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**CLERK
NEBRASKA SUPREME COURT
COURT OF APPEALS**

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

PREPARED AND SUBMITTED BY:

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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 negatively, 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

I.

A declaratory judgment action becomes moot when the issues initially presented in the proceedings no longer exist, the parties lack a legally cognizable interest in the outcome of the action. *State ex rel. Peterson v. Ebke*, 303 Neb. 637, 653, 930 N.W.2d 551, 563 (2019).

II.

A moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive. *Rath v. Sutton*, 267 Neb. 265, 673 N.W.2d 869, (2004) citing *Stoetzel & Sons v. City of Hastings*, 265 Neb. 472, 658 N.W.2d, (2003).

III.

The central question in a mootness analysis is whether changes in circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaning relief. *Blakely v. Lancaster County*, 284 Neb. 659, 671, 825 N.W.2d 149, 161 (2012).

IV.

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 (3) create doubt as to what action they have authorized after the election.” *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011).

V.

A municipality may seek a declaratory judgment regarding any questions arising under the Municipal Initiative and Referendum Act including if a measure is subject to referendum. Neb. Rev. St. §18-2538.

VI.

If a municipality does file a declaratory judgement action it shall not be required to proceed to hold such an election until a final decision has been rendered. Neb. Rev. St. §18-2538.

VII.

The Court is not required to entertain issues presented by a moot case when it is not clear that the same or a similar problem is likely to recur and relatedly that there is a need to provide future guidance for public officials. *State ex rel. Peterson v. Ebke*, 303 Neb. 637, 661, 930 N.W.2d 551, 568 (2019).

VIII.

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.

IX.

A ballot title requires a briefly worded caption by which the measure is commonly known or which accurately summarizes the measure, not measures. Neb. Rev. St. §18-2513.

X.

A court should give “statutory language its plain and ordinary meaning,” and, “should not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous.” *Lindsey Int’l Sales & Services, LLC v. Wegner*, 287 Neb. 788, 796, 901 N.W.2d 278, 283 (2017).

XI.

A court should not “read into a statute a meaning that is not there.” *Lindsey Int’l Sales & Services, LLC v. Wegner*, 287 Neb. 788, 796, 901 N.W.2d 278, 283 (2017).

XII.

Submission limitations regarding *referendum petitions* requires that no attempt to repeal or alter an existing measure by *referendum petition* be made within two years from the last attempt to do the same. Neb. Rev. Stat. §18-2519.

XIII.

Submission limitations on referendum petitions shall only apply when the subsequent attempt to repeal or alter is designed to accomplish the same, or essentially the same purpose as the previous attempt.

XIV.

Any action brought for declaratory judgment for purposes of determining whether a measure is subject to referendum may be filed in the district court any time after the filing of a referendum with the city clerk for signature verification until forty days from the date the governing body received notification. Neb. Rev. St. §18-2538.

XV.

The city clerk shall verify that the prospective petition is in proper form. Neb. Rev. St. §18-2512.

XVI.

Verification by the city clerk that the prospective petition is in proper form does not constitute an admission by the city clerk, governing body, or municipality that the measure is subject to referendum. Neb. Rev. St. §18-2512.

XVII.

Measures necessary to carry out contractual obligations for projects previously approved by a measure is not subject to referendum. Neb. Rev. St. §18-2528(1).

XVIII.

In order for a referendum proposal to be submitted to the governing body and the voters, the necessary signatures shall be filed with the city clerk within six months from the date the prospective petition was authorized for circulation. Neb. Rev. St. §18-2518(2).

XIX.

Petition is defined as a document authorized for circulation. Neb. Rev. St. §18-2508.

XX.

Prospective Petition is defined as a sample document containing the information necessary for a completed petition which has not yet been authorized for circulation. Neb. Rev. St. §18-2509.

STATEMENT OF FACTS

This case involves a viaduct that was located in Hastings, Nebraska that was closed to vehicular traffic on May 31, 2019. (E4, p. 1). On December 9, 2019, after months of deliberation, the Hastings' City Council decided to tear down the viaduct (E4, p. 1) and passed Resolution 2019-59 which provided for the demolition of the viaduct (E4, p. 1, 6-7) and noted that Resolution 2019-57 enacted November 25, 2019, declared that the viaduct had become a public safety matter due to its deterioration over time and the immediate preservation of public safety was an urgent measure. (E4, p. 6).

The City was provided with a proposed referendum petition on January 28, 2020, for circulation (E4, p. 1) and a signed petition for signature verification on March 2, 2020. (E4, p. 2). The proposed petition and the petition provided for signature verification both declared, "The purpose of this referendum is to reverse the City Council decision to demolish the old 281 viaduct." (E4, p. 8). In response the City Council adopted Resolution 2020-16 which provided for the rescission of Resolution 2019-59 and directed staff to prepare for City Council consideration ballot language that would place the issue of repair or demolition of the viaduct on the 2020, general election ballot (E4, p 11).

City Council discussion led to City Council adoption of Resolution 2020-50 on August 24, 2020. (E4, p. 2, 24-26). Resolution 2020-50 put before the voters of the City of Hastings a ballot question at the November 3, 2020, general election. (E4, p. 24-26). The ballot question asked for voter authorization to repair the viaduct and to issue bonds in an amount not to exceed \$12,500,000 to pay for the repairs. (E 4, p. 24-26). The voters of the City of Hastings failed to authorize the viaduct repair and the issuance of bonds at the November 3, 2020, general election. (Supp. T57).

The Hastings City Council then unanimously passed Resolution 2020-62 on November 9, 2020, (E4, p. 2) providing for the demolition of the viaduct and designating the condition of the viaduct "as a public safety matter due to its deterioration over time and that the immediate preservation of public safety is an urgent matter requiring the viaduct to be demolished." (E4, p. 41-43). Plans for demolition were subsequently developed and bidding occurred. (Supp. T74). As a result, an item was placed on the December 13, 2021, Hastings City Council

agenda to approve a contract between the City of Hastings and United Contractors, Inc. for demolition of the viaduct. (E4, p. 3, 70-71).

On December 13, 2021, the City of Hastings Administrative Offices closed at 5:00 p.m. Just as a regularly scheduled meeting of the Hastings City Council was about to commence, the City Clerk was handed a proposed referendum petition. (E4, p. 3). The proposed petition was identical to the proposed petition Chief Petitioners presented to the City Clerk on January 28, 2020, (E4, p. 8-10, 56-58). That proposed petition, declared, as did the earlier petition, “The purpose of this referendum is to reverse the City Council decision to demolish the old 281 Viaduct.” (E4, p. 8-10, 56-58).

The December 13, 2021, City Council meeting was convened and at the meeting the contract between the City and United Contractors, Inc. for the viaduct demolition was unanimously approved by the council members present at the meeting. (E4, p. 59-69).

The proposed referendum petition delivered to the City on December 13, 2021, was presented to the City as a signed petition for signature verification on February 17, 2022. (E4, p. 4).

On March 2, 2022, this suit was filed (E4, p. 4) seeking a declaratory judgment that a special election did not need to be held in response to the petition provided to the City of Hastings on February 17, 2022. (T115-118). The Chief Petitioners subsequently filed a counterclaim on March 18, 2022, seeking a declaration from the court that Resolution 2019-59, Resolution 2020-62, and the contract between the City and United Contractors, Inc. are all measures as defined in the Municipal Initiative and Referendum Act. (T149-156).

On April 4, 2022, Chief Petitioners filed a Motion for Interlocutory Injunction seeking a Temporary Injunction from the District Court to prevent the City from demolishing the viaduct. (T162-164). On April 4, 2022, the Chief Petitioners also filed a Motion for Writ of Mandamus seeking a court order requiring the city to place a Viaduct Referendum on a special election ballot. (T159-160). On April 6, 2022, the District Court, following an April 5, 2022, hearing denied the request for a Temporary Injunction. (T162-164).

Demolition of the viaduct was completed on or about October 20, 2022. (E4, p. 4).

Trial was had on Stipulated Facts on March 24, 2023. (T277-297). On July 6, 2023, the Adams County District Court granted the City’s request for a Declaratory Judgement. (Supp. T5). The District

Court ruled the referendum petition filed by Chief Petitioners on February 17, 2022, was void and that no election or ballot submission should be made. (Supp. T5).

The District Court adjudicated this case by determining (1) that the issue before the court was moot, (2) that a Public Interest Exception applied to this case, (3) that the limitation set forth in Nebraska Revised Statute §18-2519 does not apply to the facts in this case, and (4) that the language in Chief Petitioners' referendum petition was insufficient and Chief Petitioners' "referendum petition is void and no election or ballot submission shall be made". (Supp. T2-5).

The Chief Petitioners' subsequently appealed. (Supp. T12).

ARGUMENT

I. THE DISTRICT COURT WAS CORRECT IN ITS FINDING THAT THE CHIEF PETITIONERS ARE NOT ENTITLED TO AN ELECTION.

As outlined below, the District Court was correct in determining that this issue is moot (Supp. T2) and finding that the Chief Petitioners are not entitled to an election. (Supp. T5).

A. This case is moot as the issues initially presented no longer exist.

A declaratory judgment action becomes moot when the issues initially presented in the proceedings no longer exist, the parties lack a legally cognizable interest in the outcome of the action. *State ex rel. Peterson v. Ebke*, 303 Neb. 637, 653, 930 N.W.2d 551, 563 (2019).

In *Rath v. Sutton*, 267 Neb. 265, 673 N.W.2d 869, (2004), a Nebraska Supreme Court case, there was a dispute regarding a bid the City of Sutton had selected for a wastewater plant project. An injunction was requested. The court denied the injunction request. There was no stay or supersedeas bond issued and by the time the issue made its way to be decided by the court the project had been completed.

A “moot case is one which seeks to determine a question which does not rest upon existing facts or rights, in which the issues presented are no longer alive.” The *Rath* court citing *Stoetzel & Sons v. City of Hastings*, 265 Neb. 472, 658 N.W.2d, (2003).

The central question in a mootness analysis is whether changes in circumstances that prevailed at the beginning of litigation have forestalled any occasion for meaning relief. *Blakely v. Lancaster County*, 284 Neb. 659, 671, 825 N.W.2d 149, 161 (2012).

The demolition and removal of the viaduct has been completed by the City on or about October 20, 2022. (E4, p. 4). The fact that the viaduct demolition and removal is complete leads to a situation where the facts that existed at the time of the filing of this case no longer exist. The viaduct has been

demolished and removed. (E4, p. 4). The Chief Petitioners agree that “the demolition of the viaduct is the harm that can’t be replaced by the citizens of Hastings on their own or any way possible” (5:11-13) as “The Petition itself goes to the demolition.” (5:14)

The Chief Petitioners, after their unsuccessful attempt for an interlocutory injunction, are now asking the District Court to enforce their right to referendum, by requiring the City to specifically undertake the special election procedure. (T56). However, if the election were held to “REVERSE THE CITY COUNCIL’S DECISION TO DEMOLISH THE OLD 281 VIADUCT” (T239) were successful it would result in rescinding a measure which if repealed would have zero effect. All purported measures claimed by the Chief Petitioners are hallow vessels as the viaduct has been demolished (E4 p. 4) and the approved contract for demolition of the viaduct is substantially complete. *Id.* As such a valid referendum petition, if it did exist, would result in having an election on whether or not to tear down a nonexistent viaduct. Therefore, this matter is moot.

B. Proceeding forward with an election will only cause confusion and doubt as to what action the voter has authorized.

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 (3) create doubt as to what action they have authorized after the election.” *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011).

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 be extreme confusion among the voters as the viaduct is gone. The viaduct no longer exists, and no remedy provided by this court can bring it back. The voter would have no idea the consequences of their vote.

Neither party to this case can determine what would occur after a vote. (T309) How would a voter not be confused or have doubt as to what action they have authorized after an

election? This confusion and doubt would be in direct contrast to the holding in *Tilgner*.

Therefore, proceeding forward with an election would only seek to effectuate the prevention of the demolition of a structure that is already gone. There is nothing to be gained by an election. No referendum petition or public election can bring the old viaduct back. “Simply put, we lack the power, ‘once a bell has been rung, to unring it.’” *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004). Therefore, this dispute should be declared moot.

C. Public interest exception is not applicable.

Under certain circumstances, an appellate court may entertain the issues presented by a moot case when the claims presented involve a matter of great public interest or when other rights or liabilities may be affected by the case's determination. In determining whether the public interest exception should be invoked, the court considers the public or private nature of the question presented, the desirability of an authoritative adjudication for future guidance of public officials, and the likelihood of future recurrence of the same or a similar problem. While this case involves questions of a public nature, it is not at all clear that the same or a similar problem is likely to recur and, relatedly, that there is a need to provide future guidance for public officials... We will not issue an opinion on a hypothetical set of facts that are unlikely to recur. *State ex rel. Peterson v. Ebke*, 303 Neb. 637, 661, 930 N.W.2d 551, 568 (2019).

Here the fact that we had multiple measures (i.e. general authorization for demolition as well as a contract approval of demolition) acted upon by the City Council, at the same time a second identical photocopied referendum petition is presented is unlikely to occur again in the future as this is a very fact specific occurrence.

Additionally, there is no need for guidance of public officials even if this issue were to occur again in the future. As detailed below, the language in Neb. Rev. St. 18-2519 is clear that Chief Petitioners violated the limitation submission requirement of “no attempt” being allowed within two years of

the first attempt. Therefore, the Court should hold that no Public Interest Exemption applies to the facts before the Court today.

II. THE DISTRICT COURT WAS CORRECT IN FINDING THAT THE REFERENDUM FAILED TO ARTICULATE THE SUBJECT MEASURE.

The District Court found that the referendum petition failed to articulate the measure being repealed, the referendum petition fell outside the statutory framework of Neb. Rev. St. § 18-2501. (Supp. T4-5). This finding is in line with the plain reading of Neb. Rev. St. § 18-2506. Additionally, proceeding forward with authorizing the election would only seek to effectuate the prevention of demolition of a structure that is already gone; thereby, creating confusion and doubt as outlined below.

A. Neb. Rev. St. §18-2506 does require the specific identification of measures to be repealed.

“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.

Therefore, a court should give “statutory language its plain and ordinary meaning,” and, “should not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous,” *Lindsey Int’l Sales & Services, LLC v. Wegner*, 287 Neb. 788, 796, 901 N.W.2d 278, 283 (2017). A court should not “read into a statute a meaning

that is not there.” *Id.* State statute requires *an* ordinance or *resolution* to be identified. Neb. Rev. St. § 18-2513.

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 in their Counterclaim for Declaratory Judgment 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 and the District Court agreed. (Supp. T4-5). How is a voter to know what measure is before them if a court, after extensive review of the facts, cannot determine what “measure” was intended?

B. Chief Petitioners failure to articulate the subject measure will cause voter confusion and create doubt as to what action the voter is authorizing.

“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 (3) create doubt as to what action they have authorized after the election.” *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011).

A voter may have voted in the affirmative to “reverse city council’s decision to demolish the old 281 viaduct” because they had an issue with the United Contractors Inc. contract. Alternatively, a voter may have voted to “reverse city council’s decision to demolish the old 281 viaduct” because they disagreed with Resolution 2019-59 or Resolution 2020-62.

If the voters were to vote in the affirmative regarding tearing down the old 281 viaduct the City would be left uncertain as to whether the voters disagreed with the contract entered into between the City and United Contractors Inc., or with Resolution 2019-59 and/or Resolution 2020-62. This would

compel voters to vote for or against a distinct proposition in a single vote and would confuse voters on the issues they were asked to decide as two voters would be voting on the same issue with two different outcomes in mind which cannot be done according to the holding in *Tilgner*.

Second, assuming this court would find in favor of the Chief Petitioners and order a vote on reversing the decision of City Council to demolish the old 281 viaduct, if this vote were to occur upon the conclusion of this appeal, it would confuse voters on the issue they are asked to decide and create doubt as to what action they have authorized after the election. A voter would be shocked to learn that they would be voting on whether or not to tear down a viaduct that was torn down well over a year ago. This makes no logical sense to a voter. The voter would have great confusion and doubt as to what action they have authorized after the election. This is a direct violation of the holding in *Tilgner*.

The Chief Petitioners themselves have not provided what, if any, remedy that would be available upon voter approval of reversing the decision of City Council to tear down the old 281 viaduct. (T309). The courts have ruled that “declaratory relief cannot be used to obtain a judgment which is merely advisory.” See *Putnam v. Fortenberry*, 256 Neb. 266, 273, 589 N.W. 2d 838, 844 (1999), quoting *Galvan v. Balka*, 253 Neb. 270, 570 N.W. 2d 519 (1997).

C. The City met the statutory requirements for approving the initiative petition as to form.

A declaratory judgment may be sought by a municipality only after a signed petition has been filed with the municipality. Neb. Rev. Stat. §18-2538.

In this case a signed petition was filed with the City on February 17, 2022 (E4, p. 4). On March 1, 2022, the City adopted Resolution No. 2022-08 authorizing signature verification by the Adams County Clerk (E4, p. 4). This suit was filed on March 2, 2022, (E4, p. 4).

By seeking the declaratory judgment on March 2, 2022, the City sought the ruling of the Court regarding whether the

referendum petition met the statutory guidelines and should proceed to a vote of the public. Per Neb. Rev. Stat. §18-2538 the City was prohibited from filing for a declaratory judgment until after the filing of a petition for signature verification on February 17, 2022. At its March 1, 2022, City Council meeting the City complied with Neb. Rev. Stat. §18-2518 by enacting Resolution No. 2022-08. (E4, p. 91-92). Because this declaratory judgment action was filed within 40 days of receipt of the referendum petition with signatures under Neb. Rev. Stat. §18-2538 the City is not required to proceed to hold any election until a final decision has been rendered in the declaratory judgment action.

Chief Petitioners contend that any deficiency in the language of their petition lays with the City Clerk. (T280). Yet, the Chief Petitioners do not address the clear language of Neb. Rev. Stat. §18-2512 which states “Verification by the city clerk that the prospective petition is in proper form does not constitute an admission by the city clerk, governing body, or municipality that the measure is subject to referendum. . .”

Chief Petitioners further contend that the City Clerk somehow waived the confusion created by the Third Petition by indicating that pursuant to Neb. Rev. Stat. §18-2513 the title was the clerk’s responsibility. (T280). The problem with the petition is not that the form of the petition was problematic. The problem was with the substance of the Third Petition language. The title set forth by the Chief Petitioners on the Third Petition and which the clerk authorized for circulation was consistent with the language of the Petition. However, it is not possible to discern which of the “measures” as set forth in Chief Petitioners own counterclaim the Chief Petitioners wanted to address.

As an example, if the city clerk disagreed with anything of substance on the prospective petition at the time of authorizing the prospective petition and the Chief Petitioners disagreed with the city clerk (i.e. measure not articulated) there would be no remedy at law at the time of approving the petition for circulation as no action can be brought for declaratory judgement purposes in determining whether a measure is subject to referendum until after the filing of the referendum

with the city clerk for signature verification. Neb. Rev. St. §18-2538. It is not the duty of the city clerk to provide legal advice.

As noted above, the statutes do not allow questions to be asked via a declaratory judgment until after a petition is submitted with signatures for verification. So, any failing in this instance lies with the statutory framework and direction and not with any action of the City Clerk. Indeed, the December 16, 2021, letter from the City Clerk clearly states that the City Clerk is not acknowledging that the “measure” is subject to referendum. (T273). In addition, there are two additional letters of records sent by the City Clerk to the Chief Petitioners on two different dates with the same language. (T213, 237). The Clerk addressed the form, as required by the statute, but not the substance of the petition.

III. 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.

The District Court was misguided in its reasoning in finding for the Chief Petitioners. In finding for the Chief Petitioners the District Court relied on the following statute language, “The same measure, either in form of in essential substance, may not be submitted to the people *by initiative petition*, either affirmatively or negatively, more often than once every two years.” (Supp. T 3). This case has *absolutely nothing* to do with an initiative petition and therefore nothing to do with the statutory language that has to do with initiative petitions. This case does, however, have everything to do with a *referendum petition*.

The applicable language from Neb. Rev. St. §18-2519 regarding referendum petitions is as follows, “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.”

A. A referendum Petition is not controlled by the *initiative petition* language found in Neb. Rev. St §18-2519, but rather the *referendum petition* language found in Neb. Rev. St §18-2519.

The District Court emphasized the part of the statute regarding *initiative petitions*. (Supp. T3). However, the Chief Petitioners submitted a *referendum petition*. The language used by the District Court as reasoning for why Neb. Rev. St. §18-2519 has not been violated is inapplicable to this case as that language only applies to *initiative petitions*, which is not the issue before this court.

Under Neb. Rev. Stat. §18-2519 it clearly states that *no attempt* to repeal a measure “may be made within two years from the last attempt. . .”. It is important to note that it is the “attempt” that is prohibited, and an “*attempt*” is *only present when talking about referendums*, not initiative petitions.

It is clear that an attempt was made with a prospective petition, as defined in Neb. Rev. Stat. §18-2519, on January 28, 2020. (E4, p. 1). That January 28, 2020, attempt was identical to the attempt that was evidenced by the prospective petition submitted on December 13, 2021. (E4, p. 8-10, 56-58). The relevant language on the two prospective petitions were identical, in fact the second one is a photocopy of the first prospective petition.

The First Petition was submitted with signatures attached on March 2, 2020. (E4, p. 2). The Third Petition was submitted with signatures attached on February 17, 2022. (E4, p. 4). Less than two years separated them, therefore, the Third Petition is premature and prohibited by Neb. Rev. Stat. §18-2519.

It should be noted that Neb. Rev. Stat. §18-2519 does not state whether the two-year prohibition is measured from the date the prospective petition is first proposed or whether it refers to when the signatures are turned in. Either way the two years are measured the fact remains that less than two years separated the attempt.

IV. MEASURES NECESSARY TO CARRY OUT CONTRACTUAL OBLIGATIONS ARE NOT SUBJECT TO REFERENDUM.

Chief Petitioners claimed at trial that Neb. Rev. Stat. §18-2528(1), the statute pertaining to certain measures that are not subject to referendum, is not applicable because that statute deals only with the repeal of measures adopted after the contractual obligations existed and that the contractual obligation for demolishing the viaduct did not exist when Chief Petitioners submitted their *Prospective Petition*.(T285). However, Chief Petitioners argument is misguided.

Under Neb. Rev. Stat. §18-2518(2) in order for a referendum proposal to be submitted to the governing body and the voters, the necessary signatures shall be on file with the City clerk within six months from the date the prospective petition was authorized for circulation. Additionally, Neb. Rev. Stat. §18-2508 defines Petition as a document authorized for circulation pursuant to section 18-2512. Furthermore, Neb. Rev. Stat. §18-2509 defines Prospective Petition as a sample document containing the information necessary for a completed petition, including a sample signature sheet, *which has not yet been authorized for circulation*.

The facts of this case are as such that the Chief Petitioners submitted their Prospective Petition to the City Clerk on December 13, 2021, after the regular office hours of the city clerk but before the regularly scheduled council meeting at 5:30.

As is the typical process for all regularly scheduled council meetings, in order to be in compliance with the Nebraska Open Meetings Act, the City posted the agenda for the upcoming Council Meeting on the Thursday before the December 13th meeting. That means that the Chief Petitioners were informed, based on the fact that the City Council agenda had been made available to the public since Thursday, December 8th, that Council was going to vote on awarding the contract for demolition of the viaduct at the December 13th meeting.

Applying these statutes to the facts, there was no Petition as defined by Neb. Rev. Stat. §18-2508 on December 13th when Council did approve the demolition of the viaduct.

However, on December 16th there was a *Petition* as defined by Neb. Rev. Stat. §18-2508 and there was a contractual obligation in existence when there was officially a Petition. Therefore, Neb. Rev. Stat. §18-2528 *is* applicable.

CONCLUSION

Considering the forgoing reasons set forth herein the City prays that the Petition, Dated December 13, 2021, be declared moot, an order be entered declaring the case moot, and an order be entered declaring that no election should be held.

DATED the 6th day of February, 2023.

Respectfully submitted,

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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 6,144 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 6, 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 Tuesday, February 06, 2024 I provided a true and correct copy of this *Brief of Appellee City of Hastings* to the following:

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