The Citizen Initiative in Colorado

Status Report and Recommendations

March, 2015

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Preface

Colorado adopted its state constitution and became the 38th state of the United States in 1876.

In 1910, Colorado voters passed a constitutional amendment providing citizens the power of Initiative and Referendum (I&R) at the state level "to propose laws and amendments to the constitution" or "to approve or reject at the polls any act, item, section or part of any act of the general assembly." Similar powers were "reserved to the legal voters of every city, town, and municipality as to all local, special, and municipal legislation of every character." (Emphasis added.) Colo. Const. art V, section 1(1) 1(9).

The impetus for this report is a Colorado Supreme Court (CSC) decision in *Vagneur v. City of Aspen*, issued on February 11, 2013. The author is a Plaintiff in this case in the role of petition representative for two initiatives which the court disallowed on the grounds ***that the proposed initiatives are administrative in character and therefore are not a proper exercise of the people's initiative power***. (CSC Opinion)(See Notes[1])

The application of I&R power to "legislation" was an intentional limitation, meant to create a distinction between that function of government and administrative or executive actions. It has long been supposed that extension of I&R powers over administrative functions "*could result in chaos and the bringing of the machinery of government to a halt.*" *Carson V. Oxenhandler*, 334 S.W.2d 394 (Mo.Ct.App. 1960) The perceived need to exempt certain forms of government activity inevitably led to court interpretations of the meaning of the words legislative, administrative, and executive in determining the acceptable scope of I&R activities.

A general and succinct starting point for the meaning of "legislative" is found in a Virginia Supreme Court case which Colorado courts have referenced in their decisions:

"*Acts constituting a declaration of public purpose or policy are generally classified as involving the legislative power.*" *Whitehead v. H and C Development Corp.*, 204 Va. 144, 129 S.E.2d 691 (1963).

An example from Colorado illustrates a basic comparative process which is applied to distinguish legislative and administrative (or executive) actions:

"*The central inquiry is whether the proposed legislation announces new public policy or is simply the implementation of a previously declared policy.*" *City of Idaho Springs v. Blackwell*, 731 P.2d 1250 (Colo.1987)

Other and subsequent definitions and "tests" designed to distinguish legislative from administrative matters are arbitrarily applied or ignored, causing the CSC in the *Vagneur* case to note that:

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[1] Notes:

(1) Court opinions from any source are quoted in italic, while quotes from the CSC Vagneur decision are shown in bold italic.

(2) Quotes credited to (CSC Opinion) are taken from the majority opinion in this case. Quotes identified as (Coats Dissent) or (Eid Dissent) are taken from the two Colorado Supreme Court justices' dissenting opinions - which found the subject matter of the petitions to be legislative, and therefore appropriate to the initiative power.

…***our tests have attempted to establish guide posts to aid in determining the overall character of a proposed initiative. We acknowledge, however, 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***"; and that, ***We also have never explained in our decisions the interrelation between the tests or articulated whether a particular matter must be examined under more than one test to reach a determination.*** (CSC Opinion)

While I view our prior attempts to distinguish administrative from legislative action as little more than a license to judicially nullify popularly initiated measures at will, I am presently more concerned that the majority's elaborate justification in this case risks extending that entitlement to the oversight of representative bodies as well. (Coats Dissent)

It is the position of this author that the *Vagneur* decision has so confused and complicated the distinction between legislative, administrative, and executive spheres of power as to make the current constitutional provision unworkable, and that a new constitutional delineation of the extent of I&R powers is the only and necessary solution.[2]

As a consequence of the *Vagneur* decision, it is likely that we will witness a tale of two Colorados. In areas where elected officials and involved citizens maintain something of a traditional view of the initiative power, and reserve their opposition to electoral campaigns, the process may continue to function much as it has in the past. Where there is an official or private sector preference for obstruction, or powerful interests at stake, the uncertainty engendered by the *Vagneur* ruling will cause an overwhelming reluctance to employ initiatives or referenda.

Significant problems with I&R in Colorado predated the *Vagneur* case, and one of those is well illustrated in this instance. State statutes set the procedures by which the process of proposing, gathering signatures, and taking a ballot question to the voters is accomplished. These procedures vary significantly among state and local jurisdictions, but a consistent intent is that the process should proceed in a timely and expeditious manner. For example, once a petition is submitted to the clerk of a particular local jurisdiction, the determination of whether it can be accepted for circulation as "municipal legislation pursuant to section 1 (9) of article V of the state constitution," must be made within five days. (C.R.S. 31-11-106 (1))

In the *Vagneur* case, the time elapsed from the date the petition forms were submitted for approval to the clerk of the City of Aspen (who allowed the petitions to be circulated, with a warning that their legislative character might be challenged later) until a final determination was made by the Colorado Supreme Court - was five years and nine months. Petitioners had previously submitted similar versions of the same initiatives, which were rejected by the same clerk. Those petitions were revised and resubmitted after nearly a year spent waiting for a ruling (which was never issued) from the district court where the clerk's rejection was challenged. It therefore required more than six years and four layers of judicial review to reach a decision which a city clerk is charged with making in five days.

[2] We can offer no solution to the concern expressed by Justice Coats – suggesting that the court has so broadened its own powers in this decision that it could conceivably be asked to apply the same tests to actions taken by the state legislature or local elected representatives.

The ambiguous nature of the basis for acceptable initiative subject matter therefore creates the potential for lengthy, and often malicious, delay. This potential might have been tempered slightly if the *Vagneur* decision had provided clarification, but instead it has been made more likely. An attempt to address the problem was made for statewide I&R with a statute (C.R.S. 1-40-118) allowing proponents to recover legal costs if a protest (on whatever grounds) "lacked substantial justification or that the protest, or any part thereof, was interposed for delay or harassment." Notwithstanding the difficulty in proving such intent, there is no similar provision at the local level.

Section V of this report contains a recommendation for revisions to the statutory procedures for I&R to reduce the potential for harassment by litigation. These procedures would be applicable under existing constitutional provisions, or the new standards proposed in Section IV.

An additional impediment to the full use of I&R powers resulted from the ruling in *Dellinger v. Board of County Commissioners (20 P.3d 1234 Colo.App. 2000).* The Appeals Court applied a contemporary interpretation of the constitutional language used in 1910, and thereby excluded "statutory" (as distinguished from "home rule") counties from constitutional I&R provisions. Thus, the residents of all but three of the sixty four Colorado counties were left without the power to challenge the decisions of their commissioners, or to propose their own legislation. The need to address this situation as part of the overall revision of the state constitutional structure of I&R is discussed in Section I of this report.

However, the major portion of this report is dedicated to the dissection and analysis of the *Vagnuer* decision in Section II. A judicial predisposition to rein in the power of the electorate was made transparently evident in this ruling, thus leaving a constitutional amendment as the sole remedy.

It should be noted at the outset that the author of this report has neither the political or financial means to pursue a project of the scope necessary to propose and bring to adoption a state constitutional amendment. National organizations dedicated to the principles of I&R, some political in nature and some academic, do exist. However, their focus tends to be on statewide powers for reasons both practical and political – there are fewer variations in state procedures, and the issues involved tend to generate much larger impact and interest. A significant purpose of this report is to alert proponents of I&R to the danger of disregarding court decisions which negatively affect small jurisdictions. The cumulative effect should be likened to termites eating at a foundation.

Judicial rulings at the state supreme court level in the area of initiative, referendum, and recall are not voluminous, and individual decisions in one state frequently influence court proceedings in other jurisdictions throughout the country. For example, a 2012 decision of the Utah Supreme Court plays a significant role in the case under discussion here. National attention on the Vagneur ruling, and our proposed constitutional remedy, would therefore be very appropriate.

It should be further noted that without an emotional impetus there may be little opportunity to engage the public in the idea that the I&R process should be subject to significant change. However, it seems inevitable that a high profile and popular issue will be withheld from the ballot by a court decision based on the current standards. Colorado may not be the place where this first occurs, but proponents of I&R should prepare now in order to be ready with a solution whenever and wherever the climate is most amenable.

Section I

ANALYSIS OF THE COURT OF APPEALS OF COLORADO DECISION

Dellinger v. Board of County Commissioners
September 14, 2000
No. 99CA0403

Historical Background:

Colorado adopted its state constitution and became the 38th state of the United States in 1876.

Some members of the convention which drafted the proposed state constitution appended to that document an "Address of the Convention to the People of Colorado", which explained in some detail the reasons for their decisions and the case for adoption of the constitution by the voters of the territory. The lead author of the Address was William M. Clarke, and he was joined in urging passage by nine other members of the Constitutional Convention.

A major concern of the convention, and by inference their understanding of the concerns of the populace, was the potential for a concentration of power in the state capitol which would interfere with local governance: "We invite your special attention to section twenty-five of the article on legislation, wherein are enumerated the many cases in which the General Assembly is prohibited from passing any local or special laws." The concern was not just conceptual, as the drafters of the constitution had particular instances of abuse of power in mind: "The evils of local and special legislation being enormous, the passage of any law not general in its provisions is prohibited - thus saving the state from expenses usually incurred in passing and publishing laws secured by combinations to advance private interests and to create dangerous monopolies."

Though only portions (underlined below) of "section twenty-five of the article on Legislation" (Article V) will be discussed further, the scope and detail of the entire section is important:

"Sec. 25 The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say; for granting divorces; laying out, opening, altering or working roads or highways; vacating roads, town plats, streets, alleys and public grounds; locating or changing county seats; regulating county or township affairs; regulating the practice in courts of justice; regulating the jurisdiction and duties of police magistrates; changing the rules of evidence in any trial or inquiry; providing for changes of venue in civil or criminal cases; declaring any person of age; for limitation of civil actions or giving effect to informal or invalid deeds; summoning or impaneling grand or petit juries; providing for the management of common schools; regulating the rate of interest on money; the opening or conducting of any election, or designating the place of voting; the sale or mortgage of real estate belonging to minors or others under disability; the protection of game or fish; chartering or licensing ferries or toll bridges; remitting fines, penalties or forfeitures; creating, increasing or decreasing fees, percentage or allowances of public officers; changing the law of descent; granting to any corporation, association or individual the right to lay down railroad tracks; granting to any corporation, association or individual

any special or exclusive privilege, immunity or franchise whatever. In all other cases, where a general law can be made applicable no special law shall be enacted." (Emphasis added.)

It is clear that the state legislature was meant to concern itself with only those issues which affected the lesser jurisdictions universally, and that those concerns which were unique to a particular area were to be decided by local representatives. The passage of the constitution and entry into statehood was thus accomplished under this arrangement of powers. Thirty four years later a major amendment of the constitution provided powers to the public beyond the indirect function of electing representatives:

Article V, Section 1, Colorado Constitution:

"The people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly, and also reserve power at their own option to approve or reject at the polls any act, item, section or part of any act of the general assembly."

"The initiative and referendum powers reserved to the people by this section are hereby further reserved to the legal voters of every city, town, and municipality as to all local, special, and municipal legislation of every character in or for their respective municipalities."

In the context of the contemporary use of the term "municipality" to mean a city or town exclusively, it is understandable that the modern interpretation of the constitution is that the authors of the initiative language quoted above had engaged in an inexplicable exercise in redundancy. Under the current state of the law, the terms "city, town, and municipality" are understood to essentially say the same thing in three different ways.

The historical context of the constitution reveals a completely different intent. Beginning with the plain definition[3] of the words themselves, the first meaning of "municipal" is:

"adj. 1. a. Pertaining to the internal affairs of a state as distinguished from its foreign relations. Originally and still chiefly in the phrase municipal law, the law of a particular state, as distinguished from international law or the law of nations." (Emphasis added)

The second meaning of "municipal" is:

"2. a. Pertaining to the local self-government or corporate government of a city or town. In common use only from the 19th c." (Emphasis added)

The first and second meaning of "municipality" is:

"1. A town, city, or district possessed of privileges of local self-government, also applied to its inhabitants collectively." (Emphasis added)

"2. The governing body of a town or district having municipal institutions (usually, the Mayor and Corporation)."

[3] All definitions: Oxford English Dictionary Second Edition on CD-ROM (v. 4.0.0.3)

The relevant second definition of "District" is:

"2. A portion of territory marked off or defined for some special administrative or official purpose, or as the sphere of a particular officer or administrative body civil or ecclesiastical."

The drafters of the state constitution in 1876 were using the term "municipal" in its original sense, and not the more contemporary application to just cities and towns. The use of language in the law is much slower to change than common usage, and the broader meaning of municipal in use in the 19th century is more consistent with the intent of the citizens of Colorado in 1876. The amendment of 1910 would obviously be written to match the vernacular of the constitution. This is easily demonstrated in a variety of ways.

It is always perilous in the writing of law to engage in the creation of lists. The potential to leave out a relevant example is matched by the likelihood that new examples will appear post adoption. The phrase "every city, town, and municipality" provides a range – from greatest to least in terms of population – and concludes with a general term intended to encompass or capture comparable governmental entities without having to list or anticipate them. It is classic drafting practice, and "municipality" should be read as being broadly inclusive, not specifically exclusive.

Instead, the absence of a specific mention of counties led the courts to exclude all but the citizens of "home rule" counties from the general exercise of I&R power at the county level. Conceptually, it is inexplicable that people who wished to "reserve to themselves" power "as to all local, special, and municipal legislation of every character" would want to exclude certain jurisdictions.

Nor should it be considered a coincidence that the phrase "local, special, and municipal legislation" echoes the language of Article V, Sec. 25, "local or special laws". The scope of local I&R power was clearly intended to reflect the same enumerated areas of interest as those reserved to local government - and which included "regulating county or township affairs".

Defenders of the status quo might also address the use of the phrase "…State, counties, cities, towns and other municipal corporations…" in the 1876 constitution, or the specific intent of Sec. 35:

"Sec. 35. The General Assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes, or to perform any municipal function whatever." (Emphasis added.)

If the same interpretation of "municipal" which led to the exclusion of counties from I&R (under Article V, Section 1) was applied to Sec. 35, the General Assembly would be free to delegate powers to a special commission, private corporation or association anywhere outside the boundaries of cities and towns.

In one of the earliest court rulings involving Sec. 35, the phrase "municipal function" was not interpreted to refer exclusively to cities and towns:

"DESIGN AND PURPOSE OF THIS SECTION is to prohibit the delegation to private corporations of the exercise of powers strictly governmental. In re House, 23 Colo. 87, 46 P. 117, 33 L. R.A. 832 (1896)."[4] (Emphasis added.)

More contemporary court decisions have found the need to make an exception for the meaning of municipal:

"'MUNICIPAL', FOR PURPOSES OF THIS SECTION, REFERS TO COUNTIES and therefore the PUC may not regulate counties which are performing the 'municipal function' of providing mass transit within county boundaries. City of Durango v. Durango Transp., 807 P.2d 1152 (Colo. 1991)." (Emphasis added.)

"'MUNICIPAL', FOR PURPOSES OF THIS SECTION, IS NOT LIMITED TO CITIES AND TOWNS. Reg'l Transp. v. Dept. of Labor, 830 P.2d 942 (Colo. 1992)."

In the case cited above, the court provided another means to define municipal so that it could be applied to counties, and other governmental entities:

"'FUNCTIONAL APPROACH' IS USED TO DETERMINE WHETHER A UNIT OF GOVERNMENT IS A MUNICIPALITY AND A PARTICULAR SERVICE IS A MUNICIPAL SERVICE. City of Durango v. Durango Transp., 807 P.2d 1152 (Colo. 1991); Reg'l Transp. v. Dept. of Labor, 830 P.2d 942 (Colo. 1992)."

"FUNCTIONAL APPROACH TO NONDELEGATION ISSUES examines whether the function in question is truly local in the sense that, principally if not exclusively, it affects only those persons residing within the boundaries of the governmental unit in question and whether the political processes make those who perform the function responsive to the electorate within the affected area. Reg'l Transp. v. Dept. of Labor, 830 P.2d 942 (Colo. 1992)." (Emphasis added.)

Thus, historical context, common sense, consistent interpretation, and the court's description of the "functional approach" in determining whether a unit of government is a municipality all support the conclusion that the power of I&R should be available in a county - and any other political subdivision with defined boundaries and administrators responsive to the electorate.

The Opinion:

In the Dellinger decision, which embraced the opposite conclusion regarding the meaning of the word "municipal", none of the above was considered.

The issue at hand involved an initiative petition in Teller County, a non-home-rule county. The Teller county clerk had reasoned that "*the constitutional right of initiative did not extend to non-home-rule counties except in certain statutorily defined contexts*", and "*the Board refused to allow the initiative to appear on the ballot and directed the Clerk and Recorder to withhold it from the ballot.*" The "Board" refers to the Board of County Commissioners, who became the defendants in the ensuing court actions.

The plaintiffs, the proponents of the petition, "…*asserted that the defendants' actions had been in derogation of plaintiffs' constitutionally reserved right of initiative under Colo.*

[4] Note: The online service which provides the complete text of the Colorado State Constitution and state statutes, LexisNexus, also provides a précis of court decisions which help to define particular sections of those documents. For the purposes of this general discussion, these summaries are a sufficient resource. LexisNexus descriptions of court decisions are recognizable by their peculiar use of capital letters.

Const. art. V, §1, and thus violated their constitutional rights of free expression, due process, and equal protection under the United States and Colorado Constitutions."

"*The court entered summary judgment in favor of defendants, finding that there was no federal constitutional right of initiative at the state or local level, that the Colorado Constitution did not confer a right of initiative at the county level, and that plaintiffs' constitutional rights had thus not been violated. This appeal followed."*

According to the Court of Appeals of Colorado:

"*In construing the Constitution, we must give terms their ordinary and popular meaning...Further, where the language of the Constitution is plain and its meaning clear, the language must be enforced as written...Here, there is no reference to counties in Colo. Const. art. V, §1(1) & (2). Further, as plaintiffs acknowledge: 'Nowhere - and particularly nowhere in the "further" reservation of the initiative power from local governments in Article V, section 1(9) - is there a specific reference to counties.' Plaintiffs also recognize that: 'Section 1(9) should not be read to include counties, as such a reading would violate both the plain language and historical realities that existed at the time Section 1(9) was adopted.*'" (Emphasis added.)

"*Each of these sections was adopted in 1910, at a time when, as plaintiffs point out, county governments did not exercise legislative functions to any significant extent, if at all. Thus, plaintiffs do not argue that the drafters or those who adopted these constitutional provisions actually contemplated that the initiative and referendum processes would extend to legislative issues at the county level, as such.*" (Emphasis added.)

"*Nevertheless, plaintiffs argue that, in light of 'the historical evolution of the role and function of county governments in Colorado since 1910,' we should interpret Colo. Const. art. V, §1, as including a right on the part of electors to initiatives on a county-wide basis. We are not persuaded.*"

Whatever possessed the attorneys for the petitioners to cast the issue as an evolution in the role and function of county governments, rather than the evolution of the use of the word "municipal", is unknown. It is not too surprising that the court was "not persuaded". The Colorado Supreme Court refused to review the case, letting the ruling of the lower court stand.

Had the arguments presented here, regarding the clear intent to apply I&R powers to any local governmental entity with a "municipal function", been presented in the Dellinger case, the outcome would almost certainly have been the same. However, the court would have been forced to work a lot harder than simply quoting the plaintiffs in reaching their decision to exclude statutory counties and deprive the citizens of those counties of I&R powers.

For example, despite what is essentially a flashing neon link between the language of Article V, Section 1: "…as to all local, special, and municipal legislation of every character…", and Article V Section 25: "…local or special laws in any of the following enumerated cases…", it is almost inconceivable that I&R would ever be construed as applying to all such enumerated powers of local government. The courts would undoubtedly conclude that prohibiting the state legislature from passing legislation specific to a particular local jurisdiction does not mean that local entities are exercising legislative power in addressing those concerns.

"*It is often a difficult question to decide whether the act of a municipality is in its legislative or administrative capacity. There is considerable conflict in the decisions as to the class to which certain functions or power belong. Some municipal functions are so close to the line that courts vary in their findings concerning them, and there are some instances where the courts have held particular functions to be legislative, while other courts have held them to be administrative. McQuillin, Municipal Corporations, 3rd ed., Volume 5, § 16.55, pages 253 et seq.; § 16.57, page 258, et seq.; Annotation, 122 A.L.R. page 769 et seq.*" *Whitehead v. H and C Development Corp.*, 204 Va. 144, 129 S.E.2d 691 (1963)

Perhaps the most telling example of the primacy of determining "legislative" versus "administrative" actions as the basis for acceptable subject matter of I&R is found in the City of Aurora v. Zwerdlinger et al, case from 1977. In this instance the City of Aurora (Colorado) charter expressly grants referenda power over "all ordinances" other than four specified exceptions. Even given this "plain language" the supreme court managed to constrain the electorate by referencing prior cases which used the phrase "any ordinance":

"*The rule that only acts legislative in their nature are subject to referendum is particularly applicable in the field of municipal corporations. The legislative body of a municipality, whether it be designated a city council, board of aldermen, or otherwise, is frequently called upon to act in an administrative as well as a legislative capacity by the passage of ordinances and resolutions. From an early date in the history of the right of referendum it has been recognized that to subject to referendum any ordinance adopted by a city council, whether administrative or legislative, could result in chaos and the bringing of the machinery of government to a halt.*" Carson V. Oxenhandler, 334 S.W.2d 394 (Mo.Ct.App. 1960)

The Colorado Court of Appeals ruled in favor of the petitioners "...*that the city's charter provided that a referendum could be applied to all ordinances unless specifically exempted and because no exemption existed for utility rate ordinances, the ordinance in question was subject to the referendum power.*" Regardless, the Colorado Supreme Court overturned that decision and the citizens of Aurora were prevented from voting on the referendum.

The CSC would almost certainly find, if they would deign to review the Dellinger decision and be asked to rule on the meaning of Sec. 25 in relation to the scope of I&R as proclaimed in the state constitution, that the phrase "regulating county or township affairs" does not suggest that the anticipated county affairs are legislative in nature.

The distinction between legislative and administrative action is the sole criterion of consequence, and that distinction is far too elastic to be the legitimate definitional basis for determining the scope of a fundamental power of the electorate, as will be discussed further in Section II. In addition, there is no judicial remedy to the absence of I&R power for residents of statutory counties.

The solution to these problems is constitutional.

Section II

ANALYSIS OF THE COLORADO SUPREME COURT DECISION

Vagneur v. City of Aspen
February 11, 2013, 2013 CO 13
No. 09SC1022

Scope:

Persons seeking to learn the impact of the Colorado Supreme Court decision on continuing efforts to build a new highway entrance to the City of Aspen may find information of value in this analysis. However, the primary purpose of this report is to bring attention to the broader effect the decision will have on the citizen initiative process, using the highway issue as an example.

Deciding the central legal question regarding the distinction between legislative and administrative action, and thereby determining permissible citizen involvement, generally requires familiarity with specific details of the particular issue being addressed by a citizen initiative or referendum. As stated in the aforementioned *Whitehead* case:

"*So variant are the conditions under which the question arises that each case must be settled on the facts of that particular case." 204 Va. 144, 129 S.E.2d 691 (1963)*

The Practical Matter:

The specific route of the primary highway serving the community of Aspen, Colorado was chosen in the 1950s during a time of minimal traffic volume and limited state funding. A bridge was constructed at a location which required the shortest span to cross a river, at a point offset from the existing alignment of Main Street by two city blocks. Vehicles are required to negotiate two ninety degree turns to enter or leave Aspen, and the capacity of the road is limited to two lanes, one in each direction.

By the late 1960s, traffic volume had increased such that the State of Colorado suggested the need to straighten Highway 82 by crossing a new bridge, and expand the capacity with two additional lanes. In 1970, Aspen city council members requested that the state delay the reconstruction of the "Entrance to Aspen" while they studied the feasibility of a mass transit alternative to highway expansion.

Despite the creation of a public bus system, traffic and congestion continued to grow, and conditions on the highway beyond Aspen became increasingly dangerous.

In the mid-1980s the Colorado Department of Highways (CDOH) began a federally mandated Environmental Impact Study (EIS) which proposed, "…the widening to four lanes of an approximately 17 mile segment of Colorado State Highway 82. The study corridor, which lies entirely in Pitkin County, Colorado, extends from a point three quarters of a mile east of Basalt to the intersection of 7th and Main Streets on the west side of Aspen." "The

purpose of the proposed action is to improve the safety and capacity of State Highway 82..."

As a result, the "East of Basalt to Aspen" Draft Environmental Impact Statement (DEIS) was released in 1989.

Production of the DEIS was considerably more time consuming than original estimates due to complicating factors which made the process more difficult. Aspen was experiencing air quality compliance problems, and federal rules at the time required mitigation for any increase in traffic volume into the city. Also, some of the property necessary to the highway expansion had been acquired with open space funds, so the EIS process was also required to determine whether there were any feasible alternatives to the use of open space land for the project. In addition, the Aspen city charter requires voter approval for any change in use or transfer of ownership of open space property.

The first attempts to obtain voter approval for a change in use of open space property were not successful. However, these ballot questions did establish a basic structure in which voters were given specific details of the proposed new highway design so that potential benefits could be weighed against the loss of open space. As a consequence, the land use and transportation issues became inextricably entwined.

The DEIS process worked through the problems and state officials were prepared to release the Final Environmental Impact Statement (FEIS) along with a Record of Decision (ROD). The state representative for the area had obtained special funding for the project, and the last remaining hurdle was to obtain voter approval for a change in use and title for the open space property. The electorate of Aspen approved construction of a new four lane highway at the entrance to Aspen, using land acquired for open space, in early 1990.

The Aspen city council delayed the process with a protracted evaluation of the width of a single bridge and, in one of the last acts by that particular council configuration, declined to transfer the open space property to the state in early 1991. The newly seated council continued to refuse to honor the vote from the preceding year.

Anyone unfamiliar with Aspen may have difficulty understanding how it could be politically possible to reject a public vote, but it was never stated as such. Local news outlets had always been opposed to the highway expansion and did not draw any special attention to the decision – generally characterizing it as further study. It was also widely believed that the state would eventually assert its authority and simply proceed with highway construction whenever it was ready.

This city council effectively demanded that the newly formed Colorado Department of Transportation (CDOT) begin a separate EIS process for just the last two miles of the 17 mile long highway corridor so that construction could begin on the rest of the highway. Thus began the "Entrance to Aspen" EIS, while the bulk of the project went forward as the "East of Basalt to Buttermilk Ski Area" FEIS. That portion of the improved highway exists today, and includes a feature which may be unique to any four lane highway – High Occupancy Vehicle (HOV) designation for two of the lanes to provide priority service to buses and other multi-passenger vehicles during certain time periods.

From its inception the Entrance to Aspen EIS was presumptively both a refusal to accept four lanes to increase highway capacity, and a decision to substitute mass transit, preferably light rail, to accommodate transportations needs. There were no technical issues

requiring ***specialized knowledge*** (CSC Opinion) involved; it was a simple political decision made by transportation amateurs who happened to have been elected to office.

The city sought voter approval for a new plan for the entrance in 1996, based on the Entrance to Aspen EIS, which introduced a mass transit corridor in place of additional highway capacity. For many residents the 1996 election provided their first realization that the previous decision was not being acted upon, and it is not entirely clear that all voters understood that the new proposal was substituting rails for highway lanes rather than simply adding them. Regardless, a new authorization was created which retained the existing two lane highway configuration and proposed a light rail system conditioned upon subsequent approvals for design and funding. Despite being offered several ballot proposals in following years, Aspen voters have never provided the additional approvals necessary to proceed with light rail construction.

The core content of the 1996 ballot question reads, "Shall the City Council be authorized to use or to convey...City owned property...for a two lane parkway and a corridor for a light rail transit system (to be constructed when the financing is available); subject to the following? The light rail transit system shall be built only after adequate financing mechanisms and final design details are identified and approved by a public vote." There follow several contingencies regarding "environmental and historic resource mitigation measures" including a "A cut and cover tunnel of no less than 400 feet to return to public open space approximately 2 acres or more of Marolt open space."

The same group of leaders responsible for the Entrance to Aspen EIS, and the 1996 voter authorization, realized it was unlikely that any plan for the design and funding of light rail would be approved, and moved to have the state issue a ROD which included a phased plan for the entrance. Under this scheme, exclusive bus lanes would be built as an interim measure until rail was feasible. The bus lanes would result in a four lane configuration – though not one which would relieve congestion with additional capacity for general traffic - and they were then to be torn out in favor of rail at some future date.

The Record of Decision, intended by the EIS process to be the final bureaucratic step prior to construction, was issued in 1998, and pleased no one. Highway advocates did not like the idea of giving up open space for a plan which would not relieve congestion, and rail advocates did not believe that, once built, the bus lanes would ever be removed.

In 2002, the City of Aspen conveyed and granted a right-of-way easement to the State of Colorado, Department of Transportation, "to construct, operate, and maintain a two lane parkway and a corridor for a light rail transit system" (Right-of-Way Easement, Resolution No. 34, Series of 2002, April 22, 2002) under a set of conditions matching the language of the 1996 voter authorization. This agreement did not acknowledge the phased construction plan of the ROD because that configuration had not been approved by the electorate.

A third advocacy group calling themselves "Friends of Marolt Park" (FMP) did not want anything built on the open space at all, and apparently saw the right-of-way agreement and conveyance of open space as an imminent threat. They sued the state in federal court on the grounds that the phased construction approach, which was not the preferred alternative at the Final EIS stage, could not suddenly be elevated to that status in the ROD without first being subject to an additional review process called a Supplemental EIS.

The Tenth Circuit Court of Appeals described their understanding of the situation:

"In August of 1998, the USDOT issued the Record of Decision. The ROD approves the construction of a two-lane highway with a '[light rail transit] system that, if local support and/or funding are not available, will be developed initially as exclusive bus lanes.' The USDOT interprets this decision as approving both the phased and non-phased approaches. Both the phased and non-phased plans, however, require further action by the local electorate. The phased option requires approval by Aspen voters of a right-of-way transfer through Marolt Park for four lanes instead of two. The non-phased option requires voter approval to fund construction of the light rail." Friends of Marolt Park v. U.S. Dep't of Transp. 382 F.3d 1088, 1092 (10th Cir. 2004)

Regarding the procedural argument presented by Friends of Marolt Park, the Tenth Circuit ruled:

"FMP argues that the joint resolution submitted by the local governments and the Agency's[5] decision to select a previously rejected alternative necessarily constitute a 'substantial change in the proposed action that [is] relevant to environmental concerns.' 40 C.F.R. § 1502.9(c)(1)(i). Even assuming the implementation of the phased project will have a significant environmental impact, the failure to issue a supplemental EIS is not arbitrary or capricious because the relevant environmental impacts have already been considered. As stated in the ROD, the two options approved by the Agency had been fully examined in the supplemental draft EIS and the final EIS. The draft supplemental EIS considered the phased option in detail because at that stage the phased option was the preferred option. The Agency has determined a supplemental EIS is not required where the ROD selects an option not identified as the preferred option in the final EIS, as long as the selected option was fully evaluated." 23 C.F.R. §§ 771.130(a)(1),(b)(2)… (Emphasis added.)

A second element of the FMP lawsuit against the bus lane/rail phasing idea had to do with the "cut and cover tunnel". This feature was intended to preserve some portion of the Marolt open space between a roundabout (which had been constructed in the intervening years), and the beginning of Main Street. FMP argued that under the non-phased option "*immediate construction of the light rail system will have less environmental impact on the Marolt-Thomas Open Space, a publicly owned park.*" The Tenth Circuit declined to rule on this aspect, finding that the question was not ripe given that the FMP's own brief had stated:

"[c]onstruction of Highway 82 through Marolt Park is not imminent or even foreseeable." 382 F.3d 1088, 1092 (10th Cir. 2004)

The City of Aspen sought and received voter approval in 2007 to build exclusive bus lanes over most of the remaining corridor at the Entrance to Aspen, and issued an amended right-of-way agreement based on that approval, but "only between Buttermilk and the Maroon Creek Roundabout," (Entrance to Aspen Right of Way Amendment, Resolution No. 25, Series of 2008, March 18, 2008). The decision not to pursue authorization for the whole project may have come from a perception that exchanging the most significant area of open space for bus lanes could not gain voter approval, or from a desire to avoid the re-filing of the FMP lawsuit which would then become relevant if voters did approve. Or, it may have indicated that the controlling interests on city council were the same as those of the FMP all along, and that there had never been any intention of constructing anything on the Marolt open space.

[5] *Department of Transportation ("USDOT" or "the Agency")*

The construction of the bus lanes was completed to the roundabout, thus leaving a quarter mile of Highway 82 essentially untouched during the years since this same portion of highway had been identified as the priority section most in need of improvement in 1970. Traffic delays on weekdays during the resort area's high seasons are formidable. The State of Colorado continues to hold a right-of-way easement on which it believes nothing can be built.

The debate over the final section of highway between the roundabout and Main Street has centered on whether to construct a more direct alignment of the highway across City-owned property into Main Street (thus eliminating the S-curves); whether to have a two-or four-lane configuration for vehicular traffic; and whether and what type of mass transportation system (bus or light rail) to implement. Many votes have taken place during the last four decades, with no definitive resolution. (CSC Opinion) This is, of course, erroneous. There had been a definitive resolution in 1990, one that simply wasn't acted upon. The CSC did not know this because initiative proponents thought it unnecessary to reach back that far in history, but there is nothing to suggest that this additional knowledge would have influenced the court's decision.

The preceding description represents a small percentage of the complete history of attempts to improve and expand Highway 82 between the towns of Basalt and Aspen. It was into this context in 2006, between the time of the Tenth Circuit decision and the partial approval of bus lanes, that proponents of the initiatives in the *Vagneur* case submitted petitions to the clerk of the City of Aspen.

The key element in the decision to go forward with the initiative process was the Tenth Circuit finding quoted above:

"The Agency has determined a supplemental EIS is not required where the ROD selects an option not identified as the preferred option in the final EIS, as long as the selected option was fully evaluated." (Emphasis added.) 382 F.3d 1088, 1092 (10th Cir. 2004)

The Entrance to Aspen FEIS uses a three step screening process, with stages labeled "Reality Check", "Fatal Flaw", and "Comparative". Design components which survived all three stages of screening are considered "fully evaluated", and several configurations are composed of these elements – including the phased bus lane/rail option challenged by the Friends of Marolt Park. Essentially, the court had determined that an option comprised of the fully evaluated elements of the FEIS could become the preferred alternative without a protracted and extensive review like that carried out in a supplemental EIS.

Initiative proponents, who are advocates for expanded highway capacity to relieve congestion, indentified the combination of fully evaluated design features which they believe could achieve majority voter approval, and crafted two petitions based on those options.

Proponents were quite aware that the initiatives could do no more than fulfill one key federal regulation - by satisfying the city charter requirement to obtain voter approval for a change of use for open space property. However, they did not believe there was any chance of obtaining that approval unless voters were completely informed, as clearly as possible, of what they would be getting in exchange for that land.

Prior to the 1990 vote, the state had prepared and circulated a map of the conceptual plan for the routing of a new highway alignment through the Marolt open space,

and that was incorporated into the first petition. A different and later CDOT map was used in a second petition to show the location of the cut and cover tunnel. Except for the tunnel, the two petitions are essentially identical. The intention was to ask voters to approve both – thus giving the state the flexibility it needed to deal with inevitable court challenges regarding whether the tunnel was required under federal regulations to minimize impacts to the Marolt open space. The decision to build or not to build the cut and cover tunnel would thereby be left entirely to CDOT.

It was an essential goal in the drafting of the petitions to assure both the public and CDOT that the alternatives being presented for approval were not original, but were derived entirely from the process which had been underway for over twenty years. This central intent was paramount for two reasons, the first being the desire to avoid extending or expanding the official process. In addition, a major delaying tactic which had worked successfully for three decades was to propose new configurations or ideas – which then had to be evaluated. As they relate to the EIS process there is no new information in either petition, and all but a few sentences are intended to show conformance with the options and ***environmental and historic resource mitigation measures*** (CSC Opinion) derived from it.

The mission to inform the various parties that the proposals contained in the initiatives were the product of the EIS process was not an engineered effort to build a case for judicial acceptance. However, that is not an explanation for how the CSC could fail to recognize the obvious, and instead find that:

The proposed initiatives seek 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. (CSC Opinion) (Emphasis added.) This statement is not simply erroneous; it is a complete falsehood. Anyone not familiar with the details of the full EIS process who might subsequently review this decision is being purposely misled.

Other portions of the CSC majority opinion are equally misleading:

Relevant here, Alternative D and Alternative F, which are referenced in the proposed initiatives at issue, were among the alternatives eliminated from further consideration after evaluation in the DEIS. Both Alternative D and F proposed two general highway lanes and two dedicated vehicle and/or transit lanes, with a separate transit envelope for light rail. The Record of Decision reflects that these alternatives were eliminated from further consideration because of a lack of support from the community and the Elected Officials Transportation Committee… (CSC Opinion) (Emphasis added.) This "relevant" observation is the concluding sentence of a 900 word, detailed and exhaustive, description of the complex and multi-layered administrative process which the court claimed was being circumvented by the petitions. The location of this statement was clearly intended to create the impression that the condition of being "eliminated from further consideration" is an absolute final determination, and that any resurrection of such an option is the equivalent of nullifying the entire process.

The Tenth Circuit Court of Appeals, in the *Friends of Marolt Park* case, found and quoted identical language from the Final EIS:

"*The phased approach to light rail evaluated in the [draft supplemental EIS] is eliminated from further consideration because of a lack of support from the community and the Aspen City Council.*" (Emphasis added.) Contrary to the impression created by the CSC,

the Tenth Circuit ruled that an option such as the phased bus lane/rail option could be built, regardless of having been "eliminated from further consideration" at an earlier stage of the process. The CSC was obviously aware of the Tenth Circuit decision, quoting it in their recitation of some of the historical circumstances of the case, but then withheld the key information which contradicted the unfavorable image, and false basis for rejection, that they were building against the initiatives.

The primary aspect of the objection to Alternatives D&F – lack of community support – is particularly incongruous in the context of an initiative process. Because an employee of CDOT had determined at some previous time that a particular option did not have community support, the CSC found that this is an appropriate reason to block an initiative from being placed on the ballot – despite that being the most reliable means to determine community support.

Regarding the lack of support for Alternatives D&F by the Elected Officials Transportation Committee and Aspen city council, that opposition should favor a finding of legislative content in the initiatives because it is evidence they announce "new public policy" and are not "simply the implementation of a previously declared policy".

Even more difficult to understand than significant factual error and omission related to the EIS process is why any of this material appears in the CSC decision at all. None of it has anything whatever to do with the determination of administrative vs. legislative content, or at least it would not have in any prior judicial examination.

If the petitions actually had been circumventing the EIS process it would not have been relevant to the core question, as noted by Justice Eid in his dissent. ***The majority's concern—that is, the disruption the initiatives will cause to existing transportation development—is an argument that goes to the merits of the initiatives, not to whether they are legislative or administrative in character.*** (Eid Dissent)

So much of the content of the CSC's 13,000 word decision is preoccupied with the impact (real or imagined) that passage of the initiatives would have on administrative processes that we are left with two possible explanations. This may now be a new standard by which some undefined volume of administrative adjustment becomes evidence of administrative character:

Because the proposed initiatives seek to circumvent a complex and multi-layered administrative process for the approval of the location and design of a state highway, their subject matter is administrative and therefore lies outside the initiative power. (CSC Opinion) And/or, the administrative intrusion claim may be a method to distract attention from even more sweeping changes in the distinction between legislative and administrative actions.

The Legal Context:

Article V, Section 1, Colorado Constitution:

"The people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly, and also reserve power at their own option to approve or reject at the polls any act, item, section or part of any act of the general assembly."

The legislative power reserved to the people in the Colorado Constitution is therefore the same power granted to the general assembly.

In regard to the lesser jurisdictions:

"The initiative and referendum powers reserved to the people by this section are hereby further reserved to the legal voters of every city, town, and municipality as to all local, special, and municipal legislation of every character in or for their respective municipalities."

The scope of the power to legislate in the localities is not as easily stated, given that there is no body comparable to the "general assembly" at the state level:

"*The legislative body of a municipality, whether it be designated a city council, board of aldermen, or otherwise, is frequently called upon to act in an administrative as well as a legislative capacity…" Carson V. Oxenhandler*, 334 S.W.2d 394 (Mo.Ct.App. 1960)

Examples of the confusion created by the dual role of local elected officials, as compiled in the *Whitehead* decision, are significant:

"*It is often a difficult question to decide whether the act of a municipality is in its legislative or administrative capacity. There is considerable conflict in the decisions as to the class to which certain functions or power belong. Some municipal functions are so close to the line that courts vary in their findings concerning them, and there are some instances where the courts have held particular functions to be legislative, while other courts have held them to be administrative. McQuillin, Municipal Corporations, 3rd ed., Volume 5, § 16.55, pages 253 et seq.; § 16.57, page 258, et seq.; Annotation, 122 A.L.R. page 769 et seq.*" 204 Va. 144, 129 S.E.2d 691 (1963)

The seemingly simple example of what constitutes the purview of legislative power, as quoted from *Whitehead* in the Preface:

"*Acts constituting a declaration of public purpose or policy are generally classified as involving the legislative power*", has subsequently been subjected to a range of limitations and qualifiers in the form of "tests" which have greatly affected the original meaning.

The term "policy" is in ubiquitous use in government, and its definition within that context is the proper foundation of legislative power:

"This term, as applied to a law, ordinance, or rule of law, denotes its general purpose or tendency considered as directed to the welfare or prosperity of the state or community." Black's Law Dictionary 1st Ed. (1891)

The power of I&R exists because the governed may disagree with whether an act of government directed to the welfare or prosperity of the community is within the proper scope of government's delegated power, or will achieve the desired result, or is worth the cost. The application of I&R power may be as far reaching or as specific as a statement of public policy, but defining that range is the primary conceptual problem faced by the courts.

As a purely practical matter, I&R powers are particularly useful in situations where the disagreement with government is confined to a particular act or decision, or absence thereof. One specific issue may not merit removal of elected officials from office, either by recall or in the course of reelection. Also, there may be occasions when the next election cycle is not a timely remedy for an issue with immediate consequences.

There is no record of the courts finding an instance where a government policy is so broad and generalized that it encompasses or preempts other legitimate legislative

concerns, though there is such a potential (See Page 26). Instead, court cases involving the distinction between legislative and administrative or executive[6] actions are typically concerned with whether a particular action is too specific to be viewed as policy.

Over the course of several decades, the judicial discussion of the factors which distinguish legislative from administrative/executive powers has drifted considerably, despite having a basis in three specific tests. These tests are cross-referenced and re-quoted, in varying degrees of accuracy, in several CSC decisions.

In 1963, as stated in the *Whitehead* case in Virginia, there were only two tests:

"*The tests as to what are legislative or administrative acts have been stated in various cases. It has been said that those which relate to subjects of a permanent or general character are to be considered legislative; while those which are temporary in operation and effect are administrative,"* (Emphasis added.) and second, *"Acts constituting a declaration of public purpose or policy are generally classified as involving the legislative power. The crucial test is said to be whether a proposed ordinance is one making a new law, or one executing a law already in existence. If it merely pursues a plan already adopted by the legislative body itself, or may be properly classed among the executive powers, it is deemed to be administrative."* 204 Va. 144, 129 S.E.2d 691 At the time of the *Whitehead* decision the "or" in "permanent or general character" would have supported an argument that the first test was actually two distinct tests. The word "or" still survives in contemporary quotations, but the concept of permanence as an independent standard was effectively eliminated in 1987 in *City of Idaho Springs v. Blackwell*. (See Page 27)

In 1981, in *Margolis v. District Court*, the Colorado Supreme Court created the third test, though it was not until 1986 that it was succinctly stated in *Witcher v. Canon City*:

"Third, if an original act was legislative, then an amendment to the original act must also be legislative. Margolis, 638 P.2d at 304." 716 P.2d 445 (Colo. 1986)

The first test of *Whitehead* was still largely intact by the time of the *Witcher* case in 1986, but the second test had undergone a significant edit in *City of Aurora v. Zwerdlinger* in 1977. Under *Zwerdlinger*, and as repeated in *Witcher*, the second test was no longer "crucial", and though the condensed version retained the terms "policies" and "purposes", references to "law" and "plans" were removed. Also, the order of the legislative/administrative comparison was reversed, with this version as the result:

"*First, actions that relate to subjects of a permanent or general character are legislative, while those that are temporary in operation and effect are not."*

"Second, acts that are necessary to carry out existing legislative policies and purposes or which are properly characterized as executive are deemed to be administrative,

[6] The difference between administrative and executive powers has received little attention, and though the court in *Vagneur* made specific reference to executive functions, there was no clear distinction made between those and administrative actions. In his dissent, Justice Coats reached out to a federal court case to find a judicial precedent which might help to distinguish the two: ***The Supreme Court has struck down congressional action…as infringing on the executive's power…only with regard to the usurpation of the power of appointment and retention over administrative officers. See Bowsher v. Synar, 478 U.S. 714 (1986). And even this limited distinction between the respective roles of the executive and legislative branches has not been without controversy. See id. at 736*** (Coats Dissent)

while acts constituting a declaration of public policy are deemed to be legislative." (References omitted.) *Witcher v. Canon City* 716 P.2d 445 (Colo. 1986)

The change in the text of the second test between *Whitehead* in 1963 to *Witcher* in 1986 did not advance the cause of clear understanding. "A declaration of public policy" is a broad description made easier to interpret with the concurrent examples provided by Whitehead – examples such as making law or adopting a plan[7].

Addressing each test individually is best accomplished in reverse order, because any such discussion necessarily leads back to the first test (*permanent or general character)*.

The Third Test:

If an original act was legislative, then an amendment to the original act must also be legislative.

The third test requires that a prior determination be made that there is an "original act" which qualifies as legislative policy. Consequently, it is not independent of the first test.

Examples of I&R subjects which are generally predetermined to be legislative, and therefore somewhat exempt from scrutiny, are questions related to taxation or the zoning of property. Taxation is legislative due to state constitutional provisions, and zoning as the result of a prior CSC decision which applied the first test to this particular area of government activity.

In *Margolis v. District Court* the Colorado Supreme Court applied the first of the two tests, and found that zoning satisfied multiple conditions associated with the first standard:

"*It is quite clear under the tests…that original zoning decisions are legislative in character since the act of original zoning is of a general and permanent character and involves a general rule or policy.*" 638 P.2d 297, 303-04 (Colo. 1981)

In *Margolis* the court then went on to quote a California court in formulating what is now the third test:

"*While 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. While rezonings occur more frequently than initial zonings, they likewise tend to be permanent in nature. See Arnel, supra, for a listing of California cases which hold rezoning of 'small' parcels of land to be legislative.*" *Arnel Development Co. v. City of Costa Mesa*, 28 Cal. 3d 511, 620 P.2d 565 (1980). It is worth noting that the rationale used in the *Arnel* case in determining the legislative nature of rezonings was that they "tend to be permanent".

[7] *Citizens for Financially Responsible Government v. City of Spokane*, a Washington State Supreme Court decision from 1983, illustrates the significant difference in connotation supplied by retaining the word "plan": "*The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it. 5 E. McQuillin, Municipal Corporations § 16.55, at 194*" 99 Wash.2d 339, 662 P.2d 845 (1983)

Margolis also incorporates significant statements regarding how specific an action may be as it relates to land use policy, and the reason to consider this particular area of public concern worthy of broad protection for the purpose of defining I&R powers:

"*The rezoning of a 'relatively small' parcel, especially when done by initiative, may well signify a fundamental change in city land-use policy." Arnel Development Co. v. City of Costa Mesa*

"*Indeed, a heightened community sensitivity to the quality of the living environment and an increased skepticism of the judgment of elected officials provide much of the impetus for the voters' exercise of the powers of referenda and initiative in the zoning context.*" Comment, The Proper Use of Referenda in Rezoning, 29 Stanford L.R. 819 (1977). 638 P.2d 297, 303-04 (Colo. 1981)

The focus on the size of parcels in *Margolis* was due to the argument by one party in the case that only a large rezoning should be treated as legislative. In deciding against that viewpoint, the court made it implicitly true that rezoning of individual parcels could be accomplished by initiative without rezoning all similarly zoned parcels in order to satisfy the "general character" standard. It can be perceived that this further established "permanent" as an independent test, or argued that the general character criterion was satisfied because the rezoning was merely a subset of the original legislative act:

"*It seems entirely inconsistent to hold that an original act of general zoning is legislative, whereas an amendment to that act is not legislative." Margolis v. District Court* 638 P.2d 297, 303-04 (Colo. 1981)

Under any interpretation, the precedent established by *Margolis* should have been controlling in *Vagneur v. City of Aspen*. In *Vagneur*, the original legislative act was adoption of the city charter, which included section 13.4 stating the allowed uses of land acquired for open space. The provision further requires a public vote prior to any change in that allowed use.

Regardless of the stipulation in section 13.4 for a public vote to approve any change in use, the initiatives should have been allowed for the same reasons stated in *Margolis*. Allowing a zoning change on one particular parcel is directly analogous to changing the allowed use for one parcel among the many designated as open space. Neither is this a technical argument; the ideas referenced in the *Margolis* decision regarding "*sensitivity to the quality of the living environment"* and "*setting of policy for the future*" could not be more relevant to the situation surrounding the Entrance to Aspen.

The CSC addressed the *Margolis* precedent by creating a "straw man"[8] argument on behalf of the Plaintiffs. ***B. The Proposed Initiatives Do Not Establish or Amend Any Zoning Laws. We reject Proponents' suggestion that proposing a permanent change in use of a specific parcel of City-owned open space is equivalent to modifying a zoning plan and that such a proposed change in use is therefore legislative.*** (CSC Opinion) (Emphasis added.) No such "suggestion" was ever made. The Plaintiffs did cite *Margolis*, but the initiatives under review in that case were not modifying a zoning plan. The particular issue the court decided in *Margolis* was whether petitioners could modify the zoning of specific parcels within a zoning plan. The CSC in *Vagneur*, in regard to the change in use of a specific open space parcel:

[8] A straw man is a common type of argument and is an informal fallacy based on the misrepresentation of an opponent's argument. To be successful, a straw man argument requires that the audience be ignorant or uninformed of the original argument. -Wikipedia

Such case-specific actions generally do not reflect the exercise of legislative power because they do not necessarily entail the enactment of a zoning ordinance that sets a governing standard for all properties coming within its terms, nor do they necessarily amend any existing zoning ordinance of general applicability. (CSC Opinion) This statement is a direct repudiation of the core principles expressed in *Margolis*.

Moreover, the sale, exchange, conveyance, disposition, or change in use of a particular parcel of city-owned property cannot be analogized to the development of a city-wide zoning plan of general applicability. (CSC Opinion) Here the court creates a false analogy, declares that it is a false analogy, and implies that the Plaintiffs relied on this false analogy in their arguments.

A change in use of a particular parcel is obviously not analogous to a city-wide zoning plan, nor is there any reason for petitioners to argue for that idea given that the *Margolis* decision was made in relation to rezonings of small parcels. Those things which are analogous are a city-wide zoning plan and a city charter, both of which are unequivocally legislative documents. Also analogous are the set of rules by which a city is operated (by charter) and rules defining what land may be used for which purpose, especially in regard to development of that land (by zoning). There is no practical difference between parcels of land in *Margolis* and *Vagneur*, and the semantic difference is that in the first instance the land would be subject to a "rezoning", and in the other a "change of use".

The court in *Margolis* allows the initiative power to be applied to the rezoning of specific parcels under a city-wide zoning plan – meaning that entire zone districts or categories do not need to be changed in order to satisfy the concept of setting a governing standard which applies to all such properties. Under *Vagneur*, initiatives could presumably change the allowed use of open space, established under a city charter, only if that change applied to all open space property, thereby becoming:

…a governing standard for all properties coming within its terms… (CSC Opinion)

Margolis	*Vagneur*
City-wide zoning plan	City Charter
Overall plan for development of a city, which sets allowed uses for property as defined by zone districts affecting multiple parcels.	Plan for governance of the city, including special protections for multiple parcels of land purchased for open space purposes.
Court grants ability to use the initiative to rezone a specific parcel.	Court denies the ability to change the use of a specific open space parcel.

The appearance that *Margolis* has been overturned in the *Vagneur* decision is heightened by a second issue which the prior case addressed. In *Margolis*, the court found that while the zoning of property is legislative, a master plan is not:

"*The adopted plan is not of a permanent nature, but is rather subject to the control of the municipality's governing body...Being advisory only, an amendment to a master plan is not legislation which is subject to the referendum powers reserved to the people.*" 638 P.2d at 304

Under Colorado state law it is the "duty" of a planning commission to "make and adopt a master plan for the physical development of the municipality". As noted in

Margolis, that plan is "advisory" except that, as not noted in *Margolis*, "...the plan or any part thereof may be made binding by inclusion in the municipality's adopted subdivision, zoning...or other similar land development regulations after satisfying notice, due process, and hearing requirements for legislative or quasi-judicial processes..." (C.R.S. 31-23-106)

Prior to the *Vagneur* decision, if a city did not complete the necessary steps to incorporate a master plan into its land development regulations, the plan remained beyond the reach of I&R power as an "advisory" administrative document. If community leaders wished to make their master plan "binding" (i.e. a matter of law), the provisions of that plan would presumably have become subject to I&R powers as a legislative instrument. Now, as it relates to initiatives directed at particular pieces of property, or provisions of the master plan itself, the elevated importance of administrative processes may mean that the distinction between binding and advisory no longer matters - given that the extent of administrative intrusion is the same in either instance.

The description of the EIS process in *Vagneur* as:

"...a complex and multi-layered administrative 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" (CSC Opinion) is directly analogous to the formulation of a community master plan. A small sample of the state requirements for subjects to be addressed in a master plan includes everything from determining the location and extent of "streets, roads", "public places or facilities", and "public utilities terminals" to a "zoning plan for the control of the height, area, bulk, location, and use of buildings and premises". Issues are to be considered in consultation with the "Colorado geological survey…United States fish and wildlife service…Unites [sic] States Army corps of engineers", etc., after conducting public hearings. The plan will be presented along with "accompanying maps, plats, charts, and descriptive matter". (C.R.S. 31-23-106)

In particular, the ability to initiate for a rezoning of a single parcel is not likely to go unchallenged, or be upheld, post-*Vagneur* in light of the new status for administrative action as created by the CSC. Due to the significant administrative/executive effort and public input needed to develop a master plan, and the need to assess potential environmental impacts or other issues requiring ***specialized training and experience or intimate knowledge of the fiscal or other affairs of government*** (CSC Opinion), the impact of a rezoning will now need to be evaluated in the context of its effect on administrative planning procedures. The effect of this new analysis will be compounded by the direct attack on the principles of *Margolis* by the CSC statement noted above, and repeated here for emphasis:

Such case-specific actions generally do not reflect the exercise of legislative power because they do not necessarily entail the enactment of a zoning ordinance that sets a governing standard for all properties coming within its terms, nor do they necessarily amend any existing zoning ordinance of general applicability. (CSC Opinion)

...we have in the past also observed that an amendment to an original legislative act must also be considered legislative. Wichter, 716 P.2d at 450; Margolis, 638 P.2d at 304. By subtly expanding this proposition to include its inverse – that an amendment to other-than-legislative acts cannot be legislative – the court of appeals, and now the majority, shifts the focus of the inquiry from the nature of the popular initiative itself to the nature of municipal actions likely to be affected by it. (Coats Dissent)

Irrespective of the foregoing, Justice Eid saw no reason to go to *Margolis* or the zoning question to determine whether a prior legislative action was being amended by the *Vagneur* initiatives, instead agreeing with the position of the Plaintiffs:

I would take the City Charter's voter-approval requirement for what it is: an implicit recognition that changes in open space are, at least under the City Charter, legislative in character…along with the expression of policy regarding the use of open space for transportation purposes[9] ***in the 1996 question. Because the 1996 question was legislative in character, the current initiatives, which seek to undo the 1996 vote, are also legislative in character.*** (EID Dissent) (Emphasis added.)

The Second Test:

The crucial test is said to be whether a proposed ordinance is one making a new law, or one executing a law already in existence. If it merely pursues a plan already adopted by the legislative body itself, or may be properly classed among the executive powers, it is deemed to be administrative. Whitehead, Virginia (1963)

Additionally, acts that are necessary to carry out 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. City of Aurora v. Zwerdlinger, 194 Colo. at 194, 571 P.2d at 1075 (1977)

The second test, like the third test, assumes some foreknowledge or predetermination of what constitutes existing legislative policy.

The *Whitehead* version of the test references two significantly different types of government function - making law, and adopting a plan. Adopting a plan is often a much less formal function of government than making law, and that range of action should therefore apply to the definition of legislative initiative power. However, as previously noted, "plan" disappeared from the second test in *Zwerdlinger* when the court in that 1977 Colorado case created the composite version of the second test (quoted above) from three separate cases: *Whitehead*; *Keigley v. Bench*, 97 Utah 69, 89 P.2d 480, 122 A.L.R. 756 (1939); and *Monahan V. Funk*, 137 Or. 580, 3 P.2d 778 (1931)

Whether "*policies and purposes*" was intended to replicate the range suggested by laws and plans is not known.

Regardless, an additional area of uncertainty acknowledged by the CSC:

We also have never explained in our decisions the interrelation between the tests or articulated whether a particular matter must be examined under more

[9] Justice Eid might also have noted the expression of policy inherent in pressuring citizens to switch modes from private vehicles to public transportation - which is also entangled in the land use approval - and would probably not object to its mention here.

than one test to reach a determination (CSC Opinion) would seem to have been answered in *Vagneur*. At no time during the six year judicial process, at any level of that review, was it ever suggested that the *Vagneur* initiatives were carrying out "existing legislative policies". If the second test is independent of the others, that alone should have qualified the initiatives as legislative.

However, an unexpected circumstance related to the second test is that the CSC never identifies any original legislative policy related to the Entrance to Aspen; it only names that which it does not accept.

The 1996 Voter Authorization Was Not Legislative - Proponents also contend that the 1996 ballot question submitted to the voters was itself a legislative matter, and that, because their initiatives seek to amend the 1996 voter authorization, the proposed initiatives are likewise legislative. We disagree[10]. (CSC Opinion)

The CSC is steadfastly silent on whether the content of the 1996 Voter Authorization is a factor in the legislative/administrative determination, saying only that it was merely an approval ***in furtherance of the broader administrative EIS process underway at that time.*** (CSC Opinion) Again, process negates outcomes. The Entrance to Aspen project as approved in the 1996 voter authorization does not fulfill the original objective which launched the federal EIS process - to provide adequate highway capacity. Traffic congestion resulting from the abandonment of that objective has been a major stimulus for hundreds of millions of dollars in mass transit spending, with little effect on the problem. The present day community has an open-ended and unknowable obligation to the State of Colorado to make up capacity shortfall on the highway with mass transit services – apparently in perpetuity. If none of these conditions resulted from any policy decisions, the limits of administrative and executive powers have little to constrain them, at least in regard to transportation.

The CSC explanation of its position on the administrative nature of the 1996 vote is not stated in a context which acknowledges that the question is an authorization for essential public infrastructure plans. Instead, it is founded on an irrelevant provision of the Aspen city charter:

City Council's proposed change of use in 1996 was not submitted to voters as a proposed ordinance, as would be required by section 4.6 of the Charter for "legislative enactments," because it did not seek to establish any rule of general

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[10] In the closing paragraphs of its decision, the CSC indulged in one final straw man version of the Plaintiff's position by implying that the voting requirement in the city charter was the sole argument in favor of legislative status for the 1996 ballot question:

"***...the voters of Aspen have the power under section 13.4 of the City Charter to reject a particular proposal presented to them by City Council...The fact that City Council is required to obtain approval for a change in use of open space does not mean that the electorate is empowered, through an initiated ordinance, to dictate or compel a particular change in use of City-owned property.***" (CSC Opinion)

The Plaintiffs actually said:

"The 1996 measure is not 'legislative' solely by virtue of the referral mandate in Charter §13.4, though Charter §13.4 reflects the inherent significance and legislative nature of the use-change issue at stake. The fact that City Council referred the 1996 measure to a public vote is not dispositive of its legislative nature, but the contents of the measure itself are." (Emphasis added.) (Petitioner's Opening Brief, Case No. 2009SC1022)

applicability. (CSC Opinion) (Emphasis added.) The underlying implication of this sentence, that city charter provisions can determine what actions are legislative enactments for the purpose of I&R, was addressed and rejected decades ago. *"The Charter provisions cannot limit powers reserved by the Constitution. However, if the powers reserved by the Charter exceed the powers reserved by the Constitution, those powers are operative and will be given effect." Burks v. City of Lafayette, 142 Colo. 61, 349 P.2d 692 (1960); Leach & Arnold Homes, Inc. v. City of Boulder, 32 Colo. App. 16, 507 P.2d 476 (1973)." Zwerdlinger, 194 Colo at 195, 571 P.2d at 1076 (1977).*

In the underlined portion of the CSC quote above, the court effectively ceded to city council the authority to predetermine the administrative/legislative content of their actions in the course of deciding whether to submit the ballot question to voters in the form of an ordinance or resolution. This proposition is even less tenable than the idea that a city charter can limit a constitutionally reserved power of the people by its definition of what actions must be taken by ordinance.

Notwithstanding the court's long held position that a local charter cannot redefine the scope of I&R power - except to expand it - in *City of Colorado Springs v. Bull* the court did find a way to refer to charter provisions for the purpose of determining what constituted the original policy on which subsequent administrative actions were based. The court asserted that the provision:

"*The Charter authorizes the City to own and operate utilities, including an electrical utility*," 143 P.3d 1127 (Colo.App. 2006) was the core policy decision under which the setting of rates was an administative exercise.[11]

In *Vagneur*, by not identifying an original policy basis, the CSC left the public without an explanation of what the administrative action of the 1996 vote is administrating. The CSC placed a broad range of government activity beyond the reach of the electorate by default - in a context with major consequences for the community.

The absence of a legislative policy basis was not just due to silence on the part of the CSC. In a footnote, the court also rejected the plainly stated policy which determined the outcome of the EIS process:

Proponents contend that the 1998 Record of Decision established a "policy" of using traffic congestion to increase mass transit use and that the proposed initiatives are legislative in character because they purportedly establish a new policy that does not employ traffic congestion. Proponents rely on a single sentence in the 1998 Record of Decision stating that "[t]hough the highway will operate under congestion, this congestion is considered part of the disincentive for single occupancy vehicle (SOV) travel and will increase transit usage." This isolated statement in the 1998 Record of Decision cannot be viewed as legislative policy purportedly amended by the initiatives. (CSC Opinion) There may be nothing

[11] In making this determination the court created another basis for confusion, and a new legal question which it may someday need to address. Articulated in the charter along with "*rates and rules and regulations*" is the additional language, "*extension policies for the services provided by utilities. Colo. Springs Charter 6-40(a), 6-70.*" Certainly the decisions where, when, and how far to extend the city's utilites could easily have far reaching impacts on the community, and that action is specifically identified by the charter as representing extension "policies". However, the public is left to speculate whether a utility extension policy can be a subset of a larger policy to "own and operate utilities" without thereby becoming an administrative action of the encompassing policy.

quite like this statement in the history of judicial opinions. Would two sentences have been sufficient? In the complete absence of this one sentence the court could simply observe the magnitude of the consequences created by a government decision in order to determine whether it was an act "constituting a declaration of public purpose or policy" (Whitehead) "directed to the welfare or prosperity of the state or community". (Black's Law Dictionary)

The future of the second test as a means to qualify initiatives for circulation is difficult to gauge, but there appears to be little distinction between this and the third test. In both instances, some determination of legislative character needs to have already been made, and we may have only the final test as the sole remaining "guide post" with which to do so.

The First Test:

Those actions which relate to subjects of a permanent or general character are to be considered legislative; while those which are temporary in operation and effect are administrative. *Whitehead*, Virginia (1963)

First, actions which relate to subjects of a permanent or general character are legislative; while those that are temporary in operation and effect are not. Blackwell, Colorado (1987)

The first test underwent the most significant evolution in application and intent, but in contrast to the second test those changes were from redefinition rather than editing, at least until *Vagneur*. "Permanent or general character" is one of two tests which can be traced back to *Whitehead*, which in turn quotes a legal reference book called Municipal Corporations by Eugene McQuillin. Other cases credit *Keigley v. Bench* from 1939, or *Monahan V. Funk* from 1931 as the source of the first test.

In the *Blackwell* case, the CSC disallowed a petition regarding the location of a new city hall, a decision complicated by the language of the first test:

"subjects of a permanent or general character are legislative".

The CSC on the *Blackwell* decision:

We explained that, although the structure is "permanent" in the sense that it will serve as the city hall for an indefinite period of time, "the duration of legislation or the anticipated useful life of a municipal improvement does not completely determine the meaning of permanence when determining whether an ordinance is legislative or administrative." Rather, the term "permanent" is used to signify a policy of "general applicability". [12] (CSC Opinion) (Emphasis added.)

In support of their refinement of the first test, the court reached back to McQuillin and quoted additional language which it inserted into the standard recitation of the test:

"*In this connection an ordinance which shows an intent to form a permanent* ***rule of government*** *until replaced is one of permanent operation. 5 E. McQuillin, Municipal Corporations § 16.55, at 194 (3d ed. 1981) (emphasis added) (footnote omitted)." City of Idaho Springs v. Blackwell*, 731 P.2d 1250 (Colo.1987) However, it is not supportable that

[12] However, the court did not address the second half of the couplet. The context of "permanent" was in relation to the further idea that actions "which are temporary in operation and effect are administrative". There is no question this test was intended to be interpreted in terms of duration in the conventional sense.

the language in this McQuillin citation is intended to assert that a "rule of government" is the sole acceptable example of permanence.

The practical effect of the Blackwell decision was that the word "or" in the phrase "permanent or general character" was eliminated, so that there is no longer a suggestion of separate criteria, and the concept of permanence was then absorbed by the phrase "general applicability" as it replaced "general character". This led to the initiatives in *Vagneur* being rejected under an extreme diminishment of the scope of the "first test":

The initiatives do not propose new laws or rules of general applicability that set a governing standard for all cases coming within their terms. (CSC Opinion)

The CSC provides the source of some of the additional language which now comprises the revised first test:

As recently discussed by the Utah Supreme Court… Legislative power is defined by the work product it generates, namely, the promulgation of laws of general applicability; when the government legislates, it establishes a generally applicable rule that sets the governing standard for all cases coming within its terms. Carter v. Lehi City, 2012 UT 2, 269 P.3d 141 (CSC Opinion)

Using the new version of the now obsolete description "permanent or general character", we can look at the effect this new standard would have had on past CSC cases. Earlier cases often articulate the basis for legislative content, and then also provide examples for illustration. The court provided examples of legislative measures even in cases where initiatives were denied.

In the *Witcher* case from 1986, the CSC said:

"*Two elections have established the public policy of leasing the bridge, rather than operation of the bridge by the city.*" And "*Further, Canon City voters established a clear policy when they twice defeated proposals that the city operate the bridge and park itself.*" 716 P.2d at 449-50 (Emphasis added.) The decision to lease rather than operate a bridge is just as temporary in operation and effect, subject to the same termination date, as the lease itself, so there was no permanence, either in the conventional sense or as an example of a "rule of general applicability that set a governing standard"; and yet the court still found this action to be legislative.

The decision to transfer control of the bridge in *Witcher* was made by the electorate, a fact mentioned twice by the court. However, that exact condition exists in the *Vagneur* case, and the court also identified the similar nature of that voter decision:

…the 1996 resolution sought the approval required by section 13.4 for a change in use of the open space—in this case, a decision regarding the management of specific City-owned open space made in furtherance of the broader administrative EIS process underway at that time. (CSC Opinion) Neither the act of voting, nor the transfer of management of the land by the grant of an easement, was sufficient to make the Aspen situation a matter of policy subject to the initiative process.

In contrast, in the *Witcher* decision, the CSC cites the transfer of control of the bridge as the sole criterion for establishing legislative content:

Applying our original two tests, we concluded that the negotiation of the leases and amendments thereto in that case were administrative acts undertaken to carry out the previously established policy decision to transfer operational and

maintenance responsibilities for the bridge to a private company. (CSC Opinion) (Emphasis added.)

The primary difference between *Witcher* and *Vagneur* is that the temporary transfer of operational and maintenance responsibilities for a bridge in Canon City is considered legislative policy, while the permanent transfer of a right-of-way easement to construct, operate, and maintain a two lane parkway and a corridor for a light rail transit system – including a bridge – in Aspen is deemed administrative. The CSC appendage regarding the decision coming ***in furtherance of the broader administrative EIS process underway at that time*** (CSC Opinion) goes to the heart of one of the most disturbing aspects of the court's decision: Local governments may shelter policy decisions from the initiative power by imbedding them in administrative processes.

In *Vagneur*, the court explained its reasoning in *Witcher*, but then also apparently overturned it by quoting and upholding the Court of Appeals (COA) decision:

The court concluded that "the design, construction, operation, and maintenance of a specific highway structure designed to accommodate specific traffic uses is not a 'permanent' or general act" appropriate for the initiative process. (CSC Opinion) Under the COA ruling upheld in the *Vagneur* case, decisions regarding the operation and maintenance of the specific and singular bridge in *Witcher* would have been classified as administrative matters.

In their opening brief to the CSC, the Plaintiffs questioned the reliance of the COA (and earlier, the district court and hearing officer) on specificity as a determining factor by presenting six different cases, including *Witcher*, in which rezoning of individual parcels of land, building a single city hall, acquiring land for one park, etc., were all found to be legislative in nature. "Specificity – particularly geographic specificity – is relative to the purpose sought to be addressed. It would make little sense to propose a new strategy for the design of the primary transportation corridor through the 'entrance to Aspen' in terms sweeping beyond the geographically dictated 'entrance to Aspen.'" (Plaintiff's Opening Brief, Case No. 2009SC1022) The CSC provided no response or clarification, upheld the COA decision in its entirety, and established that initiatives must propose ***new laws or rules of general applicability that set a governing standard for all cases coming within their terms***. (CSC Opinion). The conclusion that this new standard has overturned precedent is unstated but inescapable.

Whether the single new standard or test for proper subject matter in an initiative or referendum also extends to matters of taxation and debt is yet to be determined, but for all other purposes citizens are limited to the phrase highlighted above for any degree of confidence in what may be proposed. In regard to the constitutional intent that the legislative power of the people of Colorado should be identical to that of their elected officials, it is almost inconceivable that this same standard would be applied to determine the acceptable range of actions available to the state legislature or local government. While the concern of Justice Coats that this new standard would lead to the court making such rulings:

…the majority's elaborate justification in this case risks extending that entitlement to the oversight of representative bodies as well (Coats Dissent), is appreciated, it is far more likely that no such extension of the court's power will occur. Instead, the people's legislative power is now diminished in comparison to that of elected bodies, and the constitutional intent has been severely compromised.

Almost as concerning as the ever-shrinking range of issues which may be reached through the I&R power is the nearly complete reversal of the perspective which the courts have previously employed:

Recall, as well as initiative and referendum, are fundamental rights of a republican form of government, which the people have reserved unto themselves. Such a reservation of power in the people must be liberally construed in favor of the right of the people to exercise it. Conversely, limitations on the power of referendum must be strictly construed. Margolis v. District Court, 638 P.2d 297, 303-04 (Colo. 1981) (References omitted.)

In the context of liberal application meant to favor the right of the people to exercise their I&R powers, it should not be settled doctrine that the three tests are the complete spectrum of considerations which can be employed in the review of I&R, or that they should be considered absolute. The *Whitehead* decision reveals just such a potential for flexibility by beginning sentences describing the tests with phrases such as, "*It has been said that*…" and "*The crucial test is said to be* …" 204 Va. 144, 129 S.E.2d 691 (1963).

Further, it is far more appropriate that each of the tests be interpreted as inclusive indicators (i.e. when a certain condition is present, legislative character is confirmed) rather than as exclusive standards (i.e. if a certain condition is not present, there can be no legislative policy or purpose).

Finally, the very phrase "*acts constituting a declaration of public purpose or policy"* (*Whitehead*) (Emphasis added.) suggests the recognition that purely administrative or executive actions may also have effects of sufficient magnitude to encompass the "welfare or prosperity of the state or community." (Black's Law Dictionary 1st Ed. 1891).

In *City of Colorado Springs v. Bull*, the court of appeals noted:

"…*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 the proponents and thereby impede the ability of the people to initiate laws,*" 143 P.3d 1127 (Colo.App. 2006) as the rationale for removing a major portion of an initiative which the court found to be administrative. This action allowed the remainder of the petition – deemed legislative - to proceed to the ballot.

The CSC *Vagneur* ruling sits in stark contrast to the accommodating atmosphere of prior cases in which the courts found a compelling need to protect the initiative power. Separate from the manner in which the three tests for legislative content were applied to *Vagneur* by the CSC, or the way in which the initiatives themselves were characterized, there are additional examples which reveal a negative mindset in places where liberal construing should prevail. These examples do not involve legal context in the sense of precedent, but are relevant to legal concepts nonetheless.

A prime example of prejudicial interpretation comes in the synopsis of the CSC opinion on Page 4 of the *Vagneur* decision. Due to the long history of the entrance controversy, and the uncertainty of what constitutes public policy, the Plaintiffs feared that the existence of multiple approvals could create new grounds for judicial review and delay. They consequently included the provision that passage of the initiatives would rescind "all enactments or authorizations inconsistent herewith". The terms "enactments" and "authorizations" were chosen because they are specific to legislative activity.

The CSC statement regarding the grounds for denial of the initiatives is a completely inexplicable failure of definition:

…the initiatives, on their face, rescind "all enactments and authorizations inconsistent herewith," thereby rescinding or amending right-of-way easements previously conveyed by the City in furtherance of that administrative decision. (CSC Opinion) The problem with this statement is that the right-of-way easement is neither an enactment nor authorization, and is therefore not directly impacted by the language of the petitions.

The term "enactment" simply cannot be misunderstood or misconstrued. It means:
"1. The action of enacting (a law)," Oxford English Dictionary (OED) Second Edition on CD-ROM (v. 4.0.0.3); it unequivocally refers to legislation.

"Authorization" is "The conferment of legality; formal warrant, or sanction." (OED) Both terms convey the power to do something, neither does the thing itself ("...*acts that are necessary to carry out existing legislative policies... are deemed to be administrative*" *Witcher*), and both are therefore applicable to legislative declarations of public purpose or policy.

The CSC misapplied the word authorization in several places in its decision - in the sense that common usage is not the proper standard for a legal document. However, if the court had a problem with the particular term, they could simply have removed the two words "and authorizations", as demonstrated in the *City of Colorado Springs v. Bull* decision, and allowed the initiatives to go forward.

Beyond the ill-defined words is the persistent problem of the CSC claim that the initiatives do that which they cannot. This is a fundamental violation of logic which is best illustrated by comparing how the Court of Appeals and the Colorado Supreme Court dealt with the same matter. The COA made note, interspersed through its decision, of the various administrative actions which would need to be taken voluntarily by various government entities in order for the initiatives to be operative:

"*The <u>desired effect</u> of the proposals is to revise the terms of the right-of-way previously conveyed to CDOT in 1996 by substituting (<u>subject to CDOT's agreement</u>)...*

Here, the initiatives each would authorize (<u>but not require) CDOT - not the city</u> - to construct the Entrance to Aspen...

<u>If implemented</u>, the proposals would require the city to amend existing contractual obligations, including the MOU[13], and to rescind or amend the existing right-of-way...

The new design <u>could be implemented only if those administrative</u> [CDOT and the Federal Highway Administration (FHA)] *<u>agencies agreed to it</u>. Under these circumstances, we cannot conclude that the hearing officer and district court erred in determining that the proposals were administrative and not suitable for legislative initiatives."* Vagneur v. City of Aspen, 232 P.3d 222, 224 (Colo. App. 2009) (Emphasis and footnote added.)

Each COA caveat confirms that the initiatives do not claim to perform any of the administrative acts necessary to carry out the new plan for the Entrance to Aspen. The court's conclusion - that this absence of any direct ability to take administrative actions is somehow an indicator of administrative character – is an obvious non sequitur. The COA seemed similarly unaware that its list of administrative changes serves to support a legislative determination under the second test; the initiatives obviously do not carry out any existing legislative policy.

[13] Memorandum of Understanding (MOU) is a separate agreement between the City of Aspen, CDOT, and the FHA.

In contrast, according to the Colorado Supreme Court:

This language necessarily requires the amendment of contractual obligations under the existing MOU between the City and state and federal agencies, as well as changes to right-of-way easements previously conveyed by the City to CDOT in furtherance of the 1996 voter authorization, the Preferred Alternative in the 1998 Record of Decision, and the MOU. Although it would be premature at this point to opine whether those required amendments would generate separate legal problems, it is clear that the initiatives require the City to amend existing contractual obligations. We have held that a city's negotiation of contracts to which it is a party, and amendments to those contracts, are administrative matters not subject to the power of initiative. See Witcher, 716 P.2d at 450. That the initiatives require the amendment of existing contractual obligations and as changes to right-of-way easements supports the conclusion that they are administrative in nature. (CSC Opinion) The CSC dispenses with the contradictions created by the COA caveats by simply claiming that the initiatives require – as though they could force – a series of administrative actions. Simple logic would dictate that if the initiatives cannot do this, they do not do this.

In a complete recasting of much of the basis for their objection to the Vagneur initiatives, the CSC then acknowledges:

…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. It is not uncommon for legislative acts to require subsequent administrative action for implementation. Nor is it unusual for legislative acts to trigger changes to administrative practices, or to have the effect of reversing or rendering moot prior administrative actions. (CSC Opinion) There is no explanation by the court as to why the administrative changes necessary to *Vagneur* are proof of administrative intrusion - rather than simply being of the same character as those described here.

By neglecting to supply any clarification to resolve the contradiction above, the CSC failed to complete their entire construction regarding the need to consider the extent of administrative consequences. Instead, the court simply retreats again, in the very next paragraph, to its one idea:

…the initiatives are not, in fact, legislative in character because they do not propose to establish a law of general applicability or a rule that sets a governing standard. (CSC Opinion)

However, the new standard for the first test to determine appropriate subject matter for an initiative - ***new laws or rules of general applicability that set a governing standard for all cases coming within their terms*** (CSC Opinion) – is completely out of step with anything to do with reserving power to the people over local affairs. On the contrary, it would be an appropriate basis to determine whether a state law passed by the General Assembly avoids violating the prohibition on "passing any local or special laws".

The entire CSC decision acts to obfuscate and confuse, and the ability of the average citizen to determine the extent of their constitutional initiative power is thereby severely impaired. There is no apparent purpose, other than the creation of complexity where none exists, for introducing the sheer volume of nonessential, irrelevant, and unsupported arguments found in the CSC decision. For all that the CSC decision tells us, it could have been stated in a single page.

The *Vagneur* initiatives do nothing beyond satisfying a requirement of the Home Rule Charter of the City of Aspen - by approving a change of use for open space. If none of the affected agencies and jurisdictions chooses to act on the authorization provided, nothing will happen and the situation will be no better or worse than it is today. It is not plausible that the Colorado Supreme Court does not know this, especially given their elaborate effort to obscure the obvious. The implication is that the *Vagneur* case is the vehicle for an agenda to broadly limit I&R power.

Section III

DISCUSSION

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 the majority's analysis virtually pointless. (Coats Dissent)

With a tip of the hat to Justice Coats, our decision to pursue this "virtually" pointless task was determined to be worthwhile for a number of reasons. The highest priority is the need to dissuade any interested parties that the current condition of the initiative power in Colorado, especially in local jurisdictions, can be rehabilitated through judicial means.

The case reviewed here is not intended to be the sole evidence of the predisposition of the courts mentioned in the Preface. Even though the *Bull* decision found a way to reference city charter provisions for a legislative determination, it also enhanced the ability of the people to exercise their I&R power by editing out administrative material it found to be objectionable. The *Margolis* decision in 1981 was also quite favorable to the initiative power. However, during the course of more than thirty years, all other appellate level decisions regarding the application and scope of I&R powers have had a restrictive or subtractive impact. Even imagining a magical transformation of sentiment among the members of the supreme court, and several perfectly tailored cases, it could take decades for new decisions to repair the current diminution of the initiative power.

Neither would a return to the 1980s era status quo be especially desirable if it could be achieved. The most charitable conclusion to be drawn from the *Vagneur* decision is that it demonstrates why the courts should not be in the position of making ***loosely-defined, concededly ad hoc, distinction[s] between executive (or administrative) actions and legislative actions*** (CSC Opinion), particularly as a means to decide matters involving "*fundamental rights of a republican form of government*" *Bernzen v. Boulder, 186 Colo. 81, 525 P.2d 416 (1974)*. The CSC description of its own role is not compatible with the concept of "rule of law".

Not just the standards noted by Justice Coats are elastic, so too is the frame of reference which contains the scope of a particular policy. In *Blackwell*, the court decided that the policy component of the situation was the decision to build a new city hall in the context of a tax increase; the location was merely an administrative detail. This meant that to affect the outcome, petitioners would have had to first reverse the decision to build a new city hall – even though they may have wanted one. Possibly, the citizens of Idaho Springs could have amended the tax question itself to contain a specific limitation, or recommendation, on the location of City Hall. How it might be determined if that is a legitimate use of I&R is a question left to the average citizen.

The Court of Appeals seemed to forget that the *Bull* decision referenced a city charter only in order to provide a basis for prior public policy. In *Vagneur*, the court expanded on the *Bull* example with no clear purpose:

"Other sections of the City Charter, such as sections 6.1 and 6.3 addressing the powers and duties of the city manager, charge the city manager with the proper

administration of all affairs of the city, including the provision of engineering, architectural, maintenance, and construction services required by the city. These sections of the charter indicate that tasks related to municipal engineering and construction, such as the design and construction of a highway, are intended by the city to be viewed as administrative." 232 P.3d 222, 224 (Colo. App. 2009) The COA innovation of listing duties delegated by charter to a city manager, perhaps intending to suggest that a job description represents a policy decision - was repeated by the CSC[14] without comment. The range of responsibilities of the city manager apparently limits citizen I&R powers over virtually any issue concerning city streets. The COA seems to say that because the position is administrative, so too are issues related to whatever tasks the manager performs.

The most striking element in the decisions of the two courts is the aspect which is entirely missing – there are no people, no citizens, and no community whatsoever to be found in these rulings. The complete context of the deliberation of the courts is that of government process.

The Entrance to Aspen is an ugly polluting mess during the morning and afternoon, five days a week, for about five months of the year. International and national guests to one of the world's premier resort areas are caught up in twenty minute traffic delays while traveling the distance of two miles. Regional residents accessing their jobs or the business services found in Aspen have the same experience, as do the residents of the town. This situation is created by a decision to use government authority to coerce a change in the travel mode choices of private citizens, a fact which is clearly stated in the planning documents prepared for a project which was originally intended to increase highway capacity.

The situation in Aspen directly affects the way people live their lives, and yet the courts cannot find any aspect of the role of government which represents an act "constituting a declaration of public purpose or policy" (Whitehead) "directed to the welfare or prosperity of the state or community". (Black's Law Dictionary)

The Court of Appeals produced a five page, five thousand word ruling in which the entire context described above was treated with something close to disdain:

The court rejected Proponents' contention that the initiatives were legislative because they sought a change in the use of the right-of-way, noting that the change in use sought was "indeed administrative in character—reconfiguring lanes." (CSC Opinion)

The COA also raised questions regarding its level of diligence by producing the statement:

"*Petitioners also contend we should apply the legislative amendment test here because the proposals seek to amend the 1996 ballot measure, which was legislative. We disagree. The petitions do not purport to amend the 1996 ballot measure, nor do they even reference the 1996 ballot measure."* 232 P.3d 222, 224 (Colo. App. 2009) The 1996 election is referenced three times in the "whereas" clauses which precede the body of the ordinance contained in the petitions, and several sentences in the ordinance regarding

[14] Both courts exhibited a certain degree of zeal, in that both lost track of the context of the case. Highway 82 is a state highway, not a city street. The initiatives cannot design a state highway; they can only approve the use of open space subject to certain conditions.

environmental and historic resource mitigation measures were quoted verbatim from the 1996 measure. It is difficult to avoid the conclusion that the COA did not read, in its entirety, either the previous ballot question or the petitioners' initiatives.

In contrast to the appearance of cursory indifference on the part of the COA, the Colorado Supreme Court produced a fifty page opinion, and spent considerable time doing so. Nearly two years elapsed between oral arguments and the release of the CSC opinion.

Upon first learning that the Colorado Supreme Court had agreed to hear *Vagneur v. City of Aspen*, we the Plaintiffs assumed it was for the purpose of addressing, and almost certainly overturning, the Court of Appeals' proposition that if administrative actions precede an initiative, and administrative actions will be necessary to implement a successful initiative, then the initiative itself must therefore be administrative. As concluded by the Court of Appeals:

"*We agree with the district court's conclusion that prior city actions on this matter, such as the 1998 Record of Decision and the MOU, stemmed from administrative processes and were accordingly clearly administrative. Because petitioners' initiated ordinances sought to change the administrative details of those decisions, they should similarly be deemed administrative.*" 232 P.3d 222, 224 (Colo. App. 2009)

The Plaintiffs were well aware that the CSC could deny the initiatives for other reasons, but it seemed clear that altering an existing government plan, thereby fostering the need for significant administrative actions to implement a new plan, could not somehow become evidence of administrative character. The second test has said the opposite for decades:

"If it merely pursues a plan already adopted by the legislative body itself…it is deemed to be administrative," (*Whitehead*). Test number two is rendered nearly meaningless by the COA decision. It was not contemplated that this was a ruling the CSC could let stand.

The CSC upheld the reasoning of the COA in applying some new form of inquiry regarding administrative consequences, even though it did not need to do so in order to reject the initiatives. The new version of the first test, that an initiative must propose ***new laws or rules of general applicability that set a governing standard for all cases coming within their terms***, (CSC Opinion) is the determining basis for the denial of the petitions.

Consequently, by both upholding and expanding the COA decision, the CSC ruling first uses its significant focus on administrative processes to lay the groundwork for eventually curtailing or overturning the *Margolis* decision – if it hasn't done so already. Then, because of the CSC rewrite of the first test - which had stood for over eighty years - the usefulness of the initiative power to address singular issues significant to the welfare and prosperity of the community is less than at any time since 1910.

The appearance is that, taken in by the superficial analysis of the Court of Appeals, the CSC majority saw *Vagneur v. City of Aspen* as a good opportunity to further constrain the powers of I&R. Then, upon delving into the details of the case, the court had to struggle with the specifics of a situation which was completely ill-suited to their purpose. The overwhelming impression created is that the Colorado Supreme Court attempted to bury its predetermined decision under an avalanche of verbiage.

Section IV

CONSTITUTIONAL RECOMMENDATION

"*From an early date in the history of the right of referendum it has been recognized that to subject to referendum any ordinance adopted by a city council, whether administrative or legislative, could result in chaos and the bringing of the machinery of government to a halt.*" Carson V. Oxenhandler, 334 S.W.2d 394 (Mo.Ct.App. 1960)

The above quote, which suggests the existence of even earlier iterations, is the great unchallenged and unexamined assumption which forms the basis for the limitations on I&R powers. It is a totally unfounded assumption, a fact which is particularly easy to demonstrate in the State of Colorado. Colorado has no standard for the appropriate basis or grounds for the recall of elected officials. If you can collect enough signatures and garner enough votes, you can recall someone for having blue eyes. Despite this invitation for "chaos" it took more than a century before the first state representatives were recalled from office, and local officials are not overly threatened by recall actions.

There is nothing to suggest that there is any appetite on the part of the public to engage in the day to day operations of government, or to grossly interfere with that process. Consequently, the starting point for any reform of I&R powers is the presumption that the electorate should be able to address any subject which could rightfully come before their elected officials.

Proposed text:

> The initiative and referendum powers reserved to the people by this section are hereby further reserved to the registered electors residing within the boundaries of any jurisdiction established through state law and governed by representatives responsive to the electorate; on any action within the power of the elected body for that jurisdiction [except personnel matters]. The general manner of exercising said power shall be prescribed by statute; except that jurisdictions may adopt additional procedures if necessary to improve citizen implementation. Not more than ten percent of the registered electors may be required to order the referendum, nor more than fifteen percent to propose any measure by the initiative in any jurisdiction. Multi-jurisdiction districts which are subject to this section shall be treated as a single jurisdiction for purposes of signature collection and vote tallies; the process shall be administered by the clerk of the sub-jurisdiction with the largest population; and the expense of any special election shall be borne by reimbursement of verifiable costs to each sub-jurisdiction by the district holding the election.

The bracketed text "except personnel matters" is included on the assumption that some exceptions may be inevitable. The potential peril of this one example becoming a list

is significant, and could result in a set of options more limited than those under the current confused definition of the word "legislation". However, for the sake of discussion, the brackets are open for suggestion.

A brief survey of provisions in other states[15] indicates a preponderance of references to "legislation". Some populations are granted I&R over "ordinances", but that does nothing more than shift the definitional quandary to what actions must be taken by ordinance. The extreme example of the peril of lists may be the excluded subjects found in Massachusetts:

"The right to receive compensation for private property appropriated to public use; the right of access to and protection in courts of justice; the right of trial by jury; protection from unreasonable search, unreasonable bail and the law martial; freedom of the press; freedom of speech; freedom of elections; and the right of peaceable assembly."

It would not seem necessary to itemize basic rights in order to protect those from I&R, though Massachusetts apparently thought otherwise.

In Oklahoma there does not appear to be any major disruption in the process of government by simply expanding on "legislation" to include, "or action":

"The powers of the initiative and referendum reserved to the people by this Constitution for the State at large, are hereby further reserved to the legal voters of every county and district therein, as to all local legislation, or action, in the administration of county and district government in and for their respective counties and districts."

Depending on the outcome of the bracketed exception experiment, our version of the Oklahoma provision, absent the bracketed exception, is our recommendation for a state constitutional amendment.

[15] Special thanks to the Initiative and Referendum Institute at the University of Southern California for their online resources: http://www.iandrinstitute.org/

Section V

STATUTORY RECOMMENDATION

As briefly outlined in the Preface, significant improvements in Colorado I&R procedures, especially in regard to timeliness, need to occur regardless of the success or failure of a constitutional remedy. As statutory elements, a concerned legislator could introduce legislation to adopt the following recommendations.

The following proposal was developed concurrently with the process of *Vagneur v. City of Aspen* through the courts, and therefore uses the standard of "municipal legislation pursuant to section 1 (9) of article V of the state constitution" as the appropriate criterion for acceptable I&R subject matter. In the event a constitutional amendment is adopted, the standard for determining the acceptability of an initiative would become "within the power of the elected body for that jurisdiction".

CONTEXT OF THE PROPOSAL

The citizen initiative or referendum process nearly always occurs in a context which places proponents in an adversarial position relative to the legislative body (and by inference a substantial proportion of the population) of a particular jurisdiction. The referendum is a direct challenge to an adopted legislative policy; and an initiative petition is generally presumed to be necessary only when a majority of elected officials oppose a proposal being put forward by private citizens.

The inherent potential for official impediment or public interference of the initiative and referendum process was anticipated. State constitutional and statutory law is clearly intended to both protect and advance the citizen initiative in the face of such difficulties.

In establishing the legislative functions of the state, the Colorado Constitution provides that, "The first power hereby reserved by the people is the initiative...", and as recently as 1980, the Colorado Supreme Court found that, "[l]ike the right to vote, the power of initiative is a fundamental right at the very core of our republican form of government." As such, "[t]his court has always liberally construed this fundamental right, and, concomitantly, we have viewed with the closest scrutiny any governmental action that has the effect of curtailing its free exercise." McKee v. City of Louisville, 616 P.2d 969, 972 (Colo. 1980).

Government is prohibited from curtailing the free exercise of the initiative, and at the state level is charged with facilitating the citizen legislator(s) with comment and assistance in drafting a legally sound proposal. State law provides that proponents submit a first draft "to the directors of the legislative council and the office of legislative legal services for review and comment" (C.R.S. 1-40-105), and that the ballot title be set by a board

"consisting of the secretary of state, the attorney general, and the director of the office of legislative legal services," at a public hearing for that purpose. (C.R.S. 1-40-106)

The extent of the protection of the direct legislative power of the people was further defined by a recent case in which the court determined that an initiative which contained impermissible provisions could have that material removed so that the remaining, and constitutionally mandated, portion of the measure could go forward to the electorate for a vote. City of Colorado Springs v. Bull, 143 P.3d 1127, 1131 (Colo. Ct. App. 2006)

The "Bull" decision to permit severance of impermissible portions of a proposed ordinance referenced the decision in a case from the state of Alaska, McAlpine v. University of Alaska, 762 P.2d 81 (Alaska 1988), which "reasoned that 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 the proponents and thereby impede the ability of the people to initiate laws." Emphasis added.

Efforts to preserve the content of the citizen initiative are also augmented by state provisions for timely processing and response by government, to insure a reasonable time frame in which the matter may be decided by voters. Specific time limits are set for most of the non-judicial steps which must be satisfied by all parties to the process.

Judging solely from the broad context of initiative and referendum procedures, the letter and intent of both constitutional and statutory law would seem to favor the ability of citizens to place their proposals before the voting public, and in a reasonable amount of time.

Whatever the intent, specific procedural steps prescribed in current law, and especially as they interact with judicial review, have created practical difficulties which now weigh heavily against the successful performance of a citizen initiative. These problems are easiest to illustrate in the context of the actual petition process as it occurred in *Vagneur v. City of Aspen,* Colorado Supreme Court, February 11, 2013, 2013 CO 13.

PETITION TIMELINE UNDER CURRENT LAW

June 25, 2006– Two proposed petitions are submitted to the Aspen city clerk to be "approved" pursuant to C.R.S. 31-11-106.

A clerk is empowered to approve or reject "the form and the first printer's proof" of the petition and, "The clerk shall assure that the petition section contains only those elements required by this article and contains no extraneous material." These are generally mechanical issues which can be easily amended by proponents if necessary.

In addition to these technical details, a city or county clerk can preemptively stop the initiative process by rejecting a petition on "the grounds that the petition or a section of the petition does not propose municipal legislation pursuant to section 1 (9) of

article V of the state constitution,"[16] or by finding that the petition contains more than a single subject, a condition prohibited by C.R.S. 1-40-106.5.

Thus the power to interpret and apply state constitutional law is invested in a municipal clerk who is often not an elected official, and who therefore serves at the pleasure of the legislative body whose policies are under challenge.

June 28, 2006- The city clerk rejects both petitions, "as they do not propose municipal legislation pursuant to section 1 (9) of article V of the state constitution."

July 6, 2006- Petitioners file a complaint with the District Court asking for a declaratory judgment that the petitions do constitute municipal legislation.

July 28, 2006- Case is argued before the District Court.

April 27, 2007**-** Rather than continue to wait for a judgment from the District Court, petitioners submit revised petitions to the city clerk.

May 10, 2007- Petitions are accepted for circulation by the city clerk.

September 27, 2007- City clerk certifies that the petitions contain the required number of valid signatures.

October 10, 2007- On the last day of the 40 day protest period (C.R.S. 1-40-118), protests of the petitions are filed on the grounds that they do not propose municipal legislation, contain more than a single subject, and that the "ballot title" is misleading. (At the municipal level a ballot title is set by city council as part of the preparation of the question for the ballot, but only after a final determination of sufficiency is made – there was no ballot title at the time the protests were filed.)

Over the course of the next few days, petitioners notify the city clerk that the protests have been filed without the required oath, and that therefore no legal challenge exists. The clerk notifies the protestors, who are then allowed to add their oath after the prescribed 40 day protest period has elapsed.

October 22, 2007- An administrative hearing officer, appointed by the city, holds a protest hearing.

October 29, 2007- The hearing officer rules in favor of the protestors, first finding that their failure to file the protest with the required oath substantially complied with state law when that omission was later rectified.

[16] There are no specific guidelines or hard definitions of what constitutes "municipal legislation". "A proposed ordinance's classification as administrative or legislative is largely an *ad hoc* determination. City of Idaho Springs v. Blackwell, supra, 731 P.2d at 1253. The term "*ad hoc,*" in this context means "for the particular end or purpose at hand and 'without reference to wider application or employment.'" City of Colorado Springs v. Bull, supra, 143 P.3d at 1131." –District Court, Pitkin County

The officer also finds that, although the core subject of the petitions is legislative, there exists significant detail which is more administrative in nature, and therefore not permissible. The hearing officer declines to strike the offending material so that the remaining question can be placed before the voters, despite the ability to do so as afforded by the aforementioned Colorado Springs v. Bull decision.

Protestors are not upheld on the single subject objection, or regarding the nonexistent misleading ballot title.

October 29, 2008**-** A Petition for Review filed by the petitioners to the District Court is decided, and the court upholds all of the findings of the hearing officer. The District Court also declines to strike impermissible subject matter so that the remaining question can be placed before the voters.

October 29, 2009**-** Colorado Court of Appeals affirms the judgment of the District Court, but for the first time finds that no portion of the petitions is legislative. In so doing, the court creates new a framework for determining whether an initiative is "legislative" or "administrative" in nature by holding a measure to be "administrative" (and thus not subject to the initiative power) if its passage would likely have the *"effect or consequence"* of engendering future administrative acts and/or vitiating prior administrative acts.

December 14, 2009**-** Initiative representatives file a Petition for Writ of Certiorari to the Colorado Supreme Court.

June 1, 2010- Colorado Supreme Court grants the Writ of Certiorari. The concern over the new standard for determining legislative and administrative content, as advanced by the Court of Appeals, is sufficient that amicus curiae in support of the cert petition are filed by Colorado Common Cause, the Initiative and Referendum Institute, Independence Institute, and Citizens In Charge.

February 11, 2013- The Colorado Supreme Court disallows the two initiatives in *Vagneur v. City of Aspen* on the grounds ***that the proposed initiatives are administrative in character and therefore are not a proper exercise of the people's initiative power***.

It therefore required slightly more than 6.5 years for petition proponents to learn that the questions could not be taken to the ballot. Even in the event of a favorable outcome it would have been reasonable to assume that when the city council did finally set the ballot titles for these questions, a new round of lawsuits would have been filed challenging those titles.

The general conditions which allow this sort of delay have been in effect for some time, and will be addressed in the following proposal.

EROSION OF CURRENT LAW

A new problem surfaced as a direct result of the judicial process for these initiatives, and some discussion will provide further context. The District Court applied a substantial compliance test (Fabec v. Beck, 922 P.2d 330 (Colo. 1996)) in determining that the absence of a signed oath provided within the period allowed for a protest filing was not a "bright line" rule which must be satisfied to the letter of the law. The Fabec three part test of substantial compliance begins with determining the extent of noncompliance. Although a previous court decision had ruled that the absence of an oath was a fatal deficiency, the District Court rejected that ruling and focused instead on the second and third legs of the test regarding "(2) the purpose of the applicable provision and whether that purpose is substantially achieved despite the alleged noncompliance; and (3) whether there was a good faith effort to comply or whether noncompliance is based on a conscious decision to mislead the electorate."

The elaboration of the District Court is revealing:

103. The purpose of the provision that the protest be under oath is to insure that the protest is "truthful" and the protestors take the matter seriously. In this case, the protest letters essentially set forth legal arguments - - not facts that could be determined to be true or false. The oath provision is not particularly relevant in the context of legal arguments because a legal argument is not "true" or "false." This is not a case where a protestor is asserting that he or she knows a fact that makes the petition invalid, such as that a signer was not a resident of the City or otherwise not qualified to vote. Rather, the protestors here are asserting that there are legal reasons to invalidate the petitions - - that they include administrative material not permitted to be inducted in an initiative, that they address more than one subject, etc. In this context, the oath does not appear as important as it might in other cases. The protestors took the matter seriously as indicated by their retention of attorneys.

The District Court seemed unaware that the matter of truthfulness in the context of a legal challenge relates to motive, or that by forgoing enforcement of the oath by the one means possible – denial of the protest, the requirement of the oath is now effectively waived. In the context of a legal argument, protestors are attesting that it is the integrity of the process itself which animates their concern (i.e. the precise difference between administrative versus legislative action), and not the content of the petitions. Without the inhibiting factor of such a public declaration, protestors are unfettered in the use of the courts as a tool of political attack against initiative content that they may not be able to defeat at the polls. The potential for abuse is particularly acute given the specific language of the current statute, which does not limit the grounds for a protest: "The grounds for protest may include, <u>but shall not be limited to</u>, the failure of any portion of a petition or circulator affidavit to meet the requirements of this article." Emphasis added.

Petitioners had intended to argue against the District Court decision to waive the oath before the Court of Appeals, but another consideration caused this portion of the case

to be abandoned. In the aforementioned Bull case, neither the clerk nor protestors had been the cause of the judicial review, but rather the city council itself. Upon being presented with a notice of sufficiency for an initiative petition, and facing the choice of either adopting the proposed ordinance or setting an election, the council did neither. The petition was instead sent to the court by the city council for a declaratory judgment action, in a procedure neither prescribed nor anticipated by state law.

The petitioners in our example above were faced with the practical reality that if arguments against the validity of the late-filed protest were successful at the Court of Appeals, no jurisdiction would have existed for the decisions made by the hearing officer or District Court, and there would be no appeal to hear on the matter of legislative content. Under these circumstances, given the example of Bull, the city council would simply refer the entire case back to the District Court on the question of legislative content – effectively setting the process back by another year.

INADEQUATE REMEDIES IN NEW LAW

The state legislature is apparently quite aware of the potential for harassment by courtroom given the passage in 2009 of HB 09-1326, which provides that "A proponent who defends a petition against a protest shall be entitled to the recovery of reasonable attorney fees and costs from the registered elector who files a protest or the registered elector's attorney, upon a determination by the district court that the protest, or any part thereof, lacked substantial justification or that the protest, or any part thereof, was interposed for delay or harassment." ("Lacked substantial justification" was defined as "substantially frivolous, substantially groundless, or substantially vexatious".)

The substantial justification standard would be difficult to apply to questions of law surrounding such ad hoc determinations as the line between legislative and administrative matters, or subjective judgments regarding the appropriate language for a ballot title. There is a need for additional protections from harassing lawsuits, but in any event, the "vexatious loser pays" concept does not currently apply to protests in county and other municipal jurisdictions.

GENERAL OBJECTIVES

Reform of initiative procedures should seek to be comprehensive, and not simply yield a need for further revision in subsequent years. As part of this endeavor, the power of initiative and referendum should be extended to statutory counties - if that has not already occurred through constitutional amendment.

Differences between municipal/county and state procedures should be appropriate in respect to the different size of the jurisdictions, but the procedures should otherwise fulfill the same conceptual purposes.

Grounds for protest must be delineated; the "shall not be limited to" language should be removed.

Cost recovery safeguards for legal challenges due to fraud by circulators, and/or harassment by opponents, should apply to all protests in all jurisdictions.

The primary safeguard against harassment or official impediment should be to eliminate open-ended opportunities for delay.

SUGGESTED PROCEDURAL MODIFICATIONS

A proposed initiative will be submitted to the clerk in accordance with the procedure and format described in C.R.S. 31-11-106, except that the clerk shall advise initiative petition representatives of content not deemed to propose municipal legislation pursuant to section 1 (9) of article V of the state constitution[17], or which constitutes more than a single subject pursuant to 1-40-106.5. A suggested ballot title may be submitted by petition representatives. Proponents may submit an Affidavit of Timeliness if they prefer to invoke a special election. Absence of the affidavit will allow elected officials to either call a special election or place any resulting question on the ballot at the next general election.

Revision of petition content by its representatives based on the clerk's advisement shall result in a second five day period in which the clerk shall approve or reject the form and first printer's proof of the petition. Upon approval of the form of the petition, the petition shall be given a first reading by the legislative body of the municipality, county, or district at a special or regular meeting within fourteen days of clerk approval.

By placing the initiative into the established municipal or county agenda procedures, sufficient public notice will be assured.

After a proposed initiative leaves the clerk's office, the further steps in the process will continue to provide the opportunity for review and revision as established for a statewide initiative, but in a manner more appropriate to smaller jurisdictions. It is also an object of these new procedures to unify the timing of protest components, and gain public disclosure of the grounds for such protests, at the beginning of the process.

1. Initiative receives a first reading within the specified time period, and a ballot title is adopted by the responsible board or council. This ballot title may also serve as the petition summary.
2. Intent to File Protest affidavits are filed with or by the clerk within ten days of first reading, stating the grounds and general description of the basis for the protest, specific to:
    A. Material in the initiative does not propose municipal legislation pursuant to section 1 (9) of article V of the state constitution[17].
    B. The ballot title is untrue, not impartial, poses an argument, is likely to create prejudice either for or against the measure, or violates 31-11-111(3). Intent

[17] Or "within the power of the elected body for that jurisdiction" in the event of constitutional amendment.

to File Protest of a ballot title which is submitted by petition representatives shall contain a proposed alternative.

C. The initiative contains more than one subject.

3. A second reading of the proposed initiative is scheduled for a special or regular meeting within fourteen days of the expiration of the protest notice period. Any revision of the petition by its representatives restarts the process with the clerk as though no process had occurred. Any revision of the ballot title results in a new first reading, and a second ten day period to file or withdraw Intent to File Protest affidavits. A ballot title may not be revised more than once without the written approval of petition representatives.
4. If no revisions are made prior to second reading, petition is cleared for circulation.

Completed petitions are reviewed per 31-11-109, Signature verification - statement of sufficiency.

5. Within 10 days of the statement of sufficiency, protests of the sufficiency of signatures or circulator affidavits shall be filed with the clerk and resolved under current law, except that the failure by a District Court to issue a decision within ninety calendar days shall uphold the findings of the clerk or hearing officer.
6. Within 21 days of the statement of sufficiency, protests established by Intent to File Protest affidavits may be formally filed with the District Court. The court is encouraged to combine such protests when feasible, and to accommodate pro se litigants.
7. If the District Court fails to issue a decision within ninety calendar days, the petition shall be deemed sufficient, the ballot title shall be adopted, or in the case of a petition representative challenge of the ballot title, the alternative shall be used on the ballot.
8. Appeals shall be filed within 30 days of any court decision, and if the reviewing court fails to issue a decision within ninety calendar days, the petition shall be deemed sufficient, the ballot title shall be adopted, or in the case of a petition representative challenge of the ballot title, the alternative shall be used on the ballot.
9. In the absence of any protest or appeal, the final determination of petition sufficiency and setting of an election occurs under the procedures in C.R.S. 31-11-104 and 105, as amended to accommodate the Affidavit of Timeliness described above.

EPILOGUE

A PERSONAL NOTE

Every effort was made during the production of this review to maintain the decorum due a state supreme court decision. Undoubtedly, some amount of cynicism crept in, and for that the author apologizes.

However, anyone familiar with the United States, whether culturally or politically, understands the profound dominance of the automobile as our primary mode of transportation. The attempt to change this preference of the citizenry on the part of any governmental entity, especially by coercive techniques, cannot be seen as anything less than the setting of new public policy. That the Colorado Supreme Court did not find any such policy issue in the context of the petitions on which they ruled can only be described as preposterous.

That something so simple and self evident could be subject to the obfuscation employed here, with the expectation that the public is too preoccupied to notice, is not reassuring to anyone prone to worry about the future of the republic.

There are elected representatives in the Roaring Fork Valley, the area served by Highway 82 and the Entrance to Aspen, who intend to guide land use development so that new population growth will be forced to occur within walking distance of the regional bus service. This is the same bus service being given preferential treatment at the Entrance to Aspen.

Could there be a more fundamental expression of our personal autonomy than to be able to choose where to live, and how to transport ourselves? And yet, major decisions which will impact those choices have been confined to "administrative" processes which are beyond the reach of the direct control provided the electorate through the power of I&R.

One of the interesting aspects of working on I&R as a stand-alone issue is that the process is not partisan. Whatever your political viewpoint, there may come a time when you will want to employ this tool of direct democracy. It therefore came as a surprise when one observer explained to me that the decision in Vagneur was due to the "liberal" slant of the supreme court, and the subsequent protection of a favored issue of the "left" – mass transit.

Your author is not quite prepared to accept the idea that the national neurosis of assigning "left and right", "liberal or conservative" labels to every conceivable public policy question has so infected our thinking that even the supposed best legal minds of our state have succumbed. For one thing, it does not help to explain the steady contraction of the scope of I&R power - which can be traced back to at least the 1977 *Zwerdlinger* decision and its elimination of the term "plan" as an attribute of legislative activity.

However, it really does not seem that the current condition of I&R can be explained in entirely conventional terms. There is more here than a reasonable disagreement about the definition of words and/or the intent of constitutional provisions created more than one hundred years ago. In *Vagneur*, the Colorado Supreme Court did not make a singular finding, but instead created a completely new context in which any attribute which could potentially disqualify an initiative is given the most weight, in direct contradiction of its previously stated perspective that, "*Such a reservation of power in the people must be liberally construed in favor of the right of the people to exercise it*".

My own observation is that the focus on higher education in our society, which is admirable in its own right, has nonetheless resulted in the creation of a very standard form of oligarchy. I call it TEC: Tyranny of Expert Credentials.

The people we have anointed as our superiors would never be so crass as to claim some exalted status, and probably prefer the mantle of "public servant" to help establish their humble intent. Regardless, it is inconceivable that the "general public" should be involved in an issue with any potential "technical" element – the poor dears just aren't properly equipped.

So, you shouldn't be determining anything to do with the future of your community except in the controlled environment of governmental boards or commissions – controlled by professional staffs and consultants who are "experts" on the subject of community planning. Also, the expertise required to tackle any form of transportation issue is clearly off-limits to mere users of the transportation.

And, finally, certainly no citizen should hereafter attempt to start a petition drive without first hiring an attorney.

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