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COURT OF APPEALS, STATE OF COLORADO

Court Address: Colorado Sate Judicial Building, 2 East
4th Ave, Suite 300, Denver, Colorado 80203

Appeal from the District Court, Pitkin County, Colorado
Honorable Gail H. Nichols
Case No. 07CV175

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Petitioners-Appellants: CURTIS VAGNEUR and JEFFREY
EVANS, Initiative Petition Proponents,

Case No.: 08CVA2552

Respondents-Appellees: CITY OF ASPEN; KATHRYN KOCH,
in her official capacity as City Clerk fir the City of Aspen;
KAREN GOLDMAN, in her official capacity as Administrative
Hearing Officer; and LES HOLST, CLIFFORD WEISS, and
TERRY PAULSON, Protestors

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**ANSWER BRIEF
OF THE MUNICIPAL RESPONDENTS**

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Come now the City of Aspen, Kathryn Koch, and Karen Goldman, hereinafter referred to as the Municipal Respondents, by and through their undersigned counsel, and hereby submit their Answer Brief pursuant to Rule 28(b), C.A.R.

Protestors Les Holst, Clifford Weiss, and Terry Paulson, filed their Answer Brief on June 10, 2009. The Municipal Respondents have reviewed that Answer Brief and concur in its statements, the proper legal standards to be applied in this case, and their legal arguments. Therefore, rather than repeat the arguments presented therein, the Municipal Respondents hereby join in the Protestors' Answer Brief and use this opportunity to provide some historical context to this litigation and highlight certain legal arguments of particular interest to the Municipal Respondents.

I. Statement of the Case.

The Municipal Respondents concur in the Statement of the Case as set forth in the Protestors' Answer Brief. However, the Municipal Respondents wish to highlight the two major objections they have to the Petitioners' initiative ordinances. First, the proposed ordinances, if either is approved by the electors, would mandate or require the City Council to convey a property interest in City-owned open space to the Colorado Department of Transportation so that they can construct a four lane

highway. Moreover, CDOT would have all the legal authority they would need to proceed with the construction, operation, and maintenance of a four lane highway over and across City-owned open space. Second, if either ordinance is approved, years of work and millions of dollars spent on administrative efforts will be automatically rescinded, including legally binding contracts, without any further action by the Aspen City Council. The sale of City-owned property is not a legislative act subject to the initiative powers reserved to the people.

The City of Aspen fully recognizes that the rights of referendum and initiative are fundamental constitutional rights in our state. However, those rights are reserved for legislative matters and not administrative functions. Petitioners seek to use their constitutional initiative powers to mandate City Council to perform certain administrative functions. For all the reasons set forth herein and in the Protestor's Answer Brief, those administrative functions are not the proper subject matter for proposed ordinances initiated by citizens; those functions rest entirely with the City Council or administrative staff of the City of Aspen.

A. Historical Background.

In order to fully understand the context of Petitioners' efforts in this matter, it may be helpful to understand the historical and political background in which it

is brought. The citizens of the City of Aspen have been engaged in a civic debate for more than 30 years concerning potential solutions to ever increasing traffic problems within the City limits and along Colorado State Highway 82 which is the main transportation artery through the Roaring Fork River Valley between the City of Glenwood Springs and the City of Aspen. The debate has centered on the alignment of any new or reconstructed highway into Aspen (whether to continue to use the existing alignment or construct a new, more direct, alignment across City-owned property¹), the width of the highway itself (two lanes or four lanes), and what type of mass transportation system, if any, should be implemented to alleviate traffic congestion and improve commuter ridership.

The Colorado Department of Transportation has been engaged in reconstructing State Highway 82 from Glenwood Springs to the entrance to Aspen by improving the highway and widening it to four lanes for over twenty years².

¹ The existing alignment of State Highway 82 from the Pitkin County Airport requires two sharp 90 degree turns on fairly narrow City streets before it connects to Main Street. The "direct alignment" would require the construction of a new highway traversing City-owned open space property thereby avoiding the 90 degree turns and providing a more direct alignment of the highway into Main Street.

² Mr. Randy Ready, the City's Director of Parking and Transportation since 1996, testified at some length before the Hearing Officer and described the history and process involved in the administrative preparation of a series of environmental impact statements to comply with the federal National Environmental Protection Act and Department of Transportation statutes. As

Unfortunately, however, for all of these years, the citizens of Aspen have been debating how the last four miles should be handled. Over these many years, the electors of the City of Aspen and Pitkin County have been asked to vote in numerous elections³ on these issues without seemingly coming to any final resolution.

A. Prior elections on the entrance to Aspen.

For instance, on November 2, 1982, the City of Aspen electors rejected a ballot question seeking to authorize the Aspen City Council to convey a right-of-way across City owned property to the Colorado Department of Highways [Transportation] to construct a two or four lane highway to replace State Highway 82 on its current alignment.

On August 12, 1986, the electors rejected a ballot question seeking to authorize the Aspen City Council to implement the construction of a four lane highway on a new alignment across City owned property. At the same election,

explained by Mr. Ready, compliance with these federal statutes is a prerequisite to the construction of any improvements on State Highway 82. *Ready Testimony*, CD pages 683 to 693.

³ Between 1975 and 2007, the electors of Pitkin County and the City of Aspen have been asked to vote on over two dozen occasions on ballot questions relating to transportation issues including the preferred alignment to any reconstructed Highway 82, the mode of any mass transportation system to be implemented, or financial questions relating to the above.

however, the electors passed a ballot question granting the City Council authority to implement a four lane highway on the existing alignment of Highway 82 subject to a number of conditions.

On February 13, 1990, the electors passed a ballot question authorizing the City Council to convey necessary rights-of-way to the State of Colorado to construct a four lane highway into the City of Aspen by using a direct alignment across City owned property, subject only to certain conditions⁴.

On November 8, 1994, the electors rejected a ballot question seeking to authorize the City Council to convey to the Department of Transportation certain rights-of-way necessary for the construction of a dedicated transitway between the City of Aspen and the Pitkin County Airport and the Town of Snowmass Village.

On November 5, 1996, the electors of the City of Aspen authorized the City Council to convey City owned property to the Colorado Department of Transportation for the construction of a "two-lane parkway and a corridor for a light rail transit system" along a new direct alignment for Highway 82. *Resolution No. 51, Series of 1996*, CD pages 818-819.

⁴ This particular election approved a four lane highway over City-owned open space, but upon a different alignment and upon different conditions than proposed by the Petitioners in the instance case.

The most recent election, in November 2007, asked the voters of Aspen to authorize the Aspen City Council to use city-owned open space between the Buttermilk Ski Area and the Roundabout on Highway 82 to expand Highway 82 on the existing alignment to accommodate two general lanes of traffic and two lanes dedicated for bus lanes. The voters approved this question and construction for this widening project was recently completed.

B. Prior administrative actions by the City Council relating to the entrance to Aspen.

The voters of Aspen were not the only ones busy trying to find solutions to the ever increasing traffic problems at the entrance to Aspen. Governing bodies for the upper valley communities of the Roaring Fork Valley worked closely and cooperatively between themselves and state and federal agencies to arrive at solutions.

In 1992, the governments of the City of Aspen, the Town of Snowmass Village, and Pitkin County, through their respective elected officials, recognizing the need to develop a transportation strategy for State Highway 82, entered into a Joint Resolution confirming a framework for an upper valley transportation strategy for State Highway 82. Pursuant to that original joint resolution, the governments adopted a subsequent joint resolution approving a Comprehensive

Valley Transportation Plan and endorsed a one-half (1/2) cent County-wide sales tax and a one-half (1/2) cent County-wide use tax to fund elements of the transportation plan. On November 2, 1993, the electors of Pitkin County passed a ballot measure authorizing Pitkin County to impose the additional half-cent sales and use taxes for "the purpose of increasing and improving the public mass transportation system within the Roaring Fork Valley," and more specifically for the construction of a fixed guideway system connecting the City of Aspen with the Town of Snowmass Village. Passage of the County-wide sales and use taxes exacerbated the community debate over the proper public mass transportation system to be developed. Prior to passage of the tax increases, the debate may have seemed a theoretical exercise; now for the first time, local governmental entities had the financial means to implement concrete improvements and increases to the public mass transportation system in the valley.

In accordance with the Valley-wide Transportation Plan, in 1994 the elected officials of the Town of Snowmass Village, the City of Aspen, and Pitkin County sponsored a ballot measure seeking authorization from the electors of Pitkin County to issue revenue bonds for the construction of a fixed guideway system for buses between the City of Aspen and the Town of Snowmass Village. That ballot

question was defeated by the voters.

Also in accordance with the Valley-wide Transportation Plan, in June, 1997, the Roaring Fork Railroad Holding Authority, a quasi-governmental entity comprised of the City of Aspen along with all governmental entities in the Roaring Fork Valley, purchased the Denver & Rio Grande Western Railroad right-of-way from Glenwood Springs to Pitkin County. The ultimate purpose of this purchase was to ensure that the railroad right-of-way continued in public hands and could eventually be used as a transportation corridor between the City of Glenwood Springs and the City of Aspen. A multi-million dollar Corridor Investment Study was undertaken by the governmental entities to determine whether the corridor should be used for a bus transportation corridor or for a light rail transit system. That study was completed in 2003 and concluded that while a rail transportation system was feasible, it would be extremely expensive and recommended a bus rapid transit system as a first phase for improving transit along Highway 82. The study has spurred additional debate in all of the communities in the Roaring Fork Valley on the merits of a bus system versus a light rail transit system to connect the City of Glenwood Springs to the City of Aspen.

In August, 1998, the Colorado Department of Transportation and the

Federal Highway Administration issued a Record of Decision for proposed improvements on State Highway 82 – Entrance to Aspen. *Ready Testimony*, page 683. The section of the highway included in the decision included the portion of the highway from the Buttermilk Ski Area on the outskirts of the City and terminating in the center of the City of Aspen. The Record of Decision was prepared in compliance with the Department of Transportation Act of 1966, as amended, and the National Environmental Protection Act, following publication of a Final Environmental Impact Statement. The Record of Decision concluded that the preferred alternative for the Entrance to Aspen Project is as follows:

The Preferred Alternative is a combination of highway and intersection improvements, a transit system, and an incremental transportation management (TM) program. The highway component will consist of a two-lane parkway that generally follows the existing alignment, except at the Maroon Creek crossing and across the Marolt-Thomas Property. ... The transit component includes an LRT [light rail transit] system that, if local support and/or funding are not available, will be developed initially as exclusive bus lanes. ...

The Record of Decision, therefore, presumably finally put to rest the community debate on the alignment of the highway into the City of Aspen, but left open to the local political process whether the “transit component” would consist of a light rail transit system or some sort of bus system operating on “exclusive bus lanes” until such time as local support and funding are available for the construction of a

light rail transit system.

Immediately before, and in contemplation of, the release of the Record of Decision, the City of Aspen entered into a Memorandum of Understanding with the Colorado Department of Transportation ("CDOT") and Federal Highway Administration (the "MOU".) *Resolution No. 61, Series of 1998*, CD pages 614-26. The MOU laid out specific design requirements of the City, conditions for the use of integrated mass transit requirements, the protection of historic resources, mitigation of environmental impacts, and commitments relating to the conveyance of City-owned open space for the construction of the new highway entrance into Aspen.

In October 2002, the City Council approved Resolution No. 34, Series of 2002, authorizing the City Manager to execute a right-of-way granting CDOT authorization to use approximately 8.6 acres of City-owned open space for the construction and operation of a two lane parkway and a corridor for light rail. *Resolution No. 34, Series of 2002*, CD pages 581-612. This resolution was consistent with the voter approval received in the 1996 election. Subsequently, the City executed a conveyance to CDOT granting to it a Right-of-Way over City-owned open space as authorized by City Council Resolution No. 34, Series of 2002. *Id.* Upon conveyance of the right-of-way, and consistent with the MOU agreed to by

the parties, CDOT conveyed to the City of Aspen 31 acres of the Mills Open Space Property at the vicinity of Brush Creek and Highway 82 as replacement land for the open space the City conveyed to CDOT for the Right-of-way. *Ready Testimony*, page 697. It is these rather complicated land exchanges and agreements that Petitioners seek to rescind by their proposed ordinances. Not only would such requests constitute administrative matters not subject to the initiative powers, but would also constitute patently improper attempts to breach legally binding contractual obligations.

III. Legal Arguments.

A. Petitioners “doth protest too much.”⁵

Petitioners repeatedly argue that their initiative petitions seek to have the City Council ask the electors of the City of Aspen to merely authorize the “conveyance of a right-of-way and change in use of certain designated City-owned property to facilitate a reconfigured State Highway 82 transportation corridor into Aspen.” *Petitioners’ Opening Brief* at 3. Indeed, Petitioners state at least fourteen times, directly or indirectly, that should their ballot questions be approved by the electors, the City Council would not be required to convey any right-of-way to the Colorado

⁵ Queen Gertrude in Shakespeare’s *Hamlet*.

Department of Transportation. For example, at page 31 of their Opening Brief, Petitioners insist that:

“neither of these proposals [initiative ordinances] 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 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.

While it is technically true that the passage of the proposed ballot questions would not automatically “implement, order, or direct the performance” of anything, passage of the ballot questions would, in fact, require the City Council to convey rights of ways over City owned property to CDOT for the construction of Petitioners’ version of a four lane highway with all of the conditions described by the ballot questions.

Petitioners’ own proposed initiative petitions belie their contention that passage of their ballot questions would not mandate any particular action by the City Council. The “Summary” Petitioners prepared to accompany both of their initiative petitions read as follows:

Shall the State of Colorado, Department of Transportation (CDOT) be authorized to construct, operate and maintain a four lane highway configuration consisting to two lanes and two vehicle and/or transit lanes

Exhibits 1 and 2 appended to Petition for Review, CD pages 9 and 22. This

summary does not describe a ballot question that merely authorizes City Council to convey City-owned property to CDOT, but specifically mandates such an action.

Section 1 of both proposed ordinances state as follows:

The State of Colorado, Department of Transportation (CDOT) is authorized to construct, operate and maintain a four lane highway configuration....

(Emphasis added.) *Id.* at 11 and 24.

At page 3 of Petitioners' Brief they state that their petitions "offer the voters of the City of Aspen two alternative proposals by which they can authorize and approve a conveyance and change in use." The problem with this statement is that their proposed ordinances do more than that. The ordinances authorize the State Department of Transportation to actually construct a four lane highway upon City-owned property. The ordinances do not authorize City Council to do anything. It is CDOT that is purportedly granted the authority to construct a four lane highway upon passage of the ordinances. There is nothing left for the City Council to do should the ordinances be approved by the electorate.

At page 8 of Petitioners' Opening Brief they state that the proposed ordinances "do *not* purport to *execute* or *direct the performance* of any of these conditions." (Emphasis in the original) That statement is true. However, passage of the proposed ordinances by the electorate would leave City Council with no other

choice, but to grant CDOT an easement and permission to build a four lane highway upon City-owned property. After all, if the ballot questions are approved, hasn't the City spoken through its electorate and approved an ordinance granting CDOT, and not the City Council, the authority to actually construct a four lane highway upon City owned property. At that point, the execution or performance by City Council of any "conditions" would be merely perfunctory and obligatory.

At the administrative Protest Hearing, Mr. Evans, one of the Petitioners, stated that:

"The voters of the city of Aspen may choose to grant them [CDOT] an allowed use which is a change in use on open space."

Administrative Hearing Transcript. CD page 759. That statement points out the basic misunderstanding of the law by the Petitioners. The voters of the City of Aspen do not have the right to change the use of open space. The voters have reserved to themselves the right to approve or authorize the City Council to sell or change the use of open space. It is the Aspen City Council that has the power to sell or change the use of open space, conditioned only upon the approval of the voters.

Petitioners were notified from the very first day they sought petitions from the City Clerk that their attempt through initiated ordinances to mandate a particular action by City Council may be problematic. The City Clerk, upon receipt of the

proposed petitions, wrote to one of the petitioners, Jeffrey Evans, on May 4, 2007, explaining that while she recognized that the initiative power is a fundamental right in a republican form of government, and because of that would not reject the petitions, still counseled that:

You may wish to consider amending your petitions to clarify that the ballot questions merely seek voter approval to authorize the City Council to convey the requested rights-of-ways (as opposed to requiring the City to convey), and that the proposed ordinances do not seek to rescind Resolution No. 34, Series of 2002. It is not entirely clear to me whether the current language of the proposed ordinances so either of these things.

Letter from City Clerk, CD page 466.

Petitioners chose to ignore the advice of the City Clerk and responded by stating: "Regarding your request for clarification of the language of the petitions, we are confident that the current language provides the specificity necessary to avoid any potential misunderstanding." *Letter from Mr. Evans, CD page 465.*

Unfortunately for the Petitioners, they were wrong. Protests of the proposed initiative ordinances were filed by citizens of the City. The protestors argued that the proposed ordinances contained innumerable measures that were not legislative matters and thus, not the proper subject matter for use of the initiative process.

Protest of Petition, CD pages 474 to 496.

The Hearing Officer, who heard the protests also concluded that the proposed

ordinances did, in fact, contain administrative matters that were not the proper subject for the initiative process. In so finding, the Hearing Officer stated:

While it appears the core purpose of the proposed initiative petitions was to ask the electors of Aspen to vote on a different entrance to Aspen alternative than the one approved by the voters in 1996, a vote was necessary by the need to use open space land in the project, location, and mitigation measures for that roadway. The proposed ordinance contained in the petitions also mandates the amendment or rescinding of existing documents authorizing the City Council because they would conflict with the specific elements or conditions of this new roadway. Both the secondary purpose of the petition and the amendment/rescinding of the documents are administrative matters entrusted to the City Manager of the City of Aspen and his staff [or the City Council.]

(Emphasis added) *Decision of Hearing Officer*, CD page 785.

Upon appeal to the District Court of the Hearing Officer's decision, the District Court clearly understood what the proposed ordinances would require if approved by the electors.

These petitions, if approved, have the City actually authorizing and approving the conveyance of an interest in real property to CDOT.

Order, paragraph 158, CD at pg. 385. Moreover, the Court correctly held that:

Petitioners cannot force, or require, the City to convey an interest in open space property to CDOT on conditions – petitioners can only obtain voter approval for such a conveyance. ... [C]onveyance of property is an administrative function and Section 13.4 [of the Aspen Home Rule Charter] does not give voters authority to direct or require City Council to convey property; it only gives the voters the right to approve such conveyances. Petitioners repeatedly state that the petitions only propose a change in use on

the open space. The petitions, however, are not written that way. The petitions start with the City authorizing and approving the conveyance of an interest in real property to CDOT, for the purposes set forth in the petition, and for no other reason. At their core, these petitions convey property to CDOT for a limited use.

Order, paragraphs 161-165, CD at 386. (Emphasis added, paragraph numbers deleted.)

B. “The petitions themselves seek to amend, or change or rescind, various administrative acts taken by City employees and City Council.” *Order* paragraph 138, CD pg. 383.

Petitioners propose in their initiative ordinances to rescind years of work and millions of dollars spent on studies to force a transit solution that they believe is best for the entrance to Aspen. Petitioners fail to explain how an ordinance of the City of Aspen, whether adopted directly by the City Council or approved by the voters, can rescind legally binding contracts with the CDOT and the Federal Highway Administration or, more importantly, how the City can rescind duly executed rights-of-way to the CDOT.

Notwithstanding Petitioners’ repeated protestations to the contrary, “[t]he petitions themselves seek to amend, or change or rescind, various administrative acts taken by City employees and the City Council.” *Order*, paragraph 138, CD pg. 383. And, “[p]etitioners want to ‘abandon’ what has been done administratively –

and this is administrative.” *Id.* at paragraph 139. Petitioners argue that the “petitions would only rescind prior enactments or authorizations inconsistent with the newly approved change of use of the conveyed property.” *Petitioners’ Opening Brief*, page 17. Again, the Petitioners’ proposed ordinances themselves belie their arguments. The introduction to the proposed ordinances state as follows:

The City of Aspen hereby authorizes and approves the conveyance of the real property or an interest in property ... to the State of Colorado... and hereby rescinds all enactments or authorizations inconsistent herewith:

(Emphasis added) *Initiative Petitions*, CD pages 11 and 24. The plain meaning of this language is clear: any “enactments” inconsistent with the proposed ordinances are rescinded. The District Court had no problem understanding the clear intent of the proposed ordinances. As the Hearing Officer stated in her Decision, the proposed ordinances “further seek to rescind any and all enactments and authorizations that would be inconsistent with [the alternative highway solutions proposed.]” *Hearing Officer’s Decision*. CD page 782.

Mr. Evans, one of the Petitioners, acknowledged at the administrative Protest Hearing that

“The 1996 ballot question was approved and it is an example of an enactment or authorization which will be rescinded if the proposed ordinances are adopted by the electorate.”

Mr. Evans clearly did not appreciate the consequences of this required "rescission." The 1996 ballot question authorized the Aspen City Council to convey a right-of-way to CDOT for the construction of a two lane highway over City-owned open space. This action was taken in accordance with the Memorandum of Understanding ("MOU") referenced above and caused the City of Aspen to convey a right-of-way to CDOT, and for CDOT to subsequently convey to the City of Aspen 31 acres of open space adjoining the Roaring Fork River to compensate the city for the conveyance of the right of way. Parties to the MOU have taken significant actions in reliance of the 1996 ballot question. Rescissions of the 1996 ballot question can not be done without significant legal consequences.

This case points out the reason why the state Constitution grants to citizens only the right to propose legislative matters and not administrative or executive matters. The local governments in the upper Roaring Fork Valley have taken numerous administrative actions to try to improve the entrance to Aspen, including the expenditure of millions of dollars to comply with the National Environmental Protection Act and National Transportation Act, as well as state and local laws. Petitioners seek to mandate a highway solution upon the City Council and citizens of the City of Aspen and to rescind countless administrative acts that have already

taken place. Simply put, the voters of Aspen should not be asked to make engineering, architectural, maintenance, construction, and design decisions for the improvement of Highway 82. Those are matters best delegated to their elected officials, professional staff and consultants.

The City of Aspen Charter does reserve to the voters the right to authorize any proposed changes in the use of City-owned open space. Thus, the decision to change the use of City-owned open space should be considered a policy decision that the Aspen voters may make. The City Charter does not, however, reserve to the voters the right to require the City Council to change the use of City-owned open space. The decision on such changes rests solely with the City Council. The voters merely reserve the right to approve Council's decision in this regard.

C. “There is no way the Court can alter the petition[s] to make [them] compliant with Section 13.4 [of the City Charter] and thus legislative, without rewriting it.” *Order*, paragraph 184, CD pg. 388.

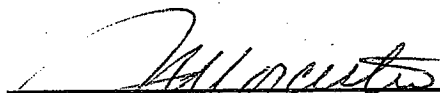
The Municipal Defendants agree with the Hearing Officer and the District Court Judge in not severing impermissible portions of the proposed ordinances. They were correct in deciding that the Petitioners themselves testified that the administrative conditions listed in the proposed ordinances were necessary to understand the proposal they were promoting. *Order*, paragraph 179, CD page 387.

Accordingly, the District Court was correct in holding that it could not “sever the administrative portions because to do so would leave little or nothing in place that could be given legal effect and would substantially change the spirit of the measure.” *Id.*, at paragraph 186.

IV. Conclusion.

For the foregoing reasons, the Municipal Respondents respectfully urge that the Court uphold the District Court’s ruling affirming each of the Hearing Officer’s ruling and deny Petitioners’ Petition for Appeal.

Respectfully submitted this 30th day of June, 2009



John P. Worcester, #20610
City Attorney

Counsel for the Municipal Defendants

CERTIFICATE OF SERVICE

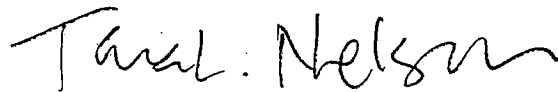
This is to certify that on June 30, 2009 a true and correct copy of the foregoing Answer Brief was served by U.S. mail, postage prepaid, to the following addresses:

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