

<p>COURT OF APPEALS, STATE OF COLORADO          Court Address: Colorado State Judicial Building, 2 East          14th Avenue, Suite 300, Denver, Colorado 80203</p>	
<p>Appeal from the District Court, Pitkin County, Colorado          Honorable Gail H. Nichols          Case No. 07CV175</p>	
<p><b>Petitioners-Appellants:</b> CURTIS VAGNEUR and          JEFFREY EVANS, Initiative Petition Proponents</p> <p><b>Respondents-Appellees:</b> CITY OF ASPEN;          KATHRYN KOCH, in her official capacity as City Clerk          for the City of Aspen; KAREN GOLDMAN, in her          official capacity as Administrative Hearing Officer          Pursuant to C.R.S. § 31-11-110(3); and LES HOLST,          CLIFFORD WEISS, and TERRY PAULSON, Protestors</p>	
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<p><b>APPELLANTS' OPENING BRIEF</b></p>	

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## **I. STATEMENT OF THE ISSUE PRESENTED FOR REVIEW**

Did the district court and hearing officer err in concluding that the Appellants' proposed initiatives consisted of "administrative" matters – as distinguished from "legislative" authorizations – such that they could not be submitted to a vote of the people under the constitutionally reserved power of the initiative?

## **II. STATEMENT OF THE CASE**

### **A. Nature of the Case, Course of Proceedings Below, and Disposition in the District Court.**

This case involves an effort by the Appellants, Curtis Vagneur and Jeffrey Evans (hereinafter "Petitioners"), to submit two alternative initiatives to the voters of the City of Aspen for their consideration under the local power of the initiative reserved to the people under Colo. Const. art. V, § 1(9).

The procedures for the exercise of the initiative and referendum powers by municipal electors are set forth in Title 31, Chapter 11, C.R.S. (2008). Upon approval of their petition forms by the City Clerk pursuant to § 31-11-106(1), C.R.S. (2008) – *Letter from City Clerk, CD pages 466-67* – Petitioners circulated their initiative petitions and obtained the requisite number of signatures (15% of the City's registered electors as required by Section 5.3(a) of the Aspen City Charter) for a timely filing with the City Clerk and submission to the City Council

and the electorate pursuant to § 31-11-104, C.R.S. (2008), on August 31, 2007. *Letter from City Clerk, CD page 468.*

On October 10, 2007, the Appellee Protestors (Holst, Weiss, and Paulson) filed protests with the City Clerk, contesting the "sufficiency" of both initiative petitions under the procedure set forth in § 31-11-110(1), C.R.S (2008). *Letters from Klein, Cote & Edwards, LLC, CD pages 474-556, pages 557-638.* Pursuant to § 31-11-110(3), C.R.S. (2008), a hearing on the protests was held on October 22, 2007 before a hearing officer (Appellee Goldman) designated by the City Council. *Memorandum, CD page 469; transcript, CD pages 653-776.* The hearing officer issued her decision on October 29, 2007, determining that both initiative petitions "contain administrative subject matter that is not subject to the rights of initiative" and were therefore "not sufficient." *Decision of Hearing Officer, CD pages 777-843.*

Petitioners filed a petition for review of the hearing officer's decision with the district court pursuant to § 31-11-110(3), C.R.S. (2008), on November 21, 2007. *Petition for Review, CD pages 1-215.* Responses were filed by the City of Aspen, the City Clerk, and the Hearing Officer (the "Municipal Defendants") on December 19, 2007 – *Municipal Defendants' Answer, CD pages 218-21* – and by the Protestors on January 7, 2008 – *Answer of Defendants Les Holst, Clifford*

*Weiss and Terry Paulson, CD pages 234-36.* The record of the administrative proceedings before the hearing officer was certified to the district court – *Certified Record of Proceedings, CD pages 434-843* – and the matter was fully briefed by the parties. *Petitioners' Memorandum of Law, CD pages 245-89; Protestors' Brief in Opposition, CD pages 303-33; Municipal Defendants' Brief in Opposition, CD pages 338-47; Petitioners' Reply, CD pages 348-57.* The district court entered its Order on October 29, 2008, affirming the determination by the hearing officer that the initiative petitions contained "administrative subject matter that is not lawfully subject to the rights of initiative, and cannot be appropriately severed out" and concluding that the initiatives therefore should not be placed on the ballot. *Order on Plaintiffs' Petition for Review, CD pages 366-88.* This appeal is taken from that Order.

**B. Statement of the Facts.**

This case is about the efforts of Petitioners to offer the voters of the City of Aspen two alternative proposals by which they can authorize and approve a conveyance and change in use of certain designated City-owned real property to facilitate a reconfigured State Highway 82 transportation corridor into Aspen. The proposals are embodied in two citizen initiatives, referred to as "Direct Connection" and "Modified Direct Connection." *Petition for Review, Exhibits 1*

and 2, CD pages 8-20 ("*Direct Connection*") and 21-33 ("*Modified Direct Connection*").

Petitioners' proposals come in the context of over 30 years of public debate concerning potential solutions to the increasing traffic problems along State Highway 82, particularly as that highway enters the city through two ninety-degree curves from the west. *Municipal Def. Brief (Dist. Ct.), CD 339*. A reconfiguration and relocation of the present two-lane highway entrance would require the use of City-owned property initially acquired by the City for open space purposes. Under Section 13.4 of the Aspen City Charter, this subjects any such proposal to the following restriction:

Council shall not sell, exchange or dispose of public building, utilities or real property in use for public purposes, including real property acquired for open space purposes, without first obtaining the approval of a majority of the electors voting thereon. Additionally, the city council shall not cause or permit the change in use of the real property acquired for open space purposes, other than for recreational, agricultural or under-ground easement purposes, without first obtaining the approval of a majority of the electors voting thereon.

In 1996, the Aspen City Council submitted its own Highway 82 proposal to the Aspen voters. The Council's proposal requested that it "be authorized" by the voters to use or convey rights of way across specified City-owned open space land to the Colorado Department of Transportation ("CDOT") for development of a two-lane parkway and corridor for a light rail transit system. The Council's

proposal was set out in *Resolution No. 51 (Series of 1996), CD pages 818-19*, providing in some detail for a cut and cover tunnel of no less than 400 feet, return to open space use of property presently occupied by Highway 82, replacement of open space land, sensitivity to the location of the historic Holden Smelting and Milling Complex and Museum, sensitivity to minimal use of open space, environment, and community character, and the inclusion of plantings, berms, and depressions. The entire proposal was explicitly made contingent upon a further public vote to approve both "financing mechanisms and final design details."

The City Council's request for authorization was approved by the voters at the November 1996 election. Pursuant to this authorization, the City Council entered into a Memorandum of Understanding with CDOT and the Federal Highway Administration ("FHA") in July 1998 – *Resolution No. 61 (Series of 1998), CD pages 614-626*. This was followed by issuance of a Record of Decision by CDOT and the FHA in August 1998 recommending "an LRT [light rail transit] system that, if local support and/or funding are not available, will be developed initially as exclusive bus lanes" in conjunction with two general traffic lanes. *Municipal Def. Brief (Dist. Ct.), CD 342-43*. In 2002, further pursuant to the 1996 authorization by the voters, the City Council conveyed a right of way over the City-owned open space property to CDOT in exchange for replacement open space

property (as required by Charter § 13.4). *Resolution No. 34 (Series of 2002) and Right of Way Easement, CD pages 581-85; Municipal Def. Brief (Dist. Ct.), CD pages 343-44.*<sup>1</sup> Each of these actions was consistent with and within the authority granted to the City Council by the voters under the 1996 ballot measure. *Municipal Def. Brief (Dist. Ct.), CD page 344.*

Since the 1996 voter authorization, and notwithstanding the recommendations and right of way conveyance to CDOT discussed above, there has been no public approval of financing mechanisms or interim or final design details for the most sensitive portion of the conveyed open space (represented in the illustrations incorporated into the present petitions). Without additional electoral approvals, or a new voter-approved use authorization, CDOT effectively holds rights of way to property it cannot use to expand transportation capacity and the Highway 82 congestion continues. This is the situation which has given rise to Petitioners' proposals. *Petitioners' Mem. of Law (Dist. Ct.), CD page 247.*

Petitioners seek to submit two alternative proposals to the Aspen voters to supplant the 1996 and 2007 authorizations with a new and different grant of

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<sup>1</sup> Resolution No. 34 (Series of 2002) has itself been replaced by Resolution No. 25 (Series of 2008), approving the grant of an amended and restated right of way easement incorporating two exclusive bus lanes pursuant to authorization under City Council Resolution No. 18 (Series of 2007) submitted by Council to the voters and approved in May 2007. The area affected by this amendment does not extend into the open space property represented in the petition illustrations.

authority. The first proposal – *Exhibit 1 to Petition for Review, CD pages 8-20* – denominated "Direct Connection," provides in its operative language that "The City of Aspen hereby authorizes and approves" conveyance of an interest in the subject City-owned property ("described in Exhibit 1 of Resolution No. 34") to CDOT for construction of a four-lane (two general and two HOV) highway configuration with a bordering transit envelope. The second – *Exhibit 2 to Petition for Review, CD pages 21-33* – denominated "Modified Direct Connection," provides that "The City of Aspen hereby authorizes and approves" the same conveyance for construction of a similar configuration with a cut and cover tunnel. Copies of the text of both measures are attached hereto as **Exhibits 1 and 2**.

Both measures contain nine paragraphs (in "Section 1") setting forth general criteria and conditions applicable to the authorizations being provided. These nine paragraphs are the crux of this case. In most respects similar, and in several instances identical, to the 1996 authorization submitted to the voters by the City Council, these paragraphs condition the authorized right of way conveyance upon (1) issuance of a revised Record of Decision if required by federal regulation, (2) the absence of a funding obligation in connection therewith, (3) compliance with the provisions of pertinent Environmental Impact Statements, (4) discretion with CDOT to design intersection and lane transitions, (5) consistency with contiguous

Highway 82 HOV lane access limitations, (6) provision of a transit envelope for the future accommodation of light rail, (7) compliance with various environmental and historic resource mitigation measures, (8) provision for necessary boundary adjustments of the conveyed property without further compensation, and (9) a requirement that land impacted by preliminary engineering and design work be re-vegetated and landscaped if the project does not go forward. *Exhibits 1 and 2 to Petition for Review, CD pages 11-12, 24-25.* It is critical to note that these paragraphs do *not* purport to *execute* or *direct the performance* of any of these conditions.

As discussed in Part A, above, Petitioners submitted petition forms and printers proofs for their proposed initiatives to the City Clerk for approval pursuant to § 31-11-106(1), C.R.S. (2008), in April 2007. This statute provides that the City Clerk may reject a petition if it contains "extraneous material" or "does not propose municipal legislation" within the purview of Colo. Const. art. V, § 1(9). The latter point defines the central issue in this case.

The City Clerk responded to Petitioner Evans by letter of May 4, 2007. *Letter from City Clerk, CD pages 463-64.* The City Clerk's letter requested a few minor technical revisions and noted that the two petitions were "quite similar" to petitions that her office had rejected the year before, but that "the two new petitions

have been changed to eliminate matters that were clearly administrative [*i.e.*, not "municipal legislation" within the scope of Colo. Const. art. V, § 1(9)] in nature." The City Clerk went on to note that both petitions "continue, however, to contain matters that may be problematic if not clarified." Particular reference was made to the possibility that the measures could be read not only to supplant the 1996 voter authorization, but actually to rescind or mandate rescission of the 2002 City Council resolution providing for the conveyance of a right of way to CDOT – the latter being an "administrative" action not within the purview of the initiative power to "legislate." The City Clerk concluded that "you may wish to consider amending your petitions to clarify that the ballot questions merely seek voter approval to *authorize* the City<sup>2</sup> to convey the requested rights of way" as opposed to "requiring" a new conveyance or "rescinding" the 2002 conveyance (emphasis added). As stated by the City Clerk, "It is not entirely clear to me whether the current language of the proposed ordinances do either of these things."

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<sup>2</sup> Petitioners note that city officials (and subsequently the hearing officer and district court) have consistently read the petitions to mean that the administrative arm of the City of Aspen is being required to perform some action, especially to convey property. This is not the case. The "City of Aspen" of the petition language is necessarily the electorate of Aspen because the city administration cannot independently adopt the following provisions under Section 13.4 of the City Charter. This "City of Aspen" is making their authorization and approval available to both the city administration, as the facilitators of policy, and the "State of Colorado, Department of Transportation" as holder of the right of way.

Mr. Evans responded the same day to the City Clerk's letter, resubmitting the petitions with the technical revisions requested. *Letter from Evans, CD page 465.* In response to the concern about the CDOT right of way, however, Evans explained that "the petitions would only rescind *prior enactments or authorizations* – [emphasis added] – inconsistent with the newly approved change of use of the conveyed property, not [the 2002 Council resolution providing for the right of way conveyance itself]," though noting that "this may render some portions of that resolution to be moot or inapplicable ...." The City Clerk responded by letter of May 10, 2007, thanking Evans for making the technical revisions, though reiterating her suggestion that Petitioners "may wish to consider" amending the petitions to further clarify the intended effect on the 2002 Council right of way conveyance resolution. Importantly, the City Clerk did not exercise her power under § 31-11-106(1), C.R.S. (2008), to reject the petitions. *Letter from City Clerk, CD pages 466-67.*

Petitioners proceeded to print and circulate their initiative petitions and obtained the required number of signatures (15% of the City's registered electors as required by Section 5.3(a) of the Aspen City Charter) for a timely filing with the City Clerk – within 180 days of her approval of the forms per § 31-11-104(1), C.R.S. (2008) – on August 31, 2007. *Letter from City Clerk, CD page 468.* The

City Clerk issued her statement of sufficiency of the number of signatures for both petitions by letter of September 27, 2007. *Id.*

Pursuant to § 31-11-110, C.R.S. (2008), any registered elector residing in the municipality may file a "protest in writing under oath" with the City Clerk upon grounds which "may include, but shall not be limited to, the failure of any portion of a petition or circulator affidavit to meet the requirements of this article." The protest must be filed within 40 days after the petition is filed with the City Clerk. On October 10, 2007 (the 40th day), the Appellee Protestors (Holst, Weiss, and Paulson) filed protests with the City Clerk. *Letters from Klein, Cote & Edwards, LLC, CD pages 474-556, pages 557-638.* While several issues were raised in the protests, the adjudication that followed primarily concerned the question of whether the initiatives (a) contained "administrative" as opposed to "legislative" provisions and, if so, (b) whether the "administrative" provisions could be severed

to permit the "legislative" matter to go forward to the ballot. This appeal concerns only those issues.<sup>3</sup>

Pursuant to § 31-11-110(3), C.R.S. (2008), a hearing on the protests was held on October 22, 2007 before a hearing officer designated by the City Council (Appellee Goldman). *Memorandum, CD page 469; transcript, CD pages 653-776.* The hearing officer issued her decision on October 29, 2007, determining that both initiative petitions "contain administrative subject matter that is not subject to the rights of initiative" and were therefore "not sufficient." *Decision of Hearing Officer, CD pages 777-843.* Focusing on the level of detail contained in the proposals, the hearing officer concluded that Petitioners had "encroached upon the administrative processes reserved to the administrative staff of the City of Aspen as authorized by the City Council." *Id., CD page 785.* Noting Petitioners' testimony that they believed the detail was necessary to an understanding of their proposals and, since "it was a specific proposal with specific conditions," the

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<sup>3</sup> The Protestors also argued that the petitions improperly contained more than a single subject and that the ballot title was misleading. The hearing officer ruled against the Protestors on both issues – *Decision of Hearing Officer, CD page 786* – and no appeal was taken. Petitioners raised the issue that the protests were deficient for not having been filed "under oath" in a timely manner as required by § 31-11-110(1), C.R.S. (2008). Both the hearing officer – *Id., CD pages 781-82* – and the district court – *Order on Plaintiffs' Petition for Review, CD pages 376-80* – rejected that argument, and Petitioners do not pursue it on this appeal.

hearing officer concluded it would not be appropriate to sever "impermissible" portions. *Id.*, *CD pages 785-86*.

As permitted by § 31-11-110(3), C.R.S. (2008), Petitioners sought review of the hearing officer's determination by the district court. *Petition for Review, CD pages 1-215*. Reviewing the matter on the record, the district court entered its Order on October 29, 2008, affirming the determination of the hearing officer. *Order on Plaintiffs' Petition for Review, CD pages 366-88*. Giving "deference to the hearing officer" – *Id.*, *CD page 381, ¶125* – and adopting her findings and conclusions – *Id.*, *CD page 382, ¶126* – the district court ruled that the initiative petitions contained "administrative subject matter that is not lawfully subject to the rights of initiative, and cannot be appropriately severed out, and, therefore, the initiative petitions are insufficient and should not be placed on the ballot." *Id.*, *CD page 389*.

This appeal is taken from that ruling.

### **III. SUMMARY OF THE ARGUMENT**

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

## IV. ARGUMENT

### A. Standard of Review.

The issues in this appeal involve the application of a legal standard to facts about which there is little underlying dispute. While the district court's factual findings would be subject to review for abuse of discretion, the application of law to those findings is reviewed *de novo*. Carmichael v. People, 2009 Colo. LEXIS 325 (April 13, 2009), at \*21.<sup>4</sup> This is particularly true where a constitutional right – in this case the local right of initiative reserved to the people by Colo. Const. art. V, § 1(9) – is at stake. People v. Castaneda, 187 P.3d 107, 109 (Colo. 2008).

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

Article V, Section 1(9), of the Colorado Constitution reserves "to the registered electors of every city, town, and municipality" the power of the initiative and referendum "as to all local, special, and municipal legislation of every character in or for their respective municipalities." "Like the right to vote, the power of initiative is a fundamental right at the very core of our republican form of

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<sup>4</sup> This is consistent with the *de novo* standard of review applied by the district court in its review of the hearing officer's decision in this case. *Order on Plaintiffs' Petition for Review*, CD page 376, ¶81.

government." McKee v. City of Louisville, 616 P.2d 969, 972 (Colo. 1980). As such, "[t]his court has always liberally construed this fundamental right, and, concomitantly, we have reviewed with the closest scrutiny any governmental action that has the effect of curtailing its free exercise." Id.

The constitutional reservation of the local initiative power is, however, explicitly limited to "local, special, and municipal legislation" and applies "only to acts which are *legislative* in character." City of Aurora v. Zwerdinger, 571 P.2d 1074, 1076 (Colo. 1977) (emphasis added). This is comparable to the reservation of the initiative power at the state level, which is explicitly a reservation from the "legislative power of the State" otherwise vested in the General Assembly. Colo. Const. art. V, § 1(1). If an act falls within the context of an "administrative" function appropriately delegated to city officials (either elected or appointed), that act is not subject to the initiative process.

The issue in this case is whether Petitioners' initiatives propose municipal "legislation" or whether they ask the voters to perform an "administrative" act. Petitioners submit that their proposals are wholly "legislative" in nature. The Protestors (now – though not altogether initially – supported by the City) submit that the initiatives propose primarily "administrative" acts. The Protestors, with the concurrence of the hearing officer and district court, further argue that the

"administrative" elements of the measures are so inextricably linked to any truly "legislative" components that the former cannot practically be severed to permit the latter to proceed to the ballot – a remedy otherwise mandated by this Court (see below at pp. 33-35).

The "legislative" vs. "administrative" issue at the heart of this case was initially addressed in an exchange between the City Clerk and Petitioner Evans in May 2007. This exchange arose in the context of the mandatory submission of the initiative petition forms to the City Clerk for her review pursuant to § 31-11-106(1), C.R.S. (2008). Under this statute, the City Clerk "may reject a petition or section of a petition on the grounds that the petition or a section of the petition does not propose municipal legislation."

As discussed at pp. 8-10, above, the Aspen City Clerk, upon review of the petitions, stated in a letter to Evans that she was "not going to reject your petitions for containing matters that are administrative in nature." *Letter from City Clerk, CD page 463*. Noting that the petitions were "quite similar" to petitions that her office had in fact rejected the year before, she nevertheless stated that "the two new petitions have been changed to eliminate matters that were clearly administrative in nature." *Id.*

The City Clerk went on, however, to advise Evans that the City Attorney had raised "some concerns" that the petitions "seem to seek voter approval to rescind Resolution No. 34, Series of 2002" by which the City Council had "authorized the City Manager to execute a Right of Way Agreement with CDOT" under the 1996 voter approved change of use authorization. *Id.* See discussion at pp. 5-6, above. The City Clerk noted that this would "create a very practical difficulty" in that CDOT would not be legally required to rescind the agreement. *Id.*, *CD pages 463-64*. The City Clerk also noted that Resolution No. 34 itself had been held to be an "administrative action" performed by the City Council. *Id.*, *CD page 464*. As discussed at p. 10, above, Evans responded to the City Clerk the same day. *Letter from Evans, CD page 465*. Consistent with the language of the initiatives themselves ("The City of Aspen authorizes and approves"), Evans assured the City Clerk that the petitions "would only rescind prior *enactments* or *authorizations* inconsistent with the newly approved change of use of the conveyed property, *not* Resolution No. 34 ...." *Id.* (*emphasis added*).<sup>5</sup> Evans concluded his letter by

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<sup>5</sup> Evans noted that passage of a new change-of-use authorization may have the secondary effect of rendering "some portions of that resolution to be moot or inapplicable," though acknowledging that CDOT would be under no obligation to act upon the new approved use. *Letter from Evans, CD page 465*. In effect, passage of the initiatives would operate only to (1) authorize City officials to perform administrative acts consistent with the new authorization and (2) satisfy Charter § 13.4's requirement of voter approval of a change in use for the subject

advising the City Clerk that "based on our understanding of your acceptance of the petitions," petitioners were prepared to begin printing copies and circulating the petitions. *Id.* As discussed at p. 10, above, the City Clerk responded merely by accepting the technical changes made by Evans at her request and reiterating, literally word for word, the "concerns" raised in her initial letter. *Letter from City Clerk, CD pages 466-67.*

The issue did not arise again until after the initiative petitions had been circulated and declared by the City Clerk to have the required number of signatures to proceed to the ballot. *Letter from City Clerk ("statement of sufficiency"), CD page 468.* On October 10, 2007 – the last day (indeed within the last ten minutes) allowed by statute – the Protestors filed their protests challenging the initiative petitions primarily upon these grounds. *Letters from Klein, Cote & Edwards, LLC, CD pages 474-556, pages 557-638.* It is through the adjudication of these protests that the matter comes to this Court.

The "legislative"/"administrative" dichotomy in the context of ballot initiatives is not new to the courts of this state, and the Supreme Court has provided specific guidance for addressing the issue through three "tests." "First, actions that relate to subjects of a permanent or general character are legislative, property to permit CDOT to proceed under its own authority consistent with local endorsement of that change of use.

while those that are temporary in operation and effect are not." Witcher v. Canon City, 716 P.2d 445, 449 (Colo. 1986), citing Zwerdlinger, *supra*, 571 P.2d at 1077. "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, while acts constituting a declaration of public policy are deemed to be legislative.'" Witcher, *supra*, 716 P.2d at 449-50, quoting Zwerdlinger, *supra*, 571 P.2d at 1077. "Third, if an original act was legislative, then an amendment to the original act must also be legislative." Witcher, *supra*, 716 P.2d at 450, citing Margolis v. District Court, 638 P.2d 297, 304 (Colo. 1981).

Examining these "tests" in application is instructive. In Witcher, the Supreme Court examined a proposed citizen referendum<sup>6</sup> to repeal an eighth amendment to a lease by which Canon City contracted for the operation of a suspension bridge across the Royal Gorge. While public votes had been taken in

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<sup>6</sup> At issue in the present case is a citizen initiative, whereby, at the local level, adoption of an ordinance is proposed initially by submission of a petition with sufficient signatures to the city council for immediate adoption, failing which it must be placed on the ballot for a vote of the city's electors. § 31-11-104, C.R.S. (2008). Several of the cases discussed in this Brief involve a citizen referendum, whereby an ordinance adopted by the city council may be protested through submission to the council of a petition with sufficient signatures, upon which the council must either repeal the ordinance in question or place the matter on the ballot for a vote of the people. § 31-11-105, C.R.S. (2008). The "legislative"/ "administrative" distinction at issue here is equally applicable to initiatives and referenda, with only "legislative" matters being subject to either reserved power.

1949 and 1967 on the question of whether the City should purchase the bridge or continue to provide for its operation by a private company on land leased from the City, neither the lease itself nor any of the seven prior lease amendments had been submitted to the people for a vote. Id. at 447. The eighth amendment provided for a further extension of the lease term, a reduction in the percentage of toll collections to be paid to the City, and consent by the City to imposition by the operator/lessee of a new fee on concessions and retail sales. Id. at 447-48. The court found the proposed referendum to repeal the eighth amendment to be "administrative" in nature, noting (1) the temporary nature of the lease term extension and accompanying toll allocation adjustment and fee approvals, (2) the fact that the leases and amendments were actions taken by the City to carry out the legislative policies established by the two public votes to lease the land to the bridge owner/operator rather than purchase and directly operate the bridge, and (3) since the original lease and all eight amendments were "administrative" in nature a repeal of the eighth amendment would be "administrative" as well. Id. at 450-51.

In Zwerdlinger, the court addressed a referendum petition to repeal an ordinance raising the rates and charges for water supplied by the City of Aurora. Id. at 1075. The court noted that while the decision to establish a city-owned water system "may have been in pursuance of a broad public policy and, therefore, a

legislative matter, the receipts and expenses incidental to its maintenance and management are executive or administrative matters" – Id. at 1077 – and thus ordinances adopting utility rates "are administrative in character." Id.

In Margolis, the Court considered three consolidated cases – involving the Cities of Greenwood Village, Lakewood, and Arvada – posing the question of "whether zoning and rezoning by municipal governing bodies are legislative acts subject to challenge by popular referendum." Id. at 298. Citing Zwerdlinger, the court began by noting 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." Margolis, 638 P.2d at 303. Hence, "[i]t seems entirely inconsistent to hold that an original act of general zoning is legislative, whereas an amendment to that act is not legislative." Id. at 304. Despite dire predictions of "chaos, significant delays in development, and ultimately ... unplanned growth and development" – Id. at 305 – the court concluded that "zoning and rezoning decisions are legislative in character and therefore are subject to the referendum and initiative provisions of the Colorado Constitution." Id. Importantly, the geographic sweep of the rezoning proposals was not dispositive: the Greenwood Village proposal involved 31 annexed parcels involving approximately 90 acres – Id. at 299 – the Lakewood case involved an area of

unspecified size around the Villa Italia Shopping Center – Id. at 300 – and the Arvada proposal involved only 3.34 acres at the corner of 72nd Avenue and Wadsworth Boulevard – Id.

In City of Idaho Springs v. Blackwell, 731 P.2d 1250 (Colo. 1987), an ordinance had been approved by the voters to enact a new sales and use tax and apply the revenues in part to fund the construction of a new city hall. Id. at 1251. Several years later, the city council approved an ordinance to authorize the purchase by the city of real property known as the "Skaff-Sweet property" as the site for the new city hall, and providing that a local historic landmark – the Grass Valley Schoolhouse – would be relocated to that property, along with an historic train, for renovation for use as the new city hall. Id. This was followed by the submission of two citizen initiatives, one purporting to repeal that ordinance (and any other ordinance providing for the relocation of the Grass Valley Schoolhouse and train or acquiring land for that purpose) and one providing prospectively that city funds could not be used for those purposes. Id. at 1251-52. A majority of the court viewed the initiatives as proposing only to "exclude one parcel of real estate (the Skaff-Sweet property) and one type of structure (the Grass Valley Schoolhouse) from the range of choices available to the Council to implement the previously declared policy of securing a city hall." Id. at 1254. Finding that these

concerns "do not relate to policy declarations of general applicability," and that the "choice of location and structure for the new city hall" is simply an "an act 'necessary to carry out' the existing legislative policy to build a new city hall" – Id. at 1254-55, quoting Witcher, 716 P.2d at 449 – the majority concluded that the initiatives "must be classified as administrative matters." Blackwell, 731 P.2d at 1255.

This court addressed two complex and multi-faceted citizen initiatives in City of Colorado Springs v. Bull, 143 P.3d 1127 (Colo. App. 2006). The first, which the court denominated the "revenue initiative," provided for a phase out of property taxes, a termination and retroactive refund of street light charges, an adjustment in general sales tax, and a refund of all excess revenues to taxpayers yearly. Id. at 1134. The court determined only that the street light charge provision – which, in view of the city council's separate repeal of the charges, did nothing more than require "a refund of revenues collected by a utility in prior fiscal years" – "is not a declaration of public policy of general applicability" and was therefore "administrative in nature." Id. at 1135. The second initiative, which the court denominated the "deficit spending initiative," in pertinent part, limited and required voter approval for future multi-year city financial obligations and, additionally, mandated a payoff schedule for all current city certificates of

participation. Id. at 1135-36. Here, the court determined the multi-year financial obligation provision to "create[] a general and permanent policy [*i.e.*, to be "legislative" in nature] which is the proper subject of an initiative." Id. at 1137. The certificate of participation retirement provision, however, like the street lighting fee refund provision, "is an administrative decision not proper for an initiative." Id. Noting similar Supreme Court precedent in a post-election context in Bickel v. City of Boulder, 885 P.2d 215, 237 (Colo. 1994), and guidance from the Alaska Supreme Court in McAlpine v. University of Alaska, 762 P.2d 81, 94-95 (Alaska 1988), the court then severed what it deemed to be "administrative" matters and remanded with a direction to place the remaining portions of the initiatives on the ballot. Bull, 143 P.3d at 1137-39.

Turning to the initiative petitions at issue here, it is respectfully submitted that they are manifestly "legislative" in character. Both initiatives provide that the electorate "authorizes and approves" conveyance of an interest in City-owned real property for purposes of a new allowed use of that property (not unlike Canon City's initial decision to lease rather than operate the Royal Gorge bridge). Petitioners acknowledge that their proposals, if adopted, would conflict with the policy preferred by the Aspen City Council as adopted through the 1996 ballot measure and might only be capable of implementation through new administrative

actions inconsistent with administrative actions taken in furtherance of the policy established by the 1996 ballot measure. [As with the 1996 ballot measure, it is CDOT who would necessarily "construct, operate, and maintain" the newly authorized state highway transportation infrastructure on the subject property – *i.e.*, largely implement the new policy.] And, finally, both initiatives rescind "all enactments or authorizations" – and only *enactments or authorizations* – inconsistent with the new proposed enactment and authorization. All of this is inherent in the nature of a "legislative" proposal.

Applying the Witcher criteria, the first question is whether the proposed actions "relate to subjects of a permanent or general character" or ones that are "temporary in operation and effect." Both initiatives propose a conveyance and permanent change of use for the subject real property – a change from its acquired use as open space and a change from the exclusive, somewhat detailed, alternative use authorized by the voters at the behest of the City Council under the 1996 ballot measure. There is nothing "temporary" about Petitioners' proposals. The proposal is for a long-term ("permanent" in any meaningful sense) change of use for the subject property to accommodate a new transportation infrastructure. It is most akin to a rezoning decision, held to be clearly "legislative" in nature in Margolis, *supra*. And, Petitioners' proposals are "general" in the same manner as a rezoning

decision, though their application is necessarily limited to the property being rezoned.<sup>7</sup>

Unlike the proposals addressed in Blackwell, *supra*, the proposals here do not simply limit options available for implementation of an existing legislative policy (*e.g.*, to build a new city hall). There is no overriding legislation (for example to develop a particular municipal transit configuration) for which use of the property at issue in this case simply represents an implementation option. The only existing legislation is an authorization of a conveyance and use for the specific property at issue in this case.<sup>8</sup> Like a rezoning measure as discussed in Margolis, the proposals at issue here would *authorize a different use of that property*. Adoption of either proposal at issue here would – like a rezoning – be incompatible with the existing (though largely unimplemented) "use" authorization.

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<sup>7</sup> The district court's observation that Petitioners' proposals "will have no impact on any other city or county road or any state highway other than the 5 miles of Highway 82 immediately west of Aspen" and are therefore "not general in nature" – *Order on Plaintiffs' Petition for Review, CD page 382, ¶131* – would as readily implicate the rezoning of any of the properties (particularly the 3.34 acres in Arvada) at issue in Margolis and the initial "legislative" policy decision to lease rather than operate the Royal Gorge bridge in Witcher.

<sup>8</sup> The presumption of a broader public purpose behind the use authorization is no different from the broader public purposes inevitably behind any zoning ordinance, *e.g.*, to increase the tax base, provide more open space, make the community more family-friendly, etc.

The second Witcher criterion is that "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." Petitioners' proposals, however characterized, are certainly *not* necessary or directed to "carry out existing legislative policies or purposes" – quite to the contrary, they are designed to *replace* the existing authorizations embodied in the 1996 ballot measure. Petitioners' proposals would constitute a declaration of a new authorization for the use of the subject property.

Two primary concerns were expressed below in the context of the second Witcher criterion. The hearing officer found the measures – particularly the nine "terms and conditions" discussed at pp. 7-8, above – to be excessively detailed (thus incorporating administrative matters) and read the initiatives as actually performing or ordering the performance of acts that indisputably would be administrative in character. *Decision of Hearing Officer, CD page 785*. The district court went a great deal further by proclaiming that "There is nothing in the petitions that creates a new 'policy,' or changes a policy, of the City of Aspen – they simply set out what property is to be conveyed and what kind of highway, and

highway design, is to be put on that property. This is not policy." *Order on Plaintiffs' Petition for Review, CD page 383, ¶136.*

Respectfully, identifying specific property and delimiting the use to which that property will be put most assuredly *is* policy in the sense of determining whether the matter is or is not "legislative." This is precisely what zoning ordinances do, and the Supreme Court has been clear that "since the original act of zoning is legislative, the amendatory act of rezoning is likewise legislative ...." Margolis, *supra*, 638 P.2d at 304. Further, this applies to rezoning of both large and small tracts: "While decisions on 'small' rezonings may directly affect only a few people, such decisions may more properly be seen as setting the policy for the future." Id. The change-in-use authorizations at issue here, and the conveyance authorized to accomplish that change in use, are little different in effect from a rezoning – though incidentally requiring voter approval under a Charter mandate restricting changes in use of City-owned property initially acquired for use as open space rather than a zoning code establishing use limitations. And, the number of people being affected by the use to which this critically located property is put – as the transportation gateway to their city – is substantial. As important, the district court itself concedes that "because of Section 13.4 [of the City Charter], the voter's [*sic*] approval of a conveyance and change of use of open space *is a legislative*

matter." *Order on Plaintiffs' Petition for Review, CD page 384, ¶147.* To the extent that Petitioners' measures amend that approval, they must necessarily, be legislative as well.<sup>9</sup>

With regard to the hearing officer's first concern, it should be noted that detail in itself is not the enemy of legislation. Much legislation is detailed. One need only look to the Internal Revenue Code or the Uniform Commercial Code as examples. Closer to home, the detailed building and use restrictions found in most zoning ordinances – *e.g.*, Title 26, Part 700 of the Aspen Municipal Code – belie any aversion to detail.

Furthermore, much of the material described as "detail" in Petitioners' proposed initiatives is actually a general delimitation of the context of the change

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<sup>9</sup> There is much discussion in the decisions of both the hearing officer – *Decision of Hearing Officer, CD page 784* – and the district court – *Order on Plaintiffs' Petition for Review, CD page 385, ¶150-56* – to the effect that Charter § 13.4's mandate that changes in use of City-owned property initially acquired for open space purposes must be referred to a vote of the people does not make everything in the 1996 measure "legislative" in nature, *i.e.*, the City Council can refer whatever it wants, but private citizens are limited to initiating "legislative" measures. While Petitioners agree that the City Council can refer whatever it wants, it is not clear how this point is applicable to the 1996 ballot measure. Petitioners do not argue that the provisions of the 1996 measure are legislative because they were placed on a ballot or, as discussed by the hearing officer, that "the fact that they were included in a ballot question regarding a change in open space use ... automatically or necessarily make these conditions legislative." Petitioners do submit, however, that a legislative authorization that is "contingent upon" stated criteria (especially in the context of a public vote) incorporates those contingencies as part of the legislative authorization.

in use being proposed – *i.e.*, compliance with federal regulations and existing Environmental Impact Statements, general environmental and historic resource mitigation and restoration measures, a general provision for incorporation of an envelope for the future accommodation of light rail, conferral of roadway design discretion upon CDOT, a limit on funding obligations, and provision for necessary boundary adjustments without further compensation. These all reflect basic policy components of the change in use Petitioners seek to authorize.

Those stipulations which come closest to being actual "details" – such things as HOV access limitations – tell the voters the essentials of what they have an opportunity to authorize, weighed against the extent of the sacrifice they are being asked to make. It would make as much sense for petition proponents to omit the "detail" and simply propose that the property be conveyed and used as a corridor for a four-lane highway (with two HOV lanes) as to zone a parcel "single family residential" and say no more.

The hearing officer's second concern echoes the exchange between the City Clerk and Mr. Evans regarding the petition forms in May 2007. See discussion at pp. 8-10 and 16-18, above. On this point, it is critical to note that Petitioners' initiatives would perform one act and one act only – they state in their operative opening paragraph (after the "Whereas" recitals) that "The City of Aspen hereby

*authorizes and approves*" the conveyance of the subject property or an interest therein to CDOT "for the purposes set forth hereinafter and for no other purpose, and hereby *rescinds all enactments or authorizations* inconsistent herewith" (emphasis added). By their express terms, all these initiatives purport to do is *authorize* and *approve* a conveyance of an interest in real property to effect a change in use – the basic "legislative" act (like a rezoning or the decision to lease rather than operate the Royal Gorge bridge) from which all else must follow – and rescind prior inconsistent *enactments* or *authorizations* – *i.e.*, only prior "legislative" acts. All of Section 1 of each measure (including the anticipated conferral on or assumption of authority by CDOT) is simply a description of that which is being authorized by the City through the operative opening paragraph.

Particularly, neither of these proposals implement, order, or direct the performance of anything that they authorize. They do not revoke the 1998 Memorandum of Understanding between the Aspen City Council, CDOT, and the FHA. They do not repeal or amend Resolution No. 61 (Series of 1998) related thereto. They do not repeal or amend or negate in any way the Record of Decision issued by CDOT and the FHA in August 1998. They do not convey a new right of way easement to CDOT. They do not direct the conveyance of a new right of way easement to CDOT. They do not repeal or amend Resolution No. 34 (Series of

2002). They do not direct the City Council or the City Manager to do anything. Neither of these proposals do anything at all except authorize and approve a conveyance and new use and rescind prior inconsistent authorizations. These measures are purely "legislative" in character.

This is not to say that the new authorizations would have no further effect. New legislation by its nature may moot administrative actions taken in furtherance and under the authority of prior legislation. And, it may necessitate new administrative actions be taken if the authorizations are to be implemented. That does not, however, convert the authorizing legislation itself into an ensuing administrative act of implementation. Should the Colorado General Assembly, for example, authorize the purchase of a tract of land and the funding and construction of a new prison at that location meeting various capacity and security specifications, that may precipitate – but does not constitute – the myriad administrative actions by the executive branch that would be necessary to implement that authorization. If Canon City authorizes leasing and contracting for the operation of the Royal Gorge bridge rather than operating the bridge itself, the ensuing administrative process of entering into and periodically amending the lease does not render the original decision anything but legislative. And, while concerns that a new, and perhaps exclusive, legislative authorization may wreak havoc with

prior administrative actions and relationships are certainly relevant to consideration of the wisdom of adopting the new legislation, that is a decision entrusted to the legislators – and, in the context of an initiative, that means the voters.

The final Witcher criterion is simply that "if an original act was legislative, then an amendment to the original act must also be legislative." Thus, to the extent that the authorizations in the 1996 ballot measure were legislative (as accurately held by the district court), Petitioners' current proposals – which provide different and conflicting authorizations – are also legislative. To the extent that the 1996 ballot measure arguably contained any administrative components (which these Petitioners respectfully suggest it did not), only the legislative components are affected by the measures at issue here. The current measures only rescind "enactments and authorizations" – *i.e.*, legislative acts – inconsistent therewith.

In sum, the current proposals are "legislative" in character. Whether or not they are a good idea is a decision that rests with the voters under the constitutionally reserved power of the initiative.

Finally, both the hearing officer and the district court acknowledged their power – and obligation – as established by this Court to sever any "impermissible portion of an initiative" and permit the remainder to go forward if the following conditions are met: "(1) standing alone, the remainder of the proposed bill can be

given legal effect; (2) deleting the impermissible portion would not substantially change the spirit of the measure; and (3) it is evident from the content of the measure and the circumstances surrounding its proposal that the sponsors and subscribers would prefer the measure to stand as altered, rather than to be invalidated in its entirety." Bull, *supra*, 143 P.3d. at 1138. This Court noted the reasoning in McAlpine, *supra*, 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." Id., citing McAlpine, 762 P.2d at 94-95. The hearing officer stated she was "reluctant to sever impermissible portions" in view of Petitioners expressed belief that "the conditions listed were necessary to understand the proposal they were promoting ...." *Decision of Hearing Officer, CD page 785-86*. The district court agreed that deleting what it perceived to be the impermissible portions (which it viewed as a "mandatory conveyance of property" and every stipulation other than "to limit the use of City open space for a four-lane highway, with two of the four lanes dedicated to buses and HOV") "would very substantially change the petitions" and concluded (albeit a bit illogically) that "[t]here is no way the Court can alter the petition to make it

compliant with Section 13.4, and thus legislative, without rewriting it." *Order on Plaintiffs' Petition for Review, CD page 388, ¶¶183, 184.*

Both the hearing officer and the district court were correct in noting that Petitioners (a) do not believe that any portions of their proposed initiatives are "impermissible," (b) believe that each portion is necessary to give the voters a clear understanding of what it is they are being asked to vote on, and (c) are not prepared, based upon the analyses of the hearing officer or the district court, to offer up any portions of their proposals for excision. Having said that, both measures contain a severability clause in Section 3, and Petitioners – who are indeed "grassroots activists" in the truest sense – are not adverse to considering the severance of an errant "impermissible" phrase or component if one is identified by this Court under a proper application of the law. As that application is being requested of this Court, Petitioners would simply request this Court to incorporate that guidance, if appropriate, into its analysis.

## **V. CONCLUSION**

Petitioners respectfully request this Court to reverse the decision of the district court and to remand with directions that the district court forthwith enter an order requiring the City of Aspen and the City Clerk for the City of Aspen to forward their proposed ordinances to the registered electors of the City of Aspen at

a regular or special election to be held in accordance with the requirements of § 31-11-104(1), C.R.S. (2008).

Respectfully submitted this 11th day of May, 2009.

ISAACSON ROSENBAUM P.C.

By: \_\_\_\_\_  
Edward T. Ramey

ATTORNEYS FOR PETITIONERS-  
APPELLANTS

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on this 11th day of May, 2009, a true and correct copy of the foregoing **APPELLANTS' OPENING BRIEF** was served by U.S. mail, postage prepaid, to the following addressees:

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