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SUPREME COURT, STATE OF COLORADO
Court Address:
101 West Colfax Avenue, Suite 800
Denver, Colorado 80202

Certiorari to the Court of Appeals, 2008CA2552
District Court, Pitkin County, 2007CV175

Petitioners:
CURTIS VAGNEUR and JEFFREY EVANS

Respondents:
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 HOLST; CLIFFORD WEISS, and TERRY PAULSON

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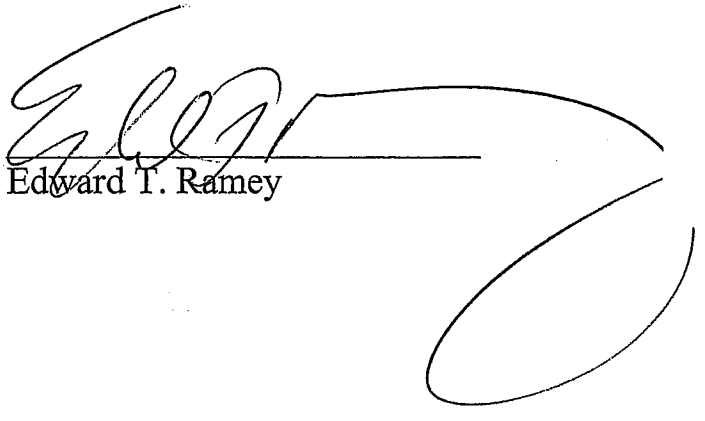
Case No. 2009SC1022

PETITIONERS' OPENING 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 8997 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 to 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.



Edward T. Ramey

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I. STATEMENT OF ISSUE PRESENTED FOR REVIEW

In 1996, Aspen's voters approved a ballot measure referred to them by City Council. The ballot measure authorized a change in use of certain City-owned real property and a conveyance of an interest in that property to the Colorado Department of Transportation for the purpose of developing a new transportation concept and design for the primary entrance to the City. The concept authorized by the voters has never been developed. Petitioners are attempting to place two (alternative) initiatives on the ballot by which Aspen's voters could substitute their prior authorization with a new comprehensive authorization for a different change in use of the same property for development of a strategically different transportation concept. The Respondents object to allowing these proposals to be submitted to the voters on the grounds that the content of the initiatives is "administrative" – rather than "legislative" – in nature.

Colo. Const. art V, §1(9) reserves the right and power of initiative to the registered electors of every city, town, and municipality "as to all local, special, and municipal legislation of every character in or for their respective municipalities." Do Petitioners' initiatives propose "municipal legislation" within the scope of Colo. Const. art. V, §1(9).

II. STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition Below.

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

The procedures for the exercise of initiative and referendum powers by municipal electors are set forth in Title 31, Chapter 11, C.R.S. (2009). Upon approval of their petition forms by the City Clerk pursuant to §31-11-106(1), C.R.S. (2009) – CD pp. 466-67[1] – Petitioners circulated their initiative petitions and obtained the required number of signatures (15% of the City's registered electors as required by Section 5.3(a) of Aspen's Home Rule Charter) for a timely filing with the City Clerk on August 31, 2007, and submission to the City Council and the electorate pursuant to §31-11-104, C.R.S. (2009).

On October 10, 2007, Respondents Holst, Weiss, and Paulson filed protests against both initiatives with the City Clerk pursuant to §31-11-110(1), C.R.S. (2009). CD pp. 474-556, 557-638. Both protests asserted, in pertinent part, that the initiatives impermissibly addressed "administrative" – as distinguished from "legislative" – matters. CD pp. 476-91, 559-74. Pursuant to §31-11-110(3), C.R.S.

[1] Citations to the Record are by reference to the applicable compact disc page numbers.

(2009), a hearing on the protests was held on October 22, 2007, before a hearing officer (Respondent Goldman) designated by the City Council. CD p. 469; transcript, CD pp. 653-776. The hearing officer issued her Decision on October 29, 2007 – CD pp. 777-87 – concluding that, while both initiatives contained a "core" legislative purpose regarding "whether the new entrance to Aspen should consist of two general highway lanes and two vehicle and/or transit lanes (HOV)," both "contain administrative subject matter that is not subject to the rights of initiative" and were therefore "not sufficient" for placement on the ballot. CD pp. 785, 787.

Petitioners filed a petition for review with the district court pursuant to §31-11-110(3), C.R.S. (2009), on November 21, 2007. CD pp. 1-15. Upon review of the record before the hearing officer and briefing by the parties,[2] the district court entered its Order on October 29, 2008, affirming the determination that the initiatives contained "administrative subject matter that is not lawfully subject to the rights of initiative, and cannot appropriately be severed out" and concluding that the initiatives should not be placed on the ballot. CD pp. 366-88. The judgment of the district court was affirmed by the court of appeals on October 29,

[2] The City now generally aligned itself with the Protestors, arguing (in accord with the hearing officer) that the only portion of the proposed initiatives perhaps suitable for submission to the voters was a request "for authorization to use City-owned open space for the purpose of constructing and operating a four lane highway," severing all additional content. CD pp. 345-46.

2009. Addendum 3. Certiorari was granted in part by this Court on June 1, 2010. Addendum 4.

B. Statement of the Facts.

This case is about the efforts of Petitioners to seek authorization from the voters of the City of Aspen for a permanent change in use of specified City-owned real property to permit development of a new strategic concept for the primary transportation corridor into the City (known as the "entrance to Aspen"). As Petitioners' proposals would involve modification and relocation (onto the City-owned property) of a segment of a state highway under the jurisdiction of the State of Colorado Department of Transportation ("CDOT"), the initiatives would authorize the City to convey an easement over the property to CDOT for this purpose. The proposals are embodied in two citizen initiatives, referred to as "Direct Connection" and "Modified Direct Connection." CD pp. 8-20, 21-33; Addendums 1 and 2.

Petitioners' proposals come in the context of over 40 years of public debate concerning potential solutions to the traffic problems along Colorado State Highway 82 as it enters the City of Aspen through two lanes and two ninety degree "S-curves" from the Roaring Fork Valley. Any redesign of the entrance to Aspen that involves expansion of State Highway 82, elimination of the existing S-curves, or development of certain alternative mass transit systems would require the State,

through CDOT, to obtain rights to use adjoining property owned by the City of Aspen. As the adjoining City-owned property was initially acquired by the City for open space purposes, any conveyance or change in use of that property would also implicate Section 13.4 of the Aspen Home Rule Charter, which provides:

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

In 1996, the Aspen City Council submitted its own "entrance to Aspen" proposal to the City's voters – invoking its power under Article V ("Initiative and Referendum"), §5.7 of the Home Rule Charter providing that "The council on its own motion, shall have the power to submit at a general or special election any proposed ordinance or question to a vote of the people in a manner as in this article provided."

Council's ballot question was submitted by resolution – Resolution No. 51 (Series of 1996), CD, pp. 818-19 – and requested that "the City Council be authorized to use or to convey to the State of Colorado, Department of Transportation, necessary rights of way across City owned property, including the Marolt Property, acquired for open space purposes, and the Thomas Property, acquired for transportation purposes, for a two lane parkway and a corridor for a

light rail transit system (to be constructed when the financing is available)." The requested authorization was explicitly contingent upon the following recited conditions:

– subsequent public votes approving "financing mechanisms" and "final design details" for the light rail system;

– construction of a "cut and cover tunnel of no less than 400 feet to return to public open space approximately 2 acres or more of Marolt open space;"

– return to open space use of a specified portion of the present Highway 82 right-of-way to be abandoned by the State through the new design;

– acquisition of substitute open space property of equal or greater value to replace any resulting net loss of open space;

– alignment of the new transportation corridor to be sensitive "to the location of the historic Holden Smelting and Milling Complex and Museum;"

– minimum use of open space "consistent with good design;"

– design of a proposed bridge to be sensitive to environment and community character; and

– a landscaping plan "to include plantings, berms and depressions, and other methods to mitigate environmental and neighborhood concerns along the entire EIS corridor."

Aspen's voters approved the Council's referred ballot question at the November 1996 election.

Grounded upon this voter authorization, a series of administrative actions followed. Each administrative act was directed toward implementing the policy authorized by the voters through their adoption of the City Council's 1996 ballot measure. Pursuant to the voter authorization, the City Council entered into a detailed Memorandum of Understanding ("MOU") with CDOT and the Federal Highway Administration ("FHWA") in July 1998. CD pp. 614-31. This was followed by issuance of an environmental impact statement Record of Decision pursuant to 23 CFR 771.127 by CDOT and the FHWA in August 1998 – CD pp. 342-43 (Mun. Def. Dist. Ct. Br.) – recommending development of a two-lane parkway and light rail system running from the outskirts of the City (Buttermilk Ski Area), through the property at issue in this case (eliminating the existing S-curves), and connecting with the City's Main Street. The Record of Decision also incorporated a provision for interim exclusive bus lanes along the entire route pending approval of funding for light rail.

In 2002, expressly pursuant to the 1996 voter authorization, Council approved a resolution authorizing the City Manager to execute and deliver a right-of-way easement to CDOT for construction of the two-lane parkway and light rail corridor over the 2-mile stretch of Highway 82 from Buttermilk, over the property

at issue in this case, to Main Street. CD pp. 581-82; pp. 372-73. This easement was executed – CD pp. 583-605 – in return for which CDOT (per the condition in the 1996 voter authorization) granted 31 acres of replacement open space land to the City. CD p. 344 (Mun. Def. Dist. Ct. Br.); CD pp. 606-12.

As the 1996 voter authorization did not include the interim dedicated bus lane alternative incorporated in the 1998 Record of Decision, the City Council returned to the voters and placed a second question on the City ballot in May 2007 requesting authorization for that alternative use of City-owned open space property adjoining Highway 82 between Buttermilk and the Maroon Creek Roundabout west of the final stretch of highway entering the City. CD p. 373, ¶52. This proposal did not affect the two lanes and S-curves for the last half mile segment of Highway 82 from the Roundabout into Main Street. The ballot measure passed, after which the easement to CDOT was accordingly amended and the voter-authorized four lanes from Buttermilk to the Maroon Creek Roundabout were constructed. Id.

And this, both physically and temporally, is where things have stopped. A funding proposal for the light rail component of the concept approved by the voters in 1996, and an alternative ballot question asking for approval for an exclusive busway from the Buttermilk Ski Area across the Marolt open space, were both rejected by Aspen's voters in November 1999. A second attempt to gain voter

approval for the bus lane alternative along this entire section of highway failed at a municipal election in May 2001. Since that time, the voters have not been asked to authorize any alternative use for the critical open space property (the Marolt property) along the proposed Highway 82 corridor between the Maroon Creek Roundabout and Main Street other than the two-lane parkway and light rail concept authorized in 1996. The S-curves remain, and the traffic problems persist.

Both the 1996 and 2002 ballot measures submitted to Aspen's voters by City Council, and all of the administrative and implementing actions that have followed from them, seek to address Aspen's traffic demand and congestion through the provision of mass transit (light rail or bus) rather than expansion of the existing highway to create additional lanes for use by general automobile traffic. This plan is based upon a discretionary policy decision to employ congestion as an incentive to the public to use mass transit rather than drive. An alternative policy, incompatible with that proposed by City Council,[3] is to address the problem of congestion through immediate highway expansion for general traffic (while preserving the future prospect for light rail). Petitioners believe this approach would better address the problems facing the City and gain public support for implementation. It is this alternative policy which forms the basis of Petitioners' proposals at issue in this case.

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[3] This policy incompatibility is made explicit in Section 2 of Petitioners' initiatives.

Petitioners wish to present Aspen's voters with two new options for resolving the current impasse. Their "Direct Connection" proposal – CD pp. 8-20; Addendum 1 – provides in its operative language that "The City of Aspen hereby authorizes and approves" conveyance to CDOT of an interest in the real property subject to the existing easement[4] for construction of a four-lane highway segment with a bordering transit envelope adequate to accommodate future light rail. The "Modified Direct Connection" proposal – CD pp. 21-33; Addendum 2 – is identical except for the inclusion of a cut and cover tunnel. Both measures, and their required change in use of municipal open space property, propose expansion of highway capacity to four lanes for general traffic (with specified minimal HOV restrictions) to address immediate problems of congestion. Both proposals are thus incompatible with the policy and use authorized by the voters in 1996.

Both of Petitioners' proposed initiatives contain nine paragraphs explaining their basic four-lane highway proposal. As with City Council's 1996 ballot measure, Petitioners' initiatives define the essential elements of the concept and change in use they are asking the voters to authorize and approve. These nine points are:

[4] The property is described by reference to the description in the copy of the existing easement attached to the Council resolution authorizing the City Manager to execute and deliver that easement to CDOT.

(1) implementation of the authorization will be contingent upon completion of any environmental impact or Record of Decision reevaluations required by federal regulation;

(2) no funding obligations incident to such reevaluations will accrue to any of the parties solely as the result of acceptance of the new authorization by CDOT;

(3) construction will comply with the provisions of identified alternatives contained in an applicable Draft Environmental Impact Statement;

(4) the design of one identified intersection and the starting point of the HOV lanes will be at the sole discretion of CDOT;

(5) lane management (*i.e.*, access limitations) for the HOV/transit lanes will be no more restrictive than those enforced on the HOV section of the highway between the town of Basalt and Buttermilk Ski Area;

(6) transit envelope alignment and bridge engineering shall be sufficient to accommodate the future addition of light rail;

(7) the same environmental and historic preservation contingencies included in the 1996 ballot measure (including the identical specifications for a cut and cover tunnel in the "Modified Direct Connection" proposal), plus an additional protection for a community garden and hang gliding landing zone, will be applicable;

(8) adjustment of boundaries of the conveyed property will be authorized and encouraged for any qualitative engineering, functional, or mitigation purposes; and

(9) any impacted landscape will be re-vegetated if the project does not go forward.

Both initiatives also explicitly "rescind[] all enactments or authorizations inconsistent herewith," and both initiatives contain a severability clause (Section 3) for any provisions found to be "invalid or unconstitutional."

Pursuant to §31-11-106(1), C.R.S. (2009), citizen initiative petition forms must first be presented for approval to the City Clerk, who has the power to reject a petition if it contains "extraneous material" or "does not propose municipal legislation" within the scope of Colo. Const. art. V, §1(9). The City Clerk accepted both petitions, noting the Petitioners had removed provisions she had found to be "clearly administrative" in a similar petition she had rejected the preceding year. CD, pp. 463-64, 466-67. In response to a suggestion for further clarification that the initiatives did not seek to rescind the 2002 Council Resolution by which Council authorized the City Manager to execute and deliver the existing right-of-way easement to CDOT, Petitioner Evans assured the City Clerk that the petitions "would only rescind prior *enactments or authorizations* inconsistent with the newly approved change of use of the conveyed property, *not* [the 2002 Council

Resolution or the easement agreement]" – though noting that "this may render some portions of that resolution to be moot or inapplicable . . . ." CD p. 465 (emphasis added).

Upon timely submission of the required signatures of at least 15% of Aspen's registered electors, the City Clerk issued her statement of sufficiency for both initiatives on September 27, 2007. CD p. 468. The protests which gave rise to this case were filed by Respondents Holst, Weiss, and Paulson pursuant to §31-11-110, C.R.S. (2009), on October 10, 2007. CD pp. 474-556, 557-638.

The only issue before this Court is whether Petitioners' proposed initiatives are "legislative" or "administrative" in nature. If legislative, they are within the right of initiative reserved to the people under Colo. Const. art. V, §1(9). If administrative, they are not. A subsidiary issue concerns the proper disposition of this case should the Court conclude that the initiatives contain both legislative and administrative provisions.

There have been three judicial or quasi-judicial rulings below.[5] All three have concluded that Petitioners' proposed initiatives are primarily, if not

[5] The decision for the hearing officer is in the record at CD pp. 777-843; the decision of the district court is at CD pp. 366-88; the decision of the court of appeals is attached as Addendum 3.

exclusively, administrative in nature.[6] All three base this conclusion largely upon predictions that passage of either initiative would necessarily have administrative consequences – precipitating new or vitiating prior administrative acts. As stated by the court of appeals, "[i]f 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." Addendum 3, p. 17.[7] The two courts go so far as to suggest the adoption of the initiatives themselves would constitute the performance of an administrative act. "Because petitioners' initiated ordinances

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[6] The hearing officer suggested that the "core purpose" of the initiatives – "ask[ing] the voters to determine whether the new entrance to Aspen should consist of two general highway lanes and two vehicle and/or transit lanes (HOV)" – may be permissible, but the "secondary purpose . . .to mandate specifics regarding the design, location, and mitigation measures for that roadway" . . . "over-reach and intrude on administrative responsibilities of city staff and are not proper subjects for consideration by the electors of the City of Aspen." CD p. 785. The City adopted a similar approach before the district court, suggesting that the initiatives would, at a minimum, have to be limited to "simply ask the voters for authorization to use City-owned open space for the purpose of constructing and operating a four lane highway." CD p. 345-46. The district court agreed and, like the hearing officer, declined to attempt to sever any "impermissible" provisions. CD p. 388, ¶¶179-82. The court of appeals apparently concluded both proposed initiatives were "administrative" in their entirety.

[7] The hearing officer concluded that the initiatives "mandate[] the amendment or rescinding of existing documents authorized by the City Council" – *i.e.*, administrative documents – "because they would conflict with the specific elements or conditions" recited in the initiatives (with specific reference to the MOU). CD p. 785. Further, the initiatives "require[] the City Council to authorize a new and different MOU and possibly a new right-of-way easement." Id.

sought to change the administrative details of [prior city administrative decisions], they should similarly be deemed administrative." Id. at p. 20.[8]

Additionally, the two courts concluded that the initiatives are insufficiently "general" in scope to establish "policy" (viewed as a requisite for legislation). Per the court of appeals, "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." Addendum 3 at p. 20.[9] The court of appeals concludes its opinion with references to the Aspen City Charter that "indicate that tasks related to municipal engineering and construction, such as the design and construction of a highway, are intended by the city to be viewed as administrative" – Id. at 21-22 – though, respectfully, nothing "related to municipal engineering and construction," as distinguished from authorizations for the use of municipal property for *State* engineering and construction (for a state highway), is addressed in the initiatives.

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[8] Per the district court, the initiatives sought "to amend, or change or rescind, various administrative acts taken by City employees and the City Council" – CD p. 383, ¶138. "At their core, these petitions convey property to CDOT for a limited use." CD p. 386, ¶165.

[9] Per the district court, "The provisions addressing specifications for the highway . . . are simply NOT policy matters and not general in nature – the specifications for the highway in both petitions will have no impact on any other city or county road or any state highway other than the 5 miles of Highway 82 immediately west of Aspen." CD p. 382, ¶131.

On the subsidiary issue of what to do should the initiatives be determined to contain both legislative and administrative matter (as concluded by all but the court of appeals), only the hearing officer noted (but did not adopt) the possibility of severing all but the core request to the voters "to determine whether the new entrance to Aspen should consist of two general highway lanes and two vehicle and/or transit lanes (HOV)." CD p. 785-86.[10]

The rulings below have, respectfully, misread the plain language of the Petitioners' proposed initiatives, and have misapplied the law applicable to a determination of whether or not the proposed initiatives are legislative in nature.

III. SUMMARY OF THE ARGUMENT

By their plain language, Petitioners initiatives do two things: they (a) *authorize and approve* a conveyance of an interest in specified City-owned property for a new use (development of a strategically different transportation concept for the entrance to Aspen), and they (b) *rescind* all prior inconsistent *enactments or authorizations*.

Were either of these initiatives to be adopted by the voters, they would assuredly have administrative consequences. New administrative actions would likely follow, and some prior administrative actions may be mooted. But these

[10] The district court declined to propose severance as it "would leave little or nothing in place that could be given legal effect." CD p. 388, ¶186.

initiatives, of themselves and by their own limited operative language, neither perform, rescind, amend, nor modify *any* administrative act.

What these initiatives *would* do is adopt – *i.e.*, authorize and approve – a new strategy for the primary entrance to the City of Aspen, together with a permanent change in use of critically located and impacted City-owned property.

Petitioners' proposals are permanent in any practical sense, and general in the context of their subject. They involve a policy decision as much as any transportation or land use issue confronting the City has ever involved. The contents of the initiatives are no more detailed or technical than those of the voter-approved policy they seek to supplant – and no more than appropriate to apprise the voters of what it is they would be asked to authorize. Far from carrying out existing legislative policies or purposes, these initiatives would break with prior policy and expressly rescind prior inconsistent "enactments or authorizations" (*i.e.*, legislation). By their limited operative language, they fully defer implementation to city, state, and federal executive and administrative officials and processes. In sum, by the standards recognized by this Court and applied generally, these proposed initiatives are *legislative* in every sense. They are within the scope of the power reserved by the people through Colo. Const. art. V, §1(9) to propose "municipal legislation of every character" to the electors of every city, town, and municipality in this State.

IV. ARGUMENT

A. Standard of Review.

This appeal involves the application of a constitutional standard to the operative language of a proposed initiative. Construction of the initiative itself – as with a statute or contract – is a question of law subject to *de novo* review. Specialty Restaurants Corp. v. Nelson, 231 P.3d 393, 397 (Colo. 2010); Ad Two, Inc. v. City and County of Denver, 9 P.3d 373, 376 (Colo. 2000). Once construed, the application to the initiative of the constitutional standard embodied in Colo. Const. art. V, §1(9) is also a question of law subject to *de novo* review. People v. Castaneda, 187 P.3d 107, 109 (Colo. 2008); Evans v. Romer, 854 P.2d 1270, 1275 (Colo. 1993). This Court has held the constitutional right at issue to be "fundamental," subject to liberal construction, and protectable by "closest scrutiny" review of curtailments of its exercise. McKee v. City of Louisville, 616 P.2d 969, 972 (Colo. 1980).

B. Interpretation of the Proposed Initiatives.

As with a statute or contract, interpretation of the proposed initiatives at issue here should begin with their plain language – and in this case may end there as well, as the operative language is clear and unambiguous. Specialty Restaurants, 231 P.3d at 397; Lombard v. Colorado Outdoor Education Center, Inc., 187 P.3d 565, 570 (Colo. 2008).

After the summary prepared pursuant to §31-11-106(3)(b), C.R.S. (2009) – and a series of "Whereas" recitals, both initiatives contain the same operative language:

> 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 No. 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.

This is followed by three sections. Section 1 recites the purposes for which City officials would be authorized to convey an easement over City-owned property to CDOT. Section 2 is simply a recital acknowledging the basic policy inconsistency with the 1998 Record of Decision. Section 3 is a severance clause.

The *only* operative effect of these initiatives is the prospective *authorization* and *approval* (by the City of Aspen through the people in this case) of subsequent acts by City officials designed to accomplish a new policy objective, and the *rescission* of prior inconsistent *enactments* and *authorizations*. All that is provided is authority; all that is taken away is authority.

Particularly, no interest in property is conveyed by these initiatives – though authority is provided to City officials to do so. No prior conveyance is rescinded or amended. No change is made to the terms of the existing easement validly granted under a prior authorization (though responsible officials may act to create one). No contract or memorandum is consummated, amended, rescinded, or

modified in any way by these initiatives (though such actions may be performed in the future by City officials should either initiative be adopted). No "tasks related to municipal engineering or construction" are performed (or even addressed).

Giving the words used in these initiatives "their ordinary and common meaning" – Lombard, 187 P.3d at 570 – noting that multiple documents and processes are referenced throughout both initiatives with no operative language that would amend, rescind, or replace any of them, and according the Petitioners (and ultimately the voters) the same presumption as the General Assembly that if they intend to do something they may be expected to say so – Sooper Credit Union v. Sholar Group Architects, P.C., 113 P.3d 768, 772 (Colo. 2005) – these initiatives should be interpreted as they are written. They propose a prospective change in a base of authority – nothing more and nothing less.

C. Criteria for Determining Whether Petitioners' Initiatives Propose Municipal Legislation.

Colo. Const. art. V, §1(9), reserves the initiative and referendum powers to the registered electors of every city, town, and municipality "as to all local, special, and municipal legislation of every character in or for their respective municipalities." Noting the express language and textual location within the Colorado Constitution of this provision, this Court has held the reservation applicable only "to acts which are legislative in character." City of Aurora v. Zwerdlinger, 571 P.2d 1074, 1076 (Colo. 1977). Not within the constitutionally

reserved power are "administrative" acts and decisions entrusted, for practical as well as textual reasons, to city officials. Id. at 1077; Witcher v. Canon City, 716 P.2d 445, 449 (Colo. 1986). Similarly, the initiative power under §5.1(a) of the Aspen City Charter is limited "to any legislative matter which is subject to said legislative power."

"Whether an ordinance is subject to initiative or referendum is a judicial question." 5 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS §16:54, p. 413 (3rd ed. 2004). "Numerous tests have been employed by various courts" and "[s]ubstantial disagreement exists in different jurisdictions" regarding the distinction between "legislative" and "administrative" measures. Zwerdlinger, 571 P.2d at 1077. One commentator has stated that "There is no satisfactory test for determining when an ordinance is 'legislative' nor is there uniform application of the rule." C. ANTIEAU, 6-89 LOCAL GOVERNMENT LAW §89.06 (2nd ed. 2010). Yet the common theme is that a measure "is 'legislative' if it makes a new law, whereas it is 'administrative' if it only provides for the execution of an old law." Id. The test is "whether the proposition is one to make new law or to execute law already in existence. The power to be exercised is legislative in its nature if it prescribes a new policy or plan; whereas, it is administrative in its nature if it merely pursues a plan already adopted by the legislative body itself, or some power superior to it." MCQUILLAN §16.54, pp. 409-10.

This Court has adopted three "tests" to guide its determination of whether a measure would constitute a "legislative" or "administrative" act. "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." Witcher, 716 P.2d at 449, citing Zwerdlinger, 571 P.2d at 1077. "Second, 'acts that are necessary to carry out existing legislative policies and purposes or which are properly characterized as executive are deemed to be administrative, while acts constituting a declaration of public policy are deemed to be legislative.'" Witcher, 716 P.2d at 499-50, quoting Zwerdlinger, 571 P.2d at 1077. "Third, if an original act was legislative, then an amendment to the original act must also be legislative." Witcher, 716 P.2d at 450, citing Margolis v. Dist. Court, 638 P.2d 297, 304 (Colo. 1981). "The central inquiry is whether the proposed legislation announces new public policy or is simply the implementation of a previously declared policy." City of Idaho Springs v. Blackwell, 731 P.2d 1250, 1254 (Colo. 1987).

D. Under the Applicable Criteria, Petitioners' Initiatives Propose Municipal Legislation.

1. Petitioners' Initiatives Relate to Subjects of a Permanent or General Character, Not Matters Temporary in Operation or Effect.

Petitioners' initiatives request authorization for a permanent change in use of critically located City-owned property and authorization for the conveyance of an easement over that property to CDOT. These changes would be "permanent" in

any practical sense. The initiatives concurrently embody and adopt a new strategic concept for the design of the State Highway 82 entrance to Aspen which will directly and indelibly affect long-term future transportation policy. There is nothing "temporary in operation or effect" about them.

Notwithstanding their evident permanency, the conjunctive "or general character" in the first Witcher test posed a question for the courts below – the district court balking at the focus on a specific stretch of one highway rather than roads and highways in general – *see* ftn. 9, *supra* – and the court of appeals juxtaposing comprehensive city-wide zoning codes against what it viewed as nothing more than an effort by Petitioners at "reconfiguring lanes." Addendum 3, p. 9. Whether consideration of generality is supplemental or alternative to permanency under this test, it is, respectfully, a concept that must be viewed in the context of the subject matter of the proposal.

While the amendment of a lease was held to be administrative in Witcher, this Court acknowledged the *legislative* nature of the two elections that "established the public policy" of leasing, rather than operating, the Royal Gorge Bridge – a single and very specific bridge. 716 P.2d at 450. Each of the zoning or rezoning decisions held to be legislative in Margolis, 638 P.2d at 303-04, involved a specific parcel of property (one of only 3.34 acres – Id. at 300) and a particular category of change in use. Annexation (necessarily involving specific land) is

recognized as a legislative act. City of Louisville v. Dist. Court, 543 P.2d 67, 70 (Colo. 1975). The decision to build a single new city hall was viewed as a "declared public policy of general applicability" (*i.e.*, legislative) in Blackwell, 731 P.2d at 1254.[11] *See also* Citizen Action for a Livable Montgomery v. Hamilton County Bd. of Elections, 875 N.E.2d 902, 909-10 (Oh. 2007), holding an initiative proposing the acquisition of specific land along a specific highway for development as a park with specific features to be "of a permanent and general nature" and thus legislative; State *ex rel.* North Main Street Coalition v. Webb, 835 N.E.2d 1222, 1226, 1229 (Oh. 2005), holding an initiative to relocate a proposed overpass bridge to a specified different location for historic preservation reasons (and limiting a municipality's financial contribution to the project) to be legislative. Specificity – particularly geographic specificity – is relative to the purpose sought to be addressed. It would make little sense to propose a new strategy for the design of the primary transportation corridor through the "entrance to Aspen" in terms sweeping beyond the geographically dictated "entrance to Aspen."

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[11] This "legislative" determination was distinguished from the subsequent attempt to constrain implementation by eliminating one parcel of real estate and one particular structure from the range of choices available for implementation of that specific project. Blackwell, 731 P.2d at 1254-55. *Cf.* Citizens for a Public Train Trench Vote v. City of Reno, 53 P.3d 387, 393 (Nev. 2002), disallowing an initiative prohibiting a specific grade separation project (a train trench) in a specific existing right of way, as explicitly distinguished from "construction of a train trench in general" or "the construction of a different type of grade separation project within the right of way" (either of which prohibitions would presumably be viewed as legislative).

2. Petitioners' Initiatives Do Not Carry Out Existing Legislative Policies or Purposes; They Declare a New Public Policy.

Turning to the second Witcher test, Petitioners' initiatives are certainly not "acts that are necessary to carry out existing legislative policies and purposes." To the contrary, they are manifestly incompatible with existing policies and purposes – indeed, they expressly seek to supplant them. Unless we ratchet the concept of "policies and purposes" – and the permissible ambit of legislation – to a level of generality wholly devoid of detail (*e.g.*, an authorization "to do something about the traffic problems on Highway 82"), Petitioners' initiatives certainly would declare a new policy.

First, Petitioners do respectfully take exception to the suggestions below that their initiatives are nothing more than "provisions addressing specifications for [a] highway" – CD p. 382, ¶131 – or "reconfiguring lanes" – Addendum 3. p. 20 – characterizations connoting something short of new "policy." Petitioners propose authorization for a permanent change in use of City-owned property and an entirely new concept of a permanent four lane highway entrance to the City. The proposals are very different from the current uses (open space) and authorizations (two lanes and light rail). This is not "reconfiguring lanes" – this is an entirely different strategy for how best to address transportation problems confronting the City at its critical point of access.

Second, as noted above, the concept of "policy" should not be inflated to a level of generality as to be meaningless. To be useful, legislation should be specific enough to guide execution. The initial votes to lease, rather than operate, the Royal Gorge Bridge in Witcher were acknowledged by this Court to establish "public policy." 716 P.2d at 450. Each of the rezonings at issue in Margolis, though they "may directly affect only a few people" were "seen as the setting of policy for the future." 638 P.2d at 304.[12] [Here it may be noted that Petitioners' proposals would directly affect virtually everyone driving, riding, or biking in or out of Aspen.] The specific decision to build and allocate funding for a new city hall was described as '[t]he only declared public policy of general applicability" involved in the Blackwell case. 731 P.2d at 1254.[13] The determination of "what

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[12] *Cf.* McQUILLAN at §16:54, p. 412 – "An ordinance need not directly affect the general public in order to be legislative. . .; the public may be indirectly benefitted by its direct effect on some of the employees of the city."

[13] Blackwell illustrates situations where a "declared public policy of general applicability" is followed by an attempt simply to narrow the range of choices available for execution of that policy (in that case to eliminate one parcel of real estate and one particular structure from consideration for the new city hall). 731 P.2d at 1254-55. *Cf.* McAlister v. City of Fairway, 212 P.3d 184, (Kan. 2009), where, though much study had gone into relocating the city hall, *no* prior policy had been declared, and a subsequent initiative severely limiting site options was held to have a policy purpose and be "legislative in character" under that factor (though the initiative was disallowed for other reasons discussed below at pp. 27-29). Id. at 196-97. *See also* City of San Diego v. Dunkl, 103 Cal.Rptr.2d 269 (Cal.App. 2001), disallowing as "administrative" an initiative that merely sought to impose conclusions regarding contractual performance under an existing memorandum of understanding entered into by the City under authority of an

type of edifice the government requires" to meet its needs, and what those needs are, "are policy issues." Convention Center Referendum Comm. v. District of Columbia Bd. of Elections and Ethics, 441 A.2d 889, 910 (D.C.App. 1981). "A local legislative enactment is likely to be held subject to a referendum" – *i.e.*, applying the same standard as applicable to initiatives – "when it involves a matter of considerable concern to the entire community." ANTIEAU at p. 3. Petitioners' proposals involve and would impact a matter of considerable concern to most residents of Aspen and the Roaring Fork Valley.

The hearing officer and district court expressed a third concern – that portions of Petitioners' initiatives may reach a level of technical complexity unsuitable for submission to the voters. CD pp. 386-87, ¶¶166-70; CD p. 785. The concern is not with detail as such – as much legislation is quite detailed – but apparently with a fear that the initiatives would pose decisions beyond the abilities of the electorate (and better left to City Council). Indeed, some courts will not permit initiatives and referenda on matters "which require specialized training and experience in municipal government and intimate knowledge of the fiscal and other affairs of a city in order to make a rational choice" – McAlister, 212 P.3d at

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earlier citizen initiative – Id. at 282; City of Wichita v. Kansas Taxpayers Network, Inc., 874 P.2d 667 (Kan. 1994), disallowing an initiative effort to repeal an ordinance found to be simply implementing a prior enacted policy to develop a storm sewer system. In the present case, there is no prior "declared public policy" other than the 1996 voter authorization – and Petitioners expressly seek to rescind, rather than implement, that.

194 (concluding that the site choice for a city hall, in the context of an initiative that would eliminate over 90% of the options, was of this nature) – or day-to-day matters such as utility rate setting and employee salaries[14] – ANTIEAU, p. 3.

There is no basis to suggest that "specialized training and experience in municipal government" or "intimate knowledge" of the City's internal affairs is a prerequisite to an informed and rational decision on Petitioners' proposals – any more than it was in 1996 when the voters were asked to, and did, adopt the comparably detailed and specific policy Petitioners now seek to supplant. Nor, respectfully, should this Court presume that Aspen's voters are any less qualified today than they were in 1996 to consider the benefits and costs of alternative transportation strategies or alternative uses for the City's open space property (reserved by their Charter for their approval in any event).

Petitioners' initiatives propose a basic alternative concept for the primary entrance to Aspen, with very moderate substantive detail (future accommodation of light rail, re-vegetation, historic preservation and environmental sensitivity, minimum dimensions already approved for a cut and cover tunnel), and substantial deference to administrative expertise at all levels (*e.g.*, §1, items 1, 3, 4, 5, and 8). These initiatives pose a strategic policy decision with minimally sufficient detail to allow the voters to understand what they are being asked to authorize and to

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[14] *But see* City of Las Vegas v. Ackerman, 457 P.2d 525, 528 (Nev. 1969); Parrack v. City of Phoenix, 329 P.2d 1103, 1106 (Ariz. 1958).

provide adequate guidance to city and state executive officials for implementation consistent with the wishes of the voters. "It would be contrary to the premise of the initiative power to place the enactment of new laws and policies out of bounds simply because such laws and policies present difficult and complex choices." Swetzof v. Philemonoff, 203 P.3d 471, 480-81 (Alaska 2009).

Finally – as discussed at pp. 14-15, above – the hearing officer and both courts below expressed concern with the potential post-adoption administrative consequences of Petitioners' initiatives, concluding that these *consequences* rendered the initiatives themselves administrative. Noting 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" – and properly noting that such actions themselves would be "administrative matters, not suitable for an initiative" – the court of appeals concluded, "Thus, the proposed ordinances are administrative and not legislative in nature." Addendum 3, p. 18.[15] Referring to the Record of Decision and MOU, the court of appeals continued, "Because petitioners' initiated ordinances sought to change the administrative details of those decisions, they should similarly be deemed administrative." Addendum 3, p. 20.

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[15] As noted at pp. 14-15 and ftn. 8, above, the opinions of the two courts even suggest that the initiatives would themselves *perform* administrative acts such as conveying property and changing administrative details of the Record of Decision and MOU. Respectfully, neither initiative, by their plain language, would do such a thing.

In a broader sense, reaching well beyond this case, this is the most disturbing aspect of the decisions below, and particularly the precedent-setting opinion of the court of appeals. It is not at all uncommon for legislation to engender administrative consequences – it may indeed be suggested that most legislation does so in one form or another. And virtually every administrative act can be traced for its authority back to a piece of legislation. To hold that the prospect of administrative consequences renders the precipitating otherwise-legislative act itself administrative is to eviscerate the legislative/administrative distinction and move virtually every governmental act into the "administrative" sphere. Very little, if anything at all, would remain "suitable for an initiative."

Further, the magnitude of the consequences envisioned by the courts below in the event of passage of either of the proposed initiatives is subject to debate, and premature to consider. In fact, it is not certain whether any of the predicted administrative actions by the City would be required in the context of (a) CDOT's own authority over State Highway 82 and (b) the satisfaction of the City Charter mandate requiring approval by the electorate prior to any change of use of the adjoining City-owned open space property. The court of appeals notes that Petitioners' proposals could not be implemented without the agreement of CDOT and the FHWA (Addendum 3, p. 18) – much the same concern as held premature by the Ohio Supreme Court with regard to the need for Ohio Department of

Transportation ("ODOT") approval of a grade separation project in Webb, 835 N.E.2d at 1230. In any event, there is no reason to suggest such agreement would not be readily forthcoming. Even predictions of impossibility of performance or illegality, however, should not bar Petitioners' measures from the ballot. *Cf.* McKee, 616 P.2d at 972-73; City of Rocky Ford v. Brown, 293 P.2d 974 (Colo. 1956).

3. Petitioners' Initiatives Amend a Prior Legislative Act.

With regard to the third Witcher test, if Petitioners' initiatives are viewed as amending any prior legislative act, they "must also be legislative."[16] In fact, by their plain language they would do exactly that – "rescind[ing] all enactments or authorizations inconsistent herewith."

Petitioners submitted below that the 1996 voter authorization would qualify as such a prior legislative act. The hearing officer appeared to agree at least as to the "core purpose" (of both the 1996 and current measures) but disagreed as to the specified environmental and resource mitigation measures. CD p. 784-85. The district court concurred that "because of Section 13.4, the voter's [*sic*] approval of a conveyance and change of use of open space is a legislative matter"– CD p. 384, ¶147 – though also agreeing with the hearing officer that "the 1996 ballot question

[16] Absent a prior legislative act to amend, Petitioners' initiatives would themselves propose a seminal legislative act under the first and second Witcher criteria discussed above.

contained many administrative/executive matters" – CD p. 385, ¶153 – which it held to be permissible in measures referred by City Council but not permissible in citizen initiatives. CD p. 385, ¶¶151-53. The court of appeals, however, apparently disagreed with the district court's (and hearing officer's) conclusion that *any* part of the 1996 measure was legislative. Addendum 3, pp. .[17].

The 1996 measure did at least two things. First, it sought voter authorization for a material change in use of City-owned property, equivalent to a zoning or rezoning and, as in Margolis, constituting a clear "setting of policy for the future." 638 P.2d at 304. Indeed, the change in use at issue (from prior use as open space) was of sufficient policy significance that §13.4 of the City Charter required the electorate – not just City Council or a planning commission – to authorize it. Second, it announced and sought voter authorization for development with CDOT of a particular transportation concept for the primary entrance to the City. The 1996 measure is not "legislative" solely by virtue of the referral mandate in Charter

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[17] The court of appeals declared that "Petitioners have conceded in this court that neither the action of the City Council in placing the 1996 measure on the ballot nor section 13.4 renders the *current* proposals legislative." Id. (emphasis added). Petitioners do not disagree, though, respectfully, this confuses two distinct points. It was *the adoption of the 1996 measure by the voters* that constituted the prior legislative act pertinent to application of the third Witcher criterion to Petitioners' current proposals. As discussed in the text immediately below, the mandate of Charter §13.4 evidences the policy significance and "legislative" character of the decision referred to and taken by the voters in 1996 – as well as the decision Petitioners would ask them to consider today.

§13.4, though Charter §13.4 reflects the inherent significance and legislative nature of the use-change issue at stake. The fact that City Council referred the 1996 measure to a public vote is not dispositive of its legislative nature, but the contents of the measure itself are.[18]

Petitioners' current initiatives propose a different use and a different transportation strategy – and "rescind[] all enactments or authorizations inconsistent herewith." Like the 1996 measure, they seek to provide minimally sufficient clarity and detail to assure that the newly authorized concept and use will be understood and implemented in a manner consistent with the policy objectives of the voters. If this Court concurs with the hearing officer and district court that the 1996 measure was legislative at least in part, the third Witcher criterion would suggest that Petitioners' current initiatives must be legislative, at least in part, as well. Petitioners respectfully submit that each measure is properly viewed as legislative in its entirety.

E. Options for Dealing with Provisions Determined to be Administrative.

As discussed above, Petitioners believe, and respectfully submit, that both of their proposed ballot initiatives are entirely legislative in character. Should the Court disagree as to any aspect of either initiative, however, there are at least three

[18] The referring Council Resolution itself acknowledged the "legislative" character of the measure by reciting as its only authority Charter §5.7 – a part of Article V ("Initiative and Referendum") limited by its terms (see §5.1) to "legislative matter." CD pp. 818-18.

options available to the Court – short of invalidation of the entire measure – for addressing provisions it concludes to be administrative. All three options are more consistent with the respect and liberal construction to be afforded the right and power of initiative under this Court's precedent in McKee, 616 P.2d at 972 – and all three are more fair to the proponents, the voters, and the process than the complete invalidation adopted below.

Citing a post-adoption severance of a portion of an initiative by this Court in Bickel v. City of Boulder, 885 P.2d 215, 237 (Colo. 1994), as well as the analysis of the Alaska Supreme Court in McAlpine v. University of Alaska, 762 P.2d 81, 94-95 (Alaska 1988), the court of appeals adopted and applied a severability test in its review of a proposed municipal initiative in its 2006 opinion in City of Colorado Springs v. Bull, 143 P.3d 1127, 1137-39 (Colo.App. 2006): "[T]he reviewing court 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 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."

Despite invitation from the Petitioners to consider this option, the presence of express severability clauses in the text of both initiatives, and an acknowledgment by the hearing officer and district court of a core legislative issue of "whether the

new entrance to Aspen should consist of two general highway lanes and two vehicle and/or transit lanes (HOV)" – CD p. 785-86 – this option was rejected below at all levels.

A difficulty with applying the McAlpine/Bull severability test is the elusive nature of the third criterion – asking a court to predict the preference of sponsors and subscribers based upon judicial pronouncements of which they are not yet informed (and encouraging sponsors to anticipate these judicial predictions of their own eventual preferences in the context of drafting and litigation). In the end, the preference of proponents and subscribers is perhaps best left to the proponents and subscribers after they have learned what, if any, portions of their proposed measures would need to be severed in order to allow the rest to proceed to the ballot.

Yet, the McAlpine/Bull approach is better than defaulting to complete invalidation in the wake of what may ultimately be determined to be a minor misjudgment in drafting. This is particularly the case, as noted by the court of appeals in Bull, in consideration that "initiatives are largely a product of grassroots activists with limited resources, and striking an entire initiative based on flawed provisions would cost significant time and money on the part of the proponents and thereby impede the ability of the people to initiate laws." 143 P.3d at 1138.

Petitioners respectfully submit that a second, more practical option, would be to apply the first and second McAlpine/Bull criteria – both largely objective in nature – and leave the proponents to determine their own preference of whether or not to proceed with the resulting measure. This would avoid encouraging proponents to preemptively sacrifice valuable content for fear of a court's prediction regarding the proponents' own preferences.

Finally, another even more appropriate and workable approach was recently adopted by the Alaska Supreme Court in Swetzof, *supra*, in the context of an initiative proposing that the City of St. Paul, Alaska, get out of the electric utility business and replace the service with a private company utilizing wind generation:

> We also believe that even though ways and means of accomplishing a new policy may be administrative in character, they should not disqualify an initiative that both provides for a new policy and provides ways and means to accomplish that purpose. The purpose of the administrative exclusion is to avoid crippling a previously enacted policy. That purpose is not called into play when a new policy and the ways and means of accomplishing it are integrated in a single initiative.

203 P.3d at 481. The court went on to conclude that "though the decision to purchase or provide a utility service may implicate administrative matters, that fact alone does not convert the new policy decision itself into an impermissible administrative one." Id.

V. CONCLUSION

Petitioners' purpose is to offer the citizens of Aspen an alternative to the dilemma presently surrounding the design of the primary transportation corridor into their city. Petitioners seek voter authorization for a new, strategically different policy and concept that can be implemented by the City in cooperation with the State of Colorado – a policy and concept that break with prior City policy and, they believe, would both address the needs and wishes of the community and have a realistic chance of being implemented. Petitioners' proposals entail a permanent change in use of critically located City property. The proposals seek only authorization, and rescission of prior inconsistent authorizations; neither contain operative language to perform any administrative act. Both measures are legislative in character.

Petitioners respectfully request the Court to reverse the decision of the court of appeals and direct the City of Aspen to place Petitioners' proposed initiatives on the ballot as required by law.

Respectfully submitted this 25 day of August, 2010.

Isaacson Rosenbaum P.C.

Edward T. Ramey

Gary A. Wright
Wright & LaSalle, LLP

Attorneys for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of August, 2010, a true and correct copy of the foregoing was served by U.S. mail, first class postage prepaid, to the following addressees:

John P. Worcester, Esq.
City Attorney
130 South Galena Street
Aspen, CO 81611

Herbert S. Klein, Esq.
Lance R. Cote, Esq.
Corey T. Zurbuch, Esq.
Klein, Cote & Edwards, LLC
201 North Mill Street, Suite 203
Aspen, CO 81611

Martha M. Tierney
Kelly Garnsey Hubbell Lass LLC
1441 18th Street, Suite 300
Denver, Colorado 80202

Ann I. Palius

1. TO SIGN A PETITION

A. Read the warning at the top of the page.

B. To sign a petition you must be a registered voter in the City of Aspen, Colorado.

C. No person may sign for another.

D. The petition circulator may not assist a signer.

E. If a signer is disabled and needs assistance, a third party should provide that assistance. The third party providing assistance shall sign his or her name and address and state that (s)he rendered assistance to the disabled elector.

2. HOW TO SIGN THE PETITION

A. Print clearly.

B. The petition form has two lines, both of which must be fully completed.

C. Use black ink. Do not use ditto marks to provide information on a signature line.

D. A signer must use the residence address where he or she is registered to vote.

E. Do not use a post office box. Street name and number must be provided.

F. The signer must complete all portions of a signature line.

G. A signer must not place a zip code or birth date under "Signing Date".

H. Corrections: If a small correction is made, the signer should initial the change. If a larger correction is required, the signer should completely cross out the incorrect information and proceed to use the next two blank lines.

3. TO CIRCULATE A PETITION

A. Read the warning at the top of each page.

B. There can only be one circulator for each petition section.

C. A petition section may not be left on a table unattended or passed among potential signers if the circulator is not accompanying the petition section. The circulator must witness every signature as it is written.

D. Do not take the petition section apart. If the original staples are removed the petition section will not count.

E. Do not sign your own petition section.

F. Make sure that all the required information is complete before a signer leaves your presence.

4. WHAT TO DO WHEN THE CIRCULATOR HAS FINISHED COLLECTING SIGNATURES

A. Every valid signature counts. Signatures on partially completed petition sections may count.

B. A petition section must be properly notarized. Take the petition to a notary public, who will then notarize the affidavit. Do not sign or date your affidavit before you appear before the notary.

C. No additional signatures may be collected after the affidavit has been notarized.

D. The notarized petition section should then be immediately returned in person or by mail to:

Jeffrey Evans Box 324, Basalt, CO 81621
Curtis Vagneur Box 1471, Aspen, CO 81612

NOTE: This page is for information only, and should not be stapled to the petition section which follows. Additional laws pertaining to initiative circulators and signers are provided in Colorado Revised Statutes, Title 31, Article 11, and can be found at:

http://198.187.128.12/colorado/lpext.dll?f=templates&fn=fs-main.htm&2.0

WARNING: IT IS AGAINST THE LAW:
For anyone to sign any initiative or referendum petition with any name other than his or her own or to knowingly sign his or her name more than once for the same measure or to knowingly sign a petition when not a registered elector who is eligible to vote on the measure.
DO NOT SIGN THIS PETITION UNLESS YOU ARE A REGISTERED ELECTOR AND ELIGIBLE TO VOTE ON THIS MEASURE. TO BE A REGISTERED ELECTOR, YOU MUST BE A CITIZEN OF COLORADO AND REGISTERED TO VOTE.
Do not sign this petition unless you have read or have had read to you the proposed initiative or referred measure or the summary in its entirety and understand its meaning.

CITIZEN INITIATED ORDINANCE - DIRECT CONNECTION

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?

PETITION TO INITIATE

IN ACCORDANCE WITH ARTICLE V OF THE CITY CHARTER OF THE CITY OF ASPEN, WE, THE UNDERSIGNED REGISTERED VOTERS OF THE CITY OF ASPEN, RESPECTFULLY ORDER AND DEMAND THAT THE FOLLOWING PROPOSED ORDINANCE BE ADOPTED OR SUBMITTED TO THE LEGAL VOTERS OF THE CITY FOR THEIR ADOPTION OR REJECTION AT THE POLLS AT THE GENERAL ELECTION TO BE HELD ON TUESDAY, NOVEMBER 6, 2007.

Each of the signers hereto says:
I sign this petition in my own proper person only. I am a registered voter of the City of Aspen. My residence address and the date of my signing this petition are correctly written immediately after my printed name. I hereby designate the following persons to represent me in all matters affecting this petition:

Jeffrey Evans Box 324, Basalt, CO 81621
Curtis Vagneur Box 1471, Aspen, CO 81612

Ordinance NO.____
(Series 2007)

AN ORDINANCE APPROVING SPECIFIC USES FOR PROPERTY CONVEYED TO THE STATE OF COLORADO, DEPARTMENT OF TRANSPORTATION.

WHEREAS, the City Council of the City of Aspen approved Resolution No.34, Series of 2002, Right-Of-Way Easement, on April 22, 2002, granting to the Colorado Department of Transportation "necessary right-of-way easements across City owned property for a two lane parkway and a corridor for a light rail transit system," while acknowledging that this system was "subject to certain specific conditions set forth in the ballot language" of the municipal ballot question 2A of November 1996, *Use Of City Owned Property For*

Transportation Corridor, from which they derived the authority to approve said grant; and

WHEREAS, the conditions set forth in the ballot language of November 1996 include the stipulation that "the light rail transit system shall be built only after adequate financing mechanisms and final design details are identified and approved by a public vote"; and

WHEREAS, the conditional voter approval of November 1996 was also the basis for the designation of the two lane parkway and a corridor for a light rail transit system as the preferred alternative in the State Highway 82 Entrance to Aspen Record of Decision, Project STA 082A-008, August 1998, as well as further specific agreements between the City of Aspen, State of Colorado Department of Transportation, and Federal Highway Administration contained in the Memorandum of Understanding, July 27, 1998, regarding allowed uses for the conveyed right-of-way; and

WHEREAS, the absence of public support for the two lane parkway and light rail option, evidenced in part by the defeat of municipal ballot measures 200 – *Light Rail Project*, and 2C - *Debt Increase for Dedicated Exclusive Busway*, November 2, 1999, has rendered the preferred alternative of the aforementioned Record of Decision and Memorandum of Understanding inoperative, and has subsequently invalidated the authorization for conveyance of the right-of-way easement; and

WHEREAS, the core policy from which the two lane parkway and a corridor for a light rail transit system was developed is described in the Record of Decision at *II. The Preferred Alternative, Meeting Project Purpose and Need, 2. Transportation Capacity*, as: "though the highway system will operate under congestion, this congestion is considered part of the disincentive for single occupancy vehicle (SOV) travel and will increase transit usage"; and

WHEREAS, the United State Court of Appeals, Tenth Circuit, in case No. 02-1480, Friends of Marolt Park v. United States Department of Transportation, affirmed the right of the defendants to select an option, "not identified as the preferred option in the final EIS, as long as the selected option was fully evaluated"; and

WHEREAS, the allowed uses as defined and delineated in the aforementioned Right-Of-Way Easement and Memorandum of Understanding for the parcels of land described in Exhibit 1 in the Right-Of-Way Easement, prevent implementation of any fully evaluated option other than a two lane parkway and a corridor for a light rail transit system; and

WHEREAS, a fully evaluated option first developed in the State Highway 82 East of Basalt to Aspen Draft Environmental Impact Statement 4(f) Evaluation Project FC 082-1(14), August 1989, and carried forward into the State Highway 82 Entrance to Aspen Draft Environmental Impact Statement Section 4(f) Evaluation, Project STA 082A-008, August 1995, identified as "Alternative D: Modified Direct Alignment, At-Grade, with Separate Transit Envelope", is by this action recognized as the preferred alternative of the citizens of Aspen for the Entrance to Aspen.

NOW, THEREFORE BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF ASPEN, COLORADO:

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 No.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:

Section 1

The State of Colorado, Department of Transportation (CDOT) is hereby authorized to construct, operate and maintain a four lane highway configuration which substantially conforms to the design described herein, subject to the following terms and conditions:

1. The highway shall be built after completion of a reevaluation if required pursuant to 23 CFR 771.129 and issuance of a revised Record of Decision (ROD) if required pursuant to 23 CFR 771.127.

2. Acceptance and implementation of this authorization by CDOT and the Federal Highway Administration shall accrue no funding obligation for any expenditure necessary to the performance of paragraph 1 above.

3. Except as provided herein, the highway shall be constructed in full compliance with all provisions relating to the construction of the Direct Connection highway configuration described in the State Highway 82 East of Basalt to Aspen Draft Environmental Impact Statement 4(f) Evaluation Project FC 082-1(14), August 1989; and the equivalent design identified as "Alternative D: Modified Direct Alignment, At-Grade, with Separate Transit Envelope", consisting of two general highway lanes and two vehicle and/or transit lanes (HOV) with a transit envelope next to the highway lanes, contained in the State Highway 82 Entrance to Aspen Draft Environmental Impact Statement, 4(f) Evaluation, Project STA 082A-008, issued by the Colorado Department of Transportation and Federal Highway Administration in August 1995.

4. The appropriate intersection design for the Maroon/Castle/Highway 82 intersection, and the optimum location for the transition from Main Street to Highway 82 HOV/Transit lanes, shall be at the sole discretion of the State of Colorado, Department of Transportation.

5. Lane management for the two HOV/Transit lanes shall be consistent with, and no more restrictive than, access limitations enforced on the Basalt to Buttermilk segment of Highway 82.

6. The transit envelope shall be accommodated by the adequacy of the alignment conveyed, and by bridge engineering sufficient to facilitate addition of a light rail transit system at such time as community support and financing become available.

7. The use of the conveyed property shall be contingent upon environmental and historic resource mitigation measures including, but not limited to:

a. A curved alignment which avoids encroachment on the community garden and hang-gliding and para-sailing landing zone, depicted in schematic form in Figure 1 appended hereto.

b. The return to open space of the portion of State highway 82 between Cemetery Lane and the Maroon Creek intersection to be abandoned by CDOT.

c. An alignment that is designed to be as sensitive as possible to the location of the historic Holden Smelting and Milling Complex and Museum.

d. The total use of open space shall be the minimum possible, consistent with good design.

e. The design of the proposed bridge shall be sensitive to the environment and community character.

f. A landscaping plan to include plantings, berms and depressions, and other methods to mitigate environmental and neighborhood concerns along the entire corridor.

8. The City of Aspen warrants that adjustment of the boundaries of the conveyed property are encouraged for any qualitative purposes, whether such action serves better engineering, highway function, or mitigation performance, and any such adjustment which results in a net increase in the acreage of property conveyed to CDOT as identified in Exhibit 1 shall require no further compensation or consideration to the city, in recognition of the sufficiency of the property already conveyed to the city.

9. Any ground disturbing activity necessary for preliminary engineering or design work performed by CDOT on any portion of the property referenced herein shall be the minimum reasonably necessary, and if construction is not scheduled to commence within one year, CDOT shall re-vegetate and landscape immediately after the completion of such activity.

Section 2

The City of Aspen acknowledges that implementation of this authorization requires abandonment of the policy described in the Entrance to Aspen Record of Decision, Project STA 082A-008, August 1998, which employs traffic congestion as a mass transit ridership incentive.

Section 3

If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional in a court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and shall not affect the validity of the remaining portions thereof.

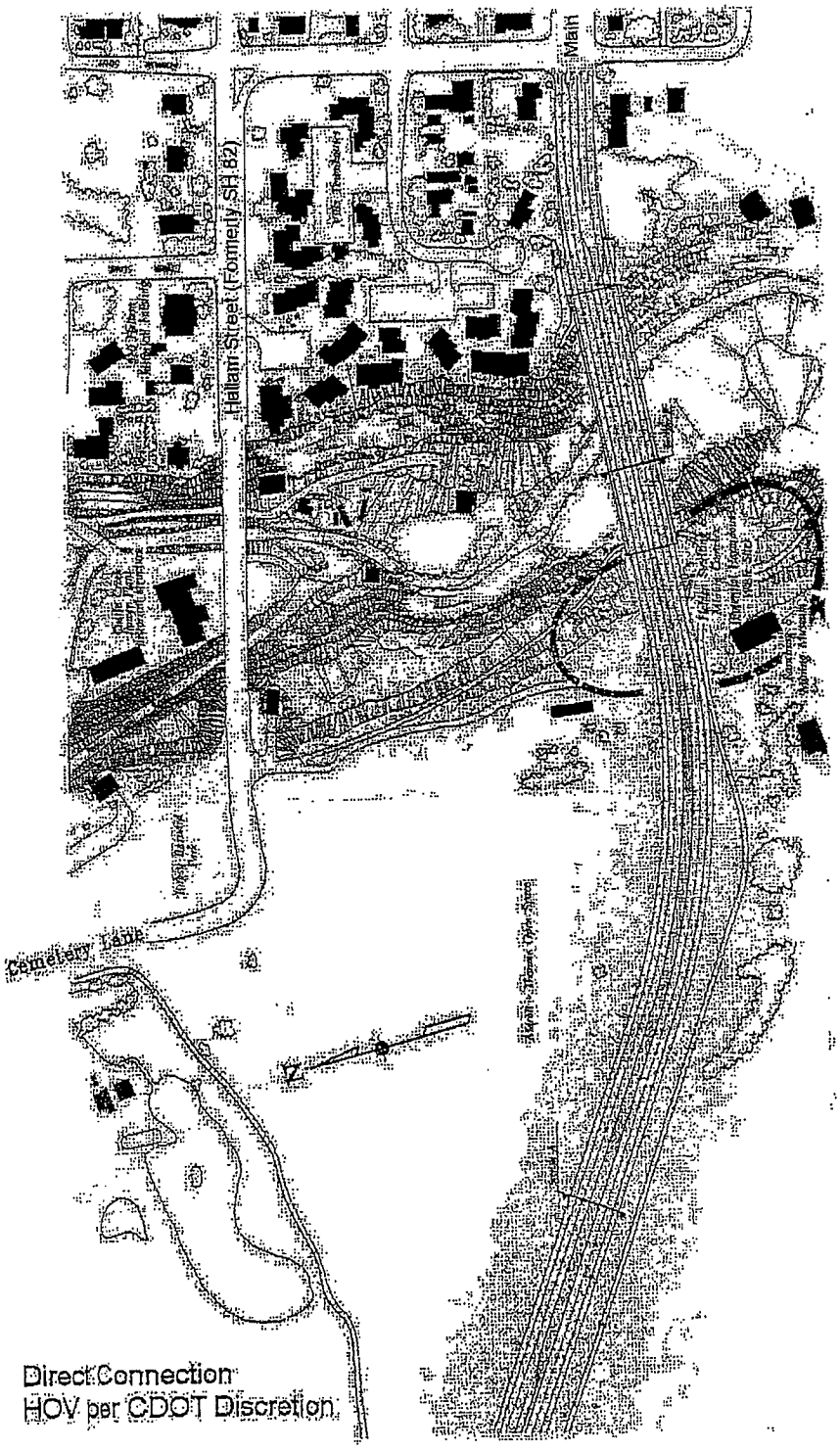
INTRODUCED, READ, AND ORDERED PUBLISHED as provided by law by the City Council of the City of Aspen on the ___day of _____, 2007.

_____
Helen Kalin Klanderud, Mayor

ATTEST:

_____
Kathryn S. Koch, City Clerk

Figure 1


Main
Hallam Street (Formerly SH 82)
Cemetery Lane
Direct Connection
HOV per CDOT Discretion

1. TO SIGN A PETITION

A. Read the warning at the top of the page.
B. To sign a petition you must be a registered voter in the City of Aspen, Colorado.
C. No person may sign for another.
D. The petition circulator may not assist a signer.
E. If a signer is disabled and needs assistance, a third party should provide that assistance. The third party providing assistance shall sign his or her name and address and state that (s)he rendered assistance to the disabled elector.

2. HOW TO SIGN THE PETITION

A. Print clearly.
B. The petition form has two lines, both of which must be fully completed.
C. Use black ink. Do not use ditto marks to provide information on a signature line.
D. A signer must use the residence address where he or she is registered to vote.
E. Do not use a post office box. Street name and number must be provided.
F. The signer must complete all portions of a signature line.
G. A signer must not place a zip code or birth date under "Signing Date".
H. Corrections: If a small correction is made, the signer should initial the change. If a larger correction is required, the signer should completely cross out the incorrect information and proceed to use the next two blank lines.

3. TO CIRCULATE A PETITION

A. Read the warning at the top of each page.
B. There can only be one circulator for each petition section.
C. A petition section may not be left on a table unattended or passed among potential signers if the circulator is not accompanying the petition section. The circulator must witness every signature as it is written.
D. Do not take the petition section apart. If the original staples are removed the petition section will not count.
E. Do not sign your own petition section.
F. Make sure that all the required information is complete before a signer leaves your presence.

4. WHAT TO DO WHEN THE CIRCULATOR HAS FINISHED COLLECTING SIGNATURES

A. Every valid signature counts. Signatures on partially completed petition sections may count.
B. A petition section must be properly notarized. Take the petition to a notary public, who will then notarize the affidavit. Do not sign or date your affidavit before you appear before the notary.
C. No additional signatures may be collected after the affidavit has been notarized.
D. The notarized petition section should then be immediately returned in person or by mail to:

Jeffrey Evans Box 324, Basalt, CO 81621
Curtis Vagneur Box 1471, Aspen, CO 81612

NOTE: This page is for information only, and should not be stapled to the petition section which follows. Additional laws pertaining to initiative circulators and signers are provided in Colorado Revised Statutes, Title 31, Article 11, and can be found at:

http://198.187.128.12/colorado/lpext.dll?f=templates&fn=fs-main.htm&2

WARNING: IT IS AGAINST THE LAW:

For anyone to sign any initiative or referendum petition with any name other than his or her own or to knowingly sign his or her name more than once for the same measure or to knowingly sign a petition when not a registered elector who is eligible to vote on the measure.

DO NOT SIGN THIS PETITION UNLESS YOU ARE A REGISTERED ELECTOR AND ELIGIBLE TO VOTE ON THIS MEASURE. TO BE A REGISTERED ELECTOR, YOU MUST BE A CITIZEN OF COLORADO AND REGISTERED TO VOTE.

Do not sign this petition unless you have read or have had read to you the proposed initiative or referred measure or the summary in its entirety and understand its meaning.

CITIZEN INITIATED ORDINANCE – MODIFIED DIRECT CONNECTION

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?

PETITION TO INITIATE

IN ACCORDANCE WITH ARTICLE V OF THE CITY CHARTER OF THE CITY OF ASPEN, WE, THE UNDERSIGNED REGISTERED VOTERS OF THE CITY OF ASPEN, RESPECTFULLY ORDER AND DEMAND THAT THE FOLLOWING PROPOSED ORDINANCE BE ADOPTED OR SUBMITTED TO THE LEGAL VOTERS OF THE CITY FOR THEIR ADOPTION OR REJECTION AT THE POLLS AT THE GENERAL ELECTION TO BE HELD ON TUESDAY, NOVEMBER 6, 2007.

Each of the signers hereto says:
I sign this petition in my own proper person only. I am a registered voter of the City of Aspen. My residence address and the date of my signing this petition are correctly written immediately after my printed name. I hereby designate the following persons to represent me in all matters affecting this petition:

Jeffrey Evans Box 324, Basalt, CO 81621
Curtis Vagneur Box 1471, Aspen, CO 81612

Ordinance NO.____
(Series 2007)

AN ORDINANCE APPROVING SPECIFIC USES FOR PROPERTY CONVEYED TO THE STATE OF COLORADO, DEPARTMENT OF TRANSPORTATION.

WHEREAS, the City Council of the City of Aspen approved Resolution No.34, Series of 2002, Right-Of-Way Easement, on April 22, 2002, granting to the Colorado Department of Transportation "necessary right-of-way easements across City owned property for a two lane parkway and a corridor for a light rail transit system," while acknowledging that this system was "subject to certain specific conditions set forth in the ballot language" of the municipal ballot question 2A of November 1996, *Use Of City Owned Property For*

Transportation Corridor, from which they derived the authority to approve said grant; and

WHEREAS, the conditions set forth in the ballot language of November 1996 include the stipulation that "the light rail transit system shall be built only after adequate financing mechanisms and final design details are identified and approved by a public vote"; and

WHEREAS, the conditional voter approval of November 1996 was also the basis for the designation of the two lane parkway and a corridor for a light rail transit system as the preferred alternative in the State Highway 82 Entrance to Aspen Record of Decision, Project STA 082A-008, August 1998, as well as further specific agreements between the City of Aspen, State of Colorado Department of Transportation, and Federal Highway Administration contained in the Memorandum of Understanding, July 27, 1998, regarding allowed uses for the conveyed right-of-way; and

WHEREAS, the absence of public support for the two lane parkway and light rail option, evidenced in part by the defeat of municipal ballot measures 2OO – *Light Rail Project*, and 2C - *Debt Increase for Dedicated Exclusive Busway*, November 2, 1999, has rendered the preferred alternative of the aforementioned Record of Decision and Memorandum of Understanding inoperative, and has subsequently invalidated the authorization for conveyance of the right-of-way easement; and

WHEREAS, the core policy from which the two lane parkway and a corridor for a light rail transit system was developed is described in the Record of Decision at *II. The Preferred Alternative, Meeting Project Purpose and Need, 2. Transportation Capacity*, as: "though the highway system will operate under congestion, this congestion is considered part of the disincentive for single occupancy vehicle (SOV) travel and will increase transit usage"; and

WHEREAS, the United States Court of Appeals, Tenth Circuit, in case No. 02-1480, Friends of Marolt Park v. United States Department of Transportation, affirmed the right of the defendants to select an option, "not identified as the preferred option in the final EIS, as long as the selected option was fully evaluated"; and

WHEREAS, the allowed uses as defined and delineated in the aforementioned Right-Of-Way Easement and Memorandum of Understanding for the parcels of land described in Exhibit 1 in the Right-Of-Way Easement, prevent implementation of any fully evaluated option other than a two lane parkway and a corridor for a light rail transit system; and

WHEREAS, a fully evaluated option described in State Highway 82 Entrance to Aspen Draft Environmental Impact Statement Section 4(f) Evaluation, Project STA 082A-008, August 1995, as "Alternative F: Modified Direct, Cut and Cover Tunnel, with Separate Transit Envelope" is by this action recognized as the preferred alternative of the citizens of Aspen for the Entrance to Aspen.

NOW, THEREFORE BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF ASPEN, COLORADO:

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 No.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:

Section 1

The State of Colorado, Department of Transportation (CDOT) is hereby authorized to construct, operate and maintain a four lane highway configuration which substantially conforms to the design described herein, subject to the following terms and conditions:

1. The highway shall be built after completion of a reevaluation if required pursuant to 23 CFR 771.129 and issuance of a revised Record of Decision (ROD) if required pursuant to 23 CFR 771.127.

2. Acceptance and implementation of this authorization by CDOT and the Federal Highway Administration shall accrue no funding obligation for any expenditure necessary to the performance of paragraph 1 above.

3. Except as provided herein, the highway shall be constructed in full compliance with all provisions relating to the construction of Alternative F: Modified Direct, Cut and Cover Tunnel, with Separate Transit Envelope, 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, contained in the State Highway 82 Draft Environmental Impact Statement Section 4(f) Evaluation, Project STA 082A-008, issued by the Colorado Department of Transportation and Federal Highway Administration in August 1995.

4. The appropriate intersection design for the Maroon/Castle/Highway 82 intersection, and the optimum location for the transition from Main Street to Highway 82 HOV/Transit lanes, shall be at the sole discretion of the State of Colorado, Department of Transportation.

5. Lane management for the two HOV/Transit lanes shall be consistent with, and no more restrictive than, access limitations enforced on the Basalt to Buttermilk segment of Highway 82.

6. The transit envelope shall be accommodated by the adequacy of the alignment conveyed, and by bridge engineering and cut and cover tunnel design sufficient to facilitate addition of a light rail transit system at such time as community support and financing become available.

7. The use of the conveyed property shall be contingent upon environmental and historic resource mitigation measures including, but not limited to:

a. A cut and cover tunnel of no less than 400 feet, to return to public open space approximately 2 acres or more of Marolt open space.

b. A curved alignment which avoids encroachment on the community garden and hang-gliding and para-sailing landing zone, which feature and the tunnel described in line "a" above are depicted in schematic form in Figure 1 appended hereto.

c. The return to open space of the portion of State highway 82 between Cemetery Lane and the Maroon Creek intersection to be abandoned by CDOT.

d. An alignment that is designed to be as sensitive as possible to the location of the historic Holden Smelting and Milling Complex and Museum.

e. The total use of open space shall be the minimum possible, consistent with good design.

f. The design of the proposed bridge shall be sensitive to the environment and community character.

g. A landscaping plan to include plantings, berms and depressions, and other methods to mitigate environmental and neighborhood concerns along the entire corridor.

8. The City of Aspen warrants that adjustment of the boundaries of the conveyed property are encouraged for any qualitative purposes, whether such action serves better engineering, highway function, or mitigation performance, and any such adjustment which results in a net increase in the acreage of property conveyed to CDOT as identified in Exhibit 1 shall require no further compensation or consideration to the city, in recognition of the sufficiency of the property already conveyed to the city.

9. Any ground disturbing activity necessary for preliminary engineering or design work performed by CDOT on any portion of the property referenced herein shall be the minimum reasonably necessary, and if construction is not scheduled to commence within one year, CDOT shall re-vegetate and landscape immediately after the completion of such activity.

Section 2

The City of Aspen acknowledges that implementation of this authorization will require abandonment of the policy described in the Entrance to Aspen Record of Decision, Project STA 082A-008, August 1998, which employs traffic congestion as a mass transit ridership incentive.

Section 3

If any section, subsection, sentence, clause, phrase or portion of this ordinance is for any reason held invalid or unconstitutional in a court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision and shall not affect the validity of the remaining portions thereof.

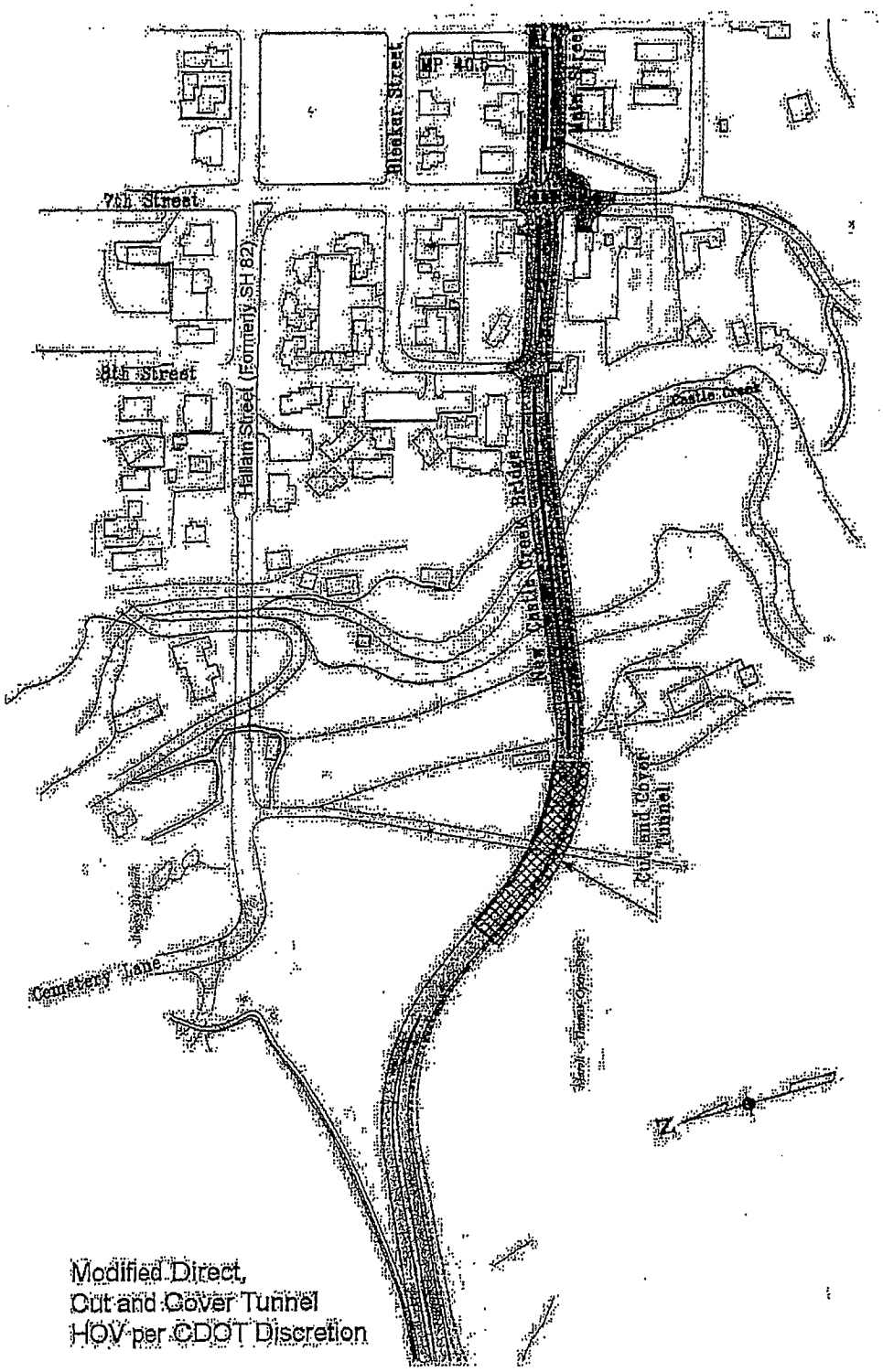
INTRODUCED, READ, AND ORDERED PUBLISHED as provided by law by the City Council of the City of Aspen on the ___day of _____, 2007.

_____
Helen Kalin Klanderud, Mayor

ATTEST:

_____
Kathryn S. Koch, City Clerk

Figure 1


MP 40.7
Main Street
Bleeker Street
7th Street
8th Street
Hallam Street (Formerly SH 82)
Castle Creek
Castle Creek Bridge
Cut and Cover Tunnel
Cemetery Lane
North Portal Open Space
N
Modified Direct,
Cut and Cover Tunnel
HOV per CDOT Discretion

COLORADO COURT OF APPEALS

Court of Appeals No. 08CA2552
Pitkin County District Court No. 07CV175
Honorable Gail H. Nichols, Judge

Curtis Vagneur and Jeffrey Evans,

Petitioners-Appellants,

v.

City of Aspen, State of Colorado; Kathryn Koch, in her official capacity as City Clerk for the City of Aspen; Karen Goldman, in her official capacity as Administrative Hearing Officer; Les Holst; Clifford Weiss; and Terry Paulson,

Respondents-Appellees.

ORDER AFFIRMED

Division III
Opinion by JUDGE MILLER
Roy and Furman, JJ. concur

Announced October 29, 2009

Isaacson Rosenbaum P.C., Edward T. Ramey, Denver, Colorado; Wright & LaSalle, LLP, Gary A. Wright, Aspen, Colorado, for Petitioners-Appellants

John P. Worcester, City Attorney, James. R. True, Special Counsel, Aspen, Colorado, for Respondents-Appellees City of Aspen, Kathryn Koch, and Karen Goldman

Klein, Coté & Edwards, LLC, Herbert S. Klein, Corey T. Zurbuch, Aspen, Colorado, for Respondents-Appellees Les Holst, Clifford Weiss, and Terry Paulson

Petitioners, Curtis Vagneur and Jeffrey Evans, appeal the district court's order concluding that two initiated ordinances they submitted consisted of administrative matters and therefore could not be placed on the ballot for the City of Aspen voters. We affirm.

I. Facts and Proceedings

A. Background

The facts are largely undisputed. Since the 1980s, 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.

This appeal followed.

II. Standard of Review

Section 31-11-110 is silent as to what standards of review should be applied by this court and by the district court.

Petitioners contend that we should apply the standard of review for a mixed question of law and fact, and review the district court's factual findings for abuse of discretion, but review its application of law to those facts de novo. The protestors assert that we should apply a more deferential standard of review, and, standing in the same position as the district court, consider whether there is a reasonable basis for the hearing officer's ruling, whether the hearing officer applied the correct legal standard, and whether there is competent evidence in the record to support her ruling.

The underlying facts of the case are largely undisputed. Because we affirm under a de novo review the district court's order upholding the hearing officer's decision, we need not consider whether the more deferential standard proposed by the protestors applies. *See People v. Arroya*, 988 P.2d 1124, 1129 (Colo. 1999)

(where an appellate court is presented with a mixed question of law and fact, we defer to the factual findings of the court so long as there is sufficient evidence in the record to support them, but we review the trial court's legal conclusions de novo).

III. Subject Matter for Initiatives

Petitioners contend the district court erred when it affirmed the hearing officer's conclusion that their proposed initiatives related to administrative matters and could not be placed on the ballot under the people's initiative power. We disagree.

A. Law

In the Colorado Constitution, the people reserve for themselves the power to legislate by way of initiative and referendum "as to all local, special, and municipal *legislation*." Colo. Const. art. V, § 1(9) (emphasis added). Additionally, the City of Aspen Charter 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." Aspen City Code art. V, § 5.1(a) (emphasis added).

Thus, both the Colorado Constitution and the City Charter limit the people's initiative power to legislative matters. *See also City of Idaho Springs v. Blackwell*, 731 P.2d 1250, 1253 (Colo. 1987); *City of Colorado Springs v. Bull*, 143 P.3d 1127, 1131 (Colo. App. 2006). State and local government officials may not prohibit the people from exercising their initiative powers by prematurely concluding that the initiated ordinance lacks substantive merit or is unconstitutional before the initiative process has run its course and the ordinance has been adopted. *McKee v. City of Louisville*, 200 Colo. 525, 530, 616 P.2d 969, 972-73 (1980). However, before a proposal is placed on the ballot, a judicial declaration may be made determining whether the initiated ordinance is legislative in character, or whether it merely addresses administrative matters and is not a proper exercise of the people's constitutional right to legislate by initiative. *Blackwell*, 731 P.2d at 1253. There are no

reported Colorado appellate opinions addressing this issue in the context of the design and construction of streets or highways.

The classification of a proposed ordinance as legislative or administrative is largely an ad hoc determination. *Id.* at 1254. Three tests are used to determine whether petitions for initiated ordinances relate to legislative or administrative matters. *Id.* 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." *Witcher v. Canon City*, 716 P.2d 445, 449 (Colo. 1986). 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." *City of Aurora v. Zwerdlinger*, 194 Colo. 192, 196, 571 P.2d 1074, 1077 (1977). Finally, in appropriate cases, we apply the "legislative amendment" test, in which we consider whether an initiated ordinance is an amendment to an original legislative act, and likewise legislative in character. *Blackwell*, 731 P.2d at 1254

n.4 (citing *Margolis v. District Court*, 638 P.2d 297, 303-04 (Colo. 1981), and *Witcher*, 716 P.2d at 450).

We may also consult the city charter in determining whether a proposed act is legislative or administrative. *Bull*, 143 P.3d at 1134.

We apply these three tests in turn, and then address the city charter.

B. Analysis

The desired effect of the proposals is to revise the terms of the right-of-way previously conveyed to CDOT in 1996 by substituting (subject to CDOT's agreement) a new right-of-way with a new design for the highway configuration. We conclude that, while the construction of a highway may have long-lasting implications, the design, construction, operation, and maintenance of a specific highway structure designed to accommodate specific traffic uses is not a "permanent" or general act.

The supreme court has declared that the use of the term "permanent" signifies "a 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 considering whether an act is permanent or temporary for the purpose of an initiated ordinance, the supreme court has held, for example, that the selection of the site and structure for a city hall and the amendment of a lease of the Royal Gorge between a city and a contractor are temporary acts that must be deemed administrative. *See id.*; *Witcher*, 716 P.2d at 450.

We find the supreme court's reasoning in *Blackwell* to be applicable to the present case. In *Blackwell*, the Idaho Springs city council enacted an ordinance establishing a tax to fund a number of projects, including a new city hall. *Blackwell*, 731 P.2d at 1251. The city council approved a motion authorizing the purchase of a specific piece of property for the new city hall, and the move and renovation of a landmark building to the property for use as the city hall. *Id.* The city entered into contracts to effectuate the council's decisions, and the building was moved to the property. *Id.* Citizens opposed to the purchase of the property and use of the landmark as

the city hall filed two petitions for initiated ordinances seeking to repeal any council actions authorizing the move of the landmark or the acquisition of the property to which the landmark had already been moved, and also seeking to prohibit the use of funds for the purpose of relocating the landmark or acquiring the property. *Id.* at 1251-52.

Considering the permanence test, the supreme court reasoned that although the structure for a city hall was permanent in that it would serve as the city hall for an indefinite period of time, the duration of the legislation or the anticipated life of the city hall did not determine permanence. *Id.* at 1254. Because the proposed ordinances only excluded a specific piece of real estate and a specific building from a variety of choices available to the city to implement the previously declared policy of securing and building a city hall, they did not relate to a general policy declaration of general applicability, and therefore were not permanent in nature. *Id.* at 1254-55.

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. *See Witcher*, 716 P.2d at 450 (when amending a lease, neither party presumes an amendment to be permanent in nature or effect, and the amendments of such a lease when the city is a party are administrative and not proper subjects for an initiative); *cf. Bull*, 143 P.3d at 1137 (formation of specific contracts of temporary character is administrative matter, even though the creation of new permanent and general policies limiting the city's

ability to enter into a class of contracts is a permanent and legislative matter appropriate for an initiative).

Thus, the proposed ordinances are administrative and not legislative in nature. They 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. *See Seattle Building & Constr. Trades Council v. City of Seattle*, 620 P.2d 82, 88 (Wash. 1980) (proposed initiative to block construction of additional highway lanes at a specific location would reverse administrative decisions of city officials and was thus invalid). The new design could be implemented only if those administrative agencies agreed to it. Under these circumstances, we cannot conclude that the hearing officer and district court erred in determining that the proposals were administrative and not suitable for legislative initiatives.

Petitioners allege that their proposals are more akin to rezoning decisions, which are legislative, *Margolis*, 638 P.2d at 304, because they call for the long-term change of use for a piece of

property to accommodate new transportation infrastructure. We are not persuaded. An original zoning decision typically involves the adoption of a comprehensive zoning or land use code regulating the use of all private and public property within a municipality. Such establishing of land use policy is legislative in character because it is general and permanent and involves a general rule or policy. *Id.* Any rezoning necessarily changes the land use policy with respect to the property implicated. *Id.* For the reasons discussed above, however, the factors relating to the permanence of the ordinances proposed here indicate that the petitions address administrative matters.

Turning to the second test articulated in *Zwerdlinger*, petitioners contend that their proposals are not necessary or intended to carry out existing legislative polices or purposes and instead declare public policy.

We agree with the district court's conclusion that prior city actions on this matter, such as the 1998 Record of Decision and the MOU, stemmed from administrative processes and were accordingly

clearly administrative. Because petitioners' initiated ordinances sought to change the administrative details of those decisions, they should similarly be deemed administrative.

Petitioners also contend we should apply the legislative amendment test here because the proposals seek to amend the 1996 ballot measure, which was legislative. We disagree. The petitions do not purport to amend the 1996 ballot measure, nor do they even reference the 1996 ballot measure. That fact notwithstanding, 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. Accordingly, we do not agree with petitioners' assertion that the legislative amendment test applies to their proposals, and even if we were to apply the test, the initiatives would fail.

We may also consult the Aspen City Charter in determining whether a proposed act is legislative or administrative. *Bull*, 143 P.3d at 1134. The district court concluded that section 13.4 of the

City Charter limiting the city council's ability to convey open space property without the approval of the voters rendered the voters' approval of a conveyance and change of use of open space a legislative matter. We disagree with the district court.

Petitioners have conceded in this court that neither the action of the City Council in placing the 1996 measure on the ballot nor section 13.4 renders the current proposals legislative. The mere fact that the City Charter requires voter approval of any proposed conveyance of an interest in open space does not dictate the conclusion that voters may by initiative compel the city to convey a specific right-of-way or that such a measure would be legislative. Other sections of the City Charter, such as sections 6.1 and 6.3 addressing the powers and duties of the city manager, charge the city manager with the proper administration of all affairs of the city, including the provision of engineering, architectural, maintenance, and construction services required by the city. These sections of the charter indicate that tasks related to municipal engineering and

construction, such as the design and construction of a highway, are intended by the city to be viewed as administrative.

IV. Conclusion

The order is affirmed.

JUDGE ROY and JUDGE FURMAN concur.

ANNOUNCEMENTS
COLORADO SUPREME COURT
TUESDAY, JUNE 1, 2010

No. 09SC1022
Court of Appeals Case No. 08CA2552

Petitioners:
Curtis Vagneur and Jeffrey Evans,
v.
Respondents:
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 Holst; Clifford Weiss; and Terry Paulson.

Petition for Writ of Certiorari GRANTED. EN BANC.

Summary of Issue:

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

DENIED AS TO ALL OTHER ISSUES.

No. 09SC1046
Court of Appeals Case No. 07CA2470

Petitioner:
Edward L. Rodriguez,
v.
Respondent:
The People of the State of Colorado.

Petition for Writ of Certiorari DENIED. EN BANC.

ADDENDUM 4