in this case lie at the heart of our representative democracy. "'All political power is vested in and derived from the people,' and all government originates from the people." *McKee v. City of Louisville*, 616 P.2d 969, 972 (Colo. 1980) (citing COLO. CONST. art. II, § 1). As the Supreme Court has noted, the people reserved for themselves the right to legislate. *Id.* "This is of first order; is it not a grant to the people but a reservation by them for themselves." *Id.* Specifically, the people's fundamental referendum and initiative powers at issue in this case emanate from Article V, Section 1 of the Colorado Constitution. That provision states, in relevant part, that the legislative power of the state is vested in the general assembly, but the people reserved to themselves the power to initiate, reform, or reject any act of the general assembly. COLO. CONST. art. V, § 1. This reservation of power in the people has become to be known as the initiative and referendum powers.

Like the right to vote, the power of initiative is a fundamental right at the very core of our republican form of government. *McKee*, 616 P.2d at 972. The initiative and referendum powers reserved to the people under article V extend "to every registered elector of every city, town, and municipality as to all local, special, and municipal legislation of every character." *Vagneur v. City of Aspen*, 295 P.3d 493, 504 (Colo. 2013) (citing COLO. CONST. art. V. § 1(9)). The people's reservation of power, however, isn't absolute. The Supreme Court has construed the above constitutional provision solely to extend to legislative matters: "only those acts of a city council which are legislative in character are subject to the referendum and initiative powers." *Margolis v. District Court,* 638 P.2d 297, 303 (Colo. 1981).

The City's Charter also reserves the referendum and initiative power to the people. Article X, § 1 provides that the registered electors of the city shall have the power to initiate any ordinance or

resolution to the Council or at the polls. City Charter, art. X § 1(a). The Court also must examine the terms of the City's referendum and initiative provision found in its Charter because rights granted under it are independent of those in the Constitution. *City of Aurora v. Zwerdlinger*, 571 P.2d 1074, 1076 (Colo. 1977). The Charter can't limit powers reserved by the Constitution, but it may grant broader powers to its electors. The Constitution, thus, provides a floor, not a ceiling.

Here, the City Charter parallels and doesn't grant more rights than those reserved by the Colorado Constitution. While the Charter uses the language "any ordinance," the Supreme Court has interpreted an identical phrase, almost universally, to extend solely to ordinances that are *legislative* in character. *Id.* (citing the general rule and policy underlying this determination).

One of the unquestioned purposes of the referendum and initiative powers is to expeditiously permit the total and free exercise of legislative powers by the people, except in rare circumstances. *Margolis*, 638 P.2d at 303. Thus, the power to call referendum and initiative elections is a direct check on the exercise or non-exercise of legislative power by elected officials. *Id.* "Indeed, a heightened community sensitivity to the quality of the living environment and an increased skepticism of the judgment of elected officials provides much of the impetus for the voters' execution" of these reserved powers. *Id.*

With that purpose in mind, the Colorado Supreme Court has held that the retained powers of initiative and referendum are fundamental rights reserved in the people and must be liberally construed. *McKee*, 616 P.2d at 972. The Court views any governmental action that has the effect of curtailing the fundamental right to legislate "with the closest scrutiny." *Id.* Therefore, in conducting the following analysis the Court liberally construed the Initiated Ordinance and closely scrutinized the City's request to restrict PATHS' right to place the Initiated Ordinance before Fort Collins' electors.

B. Separation of Powers Doctrine and Relevant Precedent.

As just noted, the foundation behind the reservation of power in the people solely for legislative matters rests on the separation of powers doctrine. *Vagneur*, 295 P.3d at 503–04. Article III of the Colorado Constitution creates three separate branches of government (executive, legislative, and judicial) and prevents each branch from exercising power belonging to the other two. COLO. CONST. art. III.

While the separation of powers doctrine is clear, sometimes, especially in the present context, it proves difficult to determine whether an initiative referred to the voters deals with legislative matters. Indeed, as the Supreme Court has previously observed, "[t]he dividing lines between the respective powers [of the legislative, executive, and judicial branches] are often in crepuscular zones, and, therefore, delineation thereof usually should be on a case-by-case basis." *MacManus v. Love*, 179 Colo. 218, 499 P.2d 609 (Colo. 1972).

Thus, the Court must begin by discussing the basic powers reserved to the legislative and executive branches. In general, the "[l]egislative power is the authority to make laws and to appropriate state funds." *Id.* at 610. The enforcement of statutes and administration thereunder are executive, not legislative, functions. *Id.* To fulfill its duty to faithfully execute the laws, the executive branch has the authority to administer the funds appropriated by the legislature for programs enacted by the legislature. *Anderson v. Lamm*, 579 P.2d 620, 623 (Colo. 1978). But the legislature "cannot administer the appropriation once it has been made." *Id.* "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." *Id.* (internal quotations omitted). Thus, it follows that the legislature isn't permitted to interfere with the executive's power to make specific resource-allocation decisions. *Id.*

With the separations-of-power doctrine in mind, the Supreme Court has developed two principal formalistic tests to determine whether a citizen-initiated referendum is legislative or executive.[2] *City of Idaho Springs v. Blackwell*, 731 P.2d 1250, 1254 (Colo. 1987). It, however, has never explained which test should be applied in a particular scenario or why one test is better suited to one type of citizen-initiated referendum over another. *Vagneur*, 295 P.3d at 506 (the Supreme Court has "never explained … the interrelation between the tests or articulated whether a particular matter must be examined under more than one test to reach a determination").

It appears that this Court must apply both tests. *See Blackwell*, 731 P.2d at 1254 ("Two 'tests' or guidelines are used to resolve the [executive versus legislative] issue in most cases"). Because—in the Supreme Court's candid admission—the classification of an ordinance "as legislative or administrative is largely an *ad hoc* determination," *id.*, the Court later noted that the two tests "are somewhat elusive."[3] *Vagneur*, 295 P.3d at 506.

The first test provides that actions that relate to subjects of a permanent or general character are legislative, while those that are temporary in operation and effect are not. *Witcher v. Canon City*, 716 P.2d 445, 449 (Colo. 1986). "In this connection an ordinance which shows an intent to form a permanent *rule of government* until replaced is one of permanent operation." *Blackwell*, 731 P.2d at

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[2] A third test exists in appropriate cases. *See Witcher v. Canon City*, 716 P.2d 445 (Colo. 1986) (citing *Margolis*, 638 P.2d at 304). That test is inapplicable here.

[3] It's unclear what this Court must do with such a unique deck of precedential cards. While, of course, the Court must follow the Supreme Court's precedent, it shares the concerns raised by former Chief Justice Coats in his *Vagneur* dissent. There, he observed that the *ad hoc* determinations developed by the Court are designed "primarily for the purpose of limiting the initiative power reserved to the voters by article V, section 1 of the state constitution." *Vagneur*, 295 P.3d at 511–12 (Coats, J., dissenting). He also noted, with due concern, that while the tests developed had a narrow original purpose—"ensure that popular democracy not interfere with day-to-day administrative functions of municipalities"—"the discretionary power of the judiciary" under the tests developed to determine whether a citizen-initiated initiative is legislative "is by no means so limited. In fact, the standards guiding judicial discretion in this context, such as they are, have become so elastic as to make any point-by-point refutation of [a determination] virtually pointless." *Id.* at 512 (Coats, J., dissenting).

1254. So, in *Margolis*, the Supreme Court held that zoning or rezoning decisions involve a general rule or policy regarding the city's land-use, which is of a general and permanent nature, and thus legislative in nature. 638 P.2d at 304. As the Court noted, the term "permanent" signifies a declaration of public policy of general applicability because a permanent enactment is more likely to involve policy considerations. *Id.*

By contrast, on the issue of "permanence," the Supreme Court determined that the proposed ordinance in opposition of the city's selection of the site and structure for a new city hall was not a permanent nor general act because the ordinances only excluded one parcel and one type of structure "from the range of choices available … to implement the previously declared policy of securing a city hall." *Blackwell*, 731 P.2d at 1254. Similarly, in *Witcher*, the Court concluded that the Cañon City council's act of amending a lease between the city and the operators of the Royal Gorge bridge was administrative, even though the lease amendment extended the useful life of the bridge until 2032. 716 P.2d at 450. The Court explained that the effect of the amendment is the "same as any other spending decision by the Council;" it is the administrative task of elected municipal officials to collect and expend monies for the protection and enhancement of public properties. *Id.*

The second test provides "acts that are necessary to carry out [or implement] existing legislative policies and purposes or which are properly characterized as executive are deemed to be administrative, while acts constituting a declaration of public policy are deemed to be legislative." *Id.* at 449–50. So, in *Blackwell*, the Supreme Court held that the choice of location and structure for a new city hall is an act "necessary to carry out" the existing legislative policy to build a new city hall using tax revenue and is thus administrative. 731 P.2d at 1255. Along the same lines, "while the establishment of the city-owned water-system may have been in pursuance of a broad public policy and, therefore, a legislative matter, the receipts and expenses incidental to its maintenance and management are executive or administrative matters." *Zwerdlinger*, 571 P.2d at 1077. The Supreme

Court later explained that as it ruled in *Zwerdlinger*, it'd be "impractical, if not impossible, for the general public to appraise [utility rates] in the absence of specific data, facts and information necessary to arrive at a fair and accurate judgment upon the subject." *Vagneur*, 295 P.3d at 505.

The Supreme Court has further explained that legislative power is defined by the work product it generates—namely, the promulgation of laws of general applicability: "when the government legislative, it establishes a generally applicable rule that sets the governing standard for all cases coming within its terms. *Id.* at 506–07. By contrast, executive acts typically aren't based on broad policy grounds, but rather on "individualized, case-specific considerations." *Id.* at 507.

In *Vagneur*, the proposed ordinance was deemed to be administrative because it sought to replace the highway design already approved by the state and federal agencies through specific negotiated contractual agreements with the city of Aspen, and mandated construction of a different design not contemplated by the city, the state, or federal agencies. *Vagneur*, 295 P.3d at 507 ("in other words, the initiatives are an attempt to reverse administrative decisions of city officials and dictate the future course of such decisions").

Following this precedent, *City of Colorado Springs v. Bull*, 143 P.3d 1127 (Colo. App. 2006), provides a good example of an initiative in which there were both executive and legislative matters in a single initiative. There, the Court of Appeals was faced with four initiatives, three of which are guiding here. The court held that the first initiative, the Multi-Year Contracts provision requiring all multi-fiscal year contracts to be fully funded in cash at the outset or submitted to the voters, was legislative because it created a general and permanent policy. *Id.* at 1136–37. It reasoned that the provision included virtually all contracts with a government entity, and that this broad scope is indicative of a general policy matter. *Id.* The court further explained that "[w]hile these contracting practices may be, or have been, administrative, the initiative at issue creates a new permanent and general policy limiting or eliminating the City's ability to enter into a certain class of contracts. *Id.* at

1137. The court was also swayed by the fact that the provisions addressed some matters that have been "historically viewed" as legislative, such as the issuance of general obligation bonds or leasing of real property. *Id.* at 1137.

On the other hand, the Court of Appeals held that the Revenue Initiative, which required the refund of street lighting fees, regulated administrative matters. *Id.* at 1134–35. It reasoned that, under *Zwerdlinger*, an initiative that is retrospective in nature and calls for a refund of revenue collected by a utility in prior fiscal years isn't a declaration of public policy of general applicability.[4] *Id.* at 1135. It also held that a provision requiring all current outstanding certificates of participation be paid off in no more than five equal yearly payments is administrative because it didn't create new permanent policy, but instead merely required the council to act in a certain manner even if the alternative would be in the City's best interest or in accordance with policy. *Id.* at 1137. As a remedy, the Court of Appeals severed the administrative matters from the balance of the initiatives. *Id.* at 1138.

Lastly, in a "close case," a court's decision may be informed by historical examples. *Vagneur*, 295 P.3d at 507–09. That is, "an initiative that finds longstanding parallels in statutes enacted by legislative bodies, for example, may be deemed legislative on that basis, while initiatives that seem more like traditional executive acts may be deemed to fall on that side of the line." *Id.* It's unclear, however, what classifies as a "close case" under the Supreme Court's precedents.

As an initial matter, the parties agree—as they told the Court during oral argument—that Sections 3 and 4 of the Initiated Ordinance are legislative and that judgment should enter accordingly. While that has narrowed the issues, the Court must ensure that both parties are entitled

[4] As the Court noted during oral argument, the dialectical nature of these holdings is hard to ignore. An argument can easily be made that the retrospective refund of revenue to the citizens from a utility is very much a declaration of *new* public policy, of general applicability, and permanent in nature.

to judgment as a matter of law given the procedural posture in which they request entry of that judgment. Colo. R. Civ. P. 56(c) (movant must establish no material factual dispute and that it's "entitled to judgment as a matter of law"). The Court agrees that the movants are so entitled as to Sections 3 and 4.

That leaves a determination of whether Sections 1, 2, and 5 through 8 are legislative or administrative. Applying the above precedent to the Initiated Ordinance, the Court concludes that Sections 1 through 4 and 8 are legislative in character and thus a proper exercise of the people's reserved powers, while Sections 5 through 7 are not.

C. Sections 1 through 4 and 8 are legislative.

Sections 1 through 4 and Section 8[5] announce new public policy for the acquisition and use of the Hughes Stadium Property and are therefore legislative matters. The Court concludes that Sections 3 and 4 involve pre-eminent legislative matters that are an appropriate exercise of the people's initiative power under Article V, § 1 of the Colorado Constitution. *McKee*, 616 P.2d at 672. Sections 3 and 4 of the Initiated Ordinance "establish or amend … zoning laws." *Vagneur*, 295 P.3d at 510.

Section 3 provides that, if approved by the electors, the Hughes Stadium Property will be re-zoned as Public Open Lands under the City's land use code. In turn, Section 4 provides that the City can't de-annex, cease acquisition efforts, or rezone the Hughes Stadium Property without voter approval. As part of a rezoning initiative, Sections 3 and 4 are "general and permanent in character," involving the promulgation and effectuation of a new land-use policy for the Hughes Stadium

[5] Section 8, which provides an effective date for the Initiated Ordinance, is also legislative and it's a provision that's found in every piece of legislation. Similarly, Section 1, which incorporates the "whereas" clauses as findings and resolutions to justify the change in policy, is also legislative. The Court agrees with the parties that Section 1 doesn't have any legal effect other than incorporating legislative findings. Nor does it direct the City to take any concrete action based on those findings.

Property. *Margolis*, 638 P.2d at 304. And Section 4 of the Initiated Ordinance makes it crystal clear that the rezoning can't be undone, except by another voter-approved ordinance, further cementing the permanent nature of the policy.

The Court also concludes that Section 2 is legislative in nature and a proper exercise of the people's reserved power. Section 2 takes the new policy to the next step, ensuring the Initiative Ordinance's vision is actualized: purchasing the Hughes Stadium Property for the purpose of using it for parks, recreation and open lands, natural areas, and wildlife rescue and education. Acts that deed or acquire land are pre-eminently legislative. For example, historically, the General Assembly has enacted laws to purchase or acquire real property, to convey real property, and to appropriate funds to accomplish those acts. PATHS' response to the motion for summary judgment describes multiple bills that do exactly that. Critically, the City itself has passed many resolutions that do the same thing: acquire or convey real property. Few would question that those resolutions or ordinances aren't an appropriate exercise of legislative power.

Similarly, in the federal context, a state may consent, via legislation, to *sell* land to the United States (or to let the United States condemn such land) "for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings." U.S. Const. art. I, § 8 cl. 17. Such laws are known as general-consent statutes. *See, e.g.*, *United States v. State Tax Commission of Miss.*, 412 U.S. 363, 372 n.15 (1973) ("General consent statutes are not uncommon."); *Paul v. United States*, 371 U.S. 245, 265 n.31 (1963) (California's general-consent statute). And such legislative acts (to sell or to purchase land) are unquestionably appropriate exercises of legislative power, enshrined in Article I of the U.S. Constitution, which covers the Congress.

When construed together, Sections 2 and 4 further the same general land-use policy for the Hugues Stadium Property: Section 4 prevents the City from de-annexing or ceasing acquisition efforts without voter approval, while Section 2 solidifies the permanent nature of that policy by

requiring the City to purchase the Hughes Stadium Property. *Cf. Margolis*, 638 P.2d at 303 (observing that "heightened community sensitivity to" quality of life and "an increased skepticism of the judgment of elected officials provides much of the impetus for the voters'" exercise of their reserved powers).

The City, however, contends that the acquisition of land isn't a legislative matter for purposes of the reserved initiative powers. Reply to Mot. for Summ. J. at 14–15. The City relies on *Vagneur*'s statement that "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." 295 P.3d at 510 (emphasis added).

The City's argument misses the mark. To begin with, that statement in *Vagneur* doesn't help the City because the proposed initiative there dealt with disposition of property that was already city-owned. Moreover, and unlike the Initiated Ordinance here, in *Vagneur* the "proposed initiatives at issue … do not establish or amend any zoning laws." *Id.* The Initiated Ordinance here was carefully crafted to include a rezoning provision, likely to avoid this potential issue.

Nor is the Court persuaded by the City's contention that the Initiated Ordinance is like the one in *Blackwell*, which the City says involved an ordinance "to purchase one specific parcel of land." Mot. for Summ. J. at 11. This case isn't like *Blackwell* at all. There, the Supreme Court concluded that an ordinance dealing with "the selection of the site and structure for the city hall is not a permanent or general act within the meaning of *Witcher* or *Zwedlinger*." 731 P.2d at 1254. Selection of the particular site for city hall, the Supreme Court observed, doesn't involve policy considerations, especially when the proposed ordinance there only excluded one parcel of property and one type of structure from being acquired. *Id.* By contrast, Section 2 of the Initiated Ordinance doesn't deal with such granular minutiae. Instead, Section 2 declares and requires acquisition of the Hughes Stadium Property, a key implementation of public policy furthered by the Initiated Ordinance.

While the Initiated Ordinance here may, as a result, necessitate the City to negotiate contracts for the acquisition of the Hughes Stadium Property and to conduct other studies and actions, that alone doesn't transform Sections 2, 3, and 4 into administrative matters. "The mere prospect that a proposed initiative will have administrative consequences or require post-adoption administrative action is not, by itself, dispositive of whether the measure is administrative or legislative." *Vagneur*, 295 P.2d at 509. Indeed, it's not uncommon for legislative acts to require subsequent administrative action for implementation. *Id.* Thus, while Sections 2 through 4 may implicate later administrative actions, the heart of those provisions is, as noted above, to create a new permanent and general policy. Naturally, that new policy requires execution by the City to effect the will of the people. *See Bull,* 143 P.3d at 1137.

In sum, Sections 1 through 4 and 8 are legislative in nature, and they're proper subjects under the initiative and referendum powers reserved to the Fort Collins electors by both the Colorado Constitution and the City Charter. Accordingly, the parties' motion for summary judgment will be granted and judgment will enter accordingly.

D. Sections 5 through 7 are executive or administrative.

The Court doesn't reach the same conclusion as to Sections 5 through 7 of the Initiated Ordinance. In the Court's view, those sections are administrative in nature and fall outside the reservation of power by the people under Article V of the Constitution. *Blackwwell*, 713 P.2d at 1253.

As the Supreme Court has noted, administrative matters are generally confined to government officials' discretion to carry out broad policy goals. Thus, decisions that an official makes on a day-to-day basis, like purchasing city vehicles, setting various fees, and maintaining city-owned lands and buildings are administrative. *Witcher*, 716 P.2d at 449. To subject each such executive decision to a vote by the electorate would result in chaos and bring the machinery of government to a halt. *Id.* (citing *Zwerdlinger*, 571 P.2d at 1076).

Still, the limitation on the initiative and referendum power doesn't leave the people without recourse. Citizens who disagree with the way their government operates or administers its stated policy goals may elect new officials who more closely share their values. *Id.*

Here, Sections 5, 6, and 7 don't meet the first test because they don't concern permanent policy declarations of general applicability. *See Vagneur*, 295 P.3d at 506. For instance, Section 5 seeks to dictate the City's decisions on the process for how and from whom to seek revenue to purchase the Hughes Stadium Property. As in *Vagneur*, *Zwerdliner*, and *Blackwell*, those decisions require the exercise of wide discretion, including weighing of factors that are both fluctuating and temporary, like the fiscal position of the City and potential funding sources. Thus, Section 5 doesn't promulgate permanent policy of general applicability; instead, it micromanages the process to effectuate the policy goal by telling the City from whom and in what order to seek funding to purchase the Hughes Stadium Property. That's akin to a law that appropriated funds for a certain purpose and then dictated the administration of that appropriation, which a legislative enactment can't do. *Anderson*, 579 P.2d at 623 (legislature can't administer an appropriation of funds once made).

In the same vein, Sections 6 and 7 invade and micromanage the discretion reserved for administrative matters. Section 7, for instance, would require the City to "use best efforts in good faith" to purchase the Hughes Stadium Property, and to do so "utilizing the financial mechanisms described in Sections 5 and 6." Ex. 8, § 7. The quoted phrases are loaded with discretionary authority, which is reserved for the executive branch of government. Indeed, Section 7 interferes with the executive's prerogative to make specific resource allocation decisions. *Anderson*, 579 P.2d at 623.

Further, giving a hard deadline of two years to acquire the Hughes Stadium Property is administrative in nature and ill-suited for a citizen-proposed initiative. There's no policy of general applicability in setting a time limit of two years for this land acquisition, nor is it permanent. (To the

contrary, it's ephemeral.) Moreover, the impracticalities aren't hard to fathom with such a provision: what happens if, despite "best efforts in good faith"—terms that are completely undefined—the City can't acquire the Hughes Stadium Property in two years? Perhaps the economy crashes, the pandemic rages on, or some other unforeseen circumstance arises. The Initiated Ordinance doesn't answer those questions—it can't and shouldn't because those matters are best left to the discretion of the City Council and City administrators.

The two-year deadline in Section 7, with no room for flexibility, is akin to an impermissible close supervision of administrative functions by the legislative branch. While in a different context, the Supreme Court has cautioned that a legislative appropriation can't interfere with the executive power's authority to allocate staff and resources; the legislative power to appropriate funds doesn't give the legislature the power "of close supervision" that's essentially executive. *Colo. General Assembly v. Owens*, 136 P.3d 262, 268 (Colo. 2006) (detailing how prior case he legislative provision that made appropriations contingent upon presentation of cost-benefit reports and five-year plans to the General Assembly to be constitutionally impermissible).

Section 6 also contains an incredible amount of discretion making it administrative. Under Section 6, too many eventualities must occur before the City may have to return to the voters to seek "additional funding" for the purchase, but as just noted, it's unclear when that point could ever be reached. The discretionary decisions don't involve policy considerations beyond those inherent in carrying out the fiscal policies of the City. The Supreme Court has struck down provisions like that as violating the separation of powers doctrine. In *Owens*, for instance, the Court held that "it would be a legislative infringement on executive power to mandate diversion of limited executive resources to a particular revenue-producing activity." 136 P.3d at 268 (citing *Colorado General Assembly v. Lamm*, 704 P.2d 1371, 1381 (Colo. 1985)). Therefore, the Court concludes that limiting the City's ability to

seek funding through a ballot measure until certain other sources are pursued and requiring that the City conduct such efforts in no less than two years, isn't a permanent rule of general applicability.

The Court further concludes that Sections 5 through 7 must be classified as administrative under the second test because those provisions, which deal with how the City should generate funds and pay for the acquisition of the Hughes Stadium Property, are acts "necessary to carry out" the concurrent legislative policy—to acquire such property and turn it into open space for City residents. *Id.* Like the Retirement of Current Certificates of Participation initiative in *Bull*, Section 5 merely requires the City to act in a certain manner in carrying out the policy of re-zoning and acquiring the Hughes Stadium Property. *See Bull*, 143 P.3d at 1137. Likewise, the limitations of Sections 6 and 7 implicate actions necessary to carry out the to be existing legislative policy of acquiring the Hughes Stadium Property. Those sections don't propose new laws or rules of general applicability that set a governing standard for all cases coming within their terms. Rather, they seek to mandate a specific proposal on how to fund the purchase of the Hughes Stadium Property. Because Sections 5 through 7 seek to modify or replace essentially administrative decisions, they're likewise administrative in character.

Naturally, PATHS disagrees. It contends that Section 5 is legislative because there's reluctance to trust the City, and the citizens are thus looking for ways to close loopholes, such as the City intentionally failing to raise enough money to acquire the Hughes Stadium Property. Thus, it argues, because the City has been reluctant to purchase open lands, the Initiated Ordinance must be as specific as possible. The Court is not persuaded. While a general "skepticism of the judgment of elected officials provides much of the impetus for the voters' exercise of" these reserved powers, *Margolis*, 638 P.2d at 303, that skepticism doesn't provide legal grounds for the electorate to include administrative matters in the Initiated Ordinance.

Besides, Sections 1 through 4 of the Initiative provide sufficient safeguards to ensure that the City carries out Initiated Ordinance's policy goals. Indeed, sound city administrators may be naturally inclined to seek funding from the sources identified in Section 5. But they need not do so. In the end, such matters are pre-eminently administrative and best left in the City's hands.

In sum, since Sections 5 through 7 are administrative in nature, they are not subject to the referendum powers reserved to the City's electors by either the Colorado Constitution or the City Charter.

IV. REMEDY BY SEVERANCE.

Because the Court holds that the Initiated Ordinance contains provisions that are legislative—and thus proper subjects for an initiative—and provisions that are not, it must address whether severance of the Initiated Ordinance is an appropriate remedy. The Court concludes that severance is, indeed, an appropriate remedy and that the administrative matters may be severed from the balance of the initiative.

Judicial exercise of the power to sever impermissible portions of a proposed ordinance promotes the people's right to enact laws through the initiative process. *See Bull*, 143 P.3d at 1138. As the Court of Appeals explained, initiatives are largely a product of grassroots activists with limited resources, and striking an entire initiative based on flawed provisions would cost significant time and money on the part of proponents and thereby impede the people's ability to initiate laws. *Id.*

Thus, a court may sever an impermissible portion of an initiative if the following conditions are met: (1) standing alone, the remainder of the proposed bill can be given legal effect; (2) deleting the impermissible portion wouldn't substantially change the spirit of the measure; and (3) it's evident from the content of the measure and the circumstances surrounding its proposal that the sponsors

and subscribers would prefer the measure to stand as altered, rather than to be invalidated in its entirety. *Id.*

Application of the above factors leads to the conclusion that severance of Sections 5 through 7 is appropriate. First, Sections 1 through 4, which deal with legislative matters, will have legal effect and will effectuate the heart of policy matter at issue here. As discussed above, Sections 1 through 4, standing alone, propose the new policy of acquiring Hughes Stadium Property for the purpose of transforming it into public open-space. Regardless of specific decisions regarding from where and how to obtain funding proposed in Sections 5 through 7, Sections 1 through 4 and 8 will still have legal effect.

Second, deleting Sections 5,6 and 7 wouldn't substantially change the spirit of the measure—principally, to acquire the Hughes Stadium Property and rezone the property.

Third, given the content of the Initiated Ordinance, the circumstances surrounding its proposal, and defendants' counsel's statement during argument that they wish to have at least Sections 3 and 4 reach the electorate, the third prong is satisfied. It's evident, too, that defendants don't wish the altered Initiated Ordinance to be invalidated in its entirety, further satisfying the last prong.

Therefore, the Court concludes that severance is appropriate and that the impermissible portions—Sections 5, 6, and 7—be severed from the remainder of the Initiated Ordinance. In an appendix below, the Court includes the severed version of the Initiated Ordinance.

V. CONCLUSION.

For the reasons set forth above, the cross motions for summary judgement are **GRANTED IN PART AND DENIED IN PART** as follows. The cross motions are **GRANTED** as to Sections 3 and 4. The City's motion is also **GRANTED** as to Sections 5, 6, and 7; defendants' motion is **DENIED** as to Sections 5, 6, and 7. Defendants' motion is also **GRANTED** as to

Sections 1 and 2, and 8, and the City's motion is **DENIED** as to those sections.

Therefore, in accordance with Colo. R. Civ. P. 57(a), it is **ORDERED** and **DECLARED** that:

(a) Sections 1, 2, 3, 4, and 8 of the Initiated Ordinance are legislative matters subject to the initiative powers the City's registered electors have under Article V, Sections 1(2) and 1(9) of the Colorado Constitution and under the City's Charter Article X, Section 1(a).

(b) Sections 5, 6, and 7 of the Initiated Ordinance are administrative matters not subject to the initiative powers the City's registered electors have under Article V, Sections 1(2) and 1(9) of the Colorado Constitution and under the City's Charter Article X, Section 1(a).

(c) Sections 5, 6, and 7 are **SEVERED** from the Initiated Ordinance.

(d) The City shall submit to the electors the Severed Initiated Ordinance reproduced below.

The Clerk is directed to enter final judgment.

SO ORDERED on this 3rd day of February, 2021.

BY THE COURT:

JUAN G. VILLASEÑOR
District Court Judge

Appendix — Severed Initiated Ordinance

WHEREAS, the citizens of Fort Collins have shown strong support to preserve and provide open space, natural areas, community separators, wildlife habitat, and trails for today and for the future; and

WHEREAS, Fort Collins citizens currently enjoy their open spaces and natural areas; the recreation they provide, such as walking, hiking, biking, wildlife viewing, bird watching, and fishing; the educational opportunities and programs provided to people of all ages and backgrounds; and the beautiful landscapes and views they provide; and

WHEREAS, open space, natural areas, wildlife habitat, community separators, agricultural lands, and trails benefit all members of the Fort Collins community; and

WHEREAS, conserved open space and natural areas help make Fort Collins a highly desirable place to live, work, and visit; and

WHEREAS, the City of Fort Collins values sustainability in policies, plans, strategies and projects that align with its Triple Bottom Line decision-making philosophy of social, economic and environmental well-being to meet its citizens' present needs and the needs of future generations without compromising the ecosystems upon which we all depend; and

WHEREAS, the citizens of Fort Collins have provided continuous funding for open space and natural areas acquisition and maintenance since first voting for a capital improvement sales tax in 1973 and approving extensions or new revenue sources in every election such a question has appeared on the ballot; and

WHEREAS, Fort Collins has conserved over 40,000 acres of open space and natural areas since 1973; and

WHEREAS, the property formerly home to the Colorado State University's Hughes Stadium is a currently undeveloped 164.56-acre parcel of land that was recently annexed into the city of Fort Collins; and

WHEREAS, the City of Fort Collins has many distinct zoning districts in its land use code; and

WHEREAS, one zoning classification in the Fort Collins land use code is "Public Open Lands," which currently allows for parks, recreation and open lands, and wildlife rescue and education centers, subject to administrative or Planning and Zoning Board review; and

WHEREAS, the Hughes Stadium property is currently zoned as Transition District (T) pursuant to Division 4.12 of its land use code, which is intended for properties for which there are no specific and immediate plans for development; and

WHEREAS, the Hughes Stadium property occupies an area in between the current Maxwell Natural Area and Pineridge Natural Area; and

WHEREAS, the acquisition of the Hughes Stadium Property and conversion into a public open lands area would build upon the City's significant history of preserving open spaces and would provide an invaluable social, economic, and environmental resource for current and future generations of Fort Collins residents; and

WHEREAS, the Hughes Stadium property would represent a crown jewel acquisition for Fort Collins open space; and

WHEREAS, absent acquisition and conservation efforts under this ordinance, the Hughes Stadium property would forever be lost to residential and/or commercial development; and

WHEREAS, the acquisition of the Hughes Stadium property by the City of Fort Collins should occur using existing voter-approved open space sales tax revenue and other funds currently available to the City, financing agreements, grants, partnerships with other local governments, or other available fiscally responsible mechanisms; and

WHEREAS, publicly available information indicates Colorado State University values the Hughes Stadium property at $10 million, and the City should use that figure as a starting point in its negotiations to acquire the property at its fair market value; and

WHEREAS, the rezoning of the Hughes Stadium property into the Public Open Lands (P-O-L) zoning district pursuant to Article 1, Division 1.3 and Article 4, Division 4.13 of the land use code would be necessary to convert the property into an area for parks, recreation and open lands, and wildlife rescue and education.

NOW THEREFORE, BE IT ORDAINED AS FOLLOWS:

Section 1. That the City hereby makes and adopts the determinations and findings contained in the recitals set forth above.

Section 2. That the City shall acquire the Hughes Stadium property, a 164.56-acre parcel of land legally described in Section 3 of Fort Collins Ordinance No. 123 (2018) ("Annexing the Property Known as the Hughes Stadium Property Annexation to the City of Fort Collins, Colorado") at its fair market value for the purpose of using it for parks, recreation and open lands, natural areas, and wildlife rescue and education.

Section 3. That notwithstanding any contrary designation in the April 2019 City Plan or any action taken by the Council subsequent to its annexation of the Hughes Stadium property but before the passage of this Ordinance, the City shall rezone the Hughes Stadium property as Public Open Lands (P-O-L) zoning district pursuant to Division 4.13 of the City of Fort Collins land use code immediately upon passage of this Ordinance.

Section 4. That the City shall not de-annex, cease acquisition efforts, or subsequently rezone the Hughes Stadium property to any designation other than Public Open Lands without voter approval of a separate initiative referred to the voters by City Council.

Section 5. [Severed].

Section 6. [Severed].

Section 7. [Severed].

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