SUMMARY
July 3, 2024

2024COA69

No. 23CA1035, *Telluride Locals v. Kavannaugh* — Telluride Locals v. Kavannaugh — Zoning — Planned Unit Development Act of 1972 — Planned Unit Development (PUD); Election Law — Initiative and Referendum

A division of the court of appeals considers whether the rezoning of land covered by a planned unit development (PUD) is a valid subject of a citizens' initiative. Because zoning and rezoning have long been considered legislative matters subject to the initiative power, and because a PUD is a form of zoning or rezoning, the division concludes that the rezoning proposed in the initiative at issue is a legislative matter subject to the initiative power. Accordingly, the division reverses the district court's judgment holding to the contrary.

COLORADO COURT OF APPEALS **2024COA69**

Court of Appeals No. 23CA1035
San Miguel County District Court No. 20CV30023
Honorable Mary E. Deganhart, Judge

Telluride Locals Coalition Petitioners' Committee; Matthew Hintermeister; Ian Wilson; Daniel Aurand; and Brighton Properties, LLC, a Colorado limited liability company,

Plaintiffs-Appellants,

v.

Tiffany Kavannaugh in her official capacity as Telluride Town Clerk; Charles Parrish; Ashley Parrish; Butcher Creek Partners, LLC, a Texas limited liability company; Emil P. Sante; and Pamela Sante,

Defendants-Appellees,

and

Gregory C. Simpson; Elizabeth B. Burk; Richard C. Stevens, Jr.; Melody B. Stevens; Wells Management Trust Investments, LLC, a Texas limited liability company; Mark A. Mitchell; Robert G. Efaw; Lars D. Carlson; Annie K. Carlson; Lori S. Quick, Mark C. Quick; and 330 Telluride Condo, LLC, a Colorado limited liability company,

Intervenors-Defendants-Appellees.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE NAVARRO
Kuhn and Schock, JJ., concur

Announced July 3, 2024

Pat Mellen Law, LLC, Patricia Ann Mellen, Denver, Colorado; West Group Law and Policy, Suzanne Taheri, Denver, Colorado, for Plaintiffs-Appellants

Nathan Dumm & Mayer PC, Nicholas C. Poppe, and Emily M. Miller, Denver, Colorado, for Defendants-Appellees

Golden & Landeryou, LLC, Kenneth S. Golden, Durango, Colorado, for Intervenors-Defendants-Appellees

¶ 1 In this case, we consider whether the rezoning of land covered by a planned unit development (PUD)[1] is a valid subject of a citizens' initiative. Because zoning and rezoning have long been considered legislative matters subject to the initiative power, and because a PUD is a form of zoning or rezoning, we conclude that the rezoning proposed in the initiative at issue is a legislative matter subject to the initiative power. Accordingly, we reverse the district court's judgment holding to the contrary.

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[1] "Planned unit development" means

> an area of land, controlled by one or more landowners, to be developed under unified control or unified plan of development for a number of dwelling units, commercial, educational, recreational, or industrial uses, or any combination of the foregoing, the plan for which does not correspond in lot size, bulk, or type of use, density, lot coverage, open space, or other restriction to the existing land use regulations.

§ 24-67-103(3), C.R.S. 2023.

I. Factual and Procedural History

¶ 2 In 1995, Brighton Properties, LLC (Brighton)[2] submitted an application to the Town of Telluride (Town) requesting approval of a PUD called Butcher Creek on forty acres of land owned by Brighton. The Town, via ordinance, approved the plan creating the Butcher Creek PUD. The PUD written agreement and plat map (collectively, the PUD Plan) were signed by representatives from the Town and Brighton, and they were recorded in January 1996. The PUD Plan created a subdivision with thirteen residential lots and three lots designated "common open space." Relevant here, the PUD Plan established Lot A — which covered approximately thirty-seven acres — as common open space.

¶ 3 In 2018, Brighton proposed an amendment to the PUD Plan that would rezone a portion of Lot A to permit construction of affordable housing. By this time, Brighton still owned Lot A, but

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[2] The plaintiffs are Brighton Properties, LLC; Telluride Locals Coalition Petitioners' Committee; Matthew Hintermeister; Ian Wilson; and Daniel Aurand. All plaintiffs were aligned in the district court and have joined the same briefs on appeal. Thus, for brevity, we refer to these parties collectively as "Brighton." We stress, however, that only Brighton Properties, LLC owned the land at issue and was a party to the relevant agreements with the Town.

the other lots had been sold. The Town declined to accept the proposal on the ground that the amendment required the consent of all lot owners within the Butcher Creek PUD, which Brighton had not obtained.

¶ 4 In 2019, Brighton filed two proposed initiated ordinances to be submitted to a vote of the electorate. The first ordinance would amend the Town's land use code by creating a new land use classification ("Affordable/Conservation," or "A/C," Subdivision), and the second ordinance would rezone Lot A in the Butcher Creek PUD and change its land use to the new A/C Subdivision classification. The Town accepted the first initiative and issued blank petitions for circulation, but the Town rejected the second initiative concerning Lot A.[3] Between 2019 and 2020, Brighton submitted different versions of the Lot A ordinance, but the Town rejected each one. In essence, the Town gave two reasons for the rejections: (1) the Lot A ordinance was not the proper subject of an initiative because it was not legislative in nature; and (2) the Lot A ordinance would amend the Butcher Creek PUD Plan, and any such

[3] A Brighton representative had informed the Town that the first initiative would be withdrawn if the Town rejected the second.

amendment must be approved by all lot owners within the Butcher Creek PUD.

¶ 5 Brighton then filed the lawsuit at issue against the Town's clerk. Pursuant to an order of the district court, all other Butcher Creek PUD lot owners were added as defendants by Brighton or allowed to intervene as defendants.[4] As relevant here, Brighton requested (1) a declaration that its proposed ballot initiative rezoning Lot A of the Butcher Creek PUD (and amending the PUD Plan accordingly) was legislative in nature and thus a proper subject of an initiative; (2) a declaration that the PUD Plan could be amended solely by approval of the Town and Brighton, without all lot owners' consent; (3) a declaration that, under the PUD Plan, the consent of all lot owners was not necessary to rezone Lot A and change its common open space designation; and (4) mandamus

[4] Hence, the defendants are Tiffany Kavannaugh in her official capacity as Telluride Town Clerk, as well as Charles Parrish; Ashley Parrish; Butcher Creek Partners, LLC; Emil P. Sante; Pamela Sante; Gregory C. Simpson; Elizabeth B. Burk, Richard C. Stevens, Jr.; Melody B. Stevens; Wells Management Trust Investments, LLC; Mark A. Mitchell; Robert G. Efaw; Lars D. Carlson; Annie K. Carlson; Lori S. Quick; Mark C. Quick; and 330 Telluride Condo, LLC. All defendants were aligned below and have joined the same answer brief on appeal.

relief requiring the Town to accept the submission of the initiated ordinance rezoning Lot A and amending the PUD Plan.

¶ 6 The district court ultimately granted summary judgment in favor of defendants on Brighton's ballot initiative claims, concluding that the initiative was administrative, not legislative, in nature. The court was particularly concerned that, if the Town's voters passed the Lot A ordinance, it would "nullify" the other lot owners' statutory and contractual rights to enforce the provisions of the PUD Plan with respect to Lot A.

¶ 7 Brighton's claims relating to the other lot owners' approval rights under the PUD Plan continued to a bench trial. After trial, the court entered judgment in favor of defendants. The court ruled that the PUD Plan could not be modified — and that Lot A's common open space designation could not be changed — unless all lot owners consented.

¶ 8 On appeal, Brighton contends that the district court erred by (1) concluding that the proposed rezoning of Lot A within the Butcher Creek PUD was not a legislative act and, therefore, was not a permissible subject of a ballot initiative; and (2) considering the substantive merits of the Lot A initiative, including its possible

effect on the other lot owners' rights, prior to its approval by the electorate. In the alternative, Brighton maintains that the court misinterpreted the PUD Plan when it decided that the other lot owners' rights thereunder would be violated by the initiative if it were approved.

¶ 9 Because we agree with Brighton's first and second contentions, we reverse the judgment. We decline to address Brighton's alternative arguments because, as Brighton acknowledges and as explained below, they are not yet ripe for judicial consideration.

II. The Proposed Amendment to the PUD Plan Is a Proper Subject of an Initiative

¶ 10 We agree with Brighton that the district court erred by concluding that the proposed initiative to rezone Lot A within the Butcher Creek PUD was administrative in character rather than legislative.

A. Standard of Review

¶ 11 Whether a particular citizen initiative is legislative in character, and therefore a proper exercise of the initiative power, is

a legal issue that we review de novo. *Vagneur v. City of Aspen*, 2013 CO 13, ¶ 32.

B. Relevant Law

¶ 12 Although the Colorado Constitution vests the legislative power of the state in the General Assembly, the constitution reserves to the people the power of initiative — the power to propose laws independent of the General Assembly and to enact or reject the same by vote. Colo. Const. art. V, § 1(2); *Vagneur*, ¶ 35. The initiative power extends "to the registered electors of every city, town, and municipality as to all local, special, and municipal legislation of every character in or for their respective municipalities." Colo. Const. art. V, § 1(9). Likewise, the Town's charter provides that "[t]he registered electors of the Town shall have the power to propose an ordinance that is a legislative act of a municipality to the Council." Telluride Home Rule Charter § 6.1(A).

¶ 13 The power of initiative is a fundamental right and is liberally construed; any governmental action that has the effect of curtailing the free exercise of this fundamental right is "viewed with the closest scrutiny." *McKee v. City of Louisville*, 200 Colo. 525, 530, 616 P.2d 969, 972 (1980). Even so, because article V of the

Colorado Constitution deals with the legislative branch of government, the Colorado Supreme Court has interpreted article V, section 1 to vest only the *legislative* power directly in the people. *Vagneur*, ¶ 36; *City of Aurora v. Zwerdlinger*, 194 Colo. 192, 195, 571 P.2d 1074, 1076 (1977); *see City of Idaho Springs v. Blackwell*, 731 P.2d 1250, 1253 (Colo. 1987). Accordingly, the initiative power applies only to acts that are "legislative in character" and does not include the right to petition for an election on administrative (i.e., executive) or judicial matters. *Vagneur*, ¶ 36 (citation omitted).[5]

¶ 14 Although a court may not interfere with the initiative process to address the substantive validity of an initiative before it is adopted, a court may, before the initiative is placed on the ballot, determine whether the proposed initiative addresses legislative or administrative matters. *Id.* at ¶ 33. But whether a proposed initiative is legislative or administrative in character is often a difficult question to answer. *Id.* at ¶ 38. "The distinction can become particularly challenging at the municipal level because the

[5] The same analysis applies to the people's power of referendum — the power to approve or reject by vote an act of the General Assembly. *See Vagneur v. City of Aspen*, 2013 CO 13, ¶¶ 35-36; Colo. Const. art. V, § 1(3).

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." *Id.*

¶ 15 The Colorado Supreme Court has articulated three tests to determine whether an action is legislative or administrative in character. *Id.* at ¶¶ 39-40; *Blackwell*, 731 P.2d at 1254. First, "action[s] that relate[] to subjects of a permanent or general character are legislative, while those which are temporary in operation and effect are not." *Zwerdlinger*, 194 Colo. at 196, 571 P.2d at 1077. Second, "acts that are necessary to carry out existing legislative policies and purposes . . . are deemed to be administrative, while acts constituting a declaration of public policy are deemed to be legislative." *Id.* Third, the "legislative amendment" test creates a presumption that, where an original act is legislative, an amendment to that act is likewise legislative. *Blackwell*, 731 P.2d at 1254 n.4; *Margolis v. Dist. Ct.*, 638 P.2d 297, 303-04 (Colo. 1981).

¶ 16 Our supreme court has acknowledged that "these tests are somewhat elusive, and that, in practice, the classification of a

particular ordinance as legislative or administrative has proven to be 'largely an ad hoc determination.'" *Vagneur*, ¶ 44 (quoting *Blackwell*, 731 P.2d at 1254). Consequently, determining whether a proposed initiative is legislative or administrative remains a case-by-case inquiry, and "no single test is necessarily controlling." *Id.* at ¶ 48. Rather, "the principles underlying those tests must guide the overall determination of whether a proposed initiative is legislative or administrative." *Id.* In close cases, a court may look to historical examples. *Id.* For instance, if an initiative finds longstanding parallels in statutes enacted by legislative bodies, the initiative may be deemed legislative on that basis. *Id.*

C. Application

¶ 17 In this case, we consider whether the rezoning of land covered by a PUD is a legislative or administrative matter. Because zoning and rezoning have long been considered legislative matters subject to the initiative power, and because a PUD is a form of zoning or rezoning, we conclude that the rezoning proposed here is a legislative matter subject to the initiative power.

1. Zoning and Rezoning Are Legislative In Character

¶ 18 Our supreme court concluded over forty years ago that "zoning and rezoning are legislative in character and thus subject to the referendum and initiative powers reserved to the people under Colo. Const. art. V., sec. 1." *Margolis*, 638 P.2d at 298. Applying the tests from *Zwerdlinger* for assessing whether a matter is legislative, the court reasoned that the act of zoning is legislative because it "is of a general and permanent character and involves a general rule or policy." *Id.* at 304; *see Vagneur*, ¶ 40. In addition, the court concluded, under the legislative amendment test, that the act of rezoning is legislative because it is "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." *Margolis*, 638 P.2d at 304 ("Essentially, the city council ultimately amends the zoning ordinance or denies the amendment, a legislative function.").

¶ 19 Furthermore, the court in *Margolis* held that zoning and rezoning decisions are legislative in character "no matter what the size of the parcel of land involved." *Id.* As the court explained,

"[w]hile decisions on 'small' rezonings may directly affect only a few people, such decisions may more properly be seen as the setting of policy for the future," and "[w]hile rezonings occur more frequently than initial zonings, they likewise tend to be permanent in nature." *Id.*; *see Vagneur*, ¶ 40 ("[Z]oning and rezoning decisions, no matter the size or number of properties involved, are legislative and thus subject to the powers of initiative and referendum.").

2. A PUD is a Form of Zoning Regulation

¶ 20 As noted, the Town and Brighton created the Butcher Creek PUD in 1995. Thus, the Butcher Creek PUD is subject to the Planned Unit Development Act of 1972 (the PUD Act). *See* §§ 24-67-101 to -108, C.R.S. 2023. The PUD Act grants counties and municipalities the power to approve PUDs "[i]n order that the public health, safety, integrity, and general welfare may be furthered in an era of increasing urbanization and of growing demand for housing of all types and design." § 24-67-102(1), C.R.S. 2023. In particular, the General Assembly authorized PUDs "[t]o encourage innovations in residential, commercial, and industrial development and renewal so that the growing demands of the population may be met by greater variety in type, design, and layout

of buildings and by the conservation and more efficient use of open space ancillary to said buildings." § 24-67-102(1)(d). A county or municipality may not, however, approve a PUD without the written consent of the landowner whose property is subject to the proposed PUD. § 24-67-105(1), C.R.S. 2023.

¶ 21 PUDs are "more flexible zoning devices" representing a step away from traditional Euclidean zoning that establishes fixed uses and requirements applicable to a specified area of the municipality.[6] *Tri-State Generation & Transmission Co. v. City of Thornton*, 647 P.2d 670, 677-78 (Colo. 1982); *Moore v. City of Boulder*, 29 Colo. App. 248, 250-51, 484 P.2d 134, 135-36 (1971). That is, the rigidity inherent in traditional zoning mechanisms has led to

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[6] Euclidean zoning owes its name to *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), where the Supreme Court upheld the constitutionality of a zoning scheme that excluded apartments and commercial uses from a single-family residential district. *Cnty. Council v. Zimmer Dev. Co.*, 120 A.3d 677, 689 n.13 (Md. 2015); *see Campion v. Bd. of Aldermen*, 899 A.2d 542, 560-61 (Conn. 2006) (explaining that Euclidean zoning describes the early zoning concept of separating theoretically incompatible land uses through the establishment of fixed legislative rules; is designed to achieve stability in land use planning and zoning; and is a comparatively inflexible, self-executing mechanism); Merriam-Webster Dictionary, https://perma.cc/T6JA-DHVX ("Euclidean zoning" is "a system of zoning whereby a town or community is divided into areas in which specific uses of land are permitted.").

increased use of more flexible zoning devices such as the PUD. *Tri-State*, 647 P.2d at 677-78. By using a PUD, a municipality can control the development of individual tracts of land by specifying the permissible form of development in accordance with the municipality's PUD enabling ordinance. *Id.* at 677. Benefits derived from such regulations may include "the flexibility necessary to permit adjustment to changing needs, and the ability to provide for more compatible and effective development patterns within a city." *Id.* at 677-78. Hence, the PUD represents a more modern concept in progressive municipal planning. *See id.* at 678.

¶ 22 Even so, Colorado courts have consistently recognized that a PUD is a form of zoning or rezoning for the area included within the PUD, "not a zoning substitute." *Bd. of Cnty. Comm'rs v. Hygiene Fire Prot. Dist.*, 221 P.3d 1063, 1068 (Colo. 2009) (noting that "the PUD Act functions as a type of zoning regulation"); *S. Creek Assocs. v. Bixby & Assocs., Inc.*, 781 P.2d 1027, 1032 (Colo. 1989) (holding that a "PUD plan adopted and approved pursuant to [a PUD-enabling] ordinance constitutes a form of rezoning for the area included within the PUD"); *Citizens for Quality Growth Petitioners' Comm. v. City of Steamboat Springs*, 807 P.2d 1197, 1198 (Colo.

App. 1990) ("Approval of a planned unit development constitutes rezoning of the area within that development."); *Moore*, 29 Colo. App. at 251, 484 P.2d at 135 (noting that a PUD is a type of rezoning of an area). As the division in *McDowell v. United States* aptly put it, a "planned unit development, duly adopted and approved by a local government entity, represents a form of rezoning for the area within the PUD because the adoption of the PUD provides a method for allowing a diversity of uses which may not have been included within the original zoning designations." 870 P.2d 656, 658 (Colo. App. 1994).

¶ 23 Consequently, we conclude that the creation of the Butcher Creek PUD constituted a rezoning of the area within the PUD.

3. Because the Proposed Lot A Initiative Would Effect a Rezoning of Land within the Butcher Creek PUD, It Is Legislative in Character

¶ 24 Under the tests articulated by our supreme court, *see Vagneur*, ¶¶ 39-41, we conclude that the proposed initiative to rezone Lot A within the Butcher Creek PUD addresses a legislative, rather than an administrative, matter. Therefore, it is a valid exercise of the initiative power.

¶ 25 Under the first two tests, an act is legislative if it "relates to subjects of a permanent or general character" or if the act constitutes a declaration of public policy. *Zwerdlinger*, 194 Colo. at 196, 571 P.2d at 1077. The initiative at issue meets these criteria.

¶ 26 The original Butcher Creek PUD constituted a zoning decision of a permanent or general character and expressed a general policy as to which land uses were permitted in the covered area. *See Margolis*, 638 P.2d at 303-04 ("[O]riginal 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 also S. Creek Assocs.*, 781 P.2d at 1032 ("A PUD enabling ordinance is a legislative enactment."). The proposed initiative seeks to modify the zoning classification applicable to one parcel within the PUD, Lot A, by changing the permitted use from open space to affordable housing. In effect, the purpose of the proposed initiative is to declare a new public policy regarding the permitted use of Lot A. Indeed, in Brighton's original proposal to the Town, Brighton argued that rezoning Lot A would provide a housing alternative that would "fill[] a void in the Town's long term affordable housing development plan."

¶ 27 In addition, the proposed Lot A initiative satisfies the legislative amendment test, which provides that, where the original act was legislative, an amendment to that act is likewise legislative. *See Margolis*, 638 P.2d at 304. As explained, the original creation of the Butcher Creek PUD constituted a rezoning and, thus, was legislative in character. The Town adopted the PUD Plan via ordinance after a public hearing. *See Villa at Greeley, Inc. v. Hopper*, 917 P.2d 350, 356 (Colo. App. 1996) ("[A]pproval of the PUD plan constituted a rezoning, legislative in nature, which was subject to voter review by referendum."). It follows that the proposed amendment to the Butcher Creek PUD Plan is also legislative in character. *See Vagneur*, ¶ 40; *Margolis*, 638 P.2d at 304.

¶ 28 The fact that the proposed initiative would rezone only Lot A does not alter its legislative character. The term "permanent" in the *Zwerdlinger* test signifies a generally applicable policy or rule that sets the governing standard for all cases coming within its terms. *Vagneur*, ¶¶ 43, 46. The proposed Lot A initiative, like any other zoning decision, would set the governing standard for all new development within Lot A. Moreover, while the proposed initiative

covers only one parcel of land, even "[t]he rezoning of a 'relatively small' parcel, especially when done by initiative, may well signify a fundamental change in city land-use policy." *Margolis*, 638 P.2d at 304 (quoting *Arnel Dev. Co. v. City of Costa Mesa*, 620 P.2d 565, 572 (Cal. 1980)). To conclude that the proposed initiative is not legislative simply because it assertedly affects only one parcel of land would reflect "a very myopic view of the matter." *Id.* (quoting *Arnel*, 620 P.2d at 572). The proposed construction of affordable housing for a significant number of people "affects the prospective tenants, the housing market, the residents living nearby, and the future character of the community." *Id.* (quoting *Arnel*, 620 P.2d at 572).

¶ 29 Contrary to defendants' suggestion, the *Vagneur* decision does not hold that changing the permitted use of a single parcel of land must be solely an administrative, rather than a legislative, decision. The *Vagneur* decision did not deal with zoning or rezoning — a point the supreme court stressed in distinguishing the case from *Margolis*. *Vagneur*, ¶ 60 ("The proposed initiatives at issue here do not establish or amend any zoning laws."). Instead, the proposed initiatives would have modified a right-of-way easement conveyed

by a city to another party across a parcel of city-owned land. *Id.* The supreme court concluded that 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" an "administrative decision related to the management of municipal infrastructure." *Id.* The facts of *Vagneur* bear little resemblance to those in this case, and that decision certainly did not overrule the supreme court's prior pronouncements pertaining to rezoning. On the contrary, the *Vagneur* court reaffirmed 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 ¶ 40.

¶ 30 Furthermore, other states have concluded that the creation or amendment of a PUD is a legislative act subject to an initiative or referendum. Because our supreme court in *Margolis*, 638 P.2d at 304-05, relied on decisions from Ohio and California to conclude that zoning is subject to an initiative or referendum, we find decisions from those states particularly instructive.

¶ 31 In *Peachtree Development Co. v. Paul*, 423 N.E.2d 1087, 1091-93 (Ohio 1981), the Ohio Supreme Court held that a local

government's approval of a developer's PUD plan constituted legislative action ("an enactment, amendment or the functional equivalent of a new zoning classification for the affected area"), and, as such, the approval was subject to a citizens' referendum.[7] Similarly, in *Gray v. Trustees*, 313 N.E.2d 366, 369 (Ohio 1974), the court concluded that a local government's approval "of an application to amend a previously approved PUD plat is equivalent to legislative rezoning." Additionally, the California Supreme Court has recognized that a proposed rezoning of a city-approved planned development is a legislative act subject to the initiative power. *See Arnel*, 620 P.2d at 567-68.

¶ 32 Given all this, and because we are not persuaded by defendants' additional arguments that we address below, we conclude that the proposed initiated ordinance rezoning Lot A within the Butcher Creek PUD is legislative in character and, as such, is a valid exercise of the initiative power.

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[7] The *Peachtree* court considered a "Community Unit Plan," which, the court noted, is the same zoning device as a PUD. *Peachtree Dev. Co. v. Paul*, 423 N.E.2d 1087, 1088 n.1 (Ohio 1981).

D. Defendants' Other Arguments Against the Proposed Initiative

¶ 33 Defendants present various arguments in support of their view that the proposed ordinance rezoning Lot A is not a legislative act subject to initiative and is otherwise invalid. These arguments center on the fact that the proposed ordinance would amend the Butcher Creek PUD Plan to reflect the rezoning of Lot A. We conclude that none shows the ordinance is not legislative and that some are not yet ripe for resolution.

¶ 34 First, defendants say that, under the PUD Act, a plan may be amended only after notice and a public hearing. *See* § 24-67-106(3)(b), C.R.S. 2023. According to defendants, this requirement renders the proposed amendment of the PUD Plan "quasi-judicial rather than legislative in nature." But our supreme court rejected an analogous argument in *Margolis*. The court explained that rezoning, which also requires notice and a hearing, is quasi-judicial for the purpose of judicial review but is legislative for the purpose of exercising the constitutional powers of initiative and referendum. *Margolis*, 638 P.2d at 304-05. Applying the same reasoning to rezoning in the form of a PUD, we conclude that creating or

amending a PUD is legislative for the purpose of exercising the powers of initiative, regardless of whether it is quasi-judicial for the purpose of judicial review.

¶ 35 Second, and related to the first point, defendants maintain that the proposed ordinance rezoning Lot A cannot be legislative given the notice, hearing, and review requirements imposed by the PUD Act and the Town's land use code. Traditional zoning and rezoning, however, also require notice and a public hearing. *See* § 30-28-116, C.R.S. 2023; §§ 31-23-304, -305, C.R.S. 2023. Yet the *Margolis* court held that zoning and rezoning are subject to the initiative power. We are bound by that decision, *see People v. Kern*, 2020 COA 96, ¶ 42 ("[W]e are bound to follow supreme court decisions unless they have been overruled or abrogated."), and amending a PUD is a form of rezoning, as discussed.

¶ 36 Third, defendants contend that the proposed ordinance would violate the due process rights (codified in the PUD Act and the Town's land use code) of the other lot owners in the Butcher Creek PUD. We conclude that it would be premature to resolve this contention because the proposed ordinance has not been adopted and might never be adopted.

¶ 37 Because courts liberally construe the fundamental right of initiative, courts may not "prematurely pass[] upon the substantive merits of the initiated measure" or "interfere with the exercise of this right by declaring unconstitutional or invalid a proposed measure before the process has run its course and the measure is actually adopted." *McKee*, 200 Colo. at 530, 616 P.2d at 972. In *McKee*, for instance, the supreme court held that the trial court had erred by ruling that "the interests of the intervening property owners would be adversely affected by the initiated measure and, therefore, the [trial] court could properly determine the validity of that measure in advance of its adoption." *Id.* at 531, 616 P.2d at 973. According to the supreme court, the trial court had "rendered an advisory opinion on a measure not yet affecting the intervenors' property interests and pre-empted the initiative process itself." *Id.*

¶ 38 We decline to make the same mistake by rendering such an advisory opinion preempting the initiative process. As in *McKee*, if the proposed Lot A ordinance is not adopted at an initiative election, the claimed interests of the other lot owners will not have been affected in any manner, yet the Town voters will have received their constitutional entitlement under the initiative clause. *See id.*

at 532, 616 P.2d at 973. If, on the other hand, the proposed ordinance receives a majority of the votes cast at the election, the fundamental right of the voters will have been preserved, and the other lot owners may then, if they so desire, "resort to the judicial process on their claimed abridgement of interest." *Id.* at 532, 616 P.2d at 973-74.

¶ 39 Moreover, if adopted, the Lot A ordinance would establish the Town electorate's desire to rezone Lot A in the Butcher Creek PUD and to amend the PUD Plan as provided in the ordinance. Only if the ordinance is adopted is it appropriate to address any next steps necessary to accomplish or enforce the electorate's desire.

¶ 40 As a result, we decline to resolve defendants' premature claims pertaining to due process and the statutory requisites for amending a PUD. On a related note, we conclude that the district court erred by ruling at this juncture that the proposed ordinance would violate the other lot owners' rights and would run afoul of the PUD Act or the Town's land use code. These issues should be addressed only if the ordinance is adopted.

¶ 41 Finally, defendants argue that the proposed Lot A ordinance is not legislative in character because it "would be a contractual act to

amend the Butcher Creek PUD Agreement." As we understand their argument, defendants say the fact that the Butcher Creek PUD was created by and subject to the PUD Plan necessarily means that any amendment to the PUD Plan is merely a contractual matter and cannot be a legislative decision. We disagree.

¶ 42 The written agreement at issue was one component of the Butcher Creek PUD Plan. The PUD Act defines a "[p]lan" as

> the provisions for development of a planned unit development, which may include, and need not be limited to, easements, covenants, and restrictions relating to use, location, and bulk of buildings and other structures, intensity of use or density of development, utilities, private and public streets, ways, roads, pedestrian areas, and parking facilities, common open space, and other public facilities. "Provisions of the plan" means the written and graphic materials referred to in this definition.

§ 24-67-103(2), C.R.S. 2023. So the plan includes the provisions describing the bounds and terms of the PUD — including its zoning and other land use conditions — as reflected in a written agreement and a graphic plat of the land. In this case, the written agreement and plat were signed by representatives of the Town and Brighton.

¶ 43 As noted, the proposed ordinance rezoning Lot A would, if adopted, reflect the Town electorate's wishes to amend the Butcher Creek PUD Plan in a manner consistent with Brighton's wishes. At first blush, then, it is not clear that the proposed ordinance amending the PUD Plan would conflict with the intent of the parties to the PUD Plan. Still, we acknowledge defendants' assertion (disputed by Brighton) that the written agreement affords the other lot owners certain rights to approve an amendment to the PUD Plan, such that a modification without their approval would violate their rights under the agreement.

¶ 44 Once again, however, it is premature for us to determine if or how the proposed ordinance would affect the other owners' rights under the PUD Plan. That question needs to be answered only if the ordinance is actually adopted. If the ordinance is not adopted, the question would be moot. If the ordinance is adopted, the other

lot owners may assert whatever rights they believe they possess to challenge the validity of the ordinance on its merits.[8]

¶ 45 To the extent defendants rely on *Vagneur* and the contracts at issue there to argue that the proposed ordinance here is not legislative, their reliance is misplaced. As mentioned, the facts of *Vagneur* are quite different from those here. *Vagneur* dealt with proposed initiatives seeking "to circumvent a complex and multi-layered administrative process for the approval of the location and design of a state highway — a process incorporating both technical expertise and public input and involving not only the City of Aspen, but also the Colorado Department of Transportation and the Federal Highway Administration." *Vagneur*, ¶ 4. As the supreme court explained, the initiatives fundamentally sought to "change the design that was previously approved by the state and federal agencies in the lengthy administrative process required by federal law," to rescind "all enactments and authorizations inconsistent"

[8] Similarly, it is premature to determine the scope of the other owners' rights regarding the reclassification of Lot A as something other than common open space. That question is ripe only if the proposed ordinance passes, and the Town and Brighton then seek to modify the classification of Lot A in the Butcher Creek PUD Plan.

with the initiatives, and to "thereby rescind[] or amend[] right-of-way easements previously conveyed by the City in furtherance of that administrative decision." *Id.* The supreme court concluded that the proposed initiatives "impermissibly intrude[d] on the administrative power of the City to manage City-owned open space." *Id.*

¶ 46 The proposed Lot A initiative is far afield from the initiatives in *Vagneur*. Most obviously, it does not involve extensive federal and state regulatory approval, and it does not involve the administrative management of land owned by the Town. Instead, it involves a rezoning of private property, a quintessential legislative act. Hence, the ultimate holding in *Vagneur* sheds little light on the appropriate outcome in this case.

¶ 47 To summarize, the proposed initiative to rezone Lot A is legislative in character and, thus, subject to the people's initiative power guaranteed by the Colorado Constitution. To hold otherwise could shield wide areas of a municipality from initiated proposals regarding zoning — that is, all areas covered by a PUD. We cannot reconcile imposing such a shield with the fundamental right of initiative and applicable case law.

III. Summary of Issues We Do Not Resolve

¶ 48 To reiterate, we do not resolve certain issues because it would be premature to do so. They require resolution only if the proposed initiative is adopted and, therefore, the Town consents to the proposed amendment to the Butcher Creek PUD Plan. (Everyone agrees that the PUD Plan cannot be amended without the Town's consent.) The issues we do not resolve are

- the legal effect of the proposed ordinance on a party's alleged constitutional, statutory, or municipal rights to notice, hearing, and review; and
- the legal effect of the proposed ordinance on a party's alleged rights under the PUD Plan, including whether amending the PUD Plan without the party's consent would violate the party's rights under the PUD Plan.

IV. Attorney Fees

¶ 49 The Town seeks an award of attorney fees incurred on appeal under the terms of the PUD Plan. Because the Town is not a prevailing party on appeal, we deny its request.

V. Conclusion

¶ 50 The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

JUDGE KUHN and JUDGE SCHOCK concur.