COLORADO COURT OF APPEALS

DATE FILED: November 22, 2023
CASE NUMBER: 2022CA1202

Court of Appeals No. 22CA1202
Jefferson County District Court No. 21CV30629
Honorable Russell B. Klein, Judge

Colorado Christian University, a Colorado nonprofit corporation,

Plaintiff-Appellant,

v.

City of Lakewood, Colorado,

Defendant-Appellee,

and

Lenore Herskovitz and Robert Baker,

Intervenors-Appellees.

JUDGMENT AFFIRMED

Division I
Opinion by JUDGE DAILEY
Grove and Gomez, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced November 22, 2023

Thomas N. Scheffel & Associates, P.C., Thomas N. Scheffel, Jonathan R. Slie, Denver, Colorado; Otten, Johnson, Robinson, Neff & Ragone, P.C., Brian J. Connolly, Andrew L.W. Peters, Denver, Colorado, for Plaintiff-Appellant

Alex Dorotik, Lakewood, Colorado, for Defendant-Appellee

Lenore Herskovitz, Pro Se

Robert Baker, Pro Se

¶ 1 In this action challenging a zoning ordinance, plaintiff, Colorado Christian University (CCU), appeals the district court's entry of summary judgment in favor of defendant, City of Lakewood (Lakewood). We affirm.

I. Background

¶ 2 In 2003, Lakewood amended its municipal code (Code) to approve a "university/college" use in districts zoned as "Mixed Use Residential" (M-R) and "Mixed Use Residential Urban" (M-R-U). Permitted activities within the "university/college" use included providing "student living units."[1]

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[1] The Code defined "university/college" as

> [a] place which is accredited by the Colorado Commission on Higher Education providing higher education beyond grade twelve, which offers either a two year or four year degree in specific disciplines that may include a combination of the following uses but is not limited to: higher education classrooms, higher education offices, administrative buildings, athletic facilities and fields, *student living units*, laboratories, library, cafeteria, student center, bookstore and auditorium that are owned or controlled by the University or College.

(Emphasis added.)

¶ 3 In April 2021, Lakewood adopted Ordinance 2020-10 (Ordinance), which defined a "student living unit" as "[a] dwelling unit that is owned or controlled by a College or University and inhabited by students enrolled in that college or university." According to the parties, the practical effect of the Ordinance was to (1) allow such "student living units" only in connection with "university/college" use in M-R or M-R-U zoned districts, and (2) ban them outside those districts (i.e., in districts zoned for residential use only).

¶ 4 CCU is a university operating in Lakewood. In 2021, it owned six neighboring duplexes — which it typically rented out to its students — in areas zoned for residential use alone. Following the adoption of the Ordinance, Lakewood served a cease and desist letter on CCU demanding that it stop renting residential properties to its students in those residential districts.

¶ 5 CCU responded by initiating the present action for declaratory and injunctive relief. In its complaint, CCU sought a declaration that Lakewood's ban on "CCU's rentals to its students" in areas zoned only for residential use was unconstitutional. In this regard, CCU pointed out that the Ordinance would not ban other entities

from making student housing available in residentially zoned areas: non-college or university landlords were not prohibited from renting to students in those areas; and neither were colleges or universities, so long as their tenants were students of other institutions.

¶ 6 Lakewood's Ordinance, CCU asserted, violated CCU's federal and Colorado constitutional rights to equal protection under the law, due process, and freedom from special legislation.

¶ 7 The parties filed cross-motions for summary judgment. Lenore Herskovitz and Robert Baker, who own residential properties next to CCU's student housing, were permitted to intervene in the case and filed responses in opposition to CCU's motion for summary judgment.

¶ 8 In a very thorough written order, the district court granted summary judgment in Lakewood's favor, concluding that the Ordinance was valid because, as pertinent here, it (1) was rationally related to the legitimate government interest of regulating the population density and character of residential neighborhoods and (2) was not unlawful special legislation specifically targeting CCU.

¶ 9 CCU now appeals, contending that the district court reversibly erred by (1) upholding the Ordinance as a constitutional exercise of

Lakewood's authority and (2) granting summary judgment on an improper basis. We address the constitutional claims in Part II of this opinion, the statutory claim in Part III, and the remaining claim in Part IV.

II. Constitutional Claims

¶ 10 CCU contends that the district court erred in granting Lakewood's motion for summary judgment. CCU asserts that, as a matter of law, the Ordinance deprived CCU of its equal protection and substantive due process rights under the United States and Colorado Constitutions, and that the Ordinance was invalid, special legislation under the Colorado Constitution. We disagree.

¶ 11 We review the constitutionality of a municipal ordinance de novo. *Rocky Mountain Retail Mgmt., LLC v. City of Northglenn*, 2017 CO 33, ¶ 18. "Generally, municipal ordinances are presumed to be constitutional, and the party challenging an ordinance bears the burden to prove its unconstitutionality beyond a reasonable doubt." *Town of Dillon v. Yacht Club Condos. Home Owners Ass'n*, 2014 CO 37, ¶ 22; *see also Zavala v. City & Cnty. of Denver*, 759 P.2d 664, 669-70 (Colo. 1988) (applying the same principle to zoning ordinances).

¶ 12 Lakewood is a home rule municipality. Lakewood City Charter § 1.2; *see also* Colo. Const. art. XX, § 6. Lakewood's charter and ordinances therefore govern its zoning authority. *Zavala*, 759 P.2d at 670. Implicit in such a "constitutional delegation of authority is the recognition that [Lakewood] possesses broad legislative discretion to determine how best to achieve declared municipal objectives." *Id.*

¶ 13 Courts typically uphold zoning ordinances as valid exercises of a municipality's police power to regulate matters of public health, safety, and welfare. *Id.* However, a municipality's authority to enact zoning ordinances is not absolute, as it is subject to the same constitutional limitations applicable to all governmental legislative decisions. *Id.*

A. Equal Protection

¶ 14 The Fourteenth Amendment to the United States Constitution provides that "[n]o [s]tate shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "Although the Colorado Constitution contains no equal protection clause, we have construed the due process clause of the Colorado Constitution to imply a similar guarantee." *Dean v.*

People, 2016 CO 14, ¶ 11; *see also* Colo. Const. art. II, § 25. "Equal protection of the laws assures the like treatment of all persons who are similarly situated." *Dean*, ¶ 11.

¶ 15 Where, as here, Lakewood's Ordinance affected neither a fundamental right nor a suspect class, its validity, for equal protection purposes, is determined using a rational basis standard of review. *See id.* at ¶ 12.

¶ 16 "Rational basis review is an extremely lenient standard of review; therefore '[a]ttacks against zoning ordinances under this test are rarely successful.'" *Lindquist v. City of Pasadena*, 656 F. Supp. 2d 662, 697 (S.D. Tex. 2009) (quoting *Baker v. St. Bernard Parish Council*, Civ. A. No. 08-1303, 2008 WL 4681373 (E.D. La. Oct. 21, 2008)), *aff'd*, 669 F.3d 225 (5th Cir. 2012); *accord FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313-14 (1993) (recognizing that, in the equal protection context, rational basis review is a "paradigm of judicial restraint").

¶ 17 Under rational basis review, "a statutory classification will stand if it bears a rational relationship to legitimate governmental objectives and is not unreasonable, arbitrary, or capricious." *HealthONE v. Rodriguez*, 50 P.3d 879, 893 (Colo. 2002). When

applying rational basis review, we presume the constitutionality of a classification. *Id.* The party claiming the violation has the burden to prove that the classification is unreasonable, arbitrary, or capricious. *Id.* "[I]f any conceivable set of facts would lead to the conclusion that a classification serves a legitimate purpose, a court must assume those facts exist." *Id.* (quoting *Christie v. Coors Transp. Co.*, 933 P.2d 1330, 1333 (Colo. 1997)).[2] "The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective." *United States v. Titley*, 770 F.3d 1357, 1359 (10th Cir. 2014) (quoting *McGowan v. Maryland*, 366 U.S. 420, 425 (1961)).

¶ 18 The preservation of a neighborhood's residential character has long been upheld as a legitimate purpose for the enactment of

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[2] "[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Students for Concealed Carry on Campus, LLC v. Regents of Univ. of Colo.*, 280 P.3d 18, 27 (Colo. App. 2010) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)); *accord Reid v. Rolling Fork Pub. Util. Dist.*, 854 F.2d 751, 754 (5th Cir. 1988) ("As long as there is *a* conceivable rational basis for the official action, it is immaterial that it was not *the* or *a* primary factor in reaching a decision or that it was not *actually* relied upon by the decisionmakers or that some *other* nonsuspect irrational factors may have been considered.").

municipal zoning ordinances. *See*, *e.g.*, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926) (zoning ordinance that prevented apartments, hotels, and other businesses in order to maintain residential area with only single-family dwellings had a legitimate purpose); *Congregation Kol Ami v. Abington Township*, 309 F.3d 120, 134 (3d Cir. 2002) (noting the Supreme Court's recognition that the creation and maintenance of residential districts to the exclusion of other businesses is a legitimate purpose); *DeSisto Coll., Inc. v. Town of Howey-in-the-Hills*, 706 F. Supp. 1479, 1500-01 (M.D. Fla. 1989) (town's enactment and enforcement of zoning ordinances against college to maintain residential character by prohibiting development and use of student residences, administration buildings, and classrooms in residential areas was not a violation of the equal protection clause).

¶ 19 Lakewood's stated purpose, both in the district court and on appeal, is the restriction of some uses of property to maintain the residential character of certain neighborhoods. More specifically, its purpose, as the district court noted, is "to regulate population density and university control over, or presence in, residential neighborhoods." These are legitimate purposes for an ordinance.

See DeSisto Coll., 706 F. Supp. at 1500-01; *see also Rademan v. City & Cnty. of Denver*, 186 Colo. 250, 254, 526 P.2d 1325, 1327 (1974) (municipal government has a legitimate purpose in controlling population density and developing land use legislation that restricts neighborhood development).

¶ 20 Having concluded Lakewood had a legitimate governmental purpose, we next determine whether the Ordinance is rationally related to that purpose. The city's objective is to prevent the development of concentrated blocs of off-campus student housing in family residential areas. And, the city argues, targeting off-campus housing that is owned by the university is a rational means of reaching that objective because such properties are more likely to be permanently dedicated to student living than they would be if they were owned by someone else. Thus, the Ordinance aims to prevent penetration of permanent student housing into neighborhoods that are not zoned for university use — thereby preserving their character and ensuring the neighborhoods do not turn into university residential life centers.

¶ 21 But, CCU asserts, Lakewood's classification discriminates not on the basis of use of property, but on the basis of ownership. After

all, the Ordinance doesn't ban non-university or college landlords from renting to students, or other universities or colleges from renting to CCU students.

¶ 22 That the Ordinance is based partially on a type of ownership does not mean that the Ordinance cannot satisfy the extremely lenient requirements of the rational basis standard.

¶ 23 Why?

¶ 24 One reason was provided by the district court:

> While CCU plans to rent their units solely to students of their university, individuals (non-university owners) renting their units in the same neighborhood are just as likely to rent to students as they are to other individuals who are not associated with the university in any way and are not part of the university culture or community. Additionally, individuals who own residential properties in the neighborhood may also choose to stop renting the property and inhabit it themselves, whereas CCU, as a university, cannot occupy their units and will likely continue to use the residential units as Student Living Units for the foreseeable future.

¶ 25 This is speculation, to be sure. But it is "rational speculation," and as the Supreme Court has made clear, "a legislative choice is not subject to courtroom fact-finding and may be based on rational

speculation unsupported by evidence or empirical data." *Beach Commc'ns*, 508 U.S. at 315.

¶ 26 It would likewise be rational to conclude that individual landlords who are unaffiliated with CCU — whether they are natural persons or corporate owners — are less likely to rent in as great (or even consolidated) numbers of students as would a university or college trying to provide housing for its own students. Unaffiliated landlords, who are presumably motivated to profit on their investments, do not necessarily have the same incentives as a university, which might acquire concentrated blocs of housing and rent them at cost, or even at a loss, in order to accommodate growth in student enrollment.

¶ 27 These, in our view, are conceivable sets of facts that establish a rational relationship between the Ordinance and its legitimate purpose in preserving the residential character of Lakewood's neighborhoods. Thus, the Ordinance does not violate CCU's right to equal protection of the laws. *See HealthONE*, 50 P.3d at 893.

¶ 28 In so concluding, we necessarily reject CCU's argument that other landlords renting to CCU students in the same areas would result in the same problems the Ordinance attempts to alleviate,

i.e., increased density, traffic, and alteration of the neighborhoods' character. That an Ordinance does not eliminate all vestiges or degrees of a problem or concern does not render it invalid; an ordinance "is not invalid under the Constitution because it might have gone farther than it did [and] reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind." *Robertson v. City & Cnty. of Denver*, 874 P.2d 325, 333 (Colo. 1994) (quoting *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966)); *see also Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 489 (1955) (Consistent with equal protection guarantees, a government actor may pursue reforms "one step at a time [in order to] address[] itself to the phase of the problem which seems most acute to the legislative mind. [It] may select one phase of one field and apply a remedy there, neglecting the others.") (citation omitted); 1 Arden H. Rathkopf et al., *Rathkopf's The Law of Zoning and Planning* § 2:4, Westlaw (4th ed. database updated Sept. 2023) ("Generally, so long as there is 'some rational basis' for different treatment of similar land uses, a zoning classification or restriction will be upheld. It has long been

recognized that equal protection does not require a regulatory body to prohibit all conduct associated with a particular evil.”).

¶ 29 Similarly, we reject, as misplaced, CCU’s reliance on *People v. Sprengel*, 176 Colo. 277, 490 P.2d 65 (1971), as requiring a different conclusion. In *Sprengel*, the supreme court determined that the attempt to distinguish motels and hotels within a statute was not based upon any substantial difference because both entities cater to travelers. *Id.* at 280, 490 P.2d at 67.

¶ 30 What we have here, however, is a prohibition on what could lead to off-campus consolidated student housing. While it is true that other landlords could also cater to students, university-owned student housing is, by definition, specifically designed to serve as student residential life, while unaffiliated student-oriented landlords rent their properties to tenants who just so happen to be students. These are not “substantially identical services and accommodations” as the motels and hotels at issue in *Sprengel*. *Id.* at 281, 490 P.2d at 67.

¶ 31 CCU similarly relies on two out of state cases that involved zoning ordinances prohibiting certain types of student occupancy. In *College Area Renters & Landlord Ass’n v. City of San Diego*, the

California Court of Appeals concluded that the city's ordinance prohibiting non-owners (primarily student-tenants) from occupying detached homes violated equal protection. 50 Cal. Rptr. 2d 515, 520-21 (Ct. App. 1996). There, the court determined the law was not rationally related to its purpose of alleviating the problems of excessive occupancy in an area zoned for single-family homes. *Id.* And in *Kirsch v. Prince George's County*, the Maryland Court of Appeals found that a county ordinance imposing additional zoning requirements on landlords renting to students violated equal protection. 626 A.2d 372, 381 (Md. 1993). The Maryland court similarly concluded the ordinance was unrelated to its stated purpose of reducing noise, litter, and parking congestion, because landlords could rent to an equal number of non-student tenants, causing the same issues, without the additional requirements. *Id.*

¶ 32 Unlike the ordinances at issue in *College Area Renters* and *Kirsch*, the Ordinance here specifically targets the problem of transforming family residential areas to student housing by prohibiting university-owned student housing. As stated above, private landlords renting to students, and even CCU renting to non-CCU students, do not present the same potential threat to altered

neighborhood character. CCU-owned student living units are not "similarly situated" with respect to the altered neighborhood character problem as owners and tenants were regarding overcrowding in *College Area Renters*, and they do not "equally" contribute to those problems like student and non-student tenants did to overcrowding and noise issues in *Kirsch*.

¶ 33 A zoning classification that treats similar uses differently does not, in and of itself, violate equal protection, so long as the classification is not arbitrary and there exists a reasonable relationship to a legitimate zoning objective. *See, e.g.*, *Haves v. City of Miami*, 52 F.3d 918, 922-23 (11th Cir. 1995) (upholding municipal ordinance that grandfathered houseboats in some areas but not others, though the use was the same, because areas where houseboats were prohibited could be distinguished based on a number of conceivable reasons including differences in residential character, industry presence, pollution, traffic, and structure).

¶ 34 Here, the classification — university-owned student housing in residential areas — is not arbitrary and a reasonable relationship exists to the legitimate zoning objective of preserving the character

of a residential neighborhood. Consequently, we, like the district court, can find no equal protection fault with the Ordinance.

B. Substantive Due Process

¶ 35 Both the United States and Colorado Constitutions establish that "[n]o person shall be deprived of life, liberty, or property, without due process of law." Colo. Const. art. II, § 25; U.S. Const. amend. XIV, § 1.

¶ 36 Where, as here, the government action does not affect a fundamental constitutional right,[3] "then the applicable test for reviewing a substantive due process challenge is the rational basis test." *City & Cnty. of Broomfield v. Farmers Reservoir & Irrigation Co.*, 239 P.3d 1270, 1277 (Colo. 2010). "Due process . . . requires only that a municipal ordinance enacted under the police power shall not be unreasonable, arbitrary or capricious, and that it bear a rational relation to a proper legislative object sought to be

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[3] "While the right to use one's own real property as one sees fit is a property right fully protected by the due process clause of the federal and state constitutions, this use is subject to the proper exercise of local police powers." *Sundheim v. Bd. of Cnty. Comm'rs*, 904 P.2d 1337, 1346 (Colo. App. 1995), *aff'd*, 926 P.2d 545 (Colo. 1996). And "[t]here is no constitutionally protected right to the most profitable, or desirable use of real property." *Id.*

attained." *Town of Dillon*, ¶ 26 (quoting *U.S. Disposal Sys., Inc. v. City of Northglenn*, 193 Colo. 277, 281, 567 P.2d 365, 367 (1977)).

¶ 37 CCU did not distinguish its substantive due process argument from its equal protection argument, and we apply the same rational basis review to a substantive due process challenge. In our equal protection analysis, we concluded that the Ordinance is rationally related to the legitimate governmental purpose of retaining the residential character of neighborhoods zoned for residential use. Because that same analysis leads to the same conclusion here, we conclude that the Ordinance did not violate CCU's substantive due process rights under the federal or state constitutions.

C. Special Legislation

¶ 38 Article V, section 25 of the Colorado Constitution prohibits state and local governments from enacting special legislation. "The provision tests whether 'legislation is "general and uniform in its operation upon all in [a] like situation."'" *Snook v. Joyce Homes, Inc.*, 215 P.3d 1210, 1214 (Colo. App. 2009) (quoting *City of Greenwood Village v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 440–41 (Colo. 2000)). "Judicial review of a statute under article V, section 25 'focuses on whether legislation creates valid

classifications, and, if so, whether the classifications are reasonable and rationally related to a legitimate public purpose.'" *Id.* (quoting *City of Greenwood Village*, 3 P.3d at 441). What distinguishes the prohibition on special legislation from a "redundant Equal Protection Clause" is whether the classification established by the legislation is factually and logically limited to a class of one, and therefore illusory. *City of Greenwood Village*, 3 P.3d at 441 (quoting *In re Interrogatory on House Bill 91S–1005*, 814 P.2d 875, 886 (Colo. 1991)).

¶ 39 CCU contends that because, at present, it is the only university or college in Lakewood, the Ordinance necessarily is limited to a class of one. Based on the record, it appears CCU is the only entity that satisfies the Ordinance's definition of "university/college" at present. However, the supreme court, as well as other divisions of this court, have upheld ordinances that have potentially broader applicability in the future. *See House Bill 91S–1005*, 814 P.2d at 887 (statute was not special legislation even though only one aviation company benefitted from the challenged law at the time it was enacted because other entities could satisfy the criteria in the future); *Vitetta v. Corrigan*, 240 P.3d 322, 328-29

(Colo. App. 2009) (Regardless of whether only one pending case was affected by statutory amendment, "all that is required is the *potential* for broader applicability."). Thus, while CCU maintains it is the only entity impacted by the Ordinance, we cannot say that the Ordinance, as written, could only ever apply to CCU, and not another institution. Consequently, we, like the district court, conclude that the Ordinance does not violate the constitutional prohibition of special legislation.

III. Statutory Claim

¶ 40 CCU further contends that the Ordinance is invalid because it violates Colorado's statutory "uniformity" requirement.[4] We disagree.

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[4] CCU also appears to contest the validity of the Ordinance under Colorado's Local Government Land Use Control Enabling Act, section 29-20-104, C.R.S. 2022. However, we are unable to discern any developed argument distinct from the "uniformity" argument we address in this section. Because "it is not this court's function to speculate as to what a party's argument might be," *Beall Transp. Equip. Co. v. S. Pac. Transp.*, 64 P.3d 1193, 1196 n.2 (Or. Ct. App. 2003), we decline to address any point about the Enabling Act. *See People v. Wiseman*, 2017 COA 49M, ¶ 48 ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990))).

¶ 41 By statute, local governments are authorized to divide municipalities into districts and "regulate and restrict the . . . use of buildings, structures, or land" within those districts. § 31-23-302, C.R.S. 2023. "All such regulations shall be *uniform* for each class or kind of buildings throughout each district . . . ." *Id.* (emphasis added). CCU asserts that the Ordinance violates the uniformity requirement because it regulates based on ownership — that is, it restricts CCU's ability to rent to its students.

¶ 42 The district court observed that generally, zoning regulations based solely on ownership are disfavored as compared to those regulating use. *See Cottonwood Farms v. Bd. of Cnty. Comm'rs*, 763 P.2d 551, 556 (Colo. 1988) (right to owner's desired use of property is an attribute of property ownership subject only to legitimate governmental regulation). But CCU does not point us to, nor can we identify, any authority holding invalid the regulation of a particular use associated with ownership of property.

¶ 43 Further, in analyzing an identical statutory "uniformity" provision, the Maryland Court of Appeals explained:

> [T]he purpose of the [uniformity] provision was mainly a political rather than a legal one, i.e., to give notice to property owners that there

> shall be no improper discriminations. We have also recognized that invidious distinctions and discriminations in applying the uniformity requirement are impermissible. The uniformity requirement does not prohibit classification within a district, so long as it is reasonable and based upon the public policy to be served.

Montgomery County v. Woodward & Lothrop, Inc., 376 A.2d 483, 501 (Md. 1977) (citations omitted); *accord Anderson House, LLC v. Mayor & City Council of Rockville*, 939 A.2d 116, 133 (Md. 2008).

¶ 44 Section 31-23-302 permits Lakewood to regulate and restrict the use of buildings within districts, while instructing that regulations for each class or kind of building remain uniform. Within residential properties, Lakewood has specifically defined "Student Living Units" as a distinct category of land use. And, as we observed above, the Ordinance prohibits what could lead to off-campus consolidated student housing,[5] while at the same time, permitting other landlords to rent to local students. The presence of multiple neighboring dwellings owned by the university and rented to its students specifically functions as concentrated student

[5] And not just by CCU, but by any university that either is or becomes located in Lakewood.

residential life. Leases between unaffiliated property owners and students could be expected to result in more of a mixed population within the district, thereby preserving the residential character of these districts. And concentrated university-owned student housing has the potential to create more traffic and density issues than a typical lease.

¶ 45 For these reasons, we are not persuaded that the Ordinance violates the uniformity requirement of section 31-23-302.

IV. Improper Basis for Summary Judgment

¶ 46 CCU also contends that the district court reversibly erred by considering unsworn declarations concerning disputed issues of fact in violation of C.R.C.P. 56(e).[6] We disagree.

¶ 47 In applying rational basis review to an equal protection challenge, no particular facts need be proved or shown: "[I]f any conceivable set of facts would lead to the conclusion that a classification serves a legitimate purpose, a court must assume those facts exist.'" *HealthONE*, 50 P.3d at 893 (quoting *Christie*,

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[6] These unsworn declarations in the intervenors' responses to CCU's motion for summary judgment included a brief summary of the concerns of CCU's residential neighbors regarding parking availability and a change to the character of the neighborhood.

933 P.2d at 1333). And, as we have already noted, the facts that a court assumes may be based on "rational speculation unsupported by evidence or empirical data." *Beach Commc'ns*, 508 U.S. at 315. Even without the unsworn statements of the intervenors, it is conceivable (and even apparently is true) that neighbors near university-owned student housing would be concerned about the inability to find parking and the alteration of their neighborhood's character resulting from an influx of local students residing in university housing. The district court, therefore, was required to assume such facts existed. Thus, even if it was an error to consider the unsworn declarations, any such error is harmless, as the district court had to assume such a set of facts was present anyway. *See City of Colorado Springs v. Givan*, 897 P.2d 753, 761 (Colo. 1995) (concluding any error by trial court in denying a party the opportunity to amend his pleadings was harmless because it did not affect the outcome of the case).

V. Disposition

¶ 48 The judgment is affirmed.

JUDGE GROVE and JUDGE GOMEZ concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

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