Appellate Court Case No. A-23-0597

City of Hastings Nebraska, a Nebraska Municipal Corporation,

Plaintiff/Appellee,

vs.

Norman Sheets, Paul Dietze, Alton Jackson, Chief Petitioners,

Defendant/Appellant

Appeal from the District Court of Adams County, Nebraska

The Honorable Morgan R. Farquhar District Judge

Reply Brief of Appellees and Reply Brief to Answer Brief on Cross-Appeal

PREPARED AND SUBMITTED BY:
Jesse M. Oswald, #26291
joswald@cityofhastings.org
Hastings City Attorney
2727 W. 2nd Street, Ste. 424
Hastings, NE 68901
(402) 461-2359

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STATEMENT OF THE CASE

NATURE OF THE CASE

Norman Sheets, Paul Dietze, and Alton Jackson ("Chief Petitioners") are appealing the decision of the District Court of Adams County ("District Court") determining that this case is moot and a Declaratory Judgement determining that the referendum petition filed with the City of Hastings by Chief Petitioners on February 17, 2021, ("Third Petition") is void and no election or ballot submission is required.

ISSUES ACTUALLY TRIED

The issue before the District Court was whether the Third Petition filed with signatures for verification on February 17, 2022, was void.

RESOLUTION OF ISSUES AND JUDGMENT OF THE DISTRICT COURT

1. The District Court determined that this case was moot since the viaduct, commonly known as the old 281 viaduct, has been demolished. Therefore, proceeding forward with an election would only seek to effectuate the prevention of demolition of a structure that is already gone. Therefore, entry of a declaratory judgement would only be advisory.
2. The District Court found that a Public Interest Exception existed. As a result, the District Court determined that guidance as to whether, given the facts in this case, the referendum petition had validity was desirable and such guidance should be provided in this case.
3. The District Court determined that Nebraska Revised Statute §18-2519 was not violated despite the fact that identical language was presented by Chief Petitioners to the City in the referendum petition filed with the City on March 2, 2020, ("First Petition") and the Third Petition without the passage of two years having occurred. The Court relied on the language in the statute that "The same measure, either in form or in essential substance, may not be submitted to the people by initiative

petition, either affirmatively or negativity, more often than once every two years."

4. The District Court determined that the referendum petition failed to articulate which measure was sought to be reversed and found no issue should be submitted to the voter that lacks specificity and fails to accurately articulate the measure to be considered by the voter.

SCOPE OF REVIEW

Statutory interpretation presents a question of law, for which an appellate court has an obligation to reach an independent conclusion irrespective of the decision made by the court below. *Hargesheimer v. Gale*, Neb. 123, 129, 881 N.W. 2d 589, 595 (2016) citing *Shurigare v. Nebraska State Patrol*, 293 Neb. 606, 879 N.W.2d24 (2016).

PROPOSITIONS OF LAW

Appellee hereby incorporates the Propositions of Law from their opening brief.

STATEMENT OF FACTS

Appellee hereby incorporates the Statement of Law from their opening brief.

ARGUMENT

I. THIS CASE IS MOOT.

Chief Petitioners argue that the Viaduct is a collateral issue to the subject of the Chief Petitioners Third Petition (Reply Brief for Appellant, p. 5) which title states "To reverse City Council's decision to demolish the olde 281 viaduct".

In *Rath v. City of Sutton* the taxpayer was seeking to reverse the decision of the Sutton City Council to build a wastewater treatment facility. The District Court denied the taxpayers request for injunctive and declaratory relief as there was no showing that the taxpayer would suffer irreparable injury. The taxpayer appealed and because there was no court order prohibiting the contractor from proceeding with the project, the contractor completed the project and was paid by the City during the pendency of the appeal. The Nebraska Supreme Court held that the completion of the project by the contractor rendered the taxpayer's appeal moot.

In the case before this Court the Chief Petitioners are seeking to reverse the decision of the Hastings City Council to demolish the viaduct. (E4, p. 8). The District Court denied the Chief Petitioners request for injunctive and declaratory relief as there was no showing that the Chief Petitioners would suffer irreparable injury. (T162-164). The Chief Petitioners appealed and because there was no order prohibiting the contractor from proceeding with the project, the contractor completed the project and was paid by the City before the District Court trial occurred. (E4, p. 4).

Therefore, this court should hold that the completion of this project by the contractor has rendered this case moot.

II. PUBLIC INTERST EXCEPTION IS NOT APPLICABLE.

Chief Petitioners argue that the City is relying on a single factor, the rule barring resubmission (See Neb. Rev. Stat. §18-2519) as to why the public interest exception should not apply. (Reply Brief for Appellant, p. 6). This simply is not true.

The public interest exception to the rule precluding consideration of issues on appeal because of mootness requires the consideration by the court of the public or private nature of the question presented, the desirability of an authoritative adjudication for guidance of public officials, and the likelihood of recurrence of the same or a similar problem. *Pro. Firefighters Ass'n of Omaha, Loc. 385, AFL-CIO CLC v. City of Omaha*, 282 Neb. 200, 215, 803 N.W.2d 17, 28 (2011).

The Court held in *Pro. Firefighters Ass'n of Omaha, Loc. 385* that:

> Were we to reach the merits of the instant appeal, it would require an analysis of complex factors which are unique to this case. Such factors would include the proper interpretation of the minimum staffing, promotion, and call-back provisions of the original CBA; an interpretation of those terms as modified by each subsequent order issued by the Commission; a determination of which terms were encompassed by the status quo order; and a finding of whether the actions of the City amounted to a violation of those terms. It is unlikely that we will be presented with a similar factual situation. Accordingly, there is no likelihood of recurrence of the same or a similar problem, and we decline to apple the public interest exception to the mootness doctrine. *Id.*

Here, if this Court were to reach the merits on the instant appeal, it would require an analysis of complex factors which are unique to this case. Such factors would include, but not be limited to, a determination of what measures the Chief Petitioners wanted reversed, the fact that we had multiple measures sought to be repealed by the Chief Petitioners, a failed

attempt at injunctive relief, and having two identical photocopied referendum petitions presented within two years in violation of Neb. Rev. Stat. § 18-2519 . It is therefore unlikely that this court will be presented with a similar factual situation in the future.

III. NEB. REV. STAT. §18-2506 DOES REQUIRE THE SPECFIC IDENTIFICATION OF MEASURES TO BE REPEALED.

The Chief Petitioners misapply the statutory scheme in arguing that the referendum petitions do not require specificity and the District Court agreed. Specifically Chief Petitioners cite Neb. Rev. Stat. § 18-2513(2) (Reply Brief for Appellant, p. 7) which states:

> All initiative and referendum measures shall be submitted in a nonpartisan manner without indicating or suggesting on the ballot that they have or have not been approved or endorsed by any political party or organization.

In this subsection of the Statute the word "measures" modifies the word "all" referring to all measures, not a specific measure. In other words, it is not saying that multiple measures can be repealed with one referendum petition, it is stating that each and every petition must be submitted in a non-partisan manner. It has nothing to do with if one petition can repeal multiple measures.

"Measure means an ordinance, charter provision, or resolution which is within the legislative authority of the governing body of a municipality to pass." Neb. Rev. St. § 18-2506. This State statute defines measure as *an* ordinance or *resolution* (*emphasis added*), which clearly indicates that Chief Petitioners have a duty to identify the ordinance or resolution to be subjected to a referendum.

Furthermore, Neb. Rev. St. § 18-1513 states "The ballot title of any measure to be initiated or referred shall consist of a briefly worded caption by which the measure is commonly known or which accurately summarizes *the measure*" (*emphasis added*). Simply put, the District Court did give the statute its plain and ordinary meaning.

The City previously asserted, and the District Court agreed, that the referendum petition of the Chief Petitioners fails to identify the action that the Chief Petitioners want reversed. (Supp. T5). The Chief Petitioners themselves in their Counterclaim for Declaratory Judgement identifies three separate and distinct "measures" subject to referendum. (T149-56). These various measures are Resolution No. 2019-59, Resolution No. 2020-62, and the contract between the City and United Contractors, Inc.. *Id.* The City found it impossible to discern from the Third Petition, which of those measures alleged by the Chief Petitioners, that the Chief Petitioners wanted to go before the voters. Therefore, the petition before this court fails to articulate a measure to be repealed and should be declared void and no election or ballot submission should be made.

IV. PROCEEDING FORWARD WITH AN ELECTION WILL ONLY CAUSE CONFUSION AND DOUBT AS TO WHAT ACTION THE VOTER HAS AUTHORIZED.

The Chief Petitioners argue that a voter would not be confused under the Tilgner standard. (Reply Brief for Appellant, p. 6). This argument is misplaced.

The *Tilgner* Court held that the "referendum petition violated a common-law single subject rule that invalidates proposed ordinances that require voters to approve distinct and independent propositions in a single vote."

Chief Petitioners are focusing exclusively on one part of a three part test set forth in Tilgner: compelling voters to vote for or against distinct propositions in a single vote – when they might not do so if presented separately. (*Id.*). The entirety of the Tilgner standard is as follows:

> A proposed municipal ballot measure is invalid if it would (1) compel voters to vote for or against distinct propositions in a single vote—when they might not do so if presented separately, (2) confuse voters on the issues they are asked to decide, *or* (*emphasis added*) (3) create doubt as to what action they have authorized *after the election*."

The *Tilgner* standard only requires *one* of the three standards be met in order for this Court to declare the municipal ballot measure invalid. Chief Petitioners have failed to address the second and third standards set forth in *Tilgner*.

If this court were to require an election where the ballot question was to "reverse the City Council's decision to demolish the old 281 viaduct" (T239-41) there would create doubt as to what action they, the voters, have authorized after the election. The Chief Petitioners themselves have been unable to answer what the consequences of an affirmative vote for reversal of City Council's decision to demolish the old 281 viaduct would be. Therefore, a voter would be confused on the issues they are asked to decide and create doubt as to what action they have authorized *after* the election.

The Chief Petitioners argument that the demolition of the viaduct is somehow "collateral" (Reply Brief for Appellant, p. 6) and that "complete relief can still be granted" (Brief for Appellant, p. 25) again fails under the Tilgner standard as the voter would have doubt as to what action they have authorized after the election due to Chief Petitioners own claim that they are seeking to repeal three measures, Resolution No. 2019-59, Resolution No. 2020-62, and *the contract between the City and United Contractors, Inc.*. (T149-56).

Alternatively, in focusing on the first test in the *Tilgner* standard, as the Chief Petitioners do. The *Drummond Court*:

> determined that the initiative was invalid because it asked voters to decide whether the city should acquire an electrical distribution system "and/or" acquire transmission lines to connect to another source of electricity. Instead of being asked to approve one proposal over another, voters could not express their preference for either proposal without also authorizing city officials to take the action that the voters did not prefer. Because voters were compelled to approve either action, they were not expressing their own preference.

City of N. Platte v. Tilgner, 282 Neb. 328, 350, 803 N.W.2d 469, 487 (2011) citing *Drummond v. City of Columbus*, 136 Neb. 87, 285 N.W. 109 (1939).

In the case before this Court, a voter is being forced to decide weather the City should reverse City Council's resolution(s) ordering demolition of the viaduct *and/or* reversing the decision of City Council to enter into a contract for the demolition of the viaduct. Instead of being asked to approve one proposal over another, voters could not express their preference for either proposal without also authorizing city officials to take action that voters did not prefer. Because voters were compelled to approve either action, they were not expressing their own preference. But rather the petition presented distinct but dual propositions for a single vote, voters could not express a preference on either without approving or rejecting both.

V. THE CITY MET THE STATUTORY REQUIREMENTS FOR APPROVING THE INTITAIVE PETITION.

Chief Petitioners claim that the City Clerk waived any argument as to vagueness and confusion the petition may cause voters by stating there is a dichotomy for bad petitions 1) those that are bad in form and 2) those that are bad in substance. (Reply Brief of Appellant, p. 11). Chief Petitioners falsely claim that the only way that a prospective petition can be bad in substance is if it is listed as one of the enumerated matters which are not subject to referendum per Neb. Rev. St. §18-2528. (*Id.*).

However, the petition before this Court did not comply with the statutory framework of Neb. Rev. Stat. §18-2501 because the measure was not articulated, as mentioned above, as well as that the Chief Petitioners did not comply with §18-2519, requiring that *no attempt* to repeal or alter an existing measure or portion of such measure by referendum petition may be made within two years from the last attempt to do the same.

Chief Petitioners argument is misplaced as they are inferring and reading into Neb. Rev. St. §18-2538 a requirement that does not exist. That requirement being that Neb. Rev. St. §18-2538, the right to a declaratory judgement, is only referring to and applicable to Neb. Rev. St. §18-2528, measures excluded from referendum. Nowhere, in the right to a declaratory

judgement, does the plain language of the statute state that this is only applicable to Neb. Rev. St. §18-2528. A Court should not read into a statute a meaning that is not there. *Lindsay Int'l Sales & Services, LLC v. Wegner*, 287 Neb. 788, 796, 901 N.W.2d 278, 283 (2017).

CONCLUSION

Considering the forgoing reasons set forth herein the City prays that the court finds this matter moot, that an order be entered declaring that the Petion dated December 13, 2021, is void, an order be entered declaring that no election should be held and whatever other relief the court may grant as just and equitable.

REPLY BRIEF TO ANSWER BRIEF ON CROSS-APPEAL

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STATEMENT OF THE CASE

Appellee hereby incorporates the State of the Case from their Reply Brief.

PROPOSITIONS OF LAW

Appellee hereby incorporates the Propositions of Law from their opening brief. Appellee further state as their propositions of law:

I.

"The same measure, either in form or in essential substance, may not be submitted to the people by initiative petition, either affirmatively or negatively, more often than once every two years. No attempt to repeal or alter an existing measure or portion of such measure by referendum petition may be made within two years from the last attempt to do the same. Such prohibition shall apply only when the subsequent attempt to repeal or alter is designed to accomplish the same, or essentially the same purpose as the previous attempt." Neb. Rev. Stat. § 18-2519.

II.

Such prohibition to prevent the attempt to repeal a measure shall apply only when the subsequent attempt to repeal is designed to accomplish the same, or essentially the same purpose, as the previous attempt. Neb. Rev. Stat. § 18-2519.

III.

In recognizing the public interest exception to the mootness doctrine the court considers the desirability of an authoritative adjudication for guidance of public officials. *Pro. Firefighters Ass'n of Omaha, Loc. 385, AFL-CIO CLC v. City of Omaha*, 282 Neb. 200, 215, 803 N.W.2d 17, 28 (2011).

STATEMENT OF FACTS

Appellee hereby incorporates the Statement of Facts from their opening brief.

ARGUMENT

Appellee hereby incorporates Section III of their argument from their opening brief. Appellee further states as their argument:

I. THE DISTIRCT COURT ERRORED IN FINDING THAT THE CHIEF PETITIONERS DID NOT VIOLATE THE REFERENDUM SUBMISSION LIMITATION

A. No Attempt to Repeal or Alter an Existing Measure by Referendum Petition May be Made Within Two Years from the Last Attempt to do the Same.

Chief Petitioners argue that "the two petitions while employing identical language, did not attempt to repeal or alter a 'measure,' but rather, two different measures were aimed at two different resolutions." This argument is misguided.

Neb. Rev. Stat. §18-2519 probits the attempt to repeal an existing measure by referendum within two years from the last attempt to do the same. When Chief Petitioners submitted their First Petition there was an existing measure. When Chief Petitioners submitted their Third Petition, dated December 13, 2021, there was an existing measure.

Furthermore Neb. Rev. Stat. §18-2519 states "Such prohibition shall apply only when the subsequent attempt to repeal or alter is *designed to accomplish the same, or essentially the same purpose* as the previous attempt.

Both Resolution 2019-59 and Resolution 2020-62 resolve to direct staff to demolish the viaduct as expeditiously as possible. Therefore, the Chief Petitioners' Third Petition dated December 13, 2021, would accomplish the same, or essentially the *same purpose* as the previous attempt on January 28, 2020, which is to "reverse the city council's decision to demolish the old 281 viaduct" and are within two years of each other. Therefore, the Third Petition is barred under Section 18-2519.

B. Should this Court Determine that the Public Interest Exception to the Mootness Doctrine Applies to this Case this Court Should Consider the City's Submission Limitation Argument.

Chief Petitioners argue that the City failed to note the cross-appeal as specified in Neb. Ct. R. App. P. § 2-109(D)(4) and therefore the Court should not consider the merits of the cross-appeal.

In order for the court to recognize the public interest exception it must first consider factors such as 1) the public or private nature of the question presented and 2) the desirability of an authoritative adjudication for guidance of public officials.

Should this Court agree with the Chief Petitioners that the City failed to properly note the cross-appeal and additionally determine that the public interest exception to the mootness doctrine does apply to this case, the court would have to determine that this case presented a question that is public in nature and that there is a desirability for an authoritative adjudication for guidance of public officials. *Pro. Firefighters Ass'n of Omaha, Loc. 385, AFL-CIO CLC v. City of Omaha*, 282 Neb. 200, 215, 803 N.W.2d 17, 28 (2011).

Therefore, this court should also apply this same standard to the merits of the cross-appeal and waive the requirements that the cross-appeal be set forth in a separate section in order to provide for the intended effect of the public interest exception, which is to provide guidance.

CONCLUSION

For the reasons set forth herein, the City respectfully requests this court to reverse the decision of the District Court regarding the submission limitation and whatever other relief the court may grant as just and equitable.

DATED the 23rd day of February, 2024.

Respectfully submitted,

Jesse M. Oswald, #26291
joswald@cityofhastings.org
Hastings City Attorney
2727 W. 2nd Street, Ste. 424
Hastings, NE 68901
(402) 461-2359

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word count and typeface requirements of Neb. Ct. R. App. P. § 2-2013(C)(4). This brief contains 3,743 words, excluding this certificate. This brief was created using Microsoft Word, version 2401.
/s/ Jesse M. Oswald, #26291

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2024, a true and correct copy of this brief was electronically served upon Council for the Appellant, Bradley D. Holbrook and Coy T. Clark, by filing with the electronic filing system and by email to bradh@jacobsenorr.com and cclark@jacobsenorr.com
/s/ Jesse M. Oswald, #26291

Certificate of Service

I hereby certify that on Friday, February 23, 2024 I provided a true and correct copy of this *Appe Reply Brief & Reply to Answer X-App* to the following:

Alton Jackson represented by Bradley D Holbrook (21490) service method: Electronic Service to **bradh@jacobsenorr.com**
Alton Jackson represented by Coy T. Clark (27028) service method: Electronic Service to **cclark@jacobsenorr.com**

Norman Sheets represented by Bradley D Holbrook (21490) service method: Electronic Service to **bradh@jacobsenorr.com**
Norman Sheets represented by Coy T. Clark (27028) service method: Electronic Service to **cclark@jacobsenorr.com**

Paul Dietze represented by Bradley D Holbrook (21490) service method: Electronic Service to **bradh@jacobsenorr.com**
Paul Dietze represented by Coy T. Clark (27028) service method: Electronic Service to **cclark@jacobsenorr.com**

Signature: /s/ Jesse M. Oswald (26291)