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NEBRASKA SUPREME COURT
COURT OF APPEALS

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,

Defendant/Appellant

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

BRIEF OF APPELLANT

PREPARED AND SUBMITTED BY:
Bradley D. Holbrook, #21490
bradh@jacobsenorr.com
Coy T. Clark, #27028
cclark@jacobsenorr.com
JACOBSEN, ORR, LINDSTROM
& HOLBROOK, P.C., L.L.O.
322 West 39th Street, P. O. Box 1060
Kearney, NE 68845-1060
(308) 234-5579, (308) 234-9305 (fax)

TABLE OF CONTENTS

Basis of Jurisdiction 5
Statement of the Case 6
Statement of Errors 7
Propositions of Law 8
Statement of Fact 13
Summary of Argument 16
Argument 17
I. THE DISTRICT COURT ERRED IN FINDING THAT THE CHIEF PETITIONERS WERE NOT ENTITLED TO A SPECIAL ELECTION ON THE THIRD PETITION. 17
- A. Chief Petitioners satisfied all statutory requirements to be entitled to a special election on the Third Petition 17
- B. The subject matter of the Chief Petitioners' Third Petition is not excluded from the right of referendum by Neb. Rev. Stat. § 18-2528 19

II. THE DISTRICT COURT ERRED BY FINDING THIS CASE WAS MOOT. 23
- A. The City's complaint for declaratory judgement is not moot. 24
- B. The Chief Petitioners' counterclaim is not moot. 24
- C. The public interest exception to the mootness doctrine preserves all issues in this case. 26

III. THE DISTRICT COURT ERRED IN DETERMINING THAT THE THIRD PETITION EXCEEDED THE SCOPE OF THE STATUTORY FRAMEWORK FOR REFERENDUM ELECTIONS 27
- A. Neb. Rev. Stat. § 18-2501 does not require the specific identification of measures to be repealed. 27
- B. The City waived its argument regarding the language of the Third Petition. 31
- C. The District Court erred in finding that the Third Petition's language did not fall within the Act. 33

Conclusion 33

TABLE OF AUTHORITIES

Blakely v. Lancaster County,
284 Neb. 659, 671, 825 N.W.2d 149, 161 (2012)............. 10, 23-24
City of North Platte v. Tilgner,
282 Neb. 328, 803 N.W.2d 469 (2011). 8-9, 11-12,17, 19-21,26-29, 31
Cunningham v. Exon,
207 Neb. 513, 300 N.W.2d 6 (1980). 29
In re Durnin, 619 S.W.3d 250 (Tex. 2021). 30
In re Interest of Giavonni P.,
304 Neb. 580, 587, 935 N.W.2d 631, 639 (2019)............. 10, 23-24
In re Petricek, 629 S.W.3d 912 (Tex. 2012). 30
Johnson v. Ames, 76 N.E.2d 1283, 412 Ill.Dec. 825 (2016). 29-30
Leek v. City of Golden, 870 P.2d 580 (Colo. 1993)..................................30
Lindsay Int' Sales & Services, LLC v. Wegner
287 Neb. 788, 901 N.W.2d 278 (2017). 11,27-28
Mauler v. Pathfinder Irr. Dist.,
244 Neb. 271, 505 N.W.2d 691 (1993). 29
Nebuda v. Dodge Cnty. Schl. Dist. 0062,
290 Neb. 740, 749, 861 N.W.2d 742. 750 (2015)...................11, 26
Rath v. City of Sutton,
267 Neb. 265, 673 N.W.2d 869 (2004). 24
State v. Seaton,
170 Neb. 687, 103 N.W.2d 83 (1960) 8, 17
State ex rel Peterson v. Ebke,
303 Neb. 637, 930 N.W.2d 551 (2019). 10, 23, 25
Stewart v. Heineman,
296 Neb. 262, 892 N.W.2d 452 (2017). 25
Voiselle v. Voiselle,
206 So.3d 289 (La. App. 3d Cir. 2016). 8,17
Neb. Rev. Stat. § 18-2501...6, 8, 12, 17, 27
Neb. Rev. Stat. § 18-2503...9, 18
Neb. Rev. Stat. § 18-2506...23, 28
Neb. Rev. Stat. § 18-2508...9, 18
Neb. Rev. Stat. § 18-2509...8, 18, 31
Neb. Rev. Stat. § 18-2512... 8-9, 12, 17-18, 31-32
Neb. Rev. Stat. § 18-2513.. 31-32
Neb. Rev. Stat. § 18-2518...9, 18, 26

Neb. Rev. Stat. § 18-2527.. 28-29
Neb. Rev. Stat. § 18-2528.. 9-10, 17, 19, 20-23
Neb. Rev. Stat. § 18-2530..11, 18, 24-25, 31

BASIS OF JURISDICTION

This court has jurisdiction of this case pursuant to Nebraska Revised Statutes, Sections 24-204 and 25-1912. This is an appeal from the District Court of Adams County, Nebraska. Final Judgment was entered on July 6, 2023 and Notice of Appeal was filed on behalf of Norman Sheets, Alton Jackson, and Paul Dietze on August 4, 2023. With the notice of appeal, appellants filed a praecipe for a Bill of Exceptions and a Transcript simultaneously and deposited the appropriate funds, including the transcript fee, with the District Court of Adams County.

STATEMENT OF THE CASE

This case arises from the decision of the City of Hastings, Nebraska, ("City") to demolish a viaduct commonly known as the "Old Highway 281 Viaduct." In 2019, the Hastings City Council ("City Council") passed Resolution No. 2019-59, which authorized the demolition of the Old Highway 281 Viaduct. Subsequently, a referendum petition ("First Petition") was circulated to the Hastings citizens to "reverse the decision of the City Council to demolish the old 281 viaduct." Upon receipt of the circulated and signed First Petition, the City Council rescinded Resolution 2019-59 and placed its own question on the 2020 ballot, which ultimately failed.

An initiative petition ("Second Petition") was submitted. Initially blocked by the Hastings City Clerk ("City Clerk"), the petition was eventually approved for circulation, but failed on other grounds.

While the Second Petition was pending approval by the City Clerk, the City passed Resolution No. 2020-62, authorizing the demolition of the Old Highway 281 Viaduct and deeming, "the public safety an urgent matter."

A new prospective referendum petition was then submitted by the Chief Petitioners and approved by the City Clerk for circulation ("Third Petition"). The Third Petition was circulated for signatures and returned to the City Clerk for verification of the signatures. The City filed suit, seeking an order of the District Court, declaring the Third Petition invalid and declaring that the City was not required to go forward with a referendum election on the Third Petition.

The Chief Petitioners filed a counterclaim seeking an order of the District Court, declaring that the City did have to proceed with a referendum election on the Third Petition. They further requested the District Court to order specific performance of compliance with the Municipal Referendums and Initiatives Act (the "Act"), Neb. Rev. Stat. § 25-18-2501, *et seq*.

At a stipulated trial, the District Court found that the Old Highway 281 Viaduct had been demolished and, thus the case was moot. The District Court applied the public interest exception to the mootness doctrine to address specific issues raised by the parties. This appeal followed.

STATEMENT OF ERRORS

I. **THE DISTRICT COURT ERRED IN FINDING THAT THE CHIEF PETITIONERS WERE NOT ENTITLED TO A SPECIAL ELECTION ON THE THIRD PETITION.**

II. **THE DISTRICT COURT ERRED BY FINDING THE CASE WAS MOOT.**

III. **THE DISTRICT COURT ERRED IN DETERMINING THAT THE THIRD PETITION EXCEEDED THE SCOPE OF THE STATUTORY FRAMEWORK FOR REFERENDUM ELECTIONS.**

PROPOSITIONS OF LAW

I.

An appellate court can render judgment in a case, even when the merits were not reached by the trial court, when the facts are stipulated and provide sufficient information to render such judgment. *See City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011); *State v. Seaton*, 170 Neb. 687, 693-94, 103 N.W.2d 833, 838 (1960); *accord Voiselle v. Voiselle*, 206 So.3d 289, 295 (La.App. 3d Ci. 2016).

II.

The procedure for municipal initiative and referendum elections is set forth in the Municipal Initiative and Referendum Act (the "Act"). Neb. Rev. Stat. § 18-2501 *et seq*.

III.

To initiate a municipal referendum or initiative process, a citizen must first prepare and file a prospective petition with the city clerk. Neb. Rev. Stat. § 18-2512.

IV.

A prospective petition is a "sample document containing the information necessary for a completed petition, including a sample signature sheet, which has not yet been authorized for circulation." Neb. Rev. Stat. § 18-2509.

V.

Upon receipt of a prospective petition, the city clerk must date it, verify it is in proper form, and provide a ballot title. Neb. Rev. Stat. § 18-2512.

VI.

"If the prospective petition is in proper form, the city clerk shall authorize the circulation of the petition and such authorization shall be given within three working days from the date the prospective petition was filed." Neb. Rev. Stat. § 18-2512.

VII.

If a prospective petition is not in proper form upon submission, the city clerk can return it to the petitioners with a request to correct the errors. Neb. Rev. Stat. § 18-2512.

VIII.

A "prospective petition," which has been approved by the city clerk, becomes a "petition" as defined by statute. Neb. Rev. Stat. § 18-2508.

IX.

A petition can be circulated to gather signatures from the electorate. *See* Neb. Rev. Stat. § 18-2503.

X.

Upon submission of the appropriate number of signatures on a petition, the Chief Petitioners can return said petition and signatures to the city clerk for verification. Neb. Rev. Stat. § 18-2518(1).

XI.

Upon receipt of the petition, the city council shall "ascertain whether the petition is signed by the requisite number of voters." Neb. Rev. Stat. § 18-2518(1).

XII.

The right to refer a municipal action specifically excludes, "[m]easures necessary to carry out contractual obligations, including but not limited to, those relating to the issuance of or provided for in bonds, notes, warrants, or other evidences of indebtedness, for projects previously approved by a measure which was, or is, subject to referendum or limited referendum or previously approved by a measure adopted prior to July 17, 1982." Neb. Rev. Stat. § 18-2528(1)(a).

XIII.

Section 18-2528(1)(a) applies only to measures enacted after a contractual obligation exists. *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011).

XIV.

The right to refer a municipal action specifically excludes, "[m]easures relating to the immediate preservation of the public peace, health, or safety which have been designated as urgent measures by unanimous vote of those present and voting of the municipal subdivision's governing body and approved by the executive officer." Neb. Rev. Stat. § 18-2528(1)(d).

XV.

A measure which is not carried out for nearly two years after it is enacted cannot be related to the "immediate preservation of the public peace, health or safety," and, thus, not protected from the right to referendum. *See* Neb. Rev. Stat. § 18-2528(1)(d).

XVI.

A measure which does not designate itself as an "urgent measure" is not protected from the right of referendum. *See* Neb. Rev. Stat. § 18-2528(1)(d).

XVII.

"Mootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the dispute's resolution that existed at the beginning of the litigation." An action is moot, "when the issues initially presented in the proceeding no longer exist or the parties lack a general 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).

XVIII.

A, "case is not moot if a court can fashion some meaningful form of relief, even if that relief only partially redresses the prevailing party's grievances." *Blakely v. Lancaster County*, 284 Neb. 659, 671, 825 N.W.2d 149, 161 (2012).

XIX.

The appropriate remedy for a moot case is summary dismissal not a judgment on the merits. *See In re Giavonni P.*, 304 Neb. 580, 587, 935 N.W.2d 631, 639 (2019).

XX.

The only way to moot a declaratory judgment action filed pursuant to the Act is for the municipality to repeal the measure or measures at issue. Neb. Rev. Stat. § 18-2530.

XXI.

In determining whether the public interest exception to the mootness doctrine applies, courts consider whether the question presented is of public or private nature, the "desirability of an authoritative adjudication for the future guidance of public officials," and the likelihood of the issue, or a similar issue, occurring in the future. *Nebuda v. Dodge County Schl. Dist. 0062*, 290 Neb. 740, 749, 861 N.W.2d 742, 750 (2015).

XXII.

While statutes are given their plain and ordinary meaning, the courts "attempt to give effect to all parts of a statute and avoid rejecting as superfluous or meaningless, any word, clause, or sentence." *City of North Platte v. Tilgner*, 282 Neb. 328, 340, 803 N.W.2d 496, 481 (2011).

XXIII.

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." *Lindsay Int'l Sales & Services, LLC v. Wegner*, 287 Neb. 788, 796, 901 N.W.2d 278, 283 (2017).

XXIV.

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).

XXV.

To the extent there may be ambiguity in the plaint text of the Act, courts should, "liberally construe grants of municipal initiative and referendum powers to permit, rather than restrict, the power and to attain, rather than prevent, its objective." *City of North Platte v. Tilgner*, 282 Neb. 328, 342, 803 N.W.2d 469, 482 (2011).

XXVI.

The Act does not require specific identification of measures to be repealed by a referendum petition. Neb. Rev. Stat. § 18-2501.

XXVII.

"[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. 329, 349, 803 N.W.2d 469, 487 (2011).

XXVIII.

The Act places the burden on the city clerk to provide the ballot language to circulate to the electorate. Neb. Rev. Stat. § 18-2512.

STATEMENT OF FACT

In May 2019, the City of Hastings, Nebraska, ("City") City Council ("City Council") voted to close a portion of road within its corporate limits (E4, p. 1). The closed road was a viaduct on Osborne Drive between its intersection with North Kansas Avenue and 19th Street, commonly referred to—and referred to herein—as the "Old Highway 281 Viaduct." (E4, p. 1).

On December 19, 2019, the City Council approved Resolution No. 2019-59, which authorized the City to take steps to demolish the Old Highway 281 Viaduct. (E4, p. 1, 6-7). In response, Alton Jackson, Paul Dietze, and Norman Sheets (collectively "Chief Petitioners") prepared a prospective referendum petition. (E4, p. 1). On January 28, 2020, Chief Petitioners submitted this prospective petition to the Hastings City Clerk, Kim Jacobitz ("City Clerk"). (E4, p. 1). On January 29, 2020, the City Clerk approved the prospective petition as submitted and returned it to the Chief Petitioners. (E4, p. 1). This approved referendum petition is referred to as the "First Petition."

The Chief Petitioners circulated the First Petition and returned it to the City Clerk, with signatures for verification, on March 2, 2020. (E4, p. 2),

The City Council considered the First Petition on March 9, 2020, at its regularly scheduled meeting. (E4, p. 2). In light of the First Petition, the City Council reconsidered Resolution 2019-59 and adopted Resolution No. 2020-16 (E4, p. 2), rescinding Resolution No. 2019-59. (E4, p. 11-12).

Following its repeal of Resolution No. 2019-59, the City Council had multiple discussions on the Old Highway 281 Viaduct, (E4, p. 2), which culminated in the City Council adopting Resolution No. 2020-50. (E4, p. 2). Resolution No. 2020-50 placed a question on the 2020 general election ballot asking voters whether the City "shall be authorized to undertake the repair" of the Old Highway 281 Viaduct and "authorize the issuance of bonds to finance the repair" ("City's Ballot Measure"). (E4, p. 24).

The City's Ballot Measure appeared on the November 3, 2020 general election ballot. (E4, p. 2) and failed. (E4, p. 55).

On November 4, 2020, the Chief Petitioners filed a proposed initiative petition with the City Clerk to fix the Old Highway 281 Viaduct. (E4, p. 2). The City Clerk initially denied this prospective petition. (E4, p. 30). This led the Chief Petitioners to file a mandamus

action against the City Clerk to approve the initiative petition. (E4, 2-3).

While the mandamus action was pending, the City Council approved Resolution No. 2020-62, approving the demolition of the Old Highway 281 Viaduct. (E4, p. 51-53). After Resolution No. 2020-62 was passed, and without final order on the pending mandamus action, the City Clerk approved the initiative petition for circulation. (E4, p. 54). This approved initiative petition is referred to herein as the "Second Petition". This Second Petition was not returned for verification within six months of its authorization. (E4, p. 3).

On December 13, 2021, before a regularly scheduled City Council meeting of the same date, the Chief Petitioners submitted a proposed referendum petition to the City Clerk. (E4, p. 3, 56-58).

At the City Council meeting on December 13, 2021, Hastings citizens spoke for and against moving forward with the demolition of the Old Highway 281 Viaduct. (E4, p. 3). Chief Petitioners Paul Dietze and Alton Jackson spoke against the City moving forward and Hastings citizen Willis Hunt read a letter from legal counsel identifying the existence of the prospective referendum petition. (E4, p. 3). After hearing and public comment, the City Council entered into an agreement with United Contractors, Inc., for the demolition of the Old Highway 281 Viaduct. (E4, p. 3).

On December 16, 2021, the City Clerk approved the prospective referendum petition submitted on December 13. (E4, p. 3, 56-58). The referendum petition approved on December 16, 2023, is referred to herein as the "Third Petition." The Third Petition was approved by the City Clerk as submitted (E4, p. 3, 56-58, 90).

The Third Petition identified the "briefly worded caption" as "REFERENDUM TO REVERSE THE CITY COUNCIL'S DECISION TO DEMOLISH TO OLD 281 VIADUCT." (E4, p. 56). It then identified the "concise and impartial statement" of the purpose of the measure: "THE PURPOSE OF THIS REFERENDUM IS TO REVERSE THE CITY COUNCIL'S DECISION TO DEMOLISH THE OLD 281 VIADUCT." (E4, p. 56).

The Chief Petitioners circulated the Third Petition and returned it with signatures for verification on February 17, 2022. (E4, p. 4). On March 1, 2022, the City Council adopted Resolution No. 2022-08, requesting the Adams County Clerk verify the number of signatures. (E4, p. 91-92). This suit was filed on March 2, 2023. (E4, p. 4). During

the pendency of this suit, the Old Highway 281 Viaduct was demolished in accordance with Resolution 2020-62. (E4, p. 4).

SUMMARY OF THE ARGUMENTS

The Municipality Initiative and Referendum Act (the "Act") sets forth a specific procedure which citizens can utilize to petition for a referendum election. The Chief Petitioners in this case followed that procedure and are, therefore, entitled to a special election on the Third Petition.

The District Court of Adams County ("District Court") found that the case was moot because the demolition of Old Highway 281 Viaduct, which was the subject of the City's actions and the Third Petition, was completed and the viaduct no longer existed at the time of trial. However, the resolutions and actions taken by the city remain law and their impact—specifically related to the demolition—are collateral to their repeal.

Further, the District Court erred in not finding in favor of the Chief Petitioners on the merits of this case. The Chief Petitioners performed all of their responsibilities under the Act. The City argued at trial that the Third Petition attempted to repeal measures that were not subject to the referendum statutes, specifically, as relevant here: that they impeded contractual matters previously entered in to by the City and that they were designated as an "urgent measure." Both arguments were misplaced. The statute dealing with contractual measures deals only with the repeal of measures adopted after the contractual obligations exist. Additionally, the applicable resolution's language does not meet the requirements of the statute that prevents referendum on urgent matters.

Finally, the District Court determined that when citizens attempt to repeal a measure, they must identify the specific measure to be repealed. This is erroneous because it reads into the Act a requirement that does not exist. Additionally, it interprets any ambiguity in the Act against holding a referendum election, rather than allowing the referendum electio to proceed as the Nebraska Supreme Court has required. What's more, the language is not vague or ambiguous, nor does it violate any other common law rule set forth by the Nebraska Supreme Court on municipal elections. Therefore, judgment should be reversed or reversed and remanded to the District Court with instructions to enter judgment in favor of the Chief Petitioners.

ARGUMENT

While this appeal revolves around three errors, to reach those errors, multiple questions are presented: (1) did the District Court err in determining the Chief Petitioners were not entitled to a special election; (2) did the Chief Petitioners satisfy their statutory prerequisites to obtain a special election on the Third Petition; (3) is the substance of the Third Petition barred from referendum by Neb. Rev. Stat. § 18-2528(1)(a); (4) is the substance of the Third Petition barred from referendum by Neb. Rev. Stat. § 18-2528(1)(d); (4) is this case mooted by the demolition of the viaduct; (5) does the Act require the enumeration of measures to be repealed in referendum proceeding; and (6) has the City waived any argument as to the language of the Third Petition, by the City Clerk's actions approving the Third Petition.

I. THE DISTRICT COURT ERRED IN FINDING THAT THE CHIEF PETITIONERS WERE NOT ENTITLED TO A SPECIAL ELECTION ON THE THIRD PETITION.

The District Court found this matter moot, (Supp. T2), and subsequently limited its analysis to certain issues that fell within the public interest exception to the mootness doctrine. (Supp. T3-6). However, as outlined below, the District Court erred in determining the case was moot and, thus, erred in failing to find the Chief Petitioners were entitled to a special election on the Third Petition.

Since this is a review de novo and the facts have been stipulated (E4), this court has sufficient information to reverse the District Court's decision on mootness and reach the merits of this case. *See City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011); *State v. Seaton*, 170 Neb. 687, 693-94, 103 N.W.2d 833, 838 (1960); *accord Voiselle v. Voiselle*, 206 So.3d 289, 295 (La.App.3d Cir. 2016).

A. Chief Petitioners satisfied all statutory requirements to be entitled to a special election on the Third Petition.

The Nebraska legislature set forth a clear procedure for municipal initiatives and referendums in the Municipal Initiative and Referendum Act (the "Act"). *See generally* Neb. Rev. Stat. § 18-2501 *et seq*. In following that procedure, a person must first complete and present a "prospective petition". Neb. Rev. Stat. § 18-2512. A prospective petition is a "sample document containing the information

necessary for a completed petition, including a sample signature sheet, which has not yet been authorized for circulation." Neb. Rev. Stat. § 18-2509. Upon receipt of a prospective petition, the city clerk must date it, verify it is in proper form, and provide a ballot title. Neb. Rev. Stat. § 18-2512. "If the prospective petition is in proper form, the city clerk shall authorize the circulation of the petition and such authorization shall be given within three working days from the date the prospective petition was filed." *Id*. If the prospective petition is not in proper form, the city clerk can return it to the petitioners with a request to correct the errors. *Id*.

Once the "prospective petition" has been authorized for circulation, it becomes a "petition" as defined by statute. Neb. Rev. Stat. § 18-2508. The Chief Petitioners can then circulate the petition for signatures of the electorate. *See* Neb. Rev. Stat. § 18-2503 (defining "circulator" as one who solicits signatures for referendum or initiative petitions). After gathering signatures from 20% of the voting electorate, Neb. Rev. Stat. § 18-2530, the Chief Petitioners can then file the petition and signatures with the city clerk for signature verification. Neb. Rev. Stat. § 18-2518(1). Then, the city council shall "ascertain whether the petition is signed by the requisite number of voters." *Id*. The city council may do this by entering into an agreement with the county clerk of the county in which the municipality is situated. *Id*. The county clerk will notify the city council of the verification. Neb. Rev. Stat. § 18-2518. A declaratory judgment action may be brought at any time after the filing of a referendum petition with the city clerk. Neb. Rev. Stat. § 18-2538.

In this case, the Chief Petitioners submitted a prospective petition to the City Clerk. (E4, p. 3, 56-58). The City Clerk approved the prospective petition for circulation. (E4, 3, 90). Thereafter, the Chief Petitioners circulated the approved Third Petition for signatures of the electorate and filed the petitions with the Hastings City Clerk for verification. (E4, p. 4). The remaining work—verifying the signatures and holding the special election—is the sole responsibility of the City.

The Chief Petitioners met all of their requirements to have the signatures on the Third Petition verified and the matter submitted to a vote at a special election. Therefore, the Chief Petitioners fulfilled their obligations and the District Court erred in finding that the Chief

Petitioners were not entitled to a special election on the ballot measure identified in the Third Petition.

Without arguing against the prima facie case for a special election, the City, at trial, made several arguments against the Third Petition, specifically: (1) that it failed to identify the "measure" being withdraw, (T291); (2) it attempted to repeal the same measure within two years, violating Neb. Rev. Stat. § 18-2519, (T291) and (3) that the substance of Resolution 2020-62 was not subject to referendum or limited referendum, pursuant to Neb. Rev. Stat. § 18-2528(1)(a) and (1)(d). (T293-94).

The District Court specifically found that the Third Petition was not barred by Section 18-2519, (Supp. T3). Two arguments remained after the District Court's finding: (1) that the substance of the Third Petition was not subject to referendum or limited referendum and (2) the Third Petition failed to specifically identify the "measure" the to be withdrawn.

B. The subject matter of the Chief Petitioners' Third Petition is not excluded from the right of referendum by Neb. Rev. Stat. § 18-2528.

The City claimed that the Third Petition was barred by the application of Neb. Rev. Stat. § 18-2528(1)(a) and (1)(d). (T 293-94). However, this argument is incorrect.

Subsection (1) of Section 18-2528 identifies the types of measures that are excluded from the citizens' right of referendum or limited referendum. Section 18-2528 specifically excludes:

> Measures necessary to carry out contractual obligations, including but not limited to, those relating to the issuance of or provided for in bonds, notes, warrants, or other evidences of indebtedness, for projects previously approved by a measure which was, or is, subject to referendum or limited referendum or previously approved by a measure adopted prior to July 17, 1982.

Neb. Rev. Stat. § 18-2528(1)(a).

However, *City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011), makes clear that Section 18-2528 does not apply to the Third Petition. In *Tilgner*, the North Platte City Council adopted a resolution in 1999 that required revenue collected by the city from hotel accommodations be used to help build and operate a visitor

center. *Id*. at 331, 803 N.W.2d at 476. In 2004, North Platte entered into an option agreement with a non-profit referred to as "Golden Spike," wherein North Platte would make monthly payments to Golden Spike in an amount equal to the occupation tax revenues collected by the city the month prior. *Id*. at 332, 803 N.W.2d at 476. In exchange, the city would have the option to purchase an existing visitor center owned by Golden Spike. *Id*. The funds paid by the city would be used by Golden Spike to pay down a USDA loan, which Golden Spike secured to build the visitor center. *Id*.

In 2009, the *Tilgner* petitioners filed a petition to amend the 1999 resolution to require payment of revenue collected on hotel accommodations to be paid to extinguish Golden Spike's USDA debt and redirect the occupation tax collected on hotel accommodations beyond the amount necessary to extinguish the USDA debt to be paid to the city's general fund. *Id*. at 332, 803 N.W.2d at 476-77.

The trial court in *Tilgner* determined that the petition at issue attempted to impair and amend a contractual obligation and determined it could not be enforced pursuant to Section 18-2528. *Tilgner*, 282 Neb. at 333, 803 N.W.2d at 477.

On appeal, the Nebraska Supreme Court reversed the trial court's decision, determining that a resolution enacted prior to the existence of a contractual obligation, cannot be "necessary" to carry out contractual obligations. *Id.* at 340-41, 803 N.W.2d at 481-82. Specifically, the *Tilgner* Court reasoned:

> The Legislature unambiguously excluded from the referendum process "[m]easures necessary to carry out contractual obligations." Regardless of the language following this phrase, under § 18-2528(1)(a), a general tax ordinance cannot be a measure necessary to carry out a contractual obligation if an obligation did not exist when the municipality passed it. Here, no contractual obligation existed in 1999 when the City passed the occupation tax ordinance. The 1999 occupation tax contemplated only a future construction of a visitor center.
>
> Accepting the City's logic would lead to an absurd result. Any general taxation measure that a city is authorized to pass could be considered a measure necessary to carrying

> out a city's later contractual obligations. It is true that without that revenue stream, a city may not meet its obligations. But the City's interpretation would mean that a city's general taxation measure to raise revenues for a general purpose is shielded from referendum—even if electors later learn that the City unlawfully entered into a contract to carry out that purpose of contracted to spend much more than the tax raised.
>
> Instead, under § 18-2528(1)(a), the Legislature has sensibly immunized from the referendum process measure necessary to carrying out contractual obligations "for projects previously approved by a measure which was, or is, subject to referendum or limited referendum." Obviously, a city must be able to contract for services to implement approved projects without fear of referendum when its citizens did not petition for a referendum on the original measure approving the project. So we reject the City's argument that the phrase "for projects previously approved" in § 18-2528(1)(a) does not modify the type of measure necessary to carry out a contractual obligation. The City's interpretation renders that phrase meaningless. If the Legislature had intended to shield from the referendum process any revenue-raising measure, it would have not included this language.
>
> We conclude that § 18-2528(1)(a) does not shield from the referendum process a revenue measure that funds the city's subsequent contractual obligations for a project that was not previously approved by a measure that was subject to referendum. The court erred in ruling that § 18-2528(1)(a) shielded the occupation tax ordinance from referendum.

Id.

Moreover, the language indicating that Section 18-2528(1)(a) applies to bonds, notes, warrants, and "other evidences of indebtedness," as well as the requirement that the obligation is for a "previously approved project," both indicate that Section 18-2528(1)(a) applies to legislative acts undertaken after a contract is entered in to,

rather than freezing previously-passed resolutions upon the execution of an agreement based thereon.

Following the statutory language of subsection (1)(a), and the reasoning of the *Tilgner* Court, a measure is only immune from referendum if it is (1) necessary to carry out contractual obligation, (2) which were previously approved by a measure, (3) that was subject to referendum or limited referendum. *Id.*; Neb. Rev. Stat. § 18-2528(1)(a).

In this case, the Third Petition was submitted to the City Clerk before the City Council undertook any contractual obligations related to the Viaduct. (E4, p. 3). Therefore, the Third Petition is not barred by Section 18-2528(1)(a).

The City also relied on Subsection (1)(d) of Section 18-2528, which bars referendum elections for:

> Measures relating to the immediate preservation of the public peace, health, or safety which have been designated as urgent measures by unanimous vote of those present and voting of the municipal subdivision's governing body and approved by the executive officer.

Neb. Rev. Stat. § 18-2528(1)(d).

The City's reliance on subdivision (1)(d) is also misplaced. To fall under this category, the measure to be repealed must (1) relate to "the immediate preservation of the public peace health, or safety," (2) be "designated as [an] urgent measure[] by unanimous vote of the governing body," and (3) approved by its executive officer. *Id*. The City fails on all three elements.

First, demolition of the Old Highway 281 Viaduct was not a matter related to the "immediate" preservation of the public peace, health or safety. In fact, the Old Highway 281 Viaduct stood closed for seven months before the City made any determination on its fate. (E4, p. 1). It then stood for another 11 months before the matter was put on the ballot for a general election. (E4, p. 1-2). It then stood for nearly another year before the City Council approved its demolition. (E4, p. 2). The requirement that the measure is "related" to public safety is not subject to the designation of the City Council and must, actually, be related to public safety. Neb. Rev. Stat. § 18-2528. The fact that the Old Highway 281 Viaduct stood for nearly 3 years after closing and two years after Resolution No. 2020-62 authorized its demolition shows that there was no immediacy to its removal. A referendum election would not further endanger the public safety.

Second, Section 18-2528(1)(d) requires that the "measure be designated as urgent." A measure is defined as "an ordinance, charter provision, or resolution which is within the legislative authority of the governing body of a municipality to pass and which is not excluded from the operation of a referendum by the exceptions in section 18-2528." Neb. Rev. Stat. § 18-2506. Thus, the legislative act itself must be designated as an urgent matter. However, Resolution 2020-62 provides, "that the immediate preservation of public safety is an urgent measure requiring the Viaduct to be demolished." (T 55). Resolution No. 2020-62 does not identify the measure itself as an "urgent measure." Instead, it designates the "immediate preservation of public safety" an "urgent measure." *Id*. Finally, the record is devoid of who approved the resolution. Thus, the City's measure fails under all three elements of section 18-2528(1)(d).

Therefore, the Third Petition is not barred by any provision of Neb. Rev. Stat. § 18-2528 and the Chief Petitioners met their statutory obligations under the Act to be entitled to a special election on the Third Petition. The District Court erred by finding otherwise.

II. THE DISTRICT COURT ERRED BY FINDING THE CASE WAS MOOT.

One of the reasons the District Court determined the Chief Petitioners were not entitled to an election is that the matter was moot. (Supp. T4-6). The District Court relied on the fact the viaduct had been demolished. *Id*. However, the City's demolition of the viaduct is collateral to the City's ordinances authorizing its removal.

Generally, "[m]ootness refers to events occurring after the filing of a suit which eradicate the requisite personal interest in the dispute's resolution that existed at the beginning of the litigation." *State ex rel. Peterson v. Ebke*, 303 Neb. 637, 653, 930 N.W.2d 551, 563 (2019). An action is moot, "when the issues initially presented in the proceeding no longer exist or the parties lack a general cognizable interest in the outcome of the action" *Id*. On the other hand, a "case is not moot if a court can fashion some meaningful form of relief, even if that relief only partially redresses the prevailing party's grievances." *Blakely v. Lancaster County*, 284 Neb. 659, 671, 825 N.W.2d 149, 161 (2012). The appropriate remedy for a moot case is summary dismissal, *In re*

Giavonni P., 304 Neb. 580, 587, 935 N.W.2d 631, 639 (2019), not a judgment on the merits.

The District Court determined that this entire case was moot. However, the District Court was faced with, essentially, two complaints: the City's Complaint for declaratory relief, (T1-34) and the Chief Petitioner's petition for equitable relief. (T51-58). Neither are moot for the same reason: the City's authorization of the demolition has not been repealed.

A. The City's complaint for declaratory judgment is not moot.

The appropriate remedy for a moot case is summary dismissal, *In re Giavonni P.*, 304 Neb. 580, 587, 935 N.W.2d 631, 639 (2019), not a judgment on the merits. However, dismissal of this case, rather than a judgment on the merits, would require the City to move forward with the Third Petition. This is because the applicable statutes do not provide the City discretion on which petitions to proceed on or not proceed on. The only "out" for the City is a judgment in this action. *See* Neb. Rev. Stat. § 18-2538.

In fact, the Act provides the manner in which a municipality can moot a referendum petition: by reconsidering the measure that gave rise to the petition. Neb. Rev. Stat. § 18-2530. The City did not choose this path. Instead, it chose to file this action.

B. The Chief Petitioners' counterclaim is not moot.

The sole issue first presented at the outset of this case remains to be answered: does the Third Petition meet the statutory requirements necessary to move forward with the referendum process.

The City and the District Court relied on *Rath v. City of Sutton*, 267 Neb. 265, 673 N.W.2d 869 (2004). (Supp. T3). However, *Rath* is distinguishable as the plaintiff there sought declaratory and injunctive relief to halt a project. *Id.* at 272, 673 N.W.2d at 879. The purpose of injunctive relief is "preventative, prohibitory, or protective." *Id.* (internal quotations omitted).

Here, the Chief Petitioners seek declaratory judgment more akin to specific performance. The only way to moot a specific-performance-type request is to specifically perform the requested action. Applying the *Blakely* standard, outlined above, that performance must be to an extent that there is no way a court could grant even partial relief. 284 Neb. at 671, 825 N.W.2d at 161.

Complete relief can still be granted in this case. The Chief Petitioners did not ask the District Court to prevent the removal of the Old Highway 281 Viaduct in their Counterclaim. (T56). Instead, they asked the District Court to enforce their right to referendum, by requiring the City to specifically undertake the special election procedures. *Id*. The fact the Viaduct is down has no bearing on the referendum process. Whether a remedy exists upon a successful referendum is not an issue before this Court. It is also speculative because it hinges on a successful referendum election. *See generally Stewart v. Heineman*, 296 Neb. 262, 892 N.W.2d 542 (2017) (discussing the general principles of ripeness).

A better guide for this Court is *State ex rel. Peterson v. Ebke, supra*. In that case, the Judicial Committee of Nebraska's 105th Legislature, with the endorsement of the Executive Committee, issued a subpoena to the Director of Nebraska Department of Corrections. In a host of lawsuits, the subpoena was quashed by the district court. An interlocutory appeal was taken on that action. The Nebraska Supreme Court determined that since the 105th Legislative Session had ended and the 106th Legislative session began, the subpoena "died" and ceased to be enforceable. *Id.* at 654, 930 N.W.2d at 654. The expiration of the subpoena, "eradicated the requisite personal interest in the dispute's resolution that existed at the beginning of the litigation." *Id*.

Like *Ebke*, this matter is only mooted by the legal eradication of the city ordinances that are in play.

The Legislature provided a manner to moot referendum petitions in Section 18-2530. That statute states, in relevant part:

> [I]t shall be the duty of the governing body of the municipality to reconsider the measure or portion of such

> measure which is the object of the referendum. If the governing body fails to repeal or amend the measure or portion thereof, in the manner proposed by the referendum, including an override of any veto, if necessary, the city clerk shall cause the measure to be submitted to a vote of the people at a special election called for such purpose within thirty days from the date the governing body received notification pursuant to section 18-2518.

Id.

The only way for a legislative act to "die" or be eradicated is to be repealed by the very body that passed it. *See Id*. Here, the City's actions have not "died," and the requisite interest has not been "eradicated." Thus, whether the Chief Petitioners are entitled to avail themselves of the referendum process, remains as much a question today as it did at the outset of this suit.

C. The public interest exception to the mootness doctrine preserves all issues in this case.

In addition to the case not being moot, it is in the public's interest to have the questions presented answered by an appellate court of this state. In determining whether the public interest exception to the mootness doctrine applies, courts consider whether the question presented is of public or private nature, the "desirability of an authoritative adjudication for the future guidance of public officials," and the likelihood of the issue, or a similar issue, occurring in the future. *Nebuda v. Dodge County Schl. Dist. 0062*, 290 Neb. 740, 749, 861 N.W.2d 742, 750 (2015).

Given that all issues presented in this case deal with the City's duties under the Act and their relationship with their citizens, the first factor weighs in favor of judicial review on all issues.

The need for guidance also weighs in favor of all issues being ruled upon. No case law exists in Nebraska which delineates a city clerk's responsibility in drafting a ballot title. There is only minimal

guidance in Nebraska related to petition language and it, generally, refers to the single-question doctrine. *See City of North Platte v. Tilgner*, 282 Neb. 328, 803 N.W.2d 469 (2011). This factor, too, weighs in favor of judicial review in this case.

Finally, the District Court specifically found that these issues will continue to be at issue and, therefore, it is necessary to address the matter and provide future guidance. (Supp. T3). That contention is not at issue here. Therefore, the public interest doctrine applies and this Court should reach the merits of this matter.

III. THE DISTRICT COURT ERRED IN DETERMINING THAT THE THIRD PETITION EXCEEDED THE SCOPE OF THE STATUTORY FRAMEWORK FOR REFERENDUM ELECTIONS.

The District Court determined that, because the referendum petition did not specifically identify the measures to be repealed, the referendum petition fell outside the statutory framework of Nebraska Revised Statutes, Section 18-2501. (Supp. T4-5). However, imposing such a requirement overlooks three propositions of law: (1) the statutory language does not require such specific language, (2) the Act is to be interpreted in favor of conducting a referendum, and (3) and it is the City, itself, that is responsible for putting forth the measure language.

A. Neb. Rev. Stat. § 18-2501 does not require the specific identification of measures to be repealed.

Municipal referendums, and the procedure citizens must follow to avail themselves of the right of referendum is governed by the Act. Neb. Rev. Stat. § 18-2501 *et. seq.* While statutes are given their plain and ordinary meaning, the courts "attempt to give effect to all parts of a statute and avoid rejecting as superfluous or meaningless, any word, clause, or sentence." *Tilgner*, 282 Neb. at 340, 803 N.W.2d at 481. 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." *Lindsay 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*.

To the extent there may be ambiguity in the plaint text of the Act, courts should, "liberally construe grants of municipal initiative and referendum powers to permit, rather than restrict, the power and to attain, rather than prevent, its objective." *Tilgner*, 282 Neb. at 342, 803 N.W.2d at 482.

"The power of referendum allows citizens the right to repeal or amend existing measures, or portions thereof, affecting the governance of each municipality in the state." Neb. Rev. Stat. § 18-2527. A "measure," is an "ordinance, charter provision, or resolution which is within the legislative authority of the governing body of a municipal subdivision to pass . . ." Neb. Rev. Stat. § 18-2506. However, the power to refer is not limited to a single measure, as the statute clearly indicates "repeal or amend existing *measures*." *Id.* (emphasis added). The District Court's requirement that the Chief Petitioners specifically identify the measures to be amended or repealed not only reads into the statute a requirement that is not there, *see Lindsay*, 287 Neb. at 796, 901 N.W.2d at 283, but also reads the statute to limit the referendum to specific language, rather than liberally construing the statutes to "attain, rather than prevent, its objective." *Tilgner*, 282 Neb. at 342, 803 N.W.2d at 482.

The most recent comment on the substance of a municipal election by a Nebraska appellate court came in *Tilgner*, when the Nebraska Supreme Court adopted a common law single-subject rule. *Id*. In *Tilgner*, the Nebraska Supreme Court determined:

> [T]hat 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.

Tilgner, 282 Neb. at 349, 803 N.W.2d at 487 (citing *Drummond v. City of Columbus*, 136 Neb. 87, 285 N.W. 109 (1939).

None of these rules are violated by the Third Petition in this case. There is only one issue which the voters would cast their vote: either for or against the repeal of the City's authorization to demolish the Old Highway 281 Viaduct. No voter would be confused on what action was taken as only one matter is at play: the authorization of the demolition of Old Highway 281 Viaduct. Finally, a reasonable voter would have no doubt as to what action that have authorized after the election: reversal of the City's decision to demolish the Old Highway 281 Viaduct.

Plainly put, the Third Petition does not contradict any standing Nebraska precedent on ballot language. Instead, the District Court appears to indicate the contrary: the Third Petition's language is too simple because it does not indicate the "measure" to be repealed. (Supp. T4-5)

Again, this holding contradicts settled principles of law. First, the Act does not require the measure to be named. The Act merely defines the power of referendum as allowing "citizens the right to repeal or amend existing measures, or potions thereof, affecting the governance of each municipality in the state." Neb. Rev. Stat. § 18-2527.

Requiring a measure to be named before it can be repealed, not only reads a requirement into a statute that does not exist, but is also contrary to the policy set forth in *Tilgner*: to attain, rather than prevent the purpose of the Act. *Tilgner*, 282 Neb. at 342, 803 N.W.2d at 482.

Finally, no other place in the law is such an explicit repeal required. *See*, *e.g.*, *Cunningham v. Exon*, 207 Neb. 513, 519, 300 N.W.2d 6, 9 (1980) (restating the requirements for implicit repeal of the articles of the Nebraska Constitution); *Mauler v. Pathfinder Irr. Dist.*, 244 Neb. 271, 219, 505 N.W.2d 691, 693 (1993) (Identifying the requirements to implicitly repeal a statute). While this is far from an implicit repeal of the City's resolution, when courts are attempting to

attain referendum elections, rather than dissuade them, they should not impose stricter requirements on the average voter than on the Legislature itself.

Other states have adopted various standards for ballot language.

Illinois courts ask only whether a ballot measure is "vague." *See Johnson v. Ames*, 76 N.E.3d 1283, 1285, 412 Ill.Dec. 825, 827 (2016). When faced with the vagueness of a ballot measure, the Supreme Court of Illinois asked whether the "the referendum could stand on its own terms and was self-executing or left gaps to be filled by either the legislature or municipal body, creating uncertainty about what voters approved." *Id*. at 1286, 412 Ill.Dec. at 828 (internal quotations omitted).

Texas requires that "[b]allot language must capture the measure's essence, but neither the entire measure nor its every detail need be on the ballot" *In re Petricek*, 629 S.W.3d 913, 920 (Tex. 2021).

The Texas Supreme Court has also held that:

> [B]allot propositions must "be submitted [to the voters] with such definitiveness and certainty that voters are not misled." [*Dacus v. Parker*, 466 S.W.3d 820, 822 (Tex. 2015)]. Although, "the ballot need not reproduce the text of the amendment or mention every detail, it must substantially identify the amendment's purpose, character, and chief features." *Id*. A ballot proposition may mislead voters "in either of two ways. First, it may affirmatively represent the measure's character and purpose or its chief features. Second, it may mislead the voters by omitting certain chief features that reflect its character and purpose."

In re Durnin, 619 S.W.3d 250, 253 (Tex. 2021).

Colorado has gone further, stating a "court should not interfere with the choice of ballot language if the language is not *clearly misleading* and fairly reflects the proposed question so that voters will not be mislead to support or oppose a proposition by reason of the

words employed." *Leek v. City of Golden*, 870 P.2d 580, 583 (Colo. 1993) (emphasis added). Nebraska, like Colorado, should limit its analysis to whether the proposed ballot language is "clearly misleading and fairly reflects the proposed question." *Id*.

The proposed ballot language, that the City "reverse" its "decision to demolish the old 281 viaduct," is a clear statement of the Chief Petitioner's intent and cannot be said to have misled or confused the voters should the language be placed on the ballot. Citizens who voted to "reverse the City Council's decision to demolish the old 281 Viaduct," would know what their vote was for.

Applying the *Tilgner* standard, the question did not create multiple issues, confuse the voter, or create doubt as to what was voted upon. 282 Neb. at 349, 803 N.W.2d at 487. The best test for the Court to apply to this is the one built into the statutory scheme: the requirement that twenty percent of the qualified electorate sign the petition to place the measure on the ballot. Neb. Rev. Stat. § 18-2530. Where twenty percent of an electorate has read the proposed ballot language and attached their signature to put the language on the ballot, the courts should be reluctant to review that determination. In this case, even a court that is not reluctant to intervene in the electorate's informed decision could—and should—find that the language is clear and unambiguous.

B. The City waived its argument regarding the language of the Third Petition.

In addition to the Third Petition's language being clear and unambiguous, the District Court overlooked the most dispositive fact: the City, not the Chief Petitioners, is responsible for drafting the ballot title that is circulated to the electorate. Neb. Rev. Stat. § 18-2512.

The Act clearly delegates tasks in the referendum process. A petitioner must first present a "prospective petition" to the city clerk. Neb. Rev. Stat. § 18-2521. A "prospective petition" is a "sample document containing the information necessary for a completed

petition, including a sample signature sheet which has not yet been authorized for circulation." *Id*. § 18-2509.

Upon receipt of the prospective petition, the city clerk must date the petition and "shall verify that the prospective petition is in proper form and shall provide a ballot title for the initiative or referendum proposal, pursuant to section 18-2513" *Id*. at 18-2512. "If the prospective petition is in proper form, the city clerk shall authorize the circulation of the petition . . . If the form of the petition is incorrect, the city clerk shall, within three working days from the date the prospective petition was filed, inform the petitioners of necessary changes and request those changes be made . . ." *Id*.

Thus, at the second stage of the referendum process, the Act mandates the city clerk "provide a ballot title" *Id*. Such ballot title must include: "a briefly worded caption," "a briefly worded question which plainly states the purpose of the measure," and "a concise and impartial statement . . . of the chief purpose of the measure." Neb. Rev. Stat. § 18-2513(1).

The statutes place the burden on the city clerk to "provide" the measure a ballot title, which comports with section 18-2512. In this case, the City Clerk received the prospective petition and approved it for circulation, without alterations—essentially rubber-stamping the prospective petition. (E4, p. 3, 90).

If the Third Petition was so vague that a ballot title could not be created around it, the City Clerk could have rejected the prospective petition and asked for clarification. She did not do so and, instead, she approved the Third Petition for circulation. Therefore, the City has waived its recourse as to the ballot language employed. To determine otherwise would allow city clerk to abrogate the duty to provide a ballot title and place the responsibility on the petitioner to not only perform his or her responsibilities under the statute, but also the municipalities' duties. Further, this places the burden on untrained citizens to draft what may become law.

C. The District Court erred in finding that the Third Petition's language did not fall within the Act.

In sum, the petition's language, "TO REVERSE THE CITY COUNCIL'S DECISION TO DEMOLISH THE OLD 281 VIADUCT," is not vague or ambiguous as to be considered outside the statutory scheme for municipal referendums. Moreover, the City waived this argument when the City Clerk accepted the prospective petition and approved it for circulation without, herself, providing any language as required by Section 18-2512 or requesting any additional information.

Therefore, the District Court erred in finding the language of the referendum petition kept the matter from being placed on the ballot.

CONCLUSION

For the reasons set forth herein, the Chief Petitioners ask this court to reverse the decision of the District Court and remand with instructions to order the City of Hastings to comply with the statutory referendum procedures.

DATED this 8th day of January, 2024.

Respectfully Submitted,

Bradley D. Holbrook, #21490
bradh@jacobsenorr.com
Coy T. Clark, #27028
cclark@jacobsenorr.com
JACOBSEN, ORR, LINDSTROM
& HOLBROOK, P.C., L.L.O.
322 West 39th Street, P. O. Box 1060
Kearney, NE 68845-1060
(308) 234-5579, (308) 234-9305 (fax)

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 9,126 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 January 8, 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 Monday, January 08, 2024 I provided a true and correct copy of this *Brief of Appellant Sheets & Dietze* 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)