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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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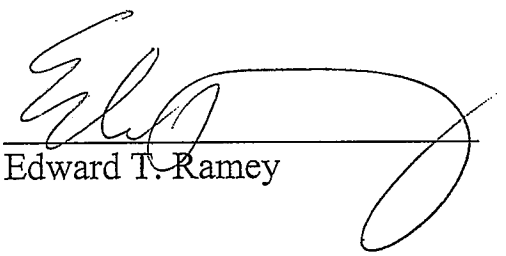
Case No. 2009SC1022

PETITIONERS' REPLY BRIEF

Certificate of Compliance

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. I certify that the brief complies with C.A.R. 28(g). It contains 3,726 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.



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I. ARGUMENT

Petitioners are attempting to submit two alternative, though substantially similar, initiatives to the voters of the City of Aspen. Both initiatives seek to adopt a new strategic concept and plan for the primary transportation entrance to the city. Both initiatives would provide Charter-mandated voter approval and authorization for the change in use of critically located City-owned property – and for conveyance of an interest in that property to the State of Colorado – to enable the State to implement this concept. Both initiatives are wholly inconsistent with, and would expressly rescind, the City's current "entrance to Aspen" transportation policy. Neither initiative would implement or perform any administrative act.

Both initiatives are submitted pursuant to the local right of initiative reserved to the people under Colo. Const. art. V, §1(9), as well as Article V of the Aspen City Charter. The issue before this Court is whether Petitioners' proposed initiatives are "legislative" in character. If legislative, the Petitioners are constitutionally entitled to submit them to Aspen's voters, and Aspen's voters are constitutionally empowered to consider and adopt them. If the initiatives are administrative in character, the City and the Respondent Protestors may insist that they be reserved for exclusive consideration by the City's elected and appointed officials.

A. Standard of Review.

At the outset, the Protestor Respondents (Holst, Weiss, and Paulson) – without support from the Municipal Respondents – appear to question the propriety of *de novo* review by the courts of questions of law addressed in the first instance by the City's hearing officer. Holst/Weiss/Paulson ("HWP") Ans. Br. pp. 6-9. Neither the district court – CD p. 376, ¶¶ 78-82 – nor the court of appeals – Addendum 3 to Pet. Op. Br., p. 10 – accepted this argument. And this Court has been clear that *de novo* review of legal questions, whether arising initially in a judicial or quasi-judicial context, is the proper standard. Specialty Restaurants Corp. v. Nelson, 231 P.3d 393, 397 (Colo. 2010); City of Commerce City v. Enclave West, Inc., 185 P.3d 174, 178 (Colo. 2008). This includes questions of both statutory and contractual construction. Enclave West, 185 P.3d at 178; Ad Two, Inc. v. City and County of Denver, 9 P.3d 373, 376 (Colo. 2000).

B. What the Proposed Initiatives Would and Would Not Do.

Central to this Court's review is its interpretation of the plain language of these initiatives. The operative language (with emphasis added) is:

> 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.

Neither initiative performs any affirmative act other than to provide authority. Neither initiative rescinds (or amends) anything other than prior inconsistent "enactments or authorizations."

To "authorize" is to "give legal authority; to empower" – BLACK'S LAW DICTIONARY (8th ed.) – and generally connotes a "grant of authority to the executive branch" (*i.e.*, from the legislative branch) to spend money or otherwise act. MERRIAM-WEBSTER UNABRIDGED DICTIONARY (online). An "enactment" is "something that has been enacted (as a law, bill, or statute)." Id. Petitioners' initiatives would endow legal authority to perform certain acts, and rescind legal authority to perform other acts. Neither initiative would perform or rescind the acts themselves.

It is simply incorrect to suggest, as do the Municipal Respondents, that Petitioners' initiatives "rescind the conveyance of a right-of-way" or "rescind the Memorandum of Understanding . . . ." Mun. Resp. Ans. Br. pp. 12-13. It is not accurate to state, as do the Protestor Respondents, that "[t]his provision, by its own terms, rescinds the Right-of-Way Grant and the Memorandum of Understanding and replaces them with a new grant of a right-of-way" – HWP Ans. Br. p. 17 – or that the initiatives "are expressly designed to rescind or amend existing administrative contracts" – Id. p. 20. It is equally incorrect to conclude that these initiatives "would reverse a host of administrative actions and decisions" made by

the City, the Colorado Department of Transportation ("CDOT"), and the Federal Highway Administration ("FHWA") – Ct. of App. Op., Addendum 3 to Pet. Op. Br., p. 18. By their plain language, these initiatives would do none of these things.

Consideration of the concern expressed by the Respondents, and by the courts below, is more accurately directed to whether adoption of either of Petitioners' proposed initiatives could have the *effect* of necessitating the administrative actions or precipitating the panoply of consequences they describe.[1] This is a concern, however, very different from the question of whether these initiatives are themselves legislative or administrative in character.

C. The Prospect of Administrative Consequences Does Not Render an Initiative "Administrative"

As discussed in Petitioners' Opening Brief at pages 29-30, and as the focus of the Brief of *Amicus Curiae* Colorado Common Cause, the most troubling aspect of the opinion of the court of appeals was the adoption of Respondents' proposition that an otherwise legislative act (a grant or rescission of authority) may be deemed "administrative" in character simply because of its potential administrative consequences. The theme is continued in the Protestors' Answer Brief at pages 9-13; 16-17, 19-23, and in the Municipal Respondents' Answer Brief at pages 1, 9, 17-18, and 20. The Municipal Respondents elaborate by submitting that the

[1] This is a prediction for which there is abundant room for debate. *See* Pet. Op. Br. pp. 30-31.

initiatives would not merely provide authority for the predicted wide-ranging administrative acts, they would "mandate" them. Mun. Resp. Ans. Br. pp. 1, 18-19.[2]

As noted by Petitioners in their Opening Brief at pages 29-30, and by the *Amicus Curiae*, it is not at all uncommon for legislation to have administrative consequences, precipitate new administrative acts, and impact the future effect of prior administrative acts. Nor is it uncommon for legislation to "mandate" administrative consequences – as demonstrated by nearly every administratively-implemented statute containing the word "shall."[3]

If the Internal Revenue Code is amended to repeal the capital gains tax, or the National Environmental Policy Act is amended to revise the standards for environmental impact statements – indisputably legislative acts – it may be

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[2] Again, there is abundant room for discourse about these predictions. And, again, that discourse would not be particularly relevant to the issue at hand. This is especially the case with commentary to the effect that the initiatives would "deliberately throw away and ignore countless hours and millions of dollars spent" on an environmental impact statement and Record of Decision – Mun. Resp. Ans. Br. p. 13 – notwithstanding the express deference accorded both of these documents in Section 1, paras. 1 and 3 of both initiatives. The same is true as to the suggestions that these initiatives would remove engineering prerogatives, and "be dangerous to public safety" – HWP R. Br. p. 12-13 – notwithstanding full express deference in both initiatives to such technical expertise (Section 1, paras. 3, 4, 6, 8).

[3] Outside of the judicial context, "mandate" commonly refers to a statutory (*i.e.*, legislative) or constituent authorization or directive. *See, e.g.*, MERRIAM-WEBSTER UNABRIDGED DICTIONARY (online) (#3); DICTIONARY.COM (online) (#1).

presumed that significant administrative consequences, including detailed regulatory revisions, would follow. The Colorado Code of Regulations is composed of extensive administrative rules grounded upon legislative authority or mandate, and subject to evisceration by future legislative acts. Successful statewide citizen initiatives ranging from prohibitions upon the use of public funds for abortions (Colo. Const. art. V, §50) to campaign finance regulation (Colo. Const. art. XXVIII) to creation of renewable energy standards (§40-2-124, C.R.S. (2010)) have all generated significant administrative consequences – good or bad depending upon one's viewpoint – and their amendment or repeal would do so again. None of this renders otherwise legislative acts "administrative."

D. The First *Witcher* Criterion: "Permanent or General Characte"

The Court is referred to pages 22-24 of Petitioners' Opening Brief for a more complete discussion of this criterion.

Both sets of Respondents rely principally upon this Court's opinion in City of Idaho Springs v. Blackwell, 731 P.2d 1250 (Colo. 1987), for the proposition that Petitioners' proposed initiatives are not "permanent or general" in character, and therefore cannot be deemed "legislative" under the first criterion enunciated by this Court in Witcher v. Canon City, 716 P.2d 445, 449 (Colo. 1986). HWP Ans. Br. pp. 18-19; Mun. R. Ans. Br. pp. 13-14. The court of appeals reached a similar conclusion. Addendum 3 to Pet. Op. Br. p. 15-18. This misreads the majority

opinion in Blackwell, however, and grafts that misreading onto the mischaracterization (discussed above) of the initiatives at issue here.

Blackwell addressed two initiatives (one arguably a referendum) that proposed only to alter the implementation details of a "previously declared policy of general applicability" – the legislative decision to build (and fund) a new city hall. 716 P.2d at 1254. Not only were the Blackwell initiatives limited to site selection and choice of structure for the previously authorized new city hall, they were directed solely at excluding "one parcel of real estate . . . and one type of structure [actually one specific structure] from the range of choices available to the Council to implement the previously declared policy of securing a city hall." Id. This was little different from the effort of the petitioners in Witcher to tinker with the terms of a lease renewal for the Royal Gorge Bridge once the legislative decision to lease, rather than operate, that bridge had been made. Witcher, 716 P.2d at 449-50. The Court noted, further, that the initiatives simply addressed options for carrying out an existing legislative policy rather than declare a new policy, thus also failing to meet the second Witcher criterion. Witcher, 716 P.2d at 450-51; Blackwell, 731 P.2d at 1255.[4]

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[4] This is also similar to Buckeye Community Hope Found. v. City of Cuyahoga Falls, 697 N.E.2d 181 (Oh. 1998), cited by the Municipal Respondents at page 12 of their Answer Brief, involving approval of a site plan for an apartment complex through application of existing zoning regulations. Id. at 185-86. This may be contrasted with that same court's *legislative* characterization of *new* proposals –

In the present case, there is no "previously declared policy of general applicability" that Petitioners seek to implement, or regarding which they are seeking to restrict implementation options.[5] Petitioners are seeking to provide an authorization for an entirely new policy, a policy at least as general in its context as the decision to lease, rather than operate, the Royal Gorge Bridge.

E. The Second *Witcher* Criterion: Declaring "Public Policy" vs. Carrying Out "Existing Legislative Policies and Purposes"

The Court is referred to pages 25-31 of Petitioners' Opening Brief for a discussion of this criterion.

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unsupported by and not simply seeking to apply, limit, or change implementation options within the parameters of existing legislative policies – notwithstanding their specificity in terms of location. *See* Citizen Action for a Livable Montgomery v. Hamilton County Bd. of Elections, 875 N.E.2d 902, 909-10 (Oh. 2007), and State *ex rel.* North Main Street Coalition v. Webb, 835 N.E.2d 1222, 1226, 1229 (Oh. 2005), noted at page 24 of Petitioners' Opening Brief.

[5] The Municipal Respondents' comment on page 19 of their Answer Brief that a "public policy of authorizing the City Council to dispose of City owned property or to construct a highway was first enunciated upon approval of the City Charter" is puzzling. If reference is to Charter §1.4 (as suggested on page 16 of Municipal Respondents' Answer Brief), this power is reposed upon "the City" – which may act on legislative matters through exercise of the initiative right expressly reserved to its electors under Colo. Const. art. V, §1(9) and Article V of the City Charter. If the point is that Council has been authorized by the Charter to exercise this power, that is assuredly so – concurrent with the constitutionally and charter reserved right of citizen initiative on legislative matters. If the argument is that conferral of broad authority upon Council to legislate on these matters constitutes a "previously declared policy of general applicability" excluding the people's reserved right of initiative – or rendering any such initiative "administrative" – this "policy" would be manifestly unconstitutional and directly contrary to Article V of the Charter itself.

First, there can be little doubt that Petitioners' proposed initiatives do not seek to "carry out existing legislative policies and purposes." The only pertinent existing policies and purposes – legislative or otherwise – are embodied in the original open space designation of the subject property and the subsequent ballot measures passed by the voters in 1996 and 2007. Petitioners expressly seek to change the former and rescind the latter. Unlike Blackwell, there is no other "declared public policy" that Petitioners could apply or carry out even if they wished.[6]

Second, unlike decisions cited by the Municipal Respondents, Petitioners' proposed initiatives do not seek to exercise or interfere with an authority reserved to another level or agency of government.[7] Rather, they seek to authorize a

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[6] By way of comparison, *see* Buckeye Community Hope Found., discussed at note 3, *supra*; Monahan v. Funk, 3 P.2d 778 (Ore. 1931), cited at Mun. Resp. Ans. Br. p. 15, disallowing a referendum against an ordinance authorizing the purchase of specified real property for a crematory site under the authority of (and carrying out) a prior charter amendment that had authorized the city council to acquire a crematory site; Read v. City of Scottsbluff, 297 N.W. 669 (Neb. 1941), cited at Mun. Resp. Ans. Br. p. 12, disallowing an initiative to reject a specific paving contract entered into in furtherance of a prior ordinance establishing a paving district; City of San Diego v. Dunkl, 103 Cal.Rptr.2d 269 (Cal. App. 2001), cited at Mun. Resp. Ans. Br. p. 20 and discussed at Pet. Op. Br. p. 26, n. 13, disallowing an initiative that sought solely to impose conclusions regarding the adequacy of performance by a party to – and terminate further obligations under – a memorandum of understanding authorized by a prior legislative initiative.

[7] For comparison, *see* Amalgamated Transit Union-Div. 757 v. Yerkovich, 545 P.2d 1401, (Ore. 1976), where the court found that the authority sought to be invoked through a proposed municipal initiative approving location of a freeway

different allowed use of City-owned property designated as open space and the conveyance to the State of Colorado of an interest in that City-owned property – authorizations that can *only* be provided by the City (and only by public vote per the City Charter). The discretion and authority of the State (or the FHWA) are in no way affected except to the degree, if any, that those agencies may elect to defer to the wishes of the City.[8]

As for declaring new "public policy," Petitioners are expressly seeking to authorize the use and transfer of City-owned property for development of a new strategic concept and design for the primary highway entrance to the City. The City's current (albeit unrealized) concept is to *restrict* and *divert* general traffic to

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actually rested with federal and state administrative agencies (Id. at 1405); Seattle Bldg. & Constr. Trades Council v. City of Seattle, 620 P.2d 82 (Wash. 1980), in which the court concluded that the city – whose authority the proponents of a municipal initiative sought to invoke – did not have the authority to prohibit expansion of a state highway previously authorized under a state-mandated process (in which the city had already participated to the full extent authorized by the state). *Compare also* City of Port Angeles v. Our Water – Our Choice!, 239 P.3d 589, (Wash. 2010), in which municipal initiative proponents sought to alter otherwise applicable state and federal water quality and fluoridation standards. Even with these authorities, the question may be posed whether the *ultra vires* nature of an initiative is less a measure of its "legislative" character than of its post-adoption enforceability.

[8] At present, the State holds an easement upon the City's property for a City-approved use that cannot be implemented. *See* Pet. Op. Br. pp. 8-9. Petitioners' initiatives would authorize conveyance of an easement for a new and different use that can be implemented.

mass transit at this critical location. Petitioners propose to immediately *expand* general traffic capacity while reserving the future potential for light rail.

Respectfully, neither the City's current policy nor Petitioners' proposed alternative policy is directed simply to "reconfiguring" lanes. These proposals are conceptually as different as single or multi-family zoning, authorization for a city hall or a regional justice complex, or authorization for development of an airport restricted to general aviation or commercial carriers. Indeed, the hearing officer, district court, and the Municipal Respondents have all acknowledged the core "legislative" purpose of these initiatives, and are contesting only the details.[9]

Both the Protestor Respondents – HWP Ans. Br. pp. 24-25 – and the Municipal Respondents – Mun. R. Ans. Br. pp. 22-25 – accuse the Petitioners of seeking to intrude upon "engineering, architectural, maintenance and construction" details "requiring specialized training and expertise," and thus appropriately delegated to administrative officials and retained professionals. The court of appeals noted that the city manager was charged with "the provision of engineering, architectural, maintenance, and construction services required by the city" – Addendum 3 to Pet. Op. Br. p. 21 – and clearly viewed the Petitioners as encroaching into this area as well.

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[9] *See* p. 14, ftn. 6, of Petitioners' Opening Brief.

Overlooked in all this is the broad authorization, absence of technical detail, and substantial deference to administrative processes and technical expertise accorded in the plain language of the Petitioners' measures. While authorizing a transfer of an interest in the subject property to the State for a new use and development of a four lane highway contrary to the current authorization, the initiatives:

(1) expressly defer to a "reevaluation if required" under federal environmental impact regulations and issuance of a revised record of decision thereon "if required;"

(2) defer any reevaluation funding obligation (to any of the parties) solely as the result of acceptance of the new authorization by CDOT;

(3) expressly defer to "all provisions relating to the construction" of identified alternatives as set forth in the completed draft environmental impact statements heretofore prepared;

(4) provide that intersection design and highway transition location "shall be at the sole discretion of the State of Colorado, Department of Transportation;"

(5) incorporate existing lane management restrictions from the adjoining section of the state highway;

(6) provide generally for a transit envelope and bridge engineering "sufficient to facilitate addition of a light rail transit system" (with no more design or engineering detail than that);

(7) call generally for various "environmental and historic mitigation measures" including avoiding a community garden and hang-gliding landing zone, return of abandoned property to open space, alignment "as sensitive as possible" to two historic structures, minimal use of open space "consistent with good design," bridge design "sensitive to the environment and community character," a landscaping plan (with plantings, berms, depressions, and "other methods") to "mitigate environmental and neighborhood concerns," and (in one measure) a cut-and-cover tunnel identical to the design already approved by the voters in Council's 1996 ballot measure;

(8) encourage adjustment of boundaries to the property authorized to be conveyed "for any qualitative purposes" without further compensation to the City; and

(9) require re-vegetation and landscaping of the property if the project is not pursued.

If any of these stipulations "intrude into areas of government requiring specialized training and expertise" – Mun. R. Ans. Br. p. 22 – and pose the prospect of "chaos

and bring[ing] the machinery of government to a halt" – HWP Ans. Br. p. 25[10] – there remains precious little that the legislative process can do. Please see the discussion at pages 27-29 of Petitioners' Opening Brief.

Finally, the Court is referred to the discussion in sections B and C, above, as well as the Brief of *Amicus Curiae* Colorado Common Cause, regarding the confusion of legislative authorization with potential (and speculative) prospects for administrative consequences.

F. The Third *Witcher* Criterion: Amending a Prior Legislative Act

The Court is referred to pages 31-33 of Petitioners' Opening Brief.

Petitioners re-emphasize that their current proposals are legislative in character *not* solely because City Council referred, and the electorate adopted, the 1996 and 2007 authorizations – nor are any of these measures legislative in character solely because of the referral mandate of Section 13.4 of the Aspen City Charter. Rather, both the prior measures and the Petitioners' current proposed measures are legislative in character because of their operative language and policy-directed content.

Charter §13.4 is reflective of the importance of the land use issues at stake to the voters of the City of Aspen as a matter of policy (*i.e.*, the "legislative" significance of these issues in each of these measures). To an even greater extent

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[10] A similar prediction was rejected by this Court in the zoning context in Margolis v. District Court, 638 P.2d 297, 305 (Colo. 1981).

than with land use and zoning issues in general – themselves inherently "legislative" and subject to initiative[11] – Aspen's voters have accorded a particularly high degree of importance at a policy level to authorizations for disposition of city-owned open space property. Concurrently, Petitioners' proposals here carry the authorization for an entirely new strategic concept for the primary transportation entrance to the City.

G. The Severance Issue.

The Court is referred to the discussion at pages 33-36 of Petitioners' Opening Brief with regard to the appropriate disposition of a proposed initiative deemed to contain both legislative and administrative material.

Petitioners' submit that both of their proposals are legislative in their entirety. Each initiative is no more detailed than necessary and appropriate to inform the voters of what it is they are being asked to authorize and allow them to make a qualitative judgment comparing gains and losses that would be realized under each measure. Each initiative is no more detailed than appropriate to provide general guidance for subsequent administrative implementation. Should the Court determine that the Petitioners have misjudged in this regard as to any component of either measure, Petitioners would respectfully request the Court to preserve as much of their proposed measures as possible, and thereby preserve the

[11] Margolis, 638 P.2d at 303-04.

ability of the people of the City of Aspen to exercise their constitutionally reserved right to consider them.

II. CONCLUSION

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 5th day of November, 2010.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of November, 2010, a true and correct copy of the foregoing was served by U.S. mail, first class postage prepaid, to the following addressees:

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