BEFORE THE IOWA SUPREME COURT

No. 20-1323

SITE A LANDOWNERS,
Plaintiff-Appellant,
vs.
SOUTH CENTRAL REGIONAL AIRPORT AGENCY, CITY OF PELLA, and CITY OF OSKALOOSA,
Defendants-Appellees,
and
MAHASKA COUNTY,
Defendant-Appellant.

CITY OF PELLA, IOWA and CITY OF OSKALOOSA, IOWA,
Plaintiffs-Appellees/Cross-Appellants,
vs.
MAHASKA COUNTY, IOWA,
Defendant-Appellant/Cross-Appellee.

CONSOLIDATED APPEAL FROM THE DISTRICT COURTS
OF MAHASKA AND WASHINGTON COUNTY
HON. SHAWN SHOWERS / HON. CRYSTAL CRONK

APPELLANT/CROSS-APPELLEE MAHASKA COUNTY'S FINAL REPLY BRIEF AND CROSS-APPEAL BRIEF

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ARGUMENT

I. Whether the 28E Agreement is Legal and Enforceable is the Only Issue Remaining on Appeal.

This consolidated appeal involves two separate cases. The first, where Pella and Oskaloosa ("the Cities") sued Mahaska County ("the County"), resulted in partial, interlocutory summary judgment rulings and terminated after the parties jointly and voluntarily dismissed their remaining claims/counterclaims without prejudice (Case No. EQEQ006593) ("Cities case").[1] The second, where the Site A Landowners sued the Cities, County, and South Central Regional Airport Agency ("SCRAA") (Case No. CVEQ088856) ("Landowners Case"), resulted in a final judgment through summary judgment. Both cases arose from the Cities' attempt to enforce against the County a 2012 Iowa Code Chapter 28E Agreement ("28E Agreement") for constructing a regional airport. All parties in both cases sought declaratory relief resolving their extreme disagreement regarding the 28E Agreement's legality and enforceability. Because of the interplay between the two cases, both were appealed and consolidated to ensure all issues were preserved.

[1] The Cities Case is before this Court under the "pragmatic finality" doctrine. *Ahls v. Sherwood/Div. of Harsco Corp.*, 473 N.W.2d 619, 622–23 (Iowa 1991).

The County's opening brief showed the District Court in the Landowners Case erred holding interlocutory, partial summary judgment in the then still-pending Cities Case had *res judicata* effect in the separate Landowners Case. *Snake v. State*, No. 99-1759, 2001 WL 985052, at *2 (Iowa Ct. App. Aug. 29, 2001) (interlocutory summary judgment <u>not</u> final for preclusion purposes); *see Harrington v. Waterloo Police Dep't*, No. C05-2074, 2006 WL 3825053, at *2–3 (N.D. Iowa Dec. 26, 2006); *Wells' Dairy, Inc. v. Travelers Indem. Co. of Ill.*, 336 F. Supp. 2d 906, 911–12 (N.D. Iowa 2004). The Cities do not contest this issue on appeal. Thus, reversal is appropriate.

The Cities focus solely on numerous other legal issues regarding the 28E Agreement's illegality and argue for affirmance on that basis. Thus, only those arguments remain on appeal. All parties agree these issues were presented and briefed below, are purely legal, and are appropriate for resolution. The parties likewise agree review is *de novo* for all constitutional questions. Further, and critically important, the parties agree decisions on which Mahaska County fettered its discretion are legislative—<u>not</u> proprietary. (App. pp. 237 (¶ 21), 244 (¶ 56)).

The Cities spend much of their brief arguing the County wants to thwart progress and grind wheels of commerce to a halt. Quite the opposite, the law

provides a clear vehicle for the Cities to pursue the regional airport they desire—just as most regional airports around the state managed. (App. pp. 936–1039). The Cities' real problem is they cannot secure the electoral support the Legislature demands, causing them to try to rewrite the law through contract. This they cannot do.

II. Legal Issues in This Declaratory Judgment Action are Ripe.

Though they seek this Court's affirmation that the 28E Agreement is legal and valid in all cases, the Cities imply arguments regarding the 28E Agreement's illegality are premature. An illegal governmental contract is void and cannot bind the parties. *Miller v. Marshall Cty.*, 641 N.W.2d 742, 750–51 (Iowa 2002). The parties actively dispute whether the 28E Agreement's terms are legal and valid. This appeal involves a declaratory judgment. Under Iowa Rule of Civil Procedure 1.1102, the County "may have any question of the construction or validity" of a "written contract" or "rights, status or legal relations thereunder" declared by a court as long as there is active disagreement among the parties. It is unnecessary for there already to be a breach before those rights can be declared. Iowa R. Civ. P. 1.1103.

Here, the County withdrew because the 28E Agreement illegally fettered its decision-making. The Cities sued, insisting the contract is legal in all respects and the County cannot reassume its legislative authority. Whether

the 28E Agreement's commands *are* illegal, and whether the County may withdraw, *is* a presently existing controversy. All aspects of the contract's illegality are properly before the Court because they animate whether Mahaska County could withdraw, regardless of whether a breach has yet occurred. Indeed, the *Cities* insisted this was true in their Petition when they sought, and seemingly achieved, a judgment declaring the 28E Agreement legal and enforceable in all ways. (App. p. 242 (¶ 50)) ("An actual and justiciable controversy exists regarding the validity and enforceability of the Agreement, including Mahaska's attempts to unilaterally amend or terminate the Agreement."). Thus, the Court should consider and decide these fundamental legal issues.[2]

III. Chapters 330 and 330A Cannot Be Ignored or Contradicted.

A. The Cities Misunderstand and Fail to Address the 28E Agreement's Separation of Powers Violation.

A serious misunderstanding of legal constraints on delegating *legislative* functions permeates the Cities' brief. Crucial here is that the 28E Agreement purports to delegate, alter, and constrain the County's *legislative* functions—including discretion over eminent domain, secondary roads, and zoning. *Residential & Agric. Advisor Comm., LLC v. Dyersville City Council*,

[2] If issues presented were not ripe, reversal would be required for that reason alone.

888 N.W.2d 24, 40 (Iowa 2016) (zoning determinations are legislative); *Lewis Investments, Inc. v. City of Iowa City*, 703 N.W.2d 180, 185 (Iowa 2005) (eminent domain is legislative function); *Marco Dev. Corp. v. City of Cedar Falls*, 473 N.W.2d 41, 43 (Iowa 1991) (street decisions are legislative); *Ermels v. City of Webster City*, 71 N.W.2d 911, 913 (1955) (condemning for airports is legislative decision). Such powers cannot be delegated from the legislative entity absent specific guidelines 28E does not provide.

The Cities seek a rural Mahaska County regional airport. The Legislature, through Iowa Code Chapters 330 and 330A, provided the method for municipalities to do that by specifying how to jointly acquire, construct and operate airports.[3] The Cities concede their 28E Agreement does not comply with either Chapter 330 or 330A. The Cities instead insist Iowa Code Chapter 28E gives them a legislative blank check to contract around these statutes' restrictions. But as the County described in its opening brief, Chapter 28E is not a substantive statute and lacks sufficient guidelines on its own for use of any particular legislative power. *Barnes v. Dept. of Housing & Urban Develop.*, 341 N.W.2d 766, 767 (Iowa 1983); *Goreham v. Des Moines*

[3] *See* Iowa Code § 6A.22(2)(c)(2) (stating a "commission or authority," as Chapters 330 and 330A describe, could condemn within unincorporated areas of a member county, otherwise eminent domain "is prohibited" for an airport absent supervisor approval after a public hearing).

Metropolitan Area Solid Waste Agency, 179 N.W.2d 449, 455–56 (Iowa 1970). Thus, to be constitutional, 28E agreements must be tethered to—and compliant with—applicable underlying substantive statutes. *Barnes*, 341 N.W.2d at 767–68. To hold otherwise violates separation of powers.

Yet, the Cities disregard this clear constitutional issue by insisting the County really must be arguing preemption:

> The County's brief reads as though it is long-established, black letter law that "for a chapter 28E agreement to be constitutional, it must implement and comply with underlying statutes." There is no legal authority following this sentence, so the question becomes, what authority requires this? The answer is that if any authority requires this, it is the preemption doctrine.

Brief at 57. The Cities ignore that the County <u>did</u> cite controlling authority: *Barnes v. Department of Housing and Urban Development* and *Goreham v. Des Moines Metropolitan Area Solid Waste Agency*. Neither is a preemption case. Both address separation of powers.

Under separation of powers, <u>only</u> a legislative body may legislate, thus even when delegation <u>is</u> allowed to a non-legislative body like SCRAA, separation of powers forbids delegating <u>legislative</u> functions without clear guidelines on how those legislative functions must be exercised. *Chartis Ins. v. Iowa Ins. Com'r*, 831 N.W.2d 119, 128–29 (Iowa 2013); *Goreham*, 179 N.W.2d at 454–55 ("administrative agencies may be delegated certain legislative functions by the legislature when properly guidelined"); *Lewis*

Consol. Sch. Dist. of Cass Cty. v. Johnston, 127 N.W.2d 118, 125 (Iowa 1964); *Chicago, R.I. & P.R. Co. v. Liddle*, 112 N.W.2d 852, 854 (Iowa 1962) ("such delegation of power must be accompanied by sufficient guides or standards to govern the board's action").

Because Chapter 28E is *not* a substantive statute, it lacks the constitutional guidelines necessary to allow delegation of legislative powers. *Barnes*, 341 N.W.2d at 767–68; *Goreham*, 179 N.W.2d at 455–56. The Constitution therefore demands Chapter 28E be read in the context of a statute that provides such guidelines—and restrictions. In the case of a regional airport, that would be the detailed methods for jointly acquiring and operating regional airports the Legislature set forth in Chapters 330 and 330A:

> True, **if chapter 28E is examined without reference to the powers granted the various governmental units *by other legislation*, the factors constituting sufficient guidelines might well be said to be insufficient**. But this legislation must be interpreted with reference to the power or powers which the contracting governmental units already have. **The pre-existing powers contain their own guidelines**.

Goreham, 179 N.W.2d at 455 (emphasis added). The issue here is *not* whether Chapters 330 and 330A preempt Chapter 28E. The issue is separation of powers demands guidelines for delegations of legislative authority and, "without reference to the powers granted" by Chapters 330 and 330A, and

their pre-existing guidelines, constitutionally mandated guardrails are absent under 28E.

This exact issue arose in *Barnes* where this Court was asked if Chapter 28E could override, or rewrite, requirements for joint housing projects enunciated in underlying Iowa Code Chapter 403A. 341 N.W.2d at 767. Because Chapter 28E is merely a vehicle to jointly implement ***other*** statutes and must comply with the guidelines and restrictions in those substantive statutes to be constitutional, this Court held a 28E entity *cannot* alter or divorce itself from underlying substantive statutes and remain constitutional. *Id.* at 767–68. Thus, the 28E agreement in *Barnes* had to implement and comply with underlying Chapter 403A's requirements. *Id.* The Court did not hold Chapter 403A preempted Chapter 28E. It held, *without* Chapter 403A, the proper guidance separation of powers demands to delegate legislative power was absent, so the 28E agreement had to comply with 403A. *Id.* at 767 (holding Chapter 28E "does not purport to be a housing law. The substantive housing law is found in chapter 403A").

The decisive, controlling cases, *Barnes* and *Goreham*, never mention "preemption," confirming the Cities misunderstand the doctrine at issue. By trying to untether their 28E Agreement from substantive Chapters 330 and 330A—which provide the Legislature's guidance and restrictions on jointly

acquiring and operating regional airports—the 28E Agreement violates separation of powers.

B. Iowa Code Chapter 330 And 330A Govern Airport Authorities and Commissions.

Nonetheless, even if the issue *were* preemption, the 28E Agreement remains unlawful. Iowa's Legislature created statutes to govern creating and operating regional airports: Chapters 330 and 330A. Chapter 330A does not require a public vote to create an airport authority, but its members must be able to freely withdraw. Iowa Code § 330A.7(1). Chapter 330 requires a public vote to create an airport commission, but allows greater permanence by also requiring a public vote for dissolution. Iowa Code § 330.17. Chapter 330A requires the airport agreement be adopted by ordinance. Iowa Code § 330A.3. Airport authorities must have an odd number of members and commissions must have three or five members. Iowa Code §§ 330.20, 330A.5. The Cities do not claim the 28E Agreement complies with these requirements but, instead, try to override the Legislature by creating an airport agency solely by contract, with an even number of members, that restricts withdrawal.

Where a municipality's scheme does "not follow the statutory scheme established" by the Legislature, the municipality's scheme *is* preempted and fails. *Goodell v. Humboldt Cty.*, 575 N.W.2d 486, 501 (Iowa 1998); *City of*

Iowa City v. Westinghouse Learning Corp., 264 N.W.2d 771, 773 (Iowa 1978) ("any municipal plan must be faithful to the legislative scheme adopted by the General Assembly"). Where "ordinances revise the state regulatory scheme and, by doing so, become irreconcilable with state law," they fail. *Goodell*, 575 N.W.2d at 502. When the Legislature states parties creating regional airports must be able to withdraw, for instance, *Goodell* makes clear municipal action compelling the opposite must fail. The Cities cannot contract around the requirement for a public vote to achieve the permanence they desire. *Miller*, 641 N.W.2d at 750–51; *Kunkle Water & Elec., Inc. v. City of Prescott*, 347 N.W.2d 648, 656 (Iowa 1984); *see Town of Mapleton, In Monona Cty. v. Iowa Light, Heat & Power Co.*, 216 N.W. 683, 686 (Iowa 1972) (holding, where vote is required, entity cannot exist without it). Because the 28E Agreement "permits what the state statute ... prohibits," it fails. *Goodell*, 575 N.W.2d at 506.

Further, the Legislature *did* indicate a desire to occupy the field and prescribe how municipalities jointly exercise powers to create and manage joint airports. In arguing the opposite, the Cities often ignore operative words. Chapter 330A provides the "complete method for the exercise of the powers granted by this chapter." Iowa Code § 330A.17. Pre-existing authorities had to transition to 330A's new requirements when the law was enacted. *Id*.

§ 330A.21. When there is conflict between 330A and other statutes, "the provisions of [330A] shall be controlling and shall, to the extent of any such conflict, supersede the provisions of any other law." *Id*. § 330A.17. For "joint exercise of any powers relating to airports," the agreement "shall function in accordance with the provisions" of Chapter 330. Iowa Code § 330.4. The County must exercise its powers "in accordance with" Chapters 330 and 330A. Iowa Code § 331.382(1)(i)-(j).

The Cities argue these provisions are optional because Chapter 330A states municipalities "may" create an airport authority. Thus, the Cities contend they can simply choose to ignore the Code when jointly pursuing a regional airport. Putting aside the above-described separation of powers issue, the Cities' argument disregards both grammar and the law. "While 'may' is ordinarily a permissive word, there are many circumstances under which it may be given a mandatory meaning." *Iowa Nat. Indus. Loan Co. v. Iowa State Dep't of Revenue*, 224 N.W.2d 437, 440 (Iowa 1974). Section 330A.3 emphasizes the point:

> One or more municipalities ***may*** provide by ordinance for the creation of an airport authority in the manner and for the purposes provided under this chapter. The authority ***shall*** be created by agreement adopted by ordinance between two or more municipalities, or by ordinance of a single municipality.

Iowa Code Ann. § 330A.3 (emphasis added).

Plainly, the statute provides an authority "may" be created, but, if it is created, it "shall" be done as the law provides. Myriad laws provide the same. *Lamb v. Time Ins. Co.*, No. 10-0241, 2011 WL 944430, at *5 (Iowa Ct. App. 2011) ("The use of the word "may" in section 514J.13(2) does not mean the legislature intended the filing of a petition for judicial review to be permissive, rather than mandatory."); *see Riley v. Boxa*, 542 N.W.2d 519, 522–23 (Iowa 1996); *Price v. Fred Carlson Co.*, 254 Iowa 296, 302, 117 N.W.2d 439, 442 (1962) ("We find no merit in claimant's contention that the words 'may within thirty days from the date such decision or order is filed, appeal therefrom to the district court', used in section 86.26, were merely permissive. Our interpretation of those terms so used is and always has been that they simply refer to the option of the parties to accept the decision or award or proceed to perfect an appeal to the courts.").

The Code does not require municipalities to jointly pursue regional airports, but if they do, they must follow its requirements. Iowa Code § 330A.17 ("the provisions of [330A] shall be controlling and shall, to the extent of any such conflict, supersede the provisions of any other law…."). Indeed, in *Barnes* where Hampton, Iowa entered a 28E agreement with the U.S. Department of Housing and Urban Development to create a housing authority, this Court confirmed the provisions of Chapter 403A "apply to

Chapter 28E regional housing authorities." *Barnes*, 341 N.W.2d at 767. Yet, this Court noted section 403A.9, like Chapters 330 and 330A, provided "'[a]ny two or more municipalities ***may*** join or co-operate with one another'" to exercise powers under 403A for housing projects. *Id.* at 768 (quoting Iowa Code § 403A.9) (emphasis added). "The legal effect of the city's participation in [the 28E] is to implement this section by joining other municipalities in a joint exercise" and thus the 28E housing authority had to comply with Chapter 403A. *Id.*[4] Like *Barnes*, the 28E Agreement's "legal effect" here "is to implement" Chapters 330 or 330A. *Id.*; *see* (App. pp. 936–1039) (Iowa airport 28E agreements implementing 330A). Thus, the 28E Agreement is void because it circumvents Chapters 330 and 330A.

IV. Chapter 28E Is Not A Vehicle to Rewrite Eminent Domain, Zoning, Permitting or Road Re-Location Law.

Beyond arguing Chapter 28E allows them to ignore Chapters 330 and 330A's guidelines, the Cities also argue Chapter 28E allows them to redelegate and re-write eminent domain, road location, zoning and permitting functions in violation of *delegatus non potest delegare*. Because these all are legislative functions, this claim has the same separation of powers issues

[4] *See* Iowa Code § 28E.5 (only allowing creation of 28E entity if it can otherwise "be legally created").

because 28E only exists to apply ***other*** legislation and does ***not*** create any power on its own. When the Legislature says how a function must be exercised, the Cities cannot re-write those Code provisions through 28E.

A. The Cities Cannot Control the County's Powers the Cities Otherwise Lack.

The Cities' exercise of County powers they otherwise lack violates the Legislature's intent. By Code, 28E agreements are limited to *joint* exercise of powers with "any **other** public agency of this state having such power or powers, privilege or authority." Iowa Code § 28E.3 (emphasis added). Use of the word "other" confirms it cannot be that *one* entity has the needed power—they all must. Here, the Cities admit they need Mahaska County in their arrangement because they *lack* power to complete the airport project without the County's eminent domain, zoning, and secondary road authority. (App. p. 741) ("Neither of these necessary tasks ['condemnation of private land and road relocations'] can be accomplished without the County's exercise of its eminent domain and police powers."); (App. p. 464) ("Oskaloosa (and Pella), without the 28E Agreement, do not have the legal ability to relocate 220th Street because the road is outside their jurisdiction").

Q. And, sir, in fact, you understand that to be accurate, that Oskaloosa and Pella, without the 28E agreement, do not have the legal ability to relocate 220th Street because the road is outside of their jurisdiction; correct?

A. Correct.

(App. p. 1109 (Tran. at 93)); (App. p. 1108 (Tran. 87–88)); (App. p. 125 (stating County's "power of eminent domain is crucial to the Agreement to acquire the land necessary to build the new regional airport")); (App. p. 244 (¶ 56)).

In response, the Cities say, "Close enough." They say, because they have some condemnation power, they can appropriately compel Mahaska County to use powers the Cities lack. *Goreham* says otherwise. 179 N.W.2d 449. There, Polk County had some bonding power, but lacked power to issue waste collection and disposal bonds. *Id.* at 461–62. Because Polk County lacked the *specific* bonding power, it could not participate in a 28E agreement with the other entities: "there is nothing in these legislative provisions to indicate that counties may participate if their power and authority is restricted and does not conform to that of the other public bodies, parties to the agreement." *Id.* The County could not participate because it "did not possess like power or authority in this field of public service with other participating municipal bodies." *Id* at 462. Here, likewise, by their own admission, the Cities' "authority is restricted and does not conform to that of the other public bodies, parties to the agreement." *Id.* at 461–62.

B. The 28E Agreement Improperly Delegates the County's Legislative Discretion.

More importantly, the *Legislature* established the Supervisors make eminent domain, secondary roads, and zoning decisions in rural Mahaska County. *See, e.g.,* Iowa Code §§ 306.4(2), 331.304(7), 335.2. The County cannot re-delegate legislative authority. *Bunger v. Iowa High Sch. Athletic Ass'n*, 197 N.W.2d 555, 560 (Iowa 1972). The Cities insist Chapter 28E, although not a substantive statute, is Legislative authorization not only allowing the County to re-delegate its authority, but to use it in contravention of the law.

But a 28E agreement is not a do-it-yourself vehicle to rewrite legislative requirements. *Barnes*, 341 N.W.2d at 767; *Goreham*, 179 N.W.2d at 455. Express authorization must be found within the corresponding substantive statute and *cannot* independently arise from 28E. *Warren Cty. Bd. of Health v. Warren Cty. Bd. of Supervisors*, 654 N.W.2d 910, 914 (Iowa 2002) (looking to substantive statute to determine if delegating employment power through 28E was authorized); *see Barnes*, 341 N.W.2d at 768 (holding city could not delegate power to approve housing projects through 28E because substantive housing law did not authorize it).[5]

[5] Rather than apply controlling Iowa law, the Cities rely on California and Nebraska cases applying their respective laws to argue 28E must allow

The Cities argue realigning the County's decision-making is okay because, really, the Supervisors *still* may vote—they just must vote however SCRAA tells them. *It is the decision-making, however, that is crucial*. "[A] governmental subdivision cannot delegate the right to make decisions it has been empowered to make." *Warren Cty. Bd. of Health*, 654 N.W.2d at 913–14. Further, the Cities' insistence that the County must exercise its authority as SCRAA dictates merely emphasizes the open meeting problem the Cities ignore. Moving decision-making from where the public knows it is supposed to occur to a separate entity thwarts public access to deliberative processes:

> We have long recognized the general principle that members of a public board "may authorize performance of ministerial or administrative functions" but cannot delegate "matters of discretion." The open meetings statute reflects the reality that deliberation upon matters of public policy involves judgment and

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delegating and altering legislative powers. Those states' laws forcefully demonstrate why the Cities' arguments fail. California, for example, explicitly authorizes joint use and delegation of eminent domain authority; 28E does not. Cal. Civ. Pro. Code § 1240.140 (West). Unlike 28E, Nebraska's law "shall be deemed to provide an additional, alternative, and complete method" for exercising powers and "shall be deemed and construed to be supplemental and additional to" powers construed by other law. Neb. Rev. Stat. Ann. § 13-825 (West). *But see Barnes*, 341 N.W.2d 767–68. Further, unlike 28E, Nebraska's law is controlling whenever "inconsistent with the provisions of any general or special law…." Neb. Rev. Stat. Ann. § 13-825 (West). *But see Barnes*, 341 N.W.2d 767–68. Chapter 330A provides the opposite: "the provisions of [330A] shall be controlling and shall, to the extent of any such conflict, supersede the provisions of any other law." Iowa Code § 330A.17. The Cities' citations highlight the risk of trying to invoke out-of-state cases in applying Iowa law.

> discretion. Thus, our conclusion that public bodies cannot use agents to deliberate matters of public policy without triggering the open meetings law is consistent with this principle.

Hutchison v. Shull, 878 N.W.2d 221, 234 (Iowa 2016) (internal citations omitted). Open meetings law is not fulfilled if the public is told a decision is made one place, by statute, only to find, when they appear at the meeting, the decision already was made elsewhere. This point emphasizes the impropriety of re-writing rules the Legislature imposed.

C. The Cities Not Only Improperly Alter the Decision-Maker, They Alter the Process and Eliminate Required Protections.

Not only do the Cities override *who* makes eminent domain, secondary road, and zoning decisions, they override *how* the decisions are made, eliminating statutory and constitutional protections. For example, our Legislature requires condemnation "shall be in accordance with the provisions of" Chapter 6B, and, before condemnation can even begin, there must be notice and a public hearing. Iowa Code §§ 6B.1A, 6B.2A(2). Road vacation also requires notice and an opportunity for public comment before the County decides. Iowa Code §§ 306.11–306.12. Similarly, zoning requires public comment and an opportunity to be heard. Iowa Code §§ 335.6–335.7. All of this is to be before the Supervisors.[6] Because the Cities want to prevent public

[6] The Cities claim these county decisions do not need to be made by the elected representatives. But the Supervisors *are* the county citizens' representatives

comment possibly thwarting their goals, they insist the Supervisors must do what they are told no matter what public comment provides. *E.g.*, (App. pp. 1120 (Tran. at 135–36), 1122 (Tran. at 142–43)).

The Cities argue rendering public comment meaningless is okay because federal due process requires no pre-deprivation hearing for eminent domain. The Cities misunderstand. Iowa law **does** require such hearings on all these topics. Thus, the question is whether, when the law requires a hearing, can it be a sham? It cannot. *Bricker v. Iowa Cty. Bd. of Sup'rs*, 240 N.W.2d 686, 690 (Iowa 1976) (holding hearing requirement demands "a genuine hearing, not a sham"). The point is simple: "[W]hen a county law provides for a hearing, due process requires that it be a meaningful hearing." *Hikmat v. Howard Cty.*, 148 Md. App. 502, 527–28, 813 A.2d 306, 321 (2002); *see Hancock v. City Council of City of Davenport*, 392 N.W.2d 472, 478–79 (Iowa 1986) (holding "requirement for a hearing presupposes a meaningful opportunity to be heard," which is what "constitutional due process requires"); *see also Gonzales v. United States*, 348 U.S. 407, 415

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and the Code demands the Supervisors make county eminent domain, road and zoning decisions. Iowa Code §§ 6B.2A, 306.4(2), 306.16, 335.3, 335.6. County citizens expect, as the law provides, not only to be heard by their representatives on these issues, but also to have the power to elect those that will listen. The Cities' stated goal is to deny that right.

(1955) ("the right to a hearing means the right to a meaningful hearing"). The Cities insist the public has no right to compel any particular result. True. But where an opportunity to be heard is required, the opportunity must be meaningful—not preordained. *Id.* What is common sense also is the law.

Iowa is not alone in recognizing that, where the law provides notice and opportunity to be heard, it cannot be a sham. *See, e.g., Nat. Res. Def. Council v. E.P.A.*, 643 F.3d 311, 321 (D.C. Cir. 2011); *Wild Fish Conservancy v. Nat'l Park Serv.*, No. C12-5109 BHS, 2014 WL 3767404, at *1 (W.D. Wash. July 31, 2014); *Save Our Springs v. Babbitt*, 27 F. Supp. 2d 739, 748 (W.D. Tex. 1997); *Connecticut Light & Power Co. v. Nuclear Regulatory Comm'n*, 673 F.2d 525, 530–31 (D.C. Cir. 1982); *Dacy v. Village of Ruidoso*, 845 P.2d 793, 797 (N.M. 1992); *Redevelopment Agency v. Norm's Slauson*, 173 Cal. App. 3d 1121, 1127 (Cal. Ct. App. 1985).[7]

[7] In *Norm's Slauson*, the court held a condemnation decision was void where a contract required the agency to exercise eminent domain, thus the required hearing was "affected not by just a gross abuse of discretion but the prior elimination of any discretion whatsoever." 173 Cal. App. 3d at 1127. The Cities cite *City of San Buenaventura v. Karno*, 2d Civ. No. B237181, 2012 WL 5987533 (Cal. Ct. App. Nov. 29, 2012), to distinguish *Norm's Slauson*. But *Karno*, instead, confirms the problem. There, condemnation was upheld because the City "did <u>not</u> guarantee that it would exercise its power of eminent domain [in the contract]: 'The City does not and cannot guarantee that the necessary property rights can be acquired or will, in fact be acquired. All necessary procedures of law would apply and have to be followed.'" *Id.* at *4 (noting the City reserved to "its sole discretion" the determination whether it could or would exercise its eminent domain authority) (emphasis added).

The Cities cannot contract around statutorily and constitutionally required notice and hearing. Because the 28E Agreement purports to do so, it is void.

V. One Legislative Body Cannot Bind the Next and Delegation Must Be Revocable.

The Cities double down on their intent to bind future supervisors on *legislative* decisions like eminent domain, road location and zoning and put those issues beyond the electorate's ability to change or influence. Appellee Br. at 45–46. Our Constitution forbids this. *Marco Dev. Corp.*, 473 N.W.2d at 43.

A. The Constitution Prevents One Legislature Binding the Next.

"No citation of authority is needed for the proposition that one legislature cannot bind future legislatures upon such policy matters" and the same applies to local bodies delegated legislative authority. *Bd. of Educ. In & For Delaware Cty. v. Bremen Twp. Rural Indep. Sch. Dist. of Delaware Cty.*, 148 N.W.2d 419, 424 (Iowa 1967). "[I]f a contract does restrict the discretionary authority of the governing body of a municipality, it is ultra vires and of no legal effect." *Marco Dev. Corp.*, 473 N.W.2d at 43. *Marco*

Here, the Cities contend the County *did* guarantee it will condemn when SCRAA orders and the County has *no* discretion under the 28E Agreement. *Id.* at *3 (prohibiting mere "rubber stamp[ing] a predetermined result" (quotation omitted)).

Development made clear this prohibition applies to legislative functions at issue in this case like road decisions. *Id.* at 42–43 ("Its proposed street widening was clearly a legislative function, and the City was not free to bind itself by contract in the exercise of its legislative functions.").

The Cities again fall back on their argument that 28E somehow grants approval for one legislative body binding the next. They misunderstand the law. The prohibition against binding legislative authority arises from the Constitution. *Bd. of Educ. In & For Delaware Cty.*, 148 N.W.2d at 424 (holding <u>*even*</u> <u>*if*</u> Legislature allowed school districts to permanently fix boundaries, doing so exceeded constitutional limits).[8] Even if the Legislature wanted to allow one body to bind the next on legislative decisions through 28E, doing so violates the Constitution. *Marco Development* made this clear:

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[8] Iowa's Constitution places legislative power in the general assembly. Iowa Const. Art. III, § 1 ("The legislative authority of this state shall be vested in a general assembly, which shall consist of a senate and house of representatives…."). Such provisions prohibit one legislature binding the next. *City of Charleston v. Se. Constr. Co.*, 64 S.E.2d 676, 682 (W. Va. 1950) ("the Legislature is without power to bind future Legislatures, and it cannot grant or delegate the right to exercise in perpetuity the police power of the State. Such delegation would be violative of Section 1, Article VI of our Constitution, which reads: 'The legislative power shall be vested in a Senate and House of Delegates.'"). The Legislature could not let 28E violate the Constitution—even if it wanted to. *Graham v. Worthington*, 146 N.W.2d 626, 631 (Iowa 1966) (holding law violating Constitution fails); *Duncan v. City of Des Moines*, 268 N.W. 547, 552 (Iowa 1936) ("The Legislature can enact no law forbidden by the State Constitution….").

> The City responds that the home rule amendment may not be applied so broadly; authority to bind successive legislative bodies could not be granted by the legislature, which itself is prohibited from doing so.
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> ***
>
> We believe that the same limitation must be recognized as to the legislature's authority to grant to a city, through home rule, the power to contract for the exercise of its governmental or legislative authority.

Marco Dev. Corp., 473 N.W.2d at 44.

The Cities complain that abiding by constitutional requirements precludes doing business and renders 28E meaningless. First, perceived inconvenience does not justify constitutional violations. *State v. Gaskins*, 866 N.W.2d 1, 15 (Iowa 2015) (holding inconvenience to government does not defeat constitutional protections); *Hagge v Iowa Dept. of Revenue & Finance*, 504 N.W.2d 448, 452 (Iowa 1993) ("equity cannot override the clear commands of the Due Process Clause…."). Second, this constitutional prohibition applies only to legislative functions, not proprietary. Chapter 28E has myriad applications to *proprietary* functions that do not violate constitutional prohibitions on delegating *legislative* functions. Finally, myriad Iowa municipalities manage to comply with Chapters 330 and 330A to create regional airports. (App. p. 936–-1039). The issue here is not that regional airports cannot be created, but that the Cities were unable to achieve the required electoral support and, thus, cannot satisfy Chapter 330's

requirement for more permanent authority. Because they cannot satisfy the law, they want to re-write it. Neither 28E nor Iowa's Constitution permits this.

Finally, the Cities contend the 2012 Supervisors may not have bound today's Board because the SCRAA could change its mind and not pursue condemnation, road closures, or zoning for the airport. The Cities forget they alleged those powers were the sole consideration the County provided in the 28E Agreement and were crucial to completing the project. (App. pp. 237 (¶ 21), 244 (¶ 56)); (App. p. 125). The Cities also forget they already sued demanding the County use those powers as the SCRAA dictates. (App. pp. 244 (¶ 56), 245 (¶ 64)). This was their suit's core and they affirmatively pled their intent was to put these legislative decisions beyond the electorate's reach. (App. p. 236 (¶11)). The unlikely possibility the *Cities* might decide not to pursue the airport they sued to ensure does not change the fact the 28E Agreement still improperly binds future Boards of Supervisors' legislative authority with no ability to freely withdraw. After all, under the 28E Agreement, the very decision whether to abandon or pursue those options is left to *the SCRAA*, not the Supervisors whose power the Cities seek to control. In *Marco Development*, the developer certainly could have changed its mind about road alterations or gone bankrupt and abandoned the project, but that

did not change the fact one legislative body unlawfully bound the next on legislative decisions through contract. The same is true here.

B. Political Entities Must Be Able to Withdraw from 28E Agreements on the Same Basis under which They Enter Them.

Perhaps the most glaring omission in the Cities' brief is their failure to address the foregoing principles' actual application *under Iowa Code Chapter 28E*. Presumably recognizing one legislative body cannot bind the next, and Chapter 28E cannot override the Constitution, this Court held public bodies consummating 28E agreements *must* be able to withdraw from those agreements under the same terms by which they entered them. *Warren Cty. Bd. of Health*, 654 N.W.2d at 915. In *Warren County Board of Health*, our Supreme Court was asked whether delegating particular legislative authority through a 28E agreement was lawful. Without deciding whether the substantive law allowed delegation, the Court held, if a public body like the County delegates authority, it must be "free to revoke or change a delegation of power" so long as it is done in the same way that created the delegation (*i.e.*, a resolution passed by the Supervisors). *Id.*[9] Nothing in 28E allows the Cities to prohibit the County from withdrawing and the County must retain the right to do so. This comports with the voters' right to control legislative

[9] Chapters 330 and 330A provide the very same thing. The law does what the Cities wish to avoid—comply with the Constitution.

decisions through elections. Iowa Att'y Gen. Op. No. 77-4-1, 1977 WL 18901, at *1 (Apr. 1, 1977). Otherwise, we invite our government to simply contract around elections—as occurred here. Because the County must be "free to revoke or change" its delegation of authority, the 28E Agreement is void. The Supervisors withdrew on the same basis upon which they entered the 28E—a majority vote. The Cities say they cannot. The Supreme Court already said they can. *Warren Cty. Bd. of Health*, 654 N.W.2d at 915.[10]

VI. The Cities' Cross-Appeal Must Be Denied.

A. This Court Lacks Jurisdiction to Decide the Cities' Moot Cross-Appeal.

Finally, the Cities cross-appeal the District Court's denial of summary judgment regarding the County's former breach of contract counterclaim in the Cities Case. However, on October 1, 2020, the parties jointly voluntarily dismissed without prejudice the County's breach of contract counterclaim and any of the Cities' "remaining claims not determined by the Court's prior summary judgment rulings in this matter." (App. pp. 663–65); (App. p. 667). Appellate jurisdiction requires a final judgment that "conclusively adjudicates

[10] The Cities also ignore the political question issue the County raised in its initial brief regarding the Cities' demand that the court to wade into legislative decisions through specific performance.

all of the rights of the parties…." *Ahls*, 473 N.W.2d at 621. Because the County voluntarily dismissed its counterclaim without prejudice, there is no final judgment and this Court lacks jurisdiction. *Id.* at 622–23 ("It is obvious that the filing of dismissals by the parties was not a final order by the court—or any kind of order."); *Helm Financial Corp. v. MNVA R.R., Inc.*, 212 F3d 1076, 1080 (8th Cir. 2000) ("In general, neither party may appeal from a voluntary dismissal because it is not an involuntary adverse judgment."); *Venard v. Winter*, 524 N.W.2d 163, 167 (Iowa 1994) ("a dismissal without prejudice … deprives the court of jurisdiction.").[11]

Voluntary dismissal without prejudice also moots appeal regarding that claim because nothing remains to rule on. *State ex rel. Turner v. Midwest Develop. Corp.*, 210 N.W.2d 525, 525–26 (Iowa 1973) (dismissing appeal as moot where State voluntarily dismissed "foundational district court action" after appeal perfected); *Bela Animal Legal Defense & Rescue v. City of Des Moines*, No. 18-1553, 2020 WL 2968368, at *2 (Iowa Ct. App. Jun. 3, 2020)

[11] The summary judgment denial was interlocutory, and the District Court never had the chance to consider or rule on the factual information later developed through discovery, depositions, and the parties' expert reports, which clearly demonstrated fact issues making this cross appeal inappropriate. *In Int. of W.D., III*, 562 N.W.2d 183, 185 (Iowa 1997).

(finding appeal regarding claim voluntarily dismissed to allow appeal of judgment on other claims moot because the controversy no longer existed).[12] "[T]he controversy the Cit[ies] claim[] exists is no longer subject to a court proceeding," therefore it cannot be remanded to the District Court. *Bela Animal Legal Defense & Rescue*, 2020 WL 2968368, at *2.

Because no judiciable controversy remains on the County's counterclaim, the Cities' cross-appeal must be denied.

B. Even if the Cross-Appeal was Justiciable, the District Court did not Err Denying Summary Judgments.

Even if a justiciable controversy remained, the District Court properly denied summary judgment on the County's since-dismissed counterclaim. "Review of a district court's … denial of summary judgment is for correction of errors at law" and the Court "review[s] the record in the light most favorable to the non-moving party." *Shatzer v. Globe Am. Cas. Co.*, 639 N.W.2d 1, 3 (Iowa 2001). Material issues of fact prevented summary judgment.

[12] *Droste v. Julien*, 477 F.3d 1030, 1035 (8th Cir. 2007) (holding plaintiff's dismissal of claim meant "it is no longer part of the case" and appeal was "necessarily moot"); *King v. Hawkeye Community College Merged Area VII Sch. Dist.*, No. C98-2004, 1998 WL 34112768, at *1 (N.D. Iowa May 22, 1998) (holding voluntary dismissal moots summary judgment motion on that claim).

The District Court held it was a fact question whether the 28E Agreement required the County to close 220th Street. The Cities expressly agreed to work with the County in good faith regarding "road relocations." 28E Art. XII § 1 (App. p. 434). Whether the Cities acted in good faith is a fact question. *In re Brady's Estate*, 308 N.W.2d 68, 71 (Iowa 1981) ("Existence of good faith … is ordinarily a question of fact."); *Loudon v. State Farm Mut. Auto. Ins. Co.*, 360 N.W.2d 575, 578 (Iowa Ct. App. 1984) ("Bad faith is always a fact question...."). The Cities concede "road relocations" is undefined in the agreement, without clear meaning. The Cities themselves can't seem to decide what the contract provides, in one breath alleging the County delegated all road authority to SCRAA, while contradictorily asserting on cross appeal the Cities cannot make the County close roads. Appellee Br. at 44, 70; (App. p. 464); (App. p. 1110 (Tran. 95–96)). Given the Cities' inconsistency and the parties' disagreement regarding the ambiguous terms, the District Court correctly found fact issues regarding whether road closures were allowed and whether the Cities acted in good faith. *Donahoe v. Gagen*, 250 N.W. 892, 894 (Iowa 1933) ("Where there is a specific contradiction between parties as to the terms of an express contract,

the fact question involved is always for the proper determination of a jury.").[13] Closing a well-used farm-to-market road damages the County by costing it a major asset and farm-to-market funds. Further, the Cities' failure to operate in good faith would entitle the County to liquidated damages. 28E Art. XIV § 2 (App. p. 435). The Cities' breach would excuse any purported breach by the County, which is a fact question. *Beckman v. Carson*, 372 N.W.2d 203, 208 (Iowa 1985).[14]

CONCLUSION

The District Court's decision that the Agreement was lawful and enforceable must be reversed to avoid enforcing an illegal governmental contract.

BELIN McCORMICK, P.C.

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[13] Further evidencing inconsistent factual issues here, the Cities claim the County separately agreed to close 220th Street, when the County merely stated it would disconnect 220th if "acceptable mitigation actions are identified." (App. p. 179). No mitigation acceptable to the County was identified.

[14] The Cities claim the County's breach of contract counterclaim invalidates its request for declaratory relief; it does not. The County pled breach of contract in the alternative, which is permitted. *Connell v. Hays*, 122 N.W.2d 341, 371 (Iowa 1963).

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PROOF OF SERVICE

I hereby certify that on the May 21, 2021, I electronically filed the foregoing Appellant's Final Reply Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System which will send notice of electronic filing to the following. Per Rule 16.317(1)(a), this constitutes service of the document for purposes of the Iowa Court Rules.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 6,947 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in Times New Roman 14 pt.

Dated: May 21, 2021

/s/ V. Drake

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