Case No. A-23-0597

**IN THE NEBRASKA COURT OF APPEALS**

City of Hastings, Nebraska, a Nebraska Municipal Corporation,
Plaintiff/Appellee,
vs.
Norman Sheets, Paul Dietze, Alton Jackson, Chief Petitioners,
Defendants/Appellants

Appeal from the District Court of Adams County, Nebraska
The Honorable Morgan R. Farquhar District Judge
District Court Case No. CI 22-77

# REPLY BRIEF OF APPELLANTS AND ANSWER TO APPELLEE'S CROSS APPEAL

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## STATUTES CITED

## BASIS OF JURISDICTION

Appellants hereby incorporate the Basis of Jurisdiction from their opening brief.

## STATEMENT OF THE CASE

This case arises from the closing and demolition of a long-standing viaduct (the "Old Highway 281 Viaduct") in Hastings, Adams County, Nebraska. The City of Hastings, Nebraska (the "City") closed the Old Highway 281 Viaduct in March 2019, (E4, p. 1) and, subsequently, slated it for demolition in Resolution No. 2019-59. (E4, p. 1). Alton Jackson, Norman Sheets, and Paul Dietze (collectively "Chief Petitioners") filed and circulated the First Petition to refer Resolution 2019-59. (E4, p. 1).

Upon receipt of the First Petition and signatures, the Hastings City Council repealed Resolution No. 2019-59 and placed a measure on the ballot in the November 2020 general election to repair the Old Highway 281 Viaduct. (E4, p. 2, 11-12). The City's ballot measure failed, and Chief Petitioners filed the Second Petition, an initiative to repair the Old Highway 281 Viaduct in accordance with a different plan. (E4, p. 2). While the Second Petition was pending, the City passed Resolution 2020-62, to demolish the Old Highway 281 Viaduct. (E4, p. 2) The Second Petition failed as a matter of law. (E4, p. 3).

The Chief Petitioners filed a prospective Third Petition, to refer Resolution No. 2020-62 and "reverse the City Council's decision to demolish the Old 281 Viaduct." (E4, p. 3, 56). The Hastings City Clerk, ("City Clerk") approved the prospective Third Petition for circulation without any changes or alterations to the Chief Petitioner's language. (E4, p. 3, 90).

The Chief Petitioners returned the Third Petition, with signatures for verification. (E4, p. 3). This suit followed.

The District Court of Adams County, Nebraska ("District Court"), on a stipulated trial, found that the case was moot, but that

the public interest exception applied (Supp. T 3). The District Court went on to find that the resubmission rule in Nebraska Revised Statutes § 18-2519 did not bar the Third Petition. Instead, the District Court, ultimately determined that the Third Petition fell outside the Nebraska Municipal Initiative and Referendum Act (the "Act") because measures to be repealed were not specifically identified in the Third Petition. (Supp. T 3).

The Chief Petitioners appealed and ask this court to reverse the judgement of the District Court and decide this case on its merits.

## PROPOSITIONS OF LAW

Appellants hereby incorporate the Propositions of Law from their opening brief.

## STATEMENT OF FACTS

Appellants hereby incorporate the Statement of Fact from their opening brief.

## ARGUMENT

### I. THIS CASE IS NOT MOOT.

The City argues that because the Old Highway 281 Viaduct has been demolished and cannot be replaced that this case is moot. (Brief for Appellee, p. 13). However, the status of the Old Highway 281 Viaduct is collateral to the subject of the Third Petition: the "City Council's decision" to demolish the viaduct. So long as the decision to demolish the viaduct has not been repealed, this case is not moot.

### II. PROCEEDING WITH AN ELECTION ON THE THIRD PETITION WILL NOT CAUSE CONFUSION IN THE ELECTORATE.

The City cites *City of North Platte v. Tilgner*, 285 Neb. 328, 803 N.W.2d 469 (2011), to assert that voting on the Third Petition would confuse voters, "as the viaduct is gone." (Brief for Appellee, p. 13). Essentially, the City argues that voters would be confused as to why

they are voting on whether to remove the viaduct after it has been demolished. *Id*. This argument misapplies the *Tilgner* standard. Specific to this argument, the *Tilgner* Court said:

> We conclude that 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 is 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.

*Tilgner*, 285 Neb. at 349, 803 N.W.2d at 487.

The *Tilgner* Court focused on the single-subject rule and the text of a petition "confusing" voters "on the issues they are asked to decide." *Id*. The City's argument focuses on the facts and circumstances surrounding the language, rather than the language within the Third Petition. (Brief for Appellee, p. 13).

A proper application of the *Tilgner* test to the language of the Third Petition shows that a voter would not be confused as to what they were voting for by voting in favor of the Third Petition. Whether a voter finds it prudent to vote to "reverse the City Council's decision to demolish the Old 281 Viaduct," following the demolition is a personal decision for the voter to make; it does not keep the measure from appearing on the ballot.

## III. THE PUBLIC INTEREST EXCEPTION TO THE MOOTNESS DOCTRINE APPLIES.

Even if the Court determines this case is moot, the Public Interest Exception to the Mootness Doctrine applies. The City, in arguing against this, relies on a single fact that is unlike to recur: petitioners' submission of multiple, similar prospective petitions. (Brief for Appellee, p. 14). The only issue this fact relates to is the City's argument that the Third Petition is barred by the rule against re-submission. *See* Neb. Rev. Stat. § 18-2519. The remaining issues are

subject to the Public Interest Exception, as outlined in Appellant's Opening Brief. *See generally Nebuda v. Dodge Cnty. Schl. Dist. 0062*, 290 Neb. 740, 749, 861 N.W.2d 742, 750 (2015).

## IV. NEBRASKA REVISED STATUTES § 18-2506 DOES NOT REQUIRE SPECIFIC IDENTIFICATION OF THE MEASURE TO BE REPEALED.

The City misapplies the statutory scheme in arguing that referendum petitions must be specifically identify the measure to be repealed under the Nebraska Municipal Initiative and Referendum Act (the "Act"). It relies on the statutory language that a "[m]easure means an ordinance, charter provision, or resolution which is within the legislative authority of the governing body of a municipality to pass." Neb. Rev. Stat. § 18-2506. The City places specific, and heavy, reliance on the terms "measure," and "an ordinance," and, "resolution," used in singular form. (Brief for Appellee, p. 15). However, Section 18-2506 defines "measure" in its singular form; it follows that its descriptors or synonyms are in singular form. The Act refers to "measure" in its plural form multiple times. *See*, *e.g.*, Neb. Rev. Stat. §§ 18-2513(2); 18-2520(1). Defining a "measure" using singular descriptors does not evidence anything.

The City further relies on the Act's use of the singular "measure" in Nebraska Revised Statutes, section 18-2513 (Brief for Appellee, p. 15). That statute contains the following language: "ballot title of any measure to be initiated or referred shall consist of . . .." Neb. Rev. Stat. § 18-2513. However, Section 18-2513 identifies the ballot title for the measure that would be voted on by the voters—i.e., the measure proposed in the prospective petition—rather than the measure to be referred. It is illogical for a city clerk to provide a ballot title for the measure to be referred, *see* Neb. Rev. Stat. § 18-2512, as suggested by the City.

Applying Section 18-2513 as it should be applied, a petitioner would present a prospective petition, containing a single measure, to the city clerk. Such single measure is referred to as a "ballot measure".

The city clerk then provides the ballot title for the ballot measure. That single ballot measure may or may not touch on multiple measures already enacted by the municipality, so long as the ballot measure does not violate the single subject rule outlined in *Tilgner*.

The use of the singular form of "measure" in the Act does not support the contention that a measure to be referred must be specifically identified in a petition or prospective petition.

## V. THE CITY DID NOT MEET THE STATUTORY REQUIREMENTS FOR APPROVING THE REFERENDUM PETITION AS TO FORM.

The City urges this Court to find that it complied with the Act and did not waive any arguments as to the vagueness or potential confusion caused by the language in the Third Petition. That is not true. The method for having a referendum or initiative petition put on the ballot starts with a petitioner submitting a prospective petition to the city clerk. Neb. Rev. Stat. § 18-2511. A "prospective petition" is "a sample document *containing the information necessary for a completed petition* . . . which has not yet been authorized for circulation." Neb. Rev. Stat. § 18-2509 (emphasis added). A prospective petition is not, itself, a form for the actual petition to be circulated. It merely contains information for the city clerk to complete its duties under Section 18-2512.

Once the city clerk receives a prospective petition, it then verifies the petition is in proper form. Neb. Rev. Stat. § 18-2512. If the prospective petition is not in proper form, the city clerk rejects the petition and request corrections. *Id*. If the prospective petition is in proper form, the city clerk provides a ballot title, as defined in Section 18-2513(1), and approves the petition for circulation. Neb. Rev. Stat. § 18-1512.

Here, it was the City Clerk's duty to provide the language that is circulated and the City Clerk approved the language that was circulated by the Chief Petitioners. In doing so, the City Clerk,

essentially, adopted the language as her own. Thus, the City waived its argument that the language is vague or confusing.

The city clerk is statutorily required to provide a ballot tile to a prospective petition that includes:

> (a) [a] briefly worded caption by which the measure is commonly known or which accurately summarizes the measure;
> (b) [a] briefly worded question which plainly states the purpose of the measure and its phrased so that an affirmative response to the question corresponds to an affirmative vote on the measure; and
> (c) [a] concise and impartial statement, of not more than seventy-five words, of the chief purpose of the measure.

Neb. Rev. Stat. § 18-2513(1). If the prospective Third Petition was too vague to understand, it should have been rejected by the City Clerk with a request for clarification. That did not happen. Instead, the Third Petition was approved for circulation as written. (E4, p. 3, 56-58, 90).

The City argues, essentially, that it is bound to whatever language a petitioner proposes to form the ballot title for two reasons. Both arguments are misplaced and addressed below.

First, the City relies on Nebraska Revised Statutes, section 18-2538, which reads, in relevant part, as follows:

> The municipality or any chief petitioner may seek a declaratory judgment regarding any questions arising under the [Act], as it may from time to time amended . . . If the municipality seeks a declaratory judgment, only the chief petitioner or chief petitioners shall be required to be served. Any action brought for declaratory judgment for purposes of determining whether a measure is subject to limited referendum or referendum, or whether a measure may be enacted by initiative, may be filed in

> the district court at any time after the filing of a referendum or initiative petition with the city clerk for signature verification until forty days from the date the governing body received notification . . . The provisions of this section relating to declaratory judgments shall not be construed as limiting, but construed as supplemental and additional to other rights and remedies conferred by law.

Neb. Rev. Stat. § 18-2538.

Here, the City argues that it *must* approve everything put before it by any petitioner since it cannot request declaratory relief until later in the process. That is simply not true.

Section 18-2538 is supplemental to all other rights and remedies. *Id*. Additionally, the issue that Section 18-2538 refers to being raised later in the process is "whether a measure is subject to limited referendum or referendum . . .." *Id*. The language that a city clerk must employ to accurately reflect the proposed measure in a ballot title does not touch on whether the measure is "subject to limited referendum or referendum."

Assuming, however, that the City's reading of Section 18-2538 is correct, and a clerk cannot file a declaratory judgment action any sooner in the process, the outcome does not change. Section 18-2512 gives a city clerk plenary power to form the ballot title. A city clerk can form the language it thinks is lawful and does not need a remedy with the courts. The burden lies with a chief petitioner who disagrees with the clerk's proposed title language. Such chief petitioner can avail themselves of a mandamus action. The City is not tied to any specific language proposed by a petitioner, so long as the ballot title meets the statutory requirements in Section 18-2513. Therefore, it remains the city clerk's responsibility to craft a fair and unambiguous ballot title. The fact that the City Clerk in this case approved the prospective petition language as written waived any argument the City might have that the language is vague or confusing.

The City further argues that the City Clerk is saved from performing her duties by 18-2512, which reads, in relevant part, "[v]erification 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 or limited referendum or that the measure may be enacted by initiative." *Id*.

This argument, too, is misplaced. There appears to be a dichotomy here for "bad petitions": those that are bad in form and those that are bad in substance. Prospective petitions that are bad in substance are not "subject" to referendum or limited referendum and, thus, the city clerk must provide a ballot title for it and take the matter up later. Prospective petitions that are in bad form must be corrected by the city clerk prior to a ballot title being issued.

Whether a measure is "subject" to referendum or limited referendum is defined by statute. "A word or phrase repeated in a statute will bear the same meaning throughout the statute, unless a different intention appears." *See*, *e.g.*, *PPG Industries Canada, Ltd. v. Kreuscher*, 204 Neb. 220, 228, 281 N.W.2d 762, 768 (1979).

Which matters are "subject to referendum or limited referendum" is enumerated in Neb. Rev. Stat. § 18-2825, which specifically states, "[t]he following measures shall not be subject to referendum or limited referendum." Neb. Rev. Stat. § 18-2528(1). That statute goes on to state which measures "shall be subject to limited referendum," Neb. Rev. Stat. § 18-2528(2), and when measures "subject to limited referendum shall ordinarily take effect." *Id.* § 18-2528(3). Finally, subsection (6) of Section 18-2528 states, "[a]ll measures, except as provided in subsections (1), (2), and (4) of this section, shall be subject to the referendum procedure at any time after such measure has been passed by the governing body, including an override of a veto, if necessary, or enacted by the voters by initiative." Any measure not enumerated in Section 18-2528 is "subject to referendum or limited referendum."

Therefore, any issue that does not find its basis in Section 18-2528 is an issue of form for the city clerk to review and clarify upon the filing of a prospective petition. The City Clerk's adoption of the Chief Petitioners' language in their prospective Third Petition waived any argument the City may have as to the vagueness of the Third Petition or the likelihood it will confuse the electorate.

## VI. RESOLUTION NO. 2020-62 IS NOT NECESSARY TO CARRY OUT A CONTRACTUAL OBLIGATION.

Measures necessary for the municipality to carry out contractual obligations are not subject to the referendum procedures in the Act. Neb. Rev. Stat. § 18-2528(1)(a). This bar only prevents the repeal of measures enacted *after* the contractual obligation. *Tilgner*, 282 Neb. at 340-41, 803 N.W.2d at 481-82. The City contends that—at the time contractual obligations related to the Old Highway 281 Viaduct were incurred—the Third Petition was merely a prospective petition and not a "petition," as defined by the Act. (Brief for Appellee, p. 21). This argument is misplaced as the *Tilgner* reasoning relies on the timing of the measure to be repealed and the accrual of the contractual obligation. The timing of the petition, or prospective petition, plays no part in the analysis.

Therefore, the *Tilgner* reasoning stands: repeal of a measure that was passed prior to a municipality incurring a contractual obligation related thereto, is not barred by Section 18-2528(1)(d).

Moreover, the Third Petition does not inhibit the performance of the City's contractual obligations. The City is still able to perform under the contract, it can just not *receive* the services contracted for.

## CONCLUSION

Chief Petitioners respectfully renew their request as set forth in their earlier brief.

**RESPONSE TO APPELLEE'S BRIEF ON CROSS APPEAL**
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## TABLE OF AUTHORITIES



## STATUTES CITED



## COURT RULES CITED

## BASIS OF JURISDICTION

Appellants hereby incorporate the Basis of Jurisdiction from their opening brief.

## STATEMENT OF THE CASE

Appellants hereby incorporate the Statement of the Case from their Reply Brief.

## PROPOSITIONS OF LAW

Appellants hereby incorporate the Propositions of Law from their opening brief. Appellants 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.

No one can attempt to repeal "an existing measure . . . within two years from the last attempt to do so." Neb. Rev. Stat. § 18-2519.

III.

A "measure" is a resolution or ordinance within the municipality's legislative authority. Neb. Rev. Stat. § 18-2506.

IV.

To trigger the protections of Section 18-2519, the referendums must attempt to repeal the same "measure." *See* Neb. Rev. Stat. § 18-2519.

V.

Cross appeals must be specifically noted on the cover page and set out in a separate section of Appellee's brief. Neb. Ct. R. App. P. § 2-109(D)(4).

VI.

A cross-appeal, not properly asserted, should not be considered by an appellate court. *Friedman v. Friedman*, 290 Neb. 973, 984, 863 N.W.2d 153, 161-62 (2015).

## STATEMENT OF FACTS

Appellants hereby incorporate the Statement of Fact from their opening brief.

## ARGUMENT

### I. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S DECISION REGARDING RESUBMISSION.

The District Court, in its final order, determined that the Third Petition was not barred by Neb. Rev. Stat. § 18-2519. (Supp. T4). The City, in its brief, argued that the Districted Court erred in that determination. That argument fails for two reasons.

#### A. The Plain Language of the Statute Allows the Third Petition to Proceed.

The City attempts to rely on Neb. Rev. Stat. § 18-2519, which reads as follows:

> 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.

The City argues that the First Petition and the Third Petition "attempt to repeal or alter an existing measure or portion of the same measure," in violation of Section 18-2519. That argument fails.

Section 18-2519 bars the attempt to repeal "an existing measure . . . within two years from the last attempt to do so." A "measure" is a resolution or ordinance within the municipality's legislative authority. Neb. Rev. Stat. § 18-2506. To trigger the protections of Section 18-2519, the referendums must attempt to repeal the same "measure." However, no two measures, related to Old Highway 281 Viaduct, were on the record at the same time as the First Petition and Third Petition. The First Petition was geared toward repealing Resolution No. 2019-59, which was repealed by the City itself. (E4, p.1). The Third Petition was aimed at Resolution No. 2020-62, which has not been repealed. Therefore, the two petitions, while employing identical language, did not attempt to repeal or alter "a measure," but rather, two different measures. The Third Petition is not barred by Section 18-2519.

**B. The City Failed to Properly Assert its Cross-Appeal.**

Additionally, cross-appeals must be specifically noted on the cover page and set out in a separate section of Appellee's brief. Neb. Ct. R. App. P. § 2-109(D)(4). This includes specifically assigning and arguing errors. *Id*. The City failed to do so (Brief for Appellee, p. 19-

20). and, therefore, the Court should not consider the merits of the purported cross-appeal. *See generally*, *Friedman v. Friedman*, 290 Neb. 973, 984, 863 N.W.2d 153, 161-62 (2015).

## CONCLUSION

Chief Petitioners respectfully request this Court dismiss the City's cross-appeal or, alternatively, find in favor of the Chief Petitioners and affirm the District Court on this issue.

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. § 2-103(C)(4). This brief contains 3,990 words, excluding this certificate. This brief was created using Microsoft Word, version 2311.
*/s./Coy T. Clark*, #27028

**CERTIFICATE OF SERVICE**

I hereby certify that on February 16, 2024, a true and correct copy of this brief was electronically served upon Council for the Appellee, Jesse Oswald, by filing with the electronic filing system and by email to JOswald@cityofhastings.org and electronically served upon counsel for Appellant, Bradley D. Holbrook, by filing with the electronic filing system and by email to bradh@jacobsenorr.com

*/S/ Coy T. Clark, #27028*

# Certificate of Service

I hereby certify that on Friday, February 16, 2024 I provided a true and correct copy of this *Reply Brf Appt Sheets & Answer Cross App* to the following:

City of Hastings, NE represented by Jesse Michael Oswald (26291) service method: Electronic Service to **joswald@cityofhastings.org**

Signature: /s/ CLARK, COY T. (27028)