

SUPREME COURT, STATE OF COLORADO
2 East 14th Avenue, 4th Floor
Denver, Colorado 80203

Colorado Court of Appeals Case No. 08CA2552
Opinion by Judge Miller; Judges Roy and Furman
concur

District Court, Pitkin County, Colorado
Case No. 07 CV 175; Honorable Gail H. Nichols

Petitioners:

CURTIS VAGNEUR and JEFFREY EVANS

Respondents: CITY OF ASPEN; KATHRYN
KOCH, in her official capacity as City Clerk of the
City of Aspen; KAREN GOLDMAN, in her official
capacity as Administrative Hearing Officer
Pursuant to Section 31-11-110(3), C.R.S. (2009);
LES HOLST; CLIFFORD WEISS, and TERRY
PAULSON

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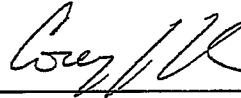
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Case Number: 09SC1022

**RESPONDENTS LES HOLST, CLIFFORD WEISS AND
TERRY PAULSON'S ANSWER BRIEF**

Certification

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. I certify that the brief complies with C.A.R. 28(g). It contains 6,546 words. Further, the undersigned certifies that the brief complies with C.A.R. 28(k). It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation of authority; and (2) a citation to the precise location in the record, not to an entire document, where the issue was raised and ruled on.



Corey T. Zurbuch

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Pursuant to Colorado Appellate Rules 28, 31 and 32, Respondents, Les Holst, Clifford Weiss and Terry Paulson, by and through their counsel of record, Klein, Coté and Edwards, LLC, hereby submit their Answer Brief.

I. STATEMENT OF ISSUE PRESENTED FOR REVIEW.

Per this Court's Order dated, June 1, 2010, the issue certified for review is:
"Whether the court of appeals erred in holding that the petitioners' Proposed Initiatives are administrative and thus outside the scope of the initiative power under article V, sections 1 and 9 of the Colorado Constitution.

II. STATEMENT OF THE CASE.

On October 22, 2007 hearing officer, Karen Goldman, held an administrative hearing in the City of Aspen, Colorado and considered the protests filed by the Respondents to two proposed ballot initiatives originally put forth by Petitioners Jeffrey Evans and Curtis Vagneur. *Hearing Transcript*, CD pages 653-776. The Proposed Initiatives sought to present to the electorate of Aspen two different plans for constructing a new four lane highway entrance to Aspen. *Proposed Initiatives*, CD pages 9-14, 22-27.

In support of their protests, the Respondents argued that the Proposed

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Initiatives mandated specific design and operational characteristics of a new highway entrance to Aspen and sought to change and in certain instances, revoke previously executed and performed contracts and land conveyances between Aspen, the Colorado Department of Transportation (“CDOT”) and the Federal Highway Administration (“FHA”), which were all based upon a previously approved design for the entrance consisting of two lanes for vehicular traffic and a mass transit corridor for light rail. *Protest Letters*, CD pages 40-62, 120-144. The Proposed Initiatives sought, among other things, to change the approved design to a four lane highway entrance with operational controls on two of the lanes for high occupancy vehicle use. *Proposed Initiatives*, CD pages 9-14, 22-27.

The Proposed Initiatives obviate, confuse and intrude into the details of these contracts and conveyances and substitute their terms for the conditions contained in them, circumventing the years of work, study, evaluation and decision making that went into the approved design for the entrance to Aspen. *Hearing Transcript*, CD) pages 683-707, 711-721. The approved design conformed with the process required by the National Environmental Policy Act (“NEPA”), the Department of Transportation Act of 1966, as amended, and the Federal Highway Act of 1968, as amended. *Hearing Transcript*, CD pages 683-707, 711-721. These processes and

decisions are entrusted to the administrative agencies of the states and federal government, working in cooperation with local governments. At the hearing, the Respondents argued that the vast number of administrative actions needed to design a highway running through open space, historic resources and environmentally sensitive areas, all subject to extensive federal, state and local regulation, could not be bypassed by the use of the initiative power. *Hearing Transcript*, CD pages 764-770.

The Respondents further argued that while some of the decision-making “delegated” to Aspen’s City Council by residents of Aspen may be overruled by those residents pursuant to a referendum or superseded by an initiative petition, not all of City Council’s decision-making is subject to direct citizen action. *Hearing Transcript*, CD pages 773,774. Respondents noted that the law dictates that only legislative matters may be the proper subject of an initiative. *Hearing Transcript*, CD pages 773,774. Acts of an executive, quasi-judicial or administrative character can only be made by government officials. The Respondents further argued that because the Proposed Initiatives are legally insufficient and could not be presented to City Council or voters pursuant to the initiative process because they include impermissible non-legislative matters and the severance of those matters would

leave the proposed ordinances without legal effect and substantially change the spirit of the ordinances. *Protest Letters*, CD pages 41, 48, 123, and 130. In response, the Petitioners attempted without success to counter each of these alleged shortcomings. *Protest Letters*, CD pages 57-60, 139-142.

On October 29, 2007, the Hearing Officer rendered her opinion in a detailed writing to the parties and correctly ruled in favor of the Respondents. In particular, the Hearing Officer held that each proposed initiative was administrative in nature and, therefore, violated the Charter of the City of Aspen which only allows citizens to initiate legislative matters. *Decision of Hearing Officer*, CD page 786.

Importantly, the Hearing Officer correctly recognized that while the Proposed Initiatives may be similar to an earlier measure placed on a 1996 ballot by the Aspen City Council, Aspen's Charter provides that City Council may place any measure on a ballot while citizens may only propose legislative matters for the initiative process. *Decision of Hearing Officer*, CD page 786. Therefore, just because City Council places administrative matters on the ballot, the door is not then opened for citizens to place administrative issues on a ballot even if they are similar. *Decision of Hearing Officer*, CD page 786. On November 21, 2007, the Petitioners filed a petition for review of the Hearing Officer's decision with the

District Court of Pitkin County, Colorado. On October 29, 2008, the District Court issued an Order affirming the rulings made by the Hearing Officer.

On December 10, 2008, the Petitioners served their Notice of Appeal and appealed the District Court's decision to the Colorado Court of Appeals. The parties fully briefed the matter and the Appellate Court heard oral arguments on September 28, 2009. On October 29, 2009, the Appellate Court reviewing the issues under a *de novo* standard, upheld the District Court's decision finding that the Proposed Initiatives contained legislative matters not properly subject to the initiative process. *Vagneur v. City of Aspen*, 08 CA 2525 (Colo. App. 10/29/2009).

Subsequently, the Petitioners brought this appeal.

As set forth more particularly below, the Record evidences that the Hearing Officer's rulings were amply supported by competent evidence and, therefore, the Hearing Officer's rulings must be upheld as a matter of law. Even reviewing the evidence *de novo*, the Proposed Initiatives are administrative and thus outside the scope of the initiative power under article V, sections 1 and 9 of the Colorado Constitution and Section 5.1(a) of the Aspen City Charter.¹

¹ The City of Aspen is a Home Rule municipality.

III. LEGAL STANDARDS.

The Appellate Court conducted a *de novo* review of the question of whether the Proposed Initiatives were administrative or legislative. The Petitioners assert that this Court should also conduct a *de novo* review. Respondents assert that Petitioners are incorrect and that the standards appropriate for C.R.C.P. 106 reviews should be applied as follows:

A. The Standard Of Review Of A Hearing Officer's Decision Under C.R.S. §31-11-110 Is The Same As Under C.R.C.P. 106.

The Petitioners originally sought District Court review of the Hearing Officer's rulings pursuant to C.R.S. §31-11-110. As noted by the District Court in paragraphs 74 through 76 of its Order, C.R.S. §31-11-110 does not set forth a standard for review and there are no Colorado case decisions defining the standard. *District Court Order*, CD page 375. However, because this matter involves the review of a hearing officer's decision in a quasi-judicial proceeding—it is appropriate to apply the review standards applicable to C.R.C.P. Rule 106.

B. The Hearing Officer Was Charged With Administering The Initiative Protest Rules.

C.R.S. §31-11-110 (3) provides that "Every hearing shall be held before the clerk with whom such protest is filed. The clerk shall serve as hearing officer unless

some other person is designated by the legislative body as the hearing officer, and the testimony in every such hearing shall be under oath..." (emphasis added). In compliance therewith, at its regular meeting on October 9, 2007, the Aspen City Council appointed Karen Goldman as Hearing Officer to conduct a hearing on Petitioners' protests. *Memorandum*, CD pages 469-473.

C. Review Under C.R.C.P Rule 106.

Decisions of administrative proceedings are reviewed by district courts pursuant to C.R.C.P. 106 which provides as follows:

Where any governmental body or officer or any lower judicial body exercising judicial or quasi-judicial functions has exceeded its jurisdiction or abused its discretion, and there is no plain, speedy and adequate remedy otherwise provided at law:

(I) Review shall be limited to a determination of whether the body or officer has exceeded its jurisdiction or abused its discretion, based on the evidence in the record before the defendant body or officer.

In interpreting this rule, the court in *Puckett* stated that "In a C.R.C.P. 106(a)(4) review, the court only considers whether the Board exceeded its jurisdiction or abused its discretion, 'as well as whether an erroneous legal standard was applied by the agency.'" *Puckett v. City and CTY of Denver*, 12 P.3d 313, 314 (Colo. App. 2000).

D. A Reasonable Basis Is All That Is Required For A Hearing Officer's Interpretation Of Laws That It Is Charged With Administering.

The standard for review of an administrative hearing officer's interpretation of a law that it is charged with administering is whether or not the hearing officer had a reasonable basis for its interpretation. "Generally, a reviewing court should defer to the construction of a statute by the administrative officials charged with its enforcement." *City, County of Denver v. Board of Adj.*, 55 P.3d 252, 254 (Colo. App. 2002). "If there is a reasonable basis for an administrative board's interpretation of the law, we may not set aside the decision on that ground. *Id. citing Wilkinson v. Board of County Commissioners*, 872 P.2d 1269 (emphasis added). Accordingly, the test is simply to determine whether or not the hearing officer had a reasonable basis for its interpretation of the law, and if so it must be upheld.

E. A Hearing Officer's Decision Must Be Upheld If Any Competent Evidence Supports The Decision.

The standard in reviewing an administrative decision under C.R.C.P. 106 heavily favors the upholding of administrative decisions, so much so, that if there is any competent evidence at all supporting the decision, it must be upheld. As a general rule, the record from an administrative hearing is reviewed "[T]o ascertain

whether the decision under review is reasonably supported by any competent evidence in the record.” *Wilkinson v. Bd., Comm’rs*, 872 P. 2d 1269, 1277 (Colo. App. 1993). An administrative decision must be upheld “unless there is no competent evidence in the record to support it such that it was arbitrary or capricious.” *City, County of Denver v. Board of Adj.*, 55 p.3d 252, 254 (Colo. App. 2002). Additionally, “The reviewing court may not reweigh the evidence presented to the hearing officer.” *Puckett v. City and CTY of Denver*, 12 P.3 313, 314 (Colo. App. 2000). Thus, a reviewing court simply looks for any competent evidence supporting the hearing officer’s ruling and if so, it must uphold that decision.

IV. LEGAL ARGUMENT.

A. Administrative Versus Legislative Analysis.

I. The Hearing Officer And The Lower Courts Correctly Determined That The Initiatives Were Administrative In Nature And Not Proper Subjects For The Initiative Process.

a. The Hearing Officer’s Determination That The Petitions Were Administrative In Nature And, Therefore, Not Proper Subjects For Initiatives Was Supported By Competent Evidence And, Therefore, Must Be Upheld.

The Appellate Court affirmed the District Court’s upholding of the Hearing Officer’s decision that the Proposed Initiatives are administrative and, therefore, not

proper subjects for the initiative process. While the District Court determined that competent evidence supported the Hearing Officer's decision and, thus, upheld the decision under the competent evidence standard, the Appellate Court conducted a *de novo* review of the Proposed Initiatives and also concluded that both were administrative. See *District Court Order*, CD page 787, lns. 1-4. *Vagneur v. City of Aspen*, 08 CA 2525, p. 18 (Colo. App. 10/29/2009). Under either standard, both of the initiatives are administrative and, therefore, the determinations of the lower Courts must be upheld.

As set forth above, an administrative decision must be upheld "unless there is no competent evidence in the record to support it such that it was arbitrary or capricious." *City, County of Denver v. Board of Adj.*, 55 p.3d 252, 254 (Colo. App. 2002). In the present case, the Respondents presented the Hearing Officer with substantial evidence that the initiatives were administrative. Particularly, Randy Ready, the Assistant City Manager for the City of Aspen, testified extensively about the administrative nature of the Proposed Initiatives. *Hearing Transcript*, CD pages 680-710. Mr. Ready testified as follows:

1. Mr. Ready is responsible for determining whether actions of the City Council are legislative or administrative. *Hearing Transcript*, CD page 681.
2. Mr. Ready is the chief administrative officer for the City of Aspen.

Hearing Transcript, CD page 681.

3. The City Manager provides for engineering and construction services.
Hearing Transcript, CD page 681.

4. In May 2007 when the City Council introduced a ballot measure pursuant to City Charter §13.4 governing the sale of open space, regarding a change in use for open space between Buttermilk and the roundabout, it was done by resolution which are only used for administrative matters. *Hearing Transcript*, CD page 682.

5. Mr. Ready was involved in planning a new entrance to Aspen since 1993.
Hearing Transcript, CD page 682.

6. Mr. Ready describes the lengthy (over 10 year) administrative process that determined the current entrance to Aspen plan including environmental impact studies, review of approximately forty alternatives for the entrance to determine the best one, coordination with various local, state and federal agencies, and the various processes for gaining the requisite approvals from these agencies. *Hearing Transcript*, CD pages 683-707.

7. Mr. Ready expressly testified that the environmental impact study process required to be completed before constructing an entrance to Aspen is an administrative process. *Hearing Transcript*, CD page 684, lns. 19-20.

8. Mr. Ready agreed that it is “[F]air to characterize the petition as requiring the amendment of contracts.” *Hearing Transcript*, CD page 705, lns. 103.

Mr. Ready’s testimony alone provided competent evidence that the Proposed Initiatives were administrative in nature. Succinctly, the Proposed Initiatives attempted to circumvent the over ten year administrative process that established the current plan for a new entrance to Aspen.

The presentation of competent supporting evidence did not stop with Mr. Ready. The Hearing Officer also heard the testimony of Bud Eylar, a licensed engineer who worked for Pitkin County from 1982 through 2006 and at various times was its Public Works Director, County Engineer, and at times both. *Hearing Transcript*, CD page 710. Mr. Eylar offered the following testimony which further supported the Hearing Officer's decision:

1. Mr. Eylar, while working for the County participated in drafting the EIS for the current plan for the new entrance to Aspen. *Hearing Transcript*, CD page 711.
2. He testified that the Proposed Initiatives dictated an administrative outcome. *Hearing Transcript*, CD page 716, lns. 2-3.
3. He testified that the initiatives dictated engineering choices that would have otherwise been made by engineers on the entrance. *Hearing Transcript*, CD page 716.
4. He testified that the initiatives removed engineering prerogatives. *Hearing Transcript*, CD page 717, lns. 16-20.
5. He agreed that that the initiatives would eliminate required administrative expertise for the design of the road. *Hearing Transcript*, CD page 718, lns. 14-16.
6. He agreed that the initiatives dictated engineering choices of the kind to which he would apply his engineering expertise during the design of the road. *Hearing Transcript*, CD page 716, lns. 19-21.
7. Finally, he testified that he agreed that "a provision that is allowed to become law through the initiative process without the benefit of traffic

engineer input could in fact be dangerous to public safety.” *Hearing Transcript*, CD pages 720-721.

Accordingly, the Hearing Officer heard testimony from two local officials possessing a wealth of experience and knowledge of the history and process of planning a new entrance to Aspen and each offered ample testimony in support of the Hearing Officer’s decision that the Proposed Initiatives were administrative in nature. Accordingly, under either the competent evidence standard or a *de novo* review, the Hearing Officer’s decision must be upheld because the Proposed Initiatives are administrative.

b. The Proposed Initiatives Are Insufficient Because They Seek To Govern Non-Legislative Matters While Only Legislative Matters May Be Decided Through An Initiative Or Referendum.

While there was ample competent evidence upon which the Hearing Officer based her decision and it must be upheld on that ground alone, one can determine from the face of the Proposed Initiatives themselves that they are administrative in nature and not proper subjects for ballot initiatives.

Section 5.1(a) of the Aspen City Charter (“Charter”), as amended in August of 2003, provides that “[t]he registered electors of the City may initiate a proposed ordinance, pursuant to the initiative power reserved by Article V, Section 1(9) of

the State Constitution, as to any legislative matter which is subject to said legislative power.” *Section 5.1*, CD page 789 (emphasis supplied).

Notwithstanding the deference normally paid to the right of the petition, the Colorado Supreme Court has held that it applies exclusively to legislative actions. “[A] necessary exception to the rule proscribing premature governmental or judicial interference with initiative and referendum exists where the electorate exceeds the proper sphere of legislation and instead attempts to exercise administrative or executive power.” *Idaho Springs v. Blackwell*, 731 P.2d 1250, 1253 (Colo. 1987). “The people have reserved the right to legislate, not to determine how previously enacted public policies will be administered or executed.” *Id.* (emphasis added).

i. Tests For Establishing Legislative Matters.

“Actions of a city council may be quasi-judicial, executive, administrative, or legislative.” *Citizens for Quality Growth The Petitioners' Committee v. City of Steamboat Springs*, 807 P.2d 1197, 1198 (Colo. App. 1990). The *Witcher* case (*Witcher v. Canon City*, 716 P.2d 445, 449-450 (Colo. 1986)) identifies three tests used by Colorado courts to determine whether a particular municipal action is legislative, as opposed to administrative or executive:

- [1] 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.
- [2] 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.'
- [3] Third, if an original act was legislative, then an amendment to the original act must also be legislative. *Witcher* 449-450 (Colo. 1986) (citations omitted).

Idaho Springs provided much needed assistance in interpreting the first of the tests listed above. The Court in *Idaho Springs* dealt with an attempt to reverse the city's decision to purchase a particular plot of land and to renovate the old school house located there as the site of a new city hall. The Court found the expected useful life of the proposed building to be largely irrelevant for purposes of applying the first test.

The structure is of course permanent in the sense that it will serve as the city hall for an indefinite period of time. However, 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. The term 'permanent' is used to signify a declaration of public policy of general applicability because a permanent enactment is more likely to involve policy considerations.

731 P.2d at 1254. In other words, if the application of the ordinance has a general application it is more likely to be legislative, but if its application is specific and deals with the "how, when or where" rather than the "what," then the provision is administrative and not appropriate for an initiative.

ii. The Acts Mandated By The Proposed Initiatives Are Not Legislative.

The Proposed Initiatives seek to substantially amend two prior administrative acts of the City of Aspen. Resolution 61 of 1998 (CD page 531), authorized the City of Aspen to enter into the July 27, 1998 Memorandum of Understanding (CD pages 532-555) with CDOT and the Federal Highway Administration. The Memorandum of Understanding laid out specific design requirements, integrated mass transit requirements, protection of historic resources, mitigation of environmental impacts and commitments related to the conveyance and acquisition of certain open space in connection with a new highway entrance. Resolution No. 34 of 2002 (CD pages 498-631) implemented the City of Aspen's obligation under the Memorandum of Understanding to convey a right of way across open space to CDOT and imposed conditions and limitations on the use of the right-of-way. Attached to Resolution No. 34 is the grant of a right of way to CDOT as approved by Resolution No. 34 (CD pages 500-529).

The Proposed Initiatives refer to Resolution No. 34 and the Memorandum of Understanding in several of their sections. One such reference is contained in an unnumbered paragraph (the "Revocation Paragraph") appearing immediately above Section 1 of both of the Proposed Initiatives which states:

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

(See CD page 447, lns. 3-7 and CD page 453 lns. 3-7.)

This provision, by its own terms, rescinds the Right-of-Way Grant and the Memorandum of Understanding and replaces them with a new grant of a right-of-way which is made subject to certain conditions and limitations stated elsewhere in the Proposed Initiatives.

While it is clear from a reading of the Memorandum of Understanding, Resolution No. 34 and the Right-of-Way Grant that they contain purely administrative matters, Aspen's City Charter removes any doubt about the administrative nature of them. Section 4.6 of the Aspen City Charter states:

Section 4.6. Council acts.

The council shall act only by ordinance, resolution or motion. *All*

legislative enactments shall be in the form of ordinances; all other actions, except as herein provided, may be in the form of resolutions or motions. A true copy of every resolution as hereafter adopted shall be numbered and recorded in the official records of the city.
(emphasis added).

Since the Memorandum of Understanding and the Right-of-Way Grant were approved by resolution, they cannot be legislative acts and can only be characterized as executive or administrative acts. Thus, a rescission or amendment of them is not the proper subject of an initiative petition.

The primary effect of the Proposed Initiatives is to direct the *how, when* and *where* for the construction of a new highway for the entrance to the City of Aspen—the Proposed Initiatives essentially re-design the construction of the highway. As a general rule, the selection of the site and design for a municipal capital improvement, such as a road, is not a permanent or general act and, therefore, it is not legislative in nature and not appropriate for consideration by initiative. *Idaho Springs v. Blackwell*, 731 P.2d 1250 (Colo. 1987). As set forth above, the Supreme Court of Colorado in *Idaho Springs*, held that the “selection of the site and structure for the city hall is not a permanent or general act within the meaning of *Witcher*...” and held that such decisions were administrative and not proper subjects for the initiative process. *Id.* at 1254. In reaching its decision, the

Court reasoned that the legislative portion of the project ended at deciding to build a new city hall and that determining the location and structure of the new city hall were administrative decisions.

Determination of the location, timing and design details associated with the construction of a new highway entrance to Aspen are administrative issues not properly subject to the initiative process. Thus the Appellate Court correctly affirmed the District Court's rejection of the Proposed Initiatives in their entirety.

iii. Contractual Matters Are Administrative And Not Appropriate Subjects For Initiatives.

The Proposed Initiatives were not appropriate for the initiative process because they called for the rescission or amendment of existing contractual obligations previously entered into by Aspen. It is well settled that the process of entering into contracts by a city for the purposes of furthering established public policies are administrative tasks and, therefore, cannot be decided by an initiative. *Witcher v. Canon City*, 716 P.2d 445 (Colo. 1986); *see also Idaho Springs v. Blackwell*, 731 P.2d 1250 (Colo. 1987). In the *Witcher* case, the court confirmed the general rule that contractual agreements are administrative when it determined that the city council's decision to modify an existing lease with a company

operating a bridge and park for the benefit of the city and to extend the lease for an additional thirty-one years was an administrative decision not appropriate for an initiative. In addition to holding that such contractual issues are administrative and not appropriate for an initiative, the Court added that "Citizens who disagree with the manner in which their municipal government is administered are free to elect new officials or recall those who are currently in office." *Witcher* at 449.

Applying the general rule prohibiting contractual agreements from being subject to initiative, one finds that the Proposed Initiatives, both in their overall effect and in explicit detail, are expressly designed to rescind or amend existing administrative contracts previously entered into by the City of Aspen. As set forth above, the Revocation Paragraph contained in the Proposed Initiatives, by its very language "rescinds all enactments or authorizations inconsistent herewith..." and then goes on in the enumerated paragraphs of Section 1 to set forth its proposed modifications to the existing "enactments" and "authorizations."

In particular, the Proposed Initiatives seek to modify City of Aspen Resolution No. 61, Series of 1998, wherein the Aspen City Council approved the Memorandum of Understanding. The Memorandum of Understanding is a contract which created binding agreements between the City of Aspen, CDOT and the

Federal Highway Administration to implement the construction of a new entrance to Aspen. The Memorandum of Understanding addresses in great detail physical properties, locations, designs and numerous other aspects of a new entrance to Aspen. For example, the Memorandum of Understanding provides the following details:

- 1) CDOT shall not utilize more than 1.5 acres of the Zoline Ranch Open Space. CD page 535, ln. 27.
- 2) CDOT shall limit roadway shoulder widths to 10 feet. CD page 535, ln. 20.
- 3) CDOT shall construct the new Maroon Creek Bridge to include a suspended pedestrian/bike access. CD page 536, lns. 6-7.
- 4) CDOT shall reconfigure and reconstruct the Cemetery Lane/State Highway 82 intersection so as to realign Cemetery Lane for direct access to Hallam Street. CD page 536, lns. 29-30.
- 5) CDOT shall convert the existing Maroon Creek Bridge to a light rail structure corridor as part of the light rail construction. CD page 538, lns. 1-2.
- 6) Including the area under the bridge, the Right-of-Way required for the new bridge that is also part of the Marolt-Thomas property shall not exceed 0.8 acres. Within this 0.8 acres, no more than .1 acres shall be used for the placement of the piers for the new Castle Creek Bridge. CD page 539, lns. 15-18.
- 7) The typical width of the median will be 12 feet from the back of curb to back of curb. CD page 540, lns. 32-33.
- 8) The City shall also grant and convey CDOT additional 20 foot wide

temporary construction easements adjacent to the permanent easements which shall expire upon completion of that component of construction for which it is needed. CD page 541, lns. 14-16.

Additionally, the Proposed Initiatives sought to amend the Right-of-Way Grant to CDOT by Aspen. The Right-of-Way Grant was originally approved by the Aspen City Council in its passage of Resolution No. 34, Series of 2002. *Reso. 34, Series of 2002*, CD pages 500-530.

Importantly, a comparison of the Memorandum of Understanding and Right-of-Way Grant to the provisions of the Proposed Initiatives shows that the Proposed Initiatives are impermissible attempts to modify the terms of these administrative agreements. While nearly every provision of the Proposed Initiatives modify these agreements to a certain extent, the most obvious administrative modification comes in the Revocation Paragraph contained in each initiative that expressly changes the design for the entrance from a two-lane road as set out in the Memorandum of Understanding and the Right-of-Way Grant to a four lane highway. While the Memorandum of Understanding is limited to a “[T]wo lane parkway and a corridor for light rail transit system” (CD page 533, lns. 25, 36 & 37), each of the Proposed Initiatives are limited to a “four lane highway.” CD page 11 ln. 10 and page 24 line

10.

Additionally, Section 1, subsection 8 of each of the Proposed Initiatives authorizes the automatic conveyance of additional property to CDOT without any additional compensation to the City of Aspen. CD pages 12 and 25. Not only do these provisions constitute administrative tasks, they are in direct conflict with the Section 13.4 of Aspen's Charter which provides that no property acquired for open space purposes can be conveyed or converted to other uses unless it is replaced with other open space of equivalent or greater value. Therefore, not only does Section 1, subsection 8 concern administrative issues, its enactment would be in clear violation of Aspen's Charter—for this reason alone it is not properly subject to the administrative process.

Again, the Proposed Initiatives do not present new statements of public policy but rather constitute attempts by the Petitioners to modify the administrative decisions embodied in the Memorandum of Understanding and Right-of-Way agreements. As the court stated in *Witcher*, such administrative actions are not subject to the initiative power and the citizenry's proper course of action if they do not like the administrative actions of city council is to elect new council members, not bring an initiative. *Witcher v. Canon City*, 716 P.2d 445 (Colo. 1986).

iv. **Decisions Pertaining To Engineering, Design, Timing And Financing Of A New Entrance For Aspen Are Administrative In Nature.**

As further evidence that decisions relating to engineering, design, timing and financing for a new entrance to Aspen as set forth in the Proposed Initiatives are administrative in nature consider that Aspen's Charter provides in Section 6.1 that "The city manager shall be the chief **administrative** officer of the City." (emphasis added). The Charter also provides that:

The manager shall be responsible to the council for the proper administration of all affairs of the City placed in his charge, and to that end he shall have the power and duty and be **required** to:

- ...
- (k) Provide for **engineering, architectural, maintenance and construction** services required by the City[.] (emphasis added).

Thus, the Charter recognizes tasks related to municipal construction projects involving engineering and architectural issues as administrative and mandates that the City Manager administer them. Moreover, the Charter also provides that:

The manager, with such assistance as the council may direct, shall prepare and submit to the council a long-range capital program, simultaneously with his recommended budget.

- ...
- (b) Contents. The capital program shall include:

- (1) A clear general summary of its contents;

(2) A list of all capital improvements which are proposed to be undertaken during the following fiscal years, with appropriate supporting information as to the necessity for the improvement;

(3) Cost estimates, method of financing and recommended schedules for each such improvement; and

(4) The estimated annual cost of operating and maintaining the facilities to be constructed or acquired.

Again, the Charter expressly requires that the City Manager oversee financial planning and scheduling of capital improvement projects for the City.

Accordingly, each of the design, engineering, timing and financing provisions set forth in the Proposed Initiatives fall squarely within the administrative tasks assigned to the City Manager by the Charter. Likewise, these same types of tasks should be considered administrative and not properly subject to the initiative process when analyzing the propriety of the proposed initiative. The Court said it best in *Witcher*, “[T]o subject each such decision to [initiative] would result in chaos and bring the machinery of government to a halt.” *Witcher v. Canon City*, 716 P.2d 445, 449 (Colo. 1986) (quoting *City of Aurora v. Zwerdlinger*, 571 P.2d 1074 (Colo. 1977)).

B. Severability Analysis.

I. Ample Evidence Supported The Hearing Officer’s Decision To Decline To Sever Administrative Provisions From The Proposed Initiatives.

Again, if any competent evidence supports the Hearing Officer's ruling, it must be upheld. Regarding the Hearing Officer's decision not to sever impermissible portions from the Proposed Initiatives and allow them to go forward in an altered state, a substantial amount of competent evidence was presented at the hearing to support her decision. Particularly, the Hearing Officer heard both the testimony of Mr. Ready and Mr. Eylar regarding the administrative nature of the provisions contained in the Proposed Initiatives. The Respondents provided the Hearing Officer with relevant case citations and legal argument in both of their protest letters and in the oral arguments of their counsel. *Protest Letters*, CD pages 474-496 & 557-579. Given the governing case law, the testimony of the witnesses and the arguments of counsel, the Hearing Officer had sufficient competent evidence upon which to base her opinion and, therefore, it must be upheld.

In reaching her opinion, the Hearing Officer expressly considered the decision in *City of Colorado Springs v. Bull*, 143 P.3d 1127 (Colo. App. 2006) allowing a Hearing Officer to sever impermissible portions of a proposed ballot initiative. *Decision of Hearing Officer*, CD pages 785-786. As the Hearing Officer correctly noted, the Court in *Bull* adopted a three part test for determining when

impermissible provisions in an initiative can be severed with the remaining initiative surviving. *Decision of Hearing Officer*, CD page 785. The test provides that impermissible provisions may be severed when:

(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.

Id. at 1138. After applying the *Bull* criteria, the Hearing Officer states in her decision that after severing the impermissible portions, the remaining initiatives would ask voters “whether the new entrance to Aspen should consist of two general highway lanes and two vehicle and/or transit lanes (HOV).” *Decision of Hearing Officer*, CD pages 785. Presumptively, the Hearing Officer determined that all of the other provisions were administrative and, therefore, impermissible. In support of this decision, the Hearing Officer relied on the statements of the Petitioners:

“Petitioners have testified that they believed the conditions listed were necessary to understand the proposal they were promoting and since it was a specific proposal with specific conditions, this hearing officer is reluctant to sever impermissible portions of the initiative and instead will consider the proposed petitions in their entirety.”

Decision of Hearing Officer, CD pages 785.

It follows that without the provisions “necessary to understand the proposal,” the remaining proposal would neither be consistent with the intent of the Petitioners nor comprehensible. Thus, the Hearing Officer properly decided to strike the Proposed Initiatives in their entirety rather than allow them to go forward in a manner that changed their intention, spirit and meaning. This decision was both supported by the evidence and consistent with the holding of *Bull* which allows severance only when deleting the impermissible portions would not substantially change the spirit of the measure. The severance of virtually all of the provisions of the Proposed Initiatives would have substantially changed these measures.

Accordingly, because the Hearing Officer based her decision not to sever the impermissible provisions from the Proposed Initiatives and allow the remaining provisions to proceed to an election upon substantial competent evidence, it must be upheld as a matter of law and the Appellate Court’s Order affirmed.

C. The Appellant Court Did Not Create A New Standard For Conducting An Administrative Versus Legislative Analysis As Alleged By Petitioners And Amicus Curiae Colorado Common Cause.

The Appellate Court’s decision should be upheld as rendered because it did not break new ground by creating a new standard for the legislative

versus administrative analysis for ballot measures. Colorado Common Cause incorrectly asserts that the Appellate Court's opinion stands for the "[P]roposition that any initiative that has post-adoption consequences that are administrative in nature—including necessitating new administrative actions—is necessarily administrative and unsuitable as a citizen initiative." Amicus Brief, page 7, lns. 1-5. The Appellate Court simply did reach such a holding.

The problem the Appellate Court recognized with the Proposed Initiatives was not that they "necessitated new administrative actions," but rather, that the initiatives actually dictate the precise changes in the various terms of previously completed administrative acts. It was the express and detailed manner, the very administrative nature, by which the Proposed Initiatives would alter prior administrative decisions that compelled the Appellate Court to correctly find the initiatives to be administrative in nature under the *Idaho Springs* and *Witcher* analysis. The Appellate Court noted:

Here, the initiatives each would authorize (but not require) CDOT – not the city- to construct the Entrance to Aspen using a design different from that developed for the same land over many years by the city's engineers and administrative staff in conjunction with their

counterparts from CDOT and FHA. The proposals would also rescind all inconsistent enactments and authorizations. If implemented, the proposals would require the city to amend existing contractual obligations, including the MOU, and to rescind or amend the existing right-of-way. The formation of contracts by a city and amendments of contracts to which a city is a party to further its policies are administrative matters, not suitable for an initiative. *Vagneur v. City of Aspen*, 08 CA 2525, p. 17 (Colo. App. 10/29/2009).

Additionally, the Appellate Court recognized that “The petitions seek a change in the design and use of the right-of-way, rather than a change in any policy of a general or permanent nature. The change in use is indeed administrative in character – reconfiguring lanes.” *Id.*

Thus, the nature of Proposed Initiatives was not that they set forth a general policy that would cause city administrators to use their administrative authority to change prior administrative acts. Rather, the Proposed Initiatives expressly direct the specific terms of the administrative decisions thereby placing the voters in the position of making administrative decisions. Importantly, the Appellate Court actually held that “The formation of contracts by a city and amendments of contracts to which a city is a party to further its policies are administrative matters, not suitable for an initiative.” *Id.* As noted by the Appellate Court, this

holding is completely consistent with Supreme Court's decision in *Witcher* that – as stated by the Appellate Court – holds that “The formation of contracts by a city and amendments of contracts to which a city is a party to further its policies are administrative matters, not suitable for an initiative” *Witcher*, 716 P. 2d. at 450; *Vagneur* at 17.

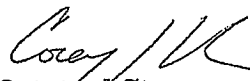
Accordingly, the Appellate Court did not create a new rule or otherwise expand the straight forward analysis handed down by this Court in *Witcher* and *Idaho Springs* and, therefore, the Appellate Court's opinion should be upheld as written.

V. CONCLUSION.

For the foregoing reasons, the undersigned respectfully requests that the Court uphold the Appellate Court's ruling and deny Petitioners' Appeal.

Respectfully submitted this 27th day of September, 2010.

KLEIN, COTÉ AND EDWARDS, LLC


By: /s/ Original Signature on File
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CERTIFICATE OF SERVICE

I certify that on September 27, 2010 this "Respondents Les Holst, Clifford Weiss and Terry Paulson's Answer Brief" was filed in paper format and the following parties were serviced this date via United States mail, first class postage prepaid, to:

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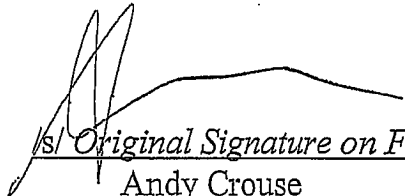
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