Colorado Supreme Court 101 West Colfax Avenue, Suite 800 Denver, CO 80202	FILED IN THE SUPREME COURT SEP 29 2010 OF THE STATE OF COLORADO SUSAN J. FESTAG, CLERK
Certiorari to the Court of Appeals, 2008CA2552, Judges Miller, Roy and Furman District Court, Pitkin County, 2007CV175, Hon. Gail H. Nichols, District Judge	▲ COURT USE ONLY ▲
Plaintiff-Appellants: Curtis Vagneur and Jeffrey Evans, v. **Defendants-Appellees:** City of Aspen; Kathryn Koch, in her official capacity as City Clerk for the City of Aspen; Karen Goldman, in her official capacity as Administrative Hearing Officer pursuant to Section 31-11-110(3), C.R.S., (2009); Les Holtz; Clifford Weiss; and Terry Paulson	Supreme Court Case No.: 2009 SC 1022
Attorneys for Municipal Appellees: John P. Worcester, Reg. # 20610, City Attorney Jim R. True, Reg. # 9528, Special Counsel City of Aspen 130 S. Galena St. Aspen, Colorado 81611 john.worcester@ci.aspen.co.us	

ANSWER BRIEF
OF THE CITY OF ASPEN, KATHRYN KOCH, AND KAREN GOLDMAN

Come now the Defendant-Appellees, the City of Aspen, Kathryn Koch, and Karen Goldman, hereinafter referred to as the Municipal Appellees, by and through their counsel of record, and hereby submit their Answer Brief.

CERTIFICATE OF COMPLIANCE

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

The brief complies with C.A.R. 28(g) as it contains 7,494 words.

The brief complies with C.A.R. 28(k) as it contains under separate heading, a statement of whether such party agrees with the Petitioners' statement concerning the standard of review and preservation for appeal, and if not, why not.

John P. Worcester

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

The Order of Court granting the Petition of Writ of Certiorari listed the following issue for review by the Court:

> 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.

Petitioners claim that their two proposed initiative ordinances would merely "authorize the City to convey an easement over the [city-owned] property to CDOT" for the purpose of constructing, operating, and maintaining a four lane highway at the entrance to Aspen. *Petitioners' Opening Brief*, p. 4. In fact, the proposed ordinances would not merely authorize the City to convey property to CDOT, but would mandate that the City convey property to CDOT for the construction, operation, and maintenance of a four lane highway on a specified alignment over City-owned property, with specific design criteria set forth in the proposed ordinances. The issue before the Court is whether these two proposed ordinances are administrative and thus not subject to the power of initiative.

STATEMENT OF THE CASE

Municipal Appellees agree with the "Facts and Proceedings" as set forth by the court of appeals in its Order and opinion. For the convenience of the reader, that

section of the court's Order is repeated here.

I. Facts and Background

A. Background

The facts are largely undisputed. Since the 1980's, the City of Aspen has been addressing how to facilitate and expand entry into the city from the west via state Highway 82 (the Entrance to Aspen). After preparing a series of environmental impact statements, the city identified a proposal as the preferred alternative for the Entrance to Aspen. The participants in this process included engineers; staff from the Federal Highway Administration (FHA), the Colorado Department of Transportation (CDOT), Pitkin County, and the city; and representatives of wetlands, air quality, water, wildlife, floodplains, archaeological resources, noise, fisheries, open space, and historic preservation interests. The city's team considered numerous alternatives, including two-lane, three-lane, and four-lane roads; building at grade, below grade, or above grade; and access for general traffic, high-occupancy vehicles (HOV), buses, light rail, and guided buses.

In 1996, the City Council placed a question relating to the Entrance to Aspen on the ballot, and the voters authorized the use and conveyance to CDOT of necessary rights-of-way across certain open space and transportation properties owned by the city, for the purpose of constructing a two-lane parkway and a corridor for light rail transit. In 1998, following development of an environmental impact statement by the city and CDOT, a Record of Decision issued explaining the preferred alternative. The alternative provided for two general purpose lanes, a corridor for light rail, or, if light rail was not feasible, two dedicated bus lanes, and called for the creation of a "cut and cover" tunnel through the open space. The "cut and cover" tunnel would be built by digging a trench, inserting the tunnel structure, and then covering it and revegetating the top to mitigate the taking of open space as required by federal law.

Thereafter, the city, CDOT, and the FHA signed a

Memorandum of Understanding (MOU) agreeing to perform acts furthering the construction of the preferred alternative as described in the 1998 Record of Decision. The MOU served as a contract among the parties, subject to amendment only upon written agreement of all three parties. The city in 2002 then conveyed an easement over 8.6 acres of open space to CDOT for the construction of a two-lane highway and light rail platform. The conveyance was inconsistent with the preferred alternative in that it did not authorize the construction of two dedicated bus lanes as an alternative to a light rail platform.

In May 2007, the city placed on the ballot the question of changing the use of part, but not all, of the open space conveyed to CDOT to permit the construction of bus lanes, consistent with the plan set forth in the preferred alternative. The voters approved. As of the trial court's order, CDOT had constructed a four-lane highway, including two general purpose lanes and two bus lanes, through the portion of the open space covered by the 2007 ballot measure.

B. The Petitions

In August 2007, petitioners submitted two initiative petitions complying with the procedures set forth in sections 31-11-101 through 31-11-118, C.R.S. 2009. The petitions set forth alternative proposals for construction of the Entrance to Aspen. Prior to circulating the petitions, petitioners submitted the proposed petitions to the City Clerk, who approved the petitions as to form only, under section 31-11-106, C.R.S. 2009. In her letter to petitioners, the City Clerk indicated that the petitions implicated administrative rather than legislative matters and also contained issues, which, if not resolved, would create practical difficulties in implementation.

The first petition, referred to as Alternative F, contained the following question:

> Shall the State of Colorado, Department of Transportation (CDOT) be authorized to construct, operate and maintain a four-lane highway configuration

consisting of two general highway lanes and two vehicle and/or transit lanes (HOV) with a cut and cover tunnel, and a transit envelope next to the highway lanes, on property conveyed to CDOT by the City of Aspen, including the Marolt property?

The proposed ordinance sought to authorize the conveyance of land adjacent to the five-mile stretch of Highway 82 just west of Aspen to CDOT for the construction of a four-lane highway consisting of two general lanes and two HOV lanes. The proposal would rescind all prior inconsistent enactments or authorizations and acknowledged that its implementation would require abandonment of the preferred alternative for the Entrance to Aspen described in the 1998 Record of Decision. The proposed ordinance also contained a number of design directives, summarized by the trial court in its order as follows:

(a) CDOT is to use its discretion in the design of the Maroon/Castle/Highway 82 intersection;

(b) lane management is to be consistent with the limitations from Basalt to Buttermilk;

(c) the cut and cover tunnel is to be no less than 400 feet, which will allow the recovery of 2 acres or more of Marolt open space;

(d) the road is to have a curved alignment to avoid encroaching on the community garden and hang-gliding and para-sailing landing zone;

(e) CDOT is not to return the old portion of Highway 82 between Cemetery Lane and Maroon Creek to open space;

(f) the road alignment is to be designed to be as sensitive as possible to the location of the historic Holden Smelting and Milling Complex and Museum;

(g) the City is to "warrant" that it will adjust boundaries for any qualitative purposes; and

(h) CDOT is to follow a landscape plan to include plantings, berms and depressions and other methods to mitigate environmental and neighborhood concerns.

The proposed ordinance further provided that the road was to be built after completion of a reevaluation pursuant to 23 C.F.R. § 771 .129 and issuance of a revised Record of Decision pursuant to 23 C.F.R. §771.127 if required.

The second initiative petition proposed an ordinance called Alternative D, which was nearly identical to Alternative F, but eliminated the cut and cover tunnel described in Alternative F, and instead proposed an at-grade road between Main Street and the roundabout. The question proposed in the second petition was:

> Shall the State of Colorado, Department of Transportation (CDOT) be authorized to construct, operate and maintain a four lane highway configuration consisting of two general highway lanes and two vehicle and/or transit lanes (HOV) with a transit envelope next to the highway lanes on property conveyed to CDOT by the City of Aspen, including the Marolt property?

C. The Protests

Les Holst, Clifford Weiss, and Terry Paulson (the protestors) filed two protest letters pertaining to each petition pursuant to section 31-11-110(1), C.R.S. 2009. The letters alleged that the petitions were invalid because (1) they sought to govern administrative matters which were not subject to the people's initiative power; (2) the proposed ordinances violated the requirement that voter initiatives address a single subject only; and (3) the ballot titles were misleading.

D. Administrative Proceedings

The Aspen City Council appointed a hearing officer to address the protests. An administrative hearing was held on October 22, 2007. The hearing officer heard a statement from petitioner Evans, as well as testimony from the protestors' witnesses, including the protestors' attorney, the Assistant City Manager for Aspen, the former Public Works Director, and the Pitkin County Engineer. The testimony covered, among other issues, the history of the Entrance to Aspen, how petitioners' proposed ordinances would impact the prior decisions taken by the city, CDOT, and the FHA on the issue, and safety concerns regarding the construction of the highway.

In a written decision, the hearing officer concluded that both petitions concerned "administrative processes that are needed to effect implementation of a proposed entrance to Aspen approved by the electors in 1996," and therefore upheld the protests. The hearing officer declined to sever the impermissible portions of the initiatives because petitioners testified that they believed the conditions listed in the petitions were necessary to understand the proposals in their entirety.

E. District Court Proceedings

Petitioners then filed a petition for review of the hearing officer's decision pursuant to section 31-11-110(3), C.R.S. 2009, in the Pitkin County District Court. As pertinent here, petitioners argued that, contrary to the hearing officer's decision, the proposed initiatives contained exclusively legislative material. In the alternative, petitioners requested that the district court sever any portions of the proposed initiatives deemed to be administrative matters and declare the revised petitions sufficient.

After receiving briefing from petitioners and the city, the City Clerk, the hearing officer, and the protestors, the district court issued a twenty-four-page order affirming the hearing officer's decision. In its order, the district court concluded that the proper standard of review was similar to that of a C.R.C.P. 106 proceeding, as the court was

> reviewing the decision of a quasi-judicial proceeding. The district court further affirmed the hearing officer's decision that the petitions contained administrative matters that may not be included in an initiative petition, the administrative portions of the proposals therein could not be severed, and the initiative petitions were therefore insufficient.

Court of Appeals Order, pp. 1-9

F. Court of Appeals Proceedings

Petitioners appealed the district court's decision to the court of appeals. Petitioners again argued that, contrary to the hearing officer's decision and the decision of the district court, the proposed ordinances contained exclusively legislative material. The crux of their argument was that the initiative ordinances merely sought 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' Memorandum of Law in Support of Petition for Review,* p 3.

The court of appeals affirmed the district court's decision that the "two initiated ordinances it [the Petitioners] submitted consisted of administrative matters and therefore could not be placed on the ballot for the City of Aspen voters." *Court of Appeals Order* pp 21-22. In arriving at its decision, the court of appeals noted that "the proposals would require the city to amend existing

contractual obligations, including the MOU, and to rescind or amend the existing right-of-way." *Id.* at 17. In addition, the court noted that the proposals "would reverse a host of administrative actions and decisions made not just by the city's administrative staff, but also by at least two administrative agencies – CDOT and the FHA." *Id.*

The only factual finding on which Municipal Appellees disagree with the Court of Appeals is their statement in the Opinion to the effect that "[t]he proposed ordinance sought to authorize the conveyance of land adjacent to the five-mile stretch of Highway 82 just west of Aspen to CDOT for the construction of a four-lane highway consisting of two general lanes and two HOV lanes." (Emphasis added.) *Court of Appeals Order,* p 5. The proposed ordinances seek to do more than authorize the conveyance of land. Both proposed ordinances actually mandate the conveyance of City-owned land to CDOT for the construction, operation, and maintenance of a four lane highway. The very first paragraph after the recitations of both proposed ordinances state as follows:

> The City of Aspen hereby authorizes and **approves** the conveyance of real property or an interest in property ... to the State of Colorado, Colorado Department of Transportation for the purposes set hereinafter and for no other purpose, and hereby rescinds all enactments or authorizations inconsistent herewith." (Emphasis added.)

(Emphasis added) *Petition to Initiate*, p 4, CD 264 & 277.

LEGAL ARGUMENTS

1. Summary.

Both the Colorado Constitution and the City of Aspen Home Rule Charter guarantee to the citizens of Aspen the power to legislate by way of initiative or referendum "as to all local, special and municipal" matters. That power, however, is limited to legislative matters. Colo. Const. art. V, §1(9). Petitioners' seek to initiate two proposed ordinances that are administrative in nature and are thus, not the proper subject for initiatives. 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 (CDOT) so that they can construct a four lane highway. 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. 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. Neither proposed ordinance contains any proposed legislative enactment. The decision to construct a four lane highway is an administrative or executive matter to be decided by the City Council. Similarly, neither the decision to convey nor the actual conveyance

of City-owned property is a legislative act subject to the initiative powers reserved to the people.

2. The power of the people to propose ordinances is limited to legislative matters.

There is no disagreement between the parties that the Colorado Constitution reserves to the people the power to legislate by way of initiative "as to any local, special, and municipal legislation." Colo. Const. art. V, §1(9). That same power is guaranteed by the Home Rule Charter of the City of Aspen. It states that "the 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." (Emphasis added.) *Aspen Home Rule Charter*, §5.1(a)[1].

Moreover, there is no disagreement between the parties that the right to initiate legislation should be "liberally construed" as it is a "fundamental right" of all citizens and courts have "reviewed with the closest scrutiny any governmental action that has the effect of curtailing its free exercise." *McKee v City of Louisville*, 616 P.2d 969, 972 (Colo. 1980).

The right to initiative and referendum, however, is limited "only to acts which are legislative in character." *City of Aurora v Zwerdlinger*, 571 P.2d 1074,

[1] Relevant portions of the Aspen Home Rule Charter are appended hereto as Addendum 1.

1076 (Colo. 1977). Both the Colorado Constitution and the Aspen Home Rule Charter guarantee to the citizens of the City of Aspen the right to initiate *legislation*. Matters that are deemed to be administrative or executive in nature are not the proper subject for initiative ordinances and need not be permitted onto the ballot. *City of Idaho Springs v Blackwell*, 731 P.2d 1250 (Colo.1987)(a judicial declaration may be made whether the initiated ordinance is legislative in character, or whether it merely addresses administrative matters and is not the proper exercise of the people's constitutional right to legislate by initiative before a proposal is placed on the ballot.)

3. What constitutes an administrative vs. a legislative matter?

"Whether a city's decision to construct, modify, or purchase any particular improvement is legislative or administrative is a difficult question." *Witcher v Canon* City, 716 P.2d 445, 459 (Colo.1986). The Court in *Witcher,* however, described three tests to be used in determining whether a matter is administrative or legislative. The Court's opinion described the tests as follows:

> 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. *Zwerdlinger*, 194 Colo. at 196, 571 P.2d at 1077; *Margolis*, 638 P.2d at 3003; see also 5 E. McQuillin, *Municipal Corporations* § 16.55 n. 7 (collecting cases). Second, "acts that are necessary to carry out existing legislative policies and purposes or which are properly characterized as executive are deemed administrative, while acts constituting a declaration of public policy

are deemed legislative." *Zwerdlinger*, 194 Colo. at 196, 571 P.2d at 1077 (1977); *Margolis*, 638 P.2d at 303; *see also* 5 E. McQuillin, *Municipal Corporations* § 16.55 n. 12. Third, if an original act was legislative, then an amendment to the original act must also be legislative. *Margolis*, 638 P.2d at 304.

This three part test is not unique to Colorado. *See, Amalgamated Transit Union-Division v Yerkovich*, 24 Or.App. 221, 226; 545 P.2d 1401, 1404 (1976)(proposed initiative ordinance approving the construction of proposed freeway merely advisory and administrative); *Seattle Building and Construction Trades Council,* 94 Wash.2d 740, 748-749, 620 P.2d 82, 87-88 (1980)(initiative which sought to prohibit expansion of highway facilities not within the initiative powers. "[T]he proposal is an attempt to reverse administrative decisions of city officials and dictate the future course of such decisions."); *Read v City of Scottsbluff*, 139 Neb. 418, 297 N.W. 669, 671 (1941)(paving contract administrative matter not subject to referendum); *Buckeye Community Hope Foundation, Inc. v City of Cuyahoga Falls*, 82 OhioSt.3d 539, 544, 697 MN.E.2d 181, 185 (1998)(site plan approval for low income housing is administrative matter not subject to referendum).

The proposed ordinances in the case at bar seek to:

1. "[R]escind all enactments or authorizations inconsistent" with the proposed ordinances. In other words, rescind the conveyance of a right-of-way granted to the Colorado Department of Transportation in 2002, rescind the Memorandum of Understanding entered into

between the City of Aspen, the Colorado Department of Transportation, and the Federal Highway Administration, and deliberately throw away and ignore countless hours and millions of dollars spent on developing an environmental impact statement (EIS) and a Record of Decision in accordance with the National Environmental Protection Act (NEPA).

2. Convey to CDOT a right-of-way across City-owned open space; and

3. Authorize CDOT to construct, operate, and maintain a four lane highway across City-owned open space.

None of these actions are legislative. As shown below, from the application of the above stated tests to the proposed ordinances and examination of the case law that helped create the tests, it is clear that the proposed ordinances are administrative in nature and are not legislative enactments subject to the powers of initiative.

4. The proposed ordinances do not relate to subjects of a permanent or general nature and are therefore administrative in nature.

Neither of Petitioners' proposed ordinances contemplates the type of permanence needed to be characterized as legislative enactments. In *Blackwell, supra,* 731 P.2d at 1251, this Court described the meaning of permanence and the temporary nature of the issues involved in that case. The *Blackwell* court was asked to determine if petitions for initiative ordinances were administrative or legislative. In that case, the city council of the City of Idaho Springs decided to

purchase the site for a new city hall and to relocate an historic schoolhouse to serve as the new city hall. Citizens opposed to the plan sought to have initiated ordinances that would have nullified the actions of the City Council. In finding that the actions of the City Council were administrative and not subject to referendum or initiative, the Court 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* or *Zwerdlinger*. 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 the declaration of public policy of general applicability because a permanent enactment is more likely to involve policy considerations.

Blackwell, 731 P.2d at 1254.

In the case at bar, the decisions to rescind prior administrative enactments or authorizations inconsistent with the proposed ordinances; to convey to CDOT a right-of-way across City-owned open space; and to authorize CDOT to construct, operate, and maintain a four lane highway across City-owned open space, are no less permanent than the decisions in *Blackwell* to purchase a site for a city hall or relocate a schoolhouse onto the site to serve as a new city hall. If adopted, the proposed ordinances would not declare any new policy of general applicability. They would simply require the City of Aspen to undertake several administrative

actions; to wit: rescind previously enacted administrative actions; convey to CDOT certain city-owned open space; and, authorize CDOT to construct a four lane highway on City-owned open space.

In *City of Aurora v Zwerdlinger*, 571 P.2d 1074 (Colo.1977), this Court held that an ordinance raising rates for water supplied by the city was not subject to referendum. The decision rested, in part, upon the determination that "the provisions of the proposed ordinance of the electors are merely temporary in operation and effect." *Id.* 571 P.2d at 1977.

In *Margolis v District Court*, 638 P.2d 297 (Colo.1981), this Court held that zoning and rezoning actions are legislative in nature and therefore subject to referendum and initiative. The Court noted its holding in *Zwerdlinger* and that zoning decisions are legislative since the act "is of a general or permanent character." *Id.* at 304. There is nothing permanent about the administrative actions that the Petitioners seek to mandate upon the Aspen City Council through their initiated ordinances.

In *Monahan v Funk,* 3 P.2d 778 (Or.1931), the question before the court was whether an ordinance authorizing the commissioner of public utilities to purchase certain real property for the city of Portland, needed for a waste crematory, was administrative or legislative. The court held that the people of the city of Portland,

via their city charter, authorized their city council "to acquire real property." Accordingly, "[t]he act or purchasing a parcel of real estate is no more legislative than the act of purchasing a fire engine and truck. It is not the enactment of a permanent law for the guidance of the citizens of Portland." *Id.* at 780. The court further held that the purchase of property is no different than the sale of city property. "The principal involved is the same." *Id.*

5. The proposed ordinances merely carry out existing legislative policies and do not constitute a new declaration of public policy.

The proposed ordinances are administrative in that they seek to simply carry out existing legislative policies and do not declare any new public policy. The City Charter of the City of Aspen already authorizes the City Council to sell, exchange or dispose of real property. Section 1.4 of the Aspen Home Rule Charter reads, in relevant part, as follows:

> **Section 1.4. Powers.**
>
> ... The City may acquire property within and without its corporate limits for any City purpose, by purchase, gift, lease or condemnation, and may sell, lease, mortgage, hold, manage, and control such property as its interests may require. ...

(Emphasis added.) With regard to property acquired by the City for open space purposes, Section 13.4 of the Aspen City Charter also authorizes the City Council to sell, exchange or dispose of such property provided the electorate approves. This

section of the City Charter reads, in relevant part, as follows:

> **Section 13.4. Restrictions on the sale or change in use of property.**
>
> Council shall not sell, exchange or dispose of public buildings, utilities or real property acquired for open space purposes, without first obtaining the approval of a majority of the electors voting thereon. ...

These sections of the Aspen City Charter[2] establish the relevant public policy dealing with City-owned open space. The proposed ordinances seek to rescind prior administrative actions taken by the City Council in accordance with the powers granted to them by these sections of the City Charter. In addition, the provisions of the proposed ordinances seeking to grant easements to CDOT for the construction of a four lane highway do not declare any new policy. The power to sell or convey rights-of-ways over city owned property already rests with the City Council. The only limitation to such power relates to the sale of real property acquired for open space purposes. In that case, the City Council needs the consent of a majority of the electors voting thereon. Petitioners' proposed ordinances do not seek voter consent to authorize City Council to convey city-owned open space, but mandates the conveyance of necessary easements to CDOT. Moreover, the proposed ordinances specifically authorize CDOT to construct, operate, and maintain a four lane highway in City open space property without any further

[2] Relevant portions of the Aspen City Charter are appended hereto as Addendum 1.

formal action by the Aspen City Council.

This Court's opinion in *Witcher v Canon City*, 716 P.2d 445 (Colo.1986), is instructive on the issue of what constitutes the declaration of new policy in determining whether certain actions are administrative or legislative. In *Witcher*, the City Council of Canon City negotiated an amendment to the lease of a portion of a city-owned park for a suspension bridge spanning the Royal Gorge. In holding that such an amendment was an administrative act not subject to referendum, the Court considered whether the negotiation of specific terms of an amendment to a lease agreement established any new public policy for the city. The Court concluded that the action of amending a lease agreement was not legislative as the amendment did not establish any public policy. The Court noted that the Canon City Charter specifically authorized the City Council to undertake improvements to municipal facilities. *Id.* at 451. As noted above, the Aspen City Charter authorizes the City Council to sell real property acquired for open space purposes. The Aspen City Charter requires the City Council to obtain voter approval if it desires to sell real property acquired for open space purposes, but the Charter does not grant to the electors the right to require or mandate that City Council sell or otherwise convey city-owned real property. The people of Aspen have retained the right to consent to the sale of open space property, but that right does not grant to the

people the power to mandate the sale of real property acquired for open space purposes. That administrative or executive authority and function remains in the hands of the Aspen City Council.

In *Blackwell, supra* at 1254, the Court noted that the decision to build a new city hall was made years before the City Council decided to purchase the site for the schoolhouse. The decision to purchase the site and move the schoolhouse to the site did not establish any new public policy. "[T]he choice of location and structure for a new city hall is an act 'necessary to carry out' the existing legislative policy to build a new city hall." *Id.* at 1255. Similarly, in the case at bar, the public policy of authorizing the City Council to dispose of City owned property or to construct a highway was first enunciated upon the approval of the City Charter. Petitioners' proposed ordinances do not enunciate any new policy.

6. The proposed ordinances are inherently administrative in nature.

The Petitioners' proposed ordinances are inherently administrative and are not the proper subject for initiated ordinances. "The rule that administrative functions are not subject to referendum is ... both logical and well grounded in common sense." *Witcher* 716 p.2d at 449. This Court explained this statement as follows:

> On a day-to-day basis, elected officials are required to make decisions on administrative functions facing the city, such as the purchase of

> city vehicles, establishment of parking fees, and the proper maintenance of city-owned lands and buildings. In *Zwerdlinger* we concluded that to subject each decision to referendum would result in chaos and bring the machinery of government to a halt.

The Court went on to state that: "[c]itizens 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." *Id.*

Petitioners do not agree with the steps taken by their elected officials in attempting to improve the entrance to Aspen. Instead of employing the political process, they seek to mandate their solution upon the community. Their proposed ordinances contain nothing that may be considered legislative. The sale, use, maintenance, and governance of city real property are administrative functions.

In *City of San Diego v Dunkl*, 86 Cal.App.4th 384, 399; 103 Cal.Rptr.2d 269, 280 (2001), the court held that an initiative ordinance seeking to prohibit the construction of a downtown ballpark redevelopment project was administrative. As a consequence, the proposed ordinance was not the proper subject of the initiative power. The court explained the rationale for limiting the power of initiative to legislative matters as follows:

> The plausible rationale for this rule espoused in numerous cases is that to allow the referendum or initiative to be invoked to annul or delay executive or administrative conduct would destroy the efficient administration of business affairs of the city or municipality.

In *Amalgamated Transit Union-Division v Yerkovich*, supra at 545 P.2d 1402-03, the Oregon Court of Appeals, in determining that a proposed initiative ordinance proposed only administrative matters, held that the ordinance

> would serve only to 'request' (1) that the United States Secretary of transportation continue to approve Mt. Hood Freeway as part of the interstate highway system, and (2) that both federal and state highway authorities undertake all necessary steps to accomplish the construction of the facility.

The court concluded, after applying similar tests for determining administrative versus legislative matters that the proposed ordinance related to administrative actions and "[t]he petition submitted by defendants did not constitute a 'legislative act'." *id.* at 1405. Coincidentally, the court noted that the proposed ordinance, if approved by the electors, would not "necessarily bind the State of Oregon or the Department of Transportation of the United States." *Id.* In the case at bar, Petitioners proposed ordinances would similarly not bind either the State of Colorado to construct a four lane highway, the United States Department of Transportation to fund such a project, or the United States Environmental Protection Agency to environmentally clear such a project[3]. *See also, Beach v City of Saline*, 316 N.W.2d 724 (Mich.1982)("there is nothing inherently legislative

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[3] Indeed, the Record of Decision issued for the Entrance to Aspen project did not environmentally clear the solutions proposed by Petitioners. They now seek to impose their solution by proposing initiative ordinances that clearly deal with administrative matters and are not legislative enactments.

about a decision to acquire real estate."); *Rollingwood Homeowners Corporation v City of Flint*, 191 N.W.2d 325 (Mich.1971)(although the transaction involved large-scale housing complexes, city's action in approving the purchase contract was not subject to referendum); *Roberts v Thies*, 689 P.2d 356, 358 (Or.App.1984)(city's decision to purchase property "was not 'municipal legislation' subject to referendum under Oregon Constitution.")

7. The proposed ordinances intrude into areas of government requiring specialized training and expertise.

Although not a guideline or test adopted by this Court in prior decisions, there is a guideline that has been adopted in other jurisdictions that seems particularly useful to consider in the case at bar. The Supreme Court of Kansas has essentially adopted the same guidelines described above to help it determine if a proposed ordinance is legislative or administrative. *See, e.g., City of Lawrence v McArdle*, 522 P.2d 420 (Ks.1974). In addition to these three tests or guidelines, the Kansas Court has adopted an additional guideline that holds that if an ordinance intrudes into areas of government requiring specialized training and expertise, it is determined to be administrative. *McAlister v City of Fairway*, 212 P.2d 184, 197 (Ks.2009.) In *McAlister* the Court held that a proposed ordinance prohibiting the city from relocating a city hall in certain areas was principally administrative in nature and therefor excluded from the initiative process. In ruling that the proposed

ordinance was administrative, the Court noted that "decisions about where municipal facilities should be located necessarily require specialized knowledge and expertise." *See also, City of Wichita v Kansas Taxpayers Network, Inc.,* 874 P.2d 667 (Ks.1994) ("The operation, management, and financing of a city-wide storm water management system reasonably fits within the context of decisions that require specialized knowledge and experience with respect to city management.")

In Nevada, a similar guideline has been adopted by their Supreme Court. In *Citizens for a Public Train Trench Vote v City of Reno*, 53 P.3d 387 (Nev.2002), the Court held that a proposed initiative that would prohibit the construction of a railroad trench within an existing railroad right-of-way was administrative in nature and therefore not the proper subject for initiative. In so holding, the Court analyzed the proposed ordinance using the guidelines or principles discussed above, but added a principle similar to the one used by the court in Kansas. The Court concluded:

> that the grade separation project is a public work and that the choice of a train trench as the best way to execute the project is administrative decision to be made by the Reno City Council, not the electorate.

Id. at 393. In arriving at its conclusion, the Court noted that an ordinance to be considered as legislative "must propose policy – it may not dictate administrative

details." *Id.* at 392.

In the case at bar, the proponents of the proposed initiative ordinances are doing exactly that – they are attempting to dictate administrative details on where a state highway should be located on city owned property, how many lanes should be constructed, how the highway is to be designed, how highway lanes will be managed, whether a tunnel is to be included in the project, how the highway will be aligned, and how the entire project is to be landscaped to mitigate for environmental and neighborhood concerns.

As noted above, the City of Aspen has already devoted a considerable amount of knowledge and expertise in an effort to address the traffic problems at the entrance to Aspen. The City, in conjunction with the professional staff of the Federal Highway Administration, Colorado Department of Transportation, Pitkin County and citizen representatives of wetlands, air quality, water, wildlife, floodplains, archaeological resources, noise, fisheries, open space, and historic preservation interests have prepared a series of environmental impact statements that identifies a preferred alternative for the Entrance to Aspen.

Petitioners should not be allowed to place initiative ordinances that consist of entirely administrative matters to a vote of the electorate. It would simply be unfair to the voters themselves to ask them to become sufficiently knowledgeable

and gain sufficient expertise to properly decide those matters. Those sorts of administrative decisions are best left to elected officials, their professional staff, and paid consultants.

8. *The proposed ordinances cannot be rewritten to sever the administrative matters so that the remaining portions of the ordinances can be considered as legislative.*

In *Bull v City of Colorado Springs*, 143 p.3d 1127 (Colo.App.2006), the court concluded that it had the power to sever administrative matters from proposed ordinances and allow the remaining legislative matters to proceed to the ballot. The court ruled that it should sever an impermissible portion of an initiative 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 circumstance surrounding its proposal that the sponsors and subscribers would prefer the measure to stand as altered, rather than be invalidated in its entirety.

Neither the Hearing Officer hearing the original protest, the district court, nor the court of appeals found it advisable to sever the offending administrative portions of the proposed ordinances. The hearing officer noted that "Petitioners have testified that they believed the conditions listed were necessary to understanding 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 entirely." *Decision of Hearing Officer* at 8-9, CD at 210-211. The district court concluded that upon applying the *Bull* factors the proposed ordinances could not be severed to allow them to proceed as legislative matters. The court further noted that the "Petitioners have not, at either the hearing or in their brief, suggested what should be severed or what should remain." *District Court Order* at 22, ¶175, CD at 387. Of course, Petitioners cannot suggest what should be severed from the proposed ordinances and what should remain. If they did, nothing would remain as nothing in either proposed ordinance contains any legislative matter subject to the powers of initiative.

9. Amicus misinterprets the opinion of the court of appeals.

Amicus, Colorado Common Cause, complains that the opinion of the court of appeals "may be interpreted and cited in future cases to stand for the proposition that any initiative that has post-adoption consequences that are administrative in nature - including necessitating new administrative actions and/or rendering moot or reversing prior administrative actions - is necessarily administrative and unsuitable as a citizen initiative." *Brief of Amicus Curia Colorado Common Cause at* 6-7. The court of appeals' opinion follows well established legal precedents that require no further clarification or correction by this Court. The court of appeals used the three tests described above to conclude that the proposed ordinances were

administrative and not legislative. Thus, the ordinances were not the proper subject for referendum.

Amicus simply misinterprets the court of appeals' opinion. The opinion does not turn on whether administrative functions will be required in the future should one of the proposed ordinances pass voter approval or the fact that the proposed ordinances will require the rescission of a vast number of administrative actions already undertaken by the city. Each of these facts is merely evidence that the proposed ordinances themselves are administrative. If the ordinances propose actions that are temporary in operation and effect they are, by definition, administrative. If the proposed ordinances do not propose any new public policy, but merely acts that are necessary to carry out existing legislative policies and purposes they are deemed administrative.

The fact that the proposed ordinances have "post adoption consequences, including necessitating new administrative actions and/or rendering moot or reversing prior administrative actions" is merely evidence that the initiatives are, in fact, administrative.

Municipal Appellees agree with *Amicus'* statement that "[t]he fact that an initiative requires administrative action or has administrative consequences does not necessarily make it administrative in nature." *Brief of Amicus Colorado*

Common Cause, p 4. The problem with Petitioners' proposed ordinances is that they require only administrative action and administrative consequences. Neither initiated ordinance proposes any legislative matter.

CONCLUSION

For all of the above stated reasons, Municipal Appellees respectfully urge this Court to affirm the decision of the court of appeals in this matter

Respectfully submitted this 29th day of September, 2010.

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CERTIFICATE OF SERVICE

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