

<p>COURT OF APPEALS, STATE OF COLORADO Court Address: Colorado State Judicial Building, 2 East 14th Avenue, Suite 300, Denver, Colorado 80203</p>	
<p>Appeal from the District Court, Pitkin County, Colorado Honorable Gail H. Nichols Case No. 07CV175</p>	
<p>Petitioners-Appellants: CURTIS VAGNEUR and JEFFREY EVANS, Initiative Petition Proponents</p> <p>Respondents-Appellees: CITY OF ASPEN; KATHRYN KOCH, in her official capacity as City Clerk for the City of Aspen; KAREN GOLDMAN, in her official capacity as Administrative Hearing Officer Pursuant to C.R.S. § 31-11-110(3); and LES HOLST, CLIFFORD WEISS, and TERRY PAULSON, Protestors</p>	
<p>Edward T. Ramey, #6748 Isaacson Rosenbaum P.C. 633 17th Street, Suite 2200 Denver, Colorado 80202 Phone Number: (303) 256-3978 Fax Number: (303) 292-3152 E-mail: eramey@ir-law.com</p> <p>Gary A. Wright, #10028 Wright & LaSalle, LLP 715 West Main Street, Suite 201 Aspen, Colorado 81611 Phone Number: (970) 925-5625 Fax Number: (970) 925-5663 E-mail: gaw@wrightlasalle.com</p>	<p>Case No. 08CA2552</p>
<p style="text-align: center;">APPELLANTS' REPLY BRIEF</p>	

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

This brief complies with C.A.R. 28(g), as it contains 2,538 words.

This brief complies with C.A.R. 28(k), as it contains a concise statement of the applicable standard of appellate review with citation to authority and/or a citation to the precise location in the record where the issue was raised and ruled on.

DATED this 14th day of July, 2009.

ISAACSON ROSENBAUM P.C.

By: *s/ Edward T. Ramey*
Edward T. Ramey

ATTORNEYS FOR PETITIONERS-
APPELLANTS

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I. ARGUMENT

A. Standard of Review.

The briefing thus far suggests that the parties are not completely in accord regarding the proper standard of review before this Court. While this action was brought by Appellants Vagneur and Evans ("Petitioners") under [§ 31-11-110\(3\), C.R.S. \(2008\)](#), Petitioners agree with the Protestor Appellees ("Protestors") that the standard of review is analogous to the standard applicable to proceedings under [C.R.C.P. 106\(a\)\(4\)](#). *Prot. Ans. Br. at 5*. Petitioners do not agree, however, that, under either provision, "a reasonable basis is all that is required for a hearing officer's *interpretation of laws* that it is charged with administering." *Prot. Ans. Br. at 7 (emphasis added)*.

Upon the basis of its own (not the district court's) *de novo* review of the record – [Feldewerth v. Joint School District 28-J](#), 3 P.3d 467, 470 (Colo. App. 1999) – this Court may indeed uphold the *factual* findings of the hearing officer as long as there is competent evidence in the record to support those findings. [Puckett v. City and County of Denver](#), 12 P.3d 313, 314 (Colo. App. 2000). There is no significant factual dispute among the parties in this case in any event.

However, this Court is also charged with considering "whether the hearing officer misconstrued or misapplied the applicable law." [Canyon Area Residents](#)

[for the Environment v. Bd. of County Comm'rs](#), 172 P.3d 905, 907 (Colo. App. 2006), citing [Van Sickle v. Boyes](#), 797 P.2d 1267, 1274 (Colo. 1990). Misconstruction or misapplication of the law by a hearing officer constitutes a reversible abuse of discretion. [Canyon Area Residents](#), 172 P.3d at 907.

The cases have not been wholly consistent on the standard to be applied to review of a quasi-judicial officer's interpretation and application of the law. The Protestor Appellees cite [Wilkinson v. Bd. of County Comm'rs](#), 872 P.2d 1269, 1277 (Colo. App. 1993), for the proposition that all that is required of a quasi-judicial officer is a "reasonable" – albeit wrong – basis for its legal conclusions. Other opinions have followed the [Wilkinson](#) lead.¹ The Supreme Court, however, has mandated a *de novo* approach to questions of law: "The court may defer to an agency's construction of a code, ordinance, or statutory provisions that govern its actions, but it is not bound by the agency's construction *because the court's review of the applicable law is de novo.*" [City of Commerce City v. Enclave West, Inc.](#), 185 P.3d 174, 178 (Colo. 2008) (emphasis added), involving a C.R.C.P. 106(a)(4) action. *Accord*, [Freedom Colorado Information, Inc. v. El Paso County Sheriff's](#)

¹ See, e.g., [Covered Bridge, Inc. v. Town of Vail](#), 197 P.3d 281, 283 (Colo. App. 2008) ("In a C.R.C.P. 106 review, an agency's legal conclusions are not reviewed *de novo*, and will be affirmed if supported by a reasonable basis"); [Quaker Court LLC v. Bd of County Comm'rs](#), 109 P.3d 1027, 1030 (Colo. App. 2004); [City and County of Denver v. Bd. of Adjustment](#), 55 P.3d 252, 254 (Colo. App. 2002).

[Dept.](#), 196 P.3d 892, 897 (Colo. 2008); [Colorado Dept. of Revenue v. Hibbs](#), 122 P.3d 999, 1002 (Colo. 2005); [Lobato v. Indus. Claim Appeals Office](#), 105 P.3d 220, 223 (Colo. 2005); [Ad Two, Inc. v. City and County of Denver](#), 9 P.3d 373, 376 (Colo. 2000). This is particularly the case when the interpretation and application of the law affects a constitutional right, as it does here. [People v. Castaneda](#), 187 P.3d 107, 109 (Colo. 2008).

The central issue in this case is the interpretation and characterization to be given to the language of the Petitioners' proposed initiatives. That, as with issues of contractual interpretation, is primarily a *legal* issue. "[C]ontract interpretation is a question of law that is reviewed *de novo* and we need not defer to a lower tribunal's interpretation of the contract." [Ad Two, Inc.](#), *supra*, 9 P.3d at 376. "Our review is guided by well-established principles of contract law. The primary goal of contract interpretation is to determine and give effect to the intent of the parties. The intent of the parties to a contract is to be determined *primarily from the language of the instrument itself*." *Id.* (internal citations omitted) (emphasis added). The same standard applies to interpretation of legislation. [Ritter v. Jones](#), 207 P.3d 954, 957 (Colo. App. 2009); *accord*, [Lombard v. Colorado Outdoor Educ. Ctr., Inc.](#), 187 P.3d 565, 570-71 (Colo. 2008); [Enclave West](#), *supra*, 185 P.3d at 178 ("In reviewing the agency's construction, we rely on the basic rules of

statutory construction, affording the language of the provisions at issue their ordinary and common sense meaning").

This is not to suggest that the issues in this case are at a level of subtlety such that the hearing officer's interpretation of the language of the Petitioners' proposed initiatives – and her application of the law defining the distinction between "legislative" and "administrative" actions – can be both wrong and reasonable. Rather, they are both wrong and, in the final analysis, unreasonable, and wholly unsustainable as a matter of law under even the most deferential standard of review. And, the result has been the loss by the Petitioners and the people of the City of Aspen of their ability to exercise a constitutionally guaranteed right.

B. The hearing officer and the district court erred in concluding that Petitioners' proposed initiatives contain "administrative" matters – as distinguished from "legislative" authorizations – such that they could not be submitted to a vote of the people of the City of Aspen under the constitutionally reserved right of the initiative.

The arguments of the Appellees can be sorted into two principal categories. First, it is clear that both the Protestors and the Municipal Appellees (the "City") view Mr. Evans' and Mr. Vagneur's substantive proposals as bad ideas. They variously describe a thirty-year "civic debate" over what to do about the increasing traffic snarls along the Highway 82 corridor – *City Ans. Br. at 3* – the involvement

of multiple state and federal agencies, prior municipal elections and administrative actions directed to the problem, investment of public monies in research and engineering studies, and "complicated land exchanges and agreements" – *City Ans. Br. at 11* – albeit, one may argue, largely for naught. *City Ans. Br. at 2-11; Prot. Ans. Br. at 9-10*. They view the Petitioners and their supporters as "attempt[ing] to circumvent the over ten year administrative process that determined the current plan for a new entrance to the City" – *Prot. Ans. Br. at 10* – seeking to "intrude into the details" of prior contracts and conveyances and "substitute[e] their terms for the conditions contained in them" – *Prot. Ans. Br. at 2* – "not appreciat[ing] the consequences" of their proposals – *City Ans. Br. at 19* – and invoking a process that could even "be dangerous to public safety." *Prot. Ans. Br. at 11*. In sum, Petitioners' proposals are horrible ideas, potentially disruptive of current policies (ineffective as they have proven to be), and should be squelched by judicial or quasi-judicial fiat before the voters actually have a chance to consider them.

Notwithstanding the contradiction between this delineation of the chaotic consequences of voter approval of either proposed ordinance, and the City's own statement that in the instance of such approval "CDOT would have all the legal authority they would need to proceed with the construction, operation, and maintenance of a four lane highway over and across City-owned open space" –

City Ans. Br. at 2 – all of this is beside the point. If Petitioners' proposals are indeed "legislative" in nature, these are questions properly entrusted to the legislative process under our constitutional distribution of powers – [Colo. Const. art. III](#) – and subject to the local right of initiative reserved to the people pursuant to [Colo. Const. art. V, § 1\(9\)](#). As with ballot title challenges, the pre-adoption judicial and quasi-judicial functions are "not to determine the merits of a proposed initiative" – [In re Proposed Initiative 2007-2008 #57](#), 185 P.3d 142, 148 (Colo. 2008) – let alone block consideration of duly submitted legislative proposals by the people. Consideration of these proposed initiatives is a legislative task properly left to the legislative process, and in this case to the people of the City of Aspen.

Second – and this is the legal issue at the heart of this case – the Appellees argue, and successfully convinced both the hearing officer and the district court, that the Petitioners' proposed initiatives would constitute "administrative" rather than "legislative" acts, thus falling outside the scope of the people's reserved power of the initiative. They are correct that new administrative acts may follow the passage of either of these initiatives, and some prior administrative acts may require amendment or abandonment. But, they are incorrect in attempting to characterize either of these initiatives as administrative acts in themselves. With

due respect to Shakespeare's Queen Gertrude – *City Ans. Br. at 11* – Petitioners cannot protest this skewed characterization strongly enough.

Following the interpretive guidance noted in part A, above, the Court is respectfully directed first to the language of the initiatives themselves. The only operative language appears in both initiatives, after the "Whereas" recitals, as follows (with emphasis added):

The City of Aspen *hereby authorizes and approves* the conveyance of the real property or an interest in the real property more fully described in Exhibit 1 of Resolution No. 34, Series of 2002, Right-of-Way Easement to the State of Colorado, Department of Transportation for the purposes set forth hereinafter and for no other purpose, and *hereby rescinds all enactments or authorizations* inconsistent herewith.

The only operative acts are the *authorization and approval* of a conveyance to the Colorado Department of Transportation ("CDOT") of an interest in city-owned property for purposes of constructing, operating, and maintaining a transportation corridor into the City meeting a specified configuration, and the rescission of prior inconsistent "enactments or authorizations" (*i.e.*, only prior legislative acts) by the City. While other acts (of an administrative nature) may – or may not – be necessitated should either of these initiatives be adopted by the voters, no other acts are *performed* by the voters under either of these measures.

Specifically, neither of these initiatives amend Resolution No. 61 (Series of 1998) nor Resolution No. 34 (Series of 2002). *Prot. Ans. Br. at 15, 19.*² Neither of these initiatives "rescinds the ROW Grant and the MOU and replaces them with a new grant of a right of way." *Prot. Ans. Br. at 16.* Neither of these initiatives "call[] for the rescission or amendment of existing contractual obligations entered into by the City." *Prot. Ans. Br. at 18; City Ans. Br. at 17.* Neither of these initiatives encroaches upon the administrative authority of the City Manager. *Prot. Ans. Br. at 22.* Neither of these initiatives authorizes CDOT to do anything – *City Ans. Br. at 13* – rather, they authorize and approve a conveyance of an interest in specified real property *by the City of Aspen* to CDOT for the purpose of constructing, operating, and maintaining the proposed transportation configuration.³

By their terms, neither of these initiatives repeal nor rescind anything other than prior inconsistent *legislative* acts ("enactments or authorizations"), among

² The reference to Resolution No. 34 in the operative paragraph is merely for purposes of incorporating by that reference a legal description of the affected real property. *Prot. Ans. Br. at 15-16.*

³ In fact, the conveyance to CDOT has already occurred through the grant of the right of way easement in 2002, as amended in 2007. *See Pet. Op. Br. at 5-6.* The proposed initiatives would approve and authorize a modified *use* of the property, which – CDOT willing – may or may not require further administrative acts by the City and CDOT to amend the details of the existing right of way easement. These initiatives do not themselves purport to amend that easement.

which the Petitioners would include the prior ballot issue submitted to a vote of the people by Resolution No. 51 (Series of 1996). Petitioners do not argue, as the Appellees suggest, that their proposals are "legislative" merely due to the action of the City Council in placing the prior question on the ballot, nor by virtue of the public vote requirement of Section 13.4 of the [City Charter](#). Both the prior question and the Petitioners' current proposals are "legislative" by virtue of the criteria discussed in Petitioners' Opening Brief. They are akin to a rezoning – or to the initial decision in [Witcher v. Canon City](#), 716 P.2d 445 (Colo. 1986), to lease and contract for the operation of the Royal Gorge Bridge rather than purchase and operate the bridge directly. The change-in-use authorizations at issue here, and the conveyance to CDOT authorized to accomplish that change in use, are in effect a rezoning – though incidentally subject to a Charter mandate that *these* legislative actions can *only* be authorized by a public vote. Please see fn. 9 of *Petitioners' Opening Brief*.

While the Petitioners' proposed initiatives do not perform any administrative acts, their passage may well precipitate some. This is a common consequence of legislation. If a statute is amended, regulations promulgated or contracts entered into under a prior version may require amendment, or even withdrawal. In some cases contractual or other rights may have vested under a prior legislative scheme

which may not readily be undone under a new one. This does not make the new legislation any less "legislative" or deprive those holding the legislative power the right, power, and ability to enact the new legislation – but it may impact the degree and manner in which the new legislation is given effect. In still other cases, new legislation may even be subject to post-enactment invalidation (*e.g.*, as unconstitutional) – but those holding the legislative power, including the people of the City of Aspen, still have the right and prerogative to enact it. As with pre-adoption ballot title challenges, it is not the province of the courts or quasi-judicial officials to "address the merits of a proposed initiative ... interpret its language or predict its application if adopted by the electorate." [In re Proposed Initiative 2007-2008 #62](#), 184 P.3d 52, 58 (Colo. 2008). "Governmental officials have no power to prohibit the exercise of the initiative by prematurely passing upon the substantive merits of the initiated measure ... Nor may the courts 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 ... Then and only then, when actual litigants whose rights are affected are before it, may the court determine the validity of the legislation." [McKee v. City of Louisville](#), 616 P.2d 969, 972-73 (Colo. 1980), citing [City of Rocky Ford v. Brown](#), 133 Colo. 262, 293 P.2d 974 (1956).

The question comes back to the criteria for distinguishing "legislative" from "administrative" acts, as discussed by the Petitioners in their Opening Brief. Petitioners will not repeat that discussion here, though the Court is respectfully referred to Petitioners' Opening Brief at pp. 16-33.

II. CONCLUSION

Petitioners respectfully request this Court to reverse the decision of the district court and to remand with directions that the district court forthwith enter an order requiring the City of Aspen and the City Clerk for the City of Aspen to forward their proposed ordinances to the registered electors of the City of Aspen at a regular or special election to be held in accordance with the requirements of [§ 31-11-104\(1\), C.R.S. \(2008\)](#).

Respectfully submitted this 14th day of July, 2009.

ISAACSON ROSENBAUM P.C.

By: s/ Edward T. Ramey
Edward T. Ramey

ATTORNEYS FOR PETITIONERS-
APPELLANTS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 14th day of July 2009, a true and correct copy of the foregoing **APPELLANTS' REPLY BRIEF** was served by U.S. mail, postage prepaid, to the following addressees:

Gary A. Wright, Esq.
Wright & LaSalle, LLP
715 West Main Street, Suite 201
Aspen, CO 81611

John P. Worcester, Esq.
City Attorney
130 South Galena Street
Aspen, CO 81611

Herbert S. Klein, Esq.
Lance R. Cote, Esq.
Corey T. Zurbuch, Esq.
Klein, Cote & Edwards, LLC
201 North Mill Street, Suite 203
Aspen, CO 81611

s/ Jayne Wills

Jayne Wills