IN THE SUPREME COURT OF IOWA

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/Cross-Appellee

CITY OF PELLA and CITY OF OSKALOOSA,
Plaintiffs/Appellees/Cross-Appellants

APPEAL FROM THE DISTRICT COURT OF MAHASKA COUNTY
THE HONORABLE CRYSTAL S. CRONK
MAHASKA COUNTY DISTRICT COURT CASE NO. EQEQ088856

and

APPEAL FROM THE DISTRICT COURT OF WASHINGTON COUNTY
THE HONORABLE CRYSTAL S. CRONK
WASHINGTON COUNTY DISTRICT COURT CASE NO. EQEQ006593

CITY OF PELLA'S, CITY OF OSKALOOSA'S, and SOUTH CENTRAL REGIONAL AIRPORT AGENCY'S JOINT FINAL BRIEF

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ROUTING STATEMENT

This case should be retained by the Supreme Court because it presents fundamental and urgent issues of broad public importance. Iowa R. App. P. 6.1101(2)(d). The Appellants' challenges to the operation of Iowa Code Chapter

28E, if sustained, would dramatically restrict the ability of municipalities to combine their efforts for beneficial public projects. Some of those challenges likewise present substantial issues of first impression in the construction and operation of Chapter 28E. Iowa R. App. P. 6.1101(2)(c). It is also the case that the Appellants lodge constitutional challenges to the operation of the Chapter 28E agreement in this case (although the Appellees do not regard those challenges as "substantial"). Iowa R. App. P. 6.1101(2)(a).

STATEMENT OF THE CASE

These appeals arise from repeated efforts to undermine an agreement for the joint exercise of municipal powers entered into under Iowa Code Chapter 28E (the "28E Agreement"). The City of Pella and the City of Oskaloosa (collectively "the Cities") entered into the 28E Agreement with Mahaska County ("the County") (collectively, the "Parties") for the construction of a new Regional Airport. The 28E Agreement created a separate legal entity, the South Central Regional Airport Agency ("SCRAA") to oversee and carry out the construction of the Regional Airport. The 28E Agreement granted SCRAA numerous powers related to the construction of the Regional Airport, including the ability to exercise eminent domain.

The Parties entered into the Agreement on March 26, 2012. However, following an election in November 2016, the County, through its Board of

Supervisors, reversed its view of the project and undertook several efforts to prevent the construction of Regional Airport. It attempted to modify the Agreement to limit SCRAA's powers, attempted to withdraw from the Agreement with permission from the Cities (which was denied), and finally purported to unilaterally withdraw from the Agreement. All of these actions were in violation of the terms of the Agreement.

After the County attempted to unilaterally withdraw, the Cities filed suit against the County on August 22, 2017 in the Iowa District Court for Mahaska County ("the Cities case"), requesting the Court declare the 28E Agreement to be valid and enforceable, to grant the Cities specific performance, and to compel the County to carry out its obligations under the Agreement. The County filed a Motion to Dismiss on October 2, 2017, which was denied. The County filed its Answer and Counterclaim for breach of contract on December 21, 2017. The Cities filed a Motion for Summary Judgment on January 19, 2018 on both of their causes of action, request for declaratory judgment and request for specific performance. After a hearing on the Motion, on June 13, 2018, the District Court issued its Ruling, granting the Cities' Motion for Summary Judgment, and in so doing, found the 28E Agreement binding and enforceable and permitted the Cities to pursue the remedies set forth in the 28E Agreement. The County filed a Motion to Reconsider, Enlarge, and Amend on June 28, 2018, which was subsequently denied by the District Court on June 29, 2018.

The Cities filed a Second Motion for Summary Judgment on September 4, 2018, requesting certain types of specific performance. The District Court granted the Second Motion in part and denied it in part on February 4, 2019. The Cities filed a Motion to Reconsider, Amend, and Enlarge on February 19, 2019, which was denied by the Court on March 20, 2019. In the interim, the Cities filed a Renewed Motion for Change of Venue on November 8, 2018, which was granted by the District Court on January 3, 2019.[1] The case was subsequently transferred to the Iowa District Court for Washington County.

On August 13, 2019, a group of County residents, the Site A Landowners ("the Landowners"), filed a separate lawsuit in the Iowa District Court for Mahaska County against the Cities, SCRAA, and the County, asserting four requests for Declaratory Judgment, requesting the 28E Agreement be invalidated on numerous different grounds ("the Landowners case"). On November 8, 2020, the County filed a Crossclaim against the Cities and SCRAA, requesting a Declaratory Judgment from the Court that the 28E Agreement was unlawful and unenforceable. On December 19, 2019, the County filed an Amended Answer and asserted a new counterclaim in the Cities case, identical to the Crossclaim filed in the Landowners case.

[1] The Renewed Motion for Change of Venue was filed because the Cities had amended their Petition to add a cause of action that sought monetary damages from the County, permitting a change of venue under Iowa R. Civ. Pro. 1.801(1).

On February 24, 2020, the Cities and SCRAA filed a joint Motion for Summary Judgment in the Landowners case against the claims asserted by the Landowners and the County's Crossclaim. The Landowners and the County each filed a Resistance to the Joint Motion for Summary Judgment as well as their own Motions for Summary Judgment. On September 18, 2020, the District Court for Mahaska County issued its Ruling, finding that the County's Crossclaim was barred by res judicata, as the issue of the legality and enforceability of the 28E Agreement was already decided in the Cities case by that court's ruling on the Cities' First Motion for Summary Judgment, and finding that the Landowner's claims could not be brought because the Landowners lacked standing to challenge the 28E Agreement.

Finally, on June 29, 2020, the County, in the Cities case, filed a Motion to Reconsider the Court's grant of the Cities' First Motion for Summary Judgment and to Grant Summary Judgment on Mahaska County's Counterclaim. The Court denied the County's Motion on September 13, 2020. The June 29, 2020 filings in the Cities case, and the summary judgment motion and resistance filed by the County in the Landowners case (filed at roughly the same time), were effectively the County's third attempt, with its third law firm, to litigate (or relitigate) the enforceability of the 28E Agreement. Most of the arguments lodged in this appeal were asserted for

the first time in this transparent attempt at a "do-over" of the previous summary judgment proceedings.

Following the final summary judgment rulings in both cases, the County voluntarily dismissed its counterclaims in the Cities case without prejudice in order to enable this appeal. The Landowners and the County timely filed their notices of appeal.

The district courts did not rule on the merits of many arguments asserted in this appeal because those arguments were raised in what the courts found were improperly repetitive procedural contexts or for other procedural reasons. Legitimate arguments can be made to this Court about whether the County in fact failed to preserve error on many of the arguments asserted in this appeal, whether some of those arguments were properly disposed of on res judicata grounds, and whether the Landowners have standing to assert all of their claims. The Cities have elected, however, to forego that procedural thicket and seek affirmance on all issues on the merits. The Cities thoroughly briefed below all of the arguments asserted by the Appellants before this Court. To the degree that the district courts did not address those arguments on the merits, this Court can nonetheless affirm on the familiar basis that it "may affirm a district court ruling on an alternative ground provided the ground was urged in that court." *State ex rel. Dickey v. Besler*, 954 N.W.2d 425, 432 (Iowa 2021) (quoting authority).

STATEMENT OF FACTS

Negotiations on the 28E Agreement began in 2010 between the Cities, the County, and the Federal Aviation Administration ("FAA"). (App. p. 764). The FAA provided the Cities and County a list of expectations needed for the Regional Airport, which included the need for the Parties' use of eminent domain. (App. p. 764). The FAA also was adamant that "[a]n Airport Authority or any other agreement must be binding and durable to outlast any elections." (App. p. 764). The FAA encouraged the creation of an Airport Authority "to be the sponsor and overall advocate for the regional airport." (App. p. 764).

On March 29, 2012, the Cities and County entered into the 28E Agreement, the express purpose of which was "to provide for the Parties' joint acquisition, construction, equipping, use and operation of the Airport Facility." (App. p. 772 Art. II, § 1). The 28E Agreement expressly stated that the costs for the construction of the Regional Airport would be the responsibility of the Cities, who would split the costs evenly. (App. p. 777 Art. VII, § 6). The County had no financial responsibility for the construction of the Regional Airport. (App. p. 777 Art. VII, § 6). The Cities and County also expressly agreed that the 28E Agreement would remain in effect until the completion of the Regional Airport. (App. p. 779 Art. XIII, §§ 1–2). To satisfy the requirements of Article XVI of the 28E Agreement, the Cities and the County each passed their own Resolution expressly approving the 28E

Agreement and authorizing its execution by the respective statutory officers, properly executed the Agreement, and filed the Agreement with the Secretary of State as required under Iowa law. (App. p. 765; App. p. 781 Art. XVI, §§ 1–2).

Following the FAA's recommendation, and consistent with Iowa Code Chapter 28E, the 28E Agreement created SCRAA to facilitate the purpose of the 28E Agreement to completion. (App. p. 772 Art. II, § 2). The Parties agreed SCRAA would have a Board of Directors. (App. p. 772 Art. II, § 2). The Board of Directors consists of six members, with each of the Cities and County having representation. (App. p. 772 Art. III, §§ 1–2). Under the terms of the 28E Agreement agreed to by the Parties, the City of Pella received three representatives; the City of Oskaloosa received two; and the County received one because, unlike the Cities, the County was not financially responsible for the project. (App. p. 772 Art. III, § 2(b)). Each Director was to serve until their successor was duly elected. (App. p. 773 Art. III, § 4(f)).

The 28E Agreement contains several relevant provisions to allow for the construction of the Regional Airport. First, Art. X, Sec. 1 of the Agreement expressly recognized the need to acquire property for the construction of the Regional Airport, potentially through the use of eminent domain, stating:

> Section 1. Acquisition: The SCRAA may acquire such property as it needs to accomplish its public purposes by purchase, gift, exchange, transfer, conveyance or otherwise, and shall hold all real, personal and intangible property which it acquires in its own name. To the extent

> authorized by law, the SCRAA may also acquire real property or an interest therein for a public use or purpose related to its function by use of the power of eminent domain, and is authorized to bring an action in eminent domain in its own name or may request a Party to bring such action, which the Party shall then do so long as the SCRAA shall fully reimburse the Party for all costs of acquisition, including the damages to be paid to the owner of the property being so acquired and all related administrative and legal expenses incurred by the Party to complete the acquisition. In the event the Board determines to contest the award made by the compensation commissioners and take possession of the property at the conclusion of the eminent domain proceedings or any appeal thereof, the SCRAA shall reimburse the Party for the costs and expenses as aforesaid and any attorney fees or damages awarded to the property owner.

(App. p. 778 Art X, § 1). In addition, the Agreement recognized in Art. VII, Sec. 1 that in order for the construction of the Airport to occur, road relocations "may be required":

> Section 1. Best Efforts. Each Party agrees to cooperate in good faith with the Board and the other Parties, exercise diligence in performing its obligations hereunder, and use its best efforts to carry out the provisions of this Agreement. In addition, Oskaloosa and Pella agree to work with Mahaska County in good faith to resolve road relocations which may be required.

(App. p. 776 Art. VII, § 1). The 28E Agreement also had specific provisions for modifying and terminating it, neither of which could occur without the express approval of each of the Parties. (App. p. 779 Art. XI §§ 1-2). If one of the Parties failed to perform their contractual obligations, the 28E Agreement contained a "Remedies" provision which expressly allows for the other Parties to seek specific

performance "to enforce compliance with any provision of this Agreement." (App. p. 779 Art. XII, § 4).

After the Agreement was executed, SCRAA began reviewing potential locations to construct the Regional Airport. (App. p. 786). In total, SCRAA considered approximately twelve (12) different locations. (App. p. 786). After a thorough review, SCRAA selected Site A as being the best location for the Regional Airport. (App. pp. 787-804).

Following elections in November 2016, which changed the composition of the membership of the Mahaska County Board of Supervisors, the County began efforts to limit the authority of SCRAA. Initially, the County, through its Board of Supervisors, attempted to modify the 28E Agreement to remove the eminent domain authority from SCRAA and SCRAA's authority to request the County exercise its eminent domain powers. (App. pp. 805-806). The Cities rejected the County's proposed modification. (App. pp. 807-808, 809-810). On November 22, 2016, the County announced it would not perform its eminent domain obligations under the 28E Agreement, stating it intended to "bring the resolution forward asking for Mahaska County to withdraw[] from the 28E Agreement." (App. p. 812). On January 17, 2017, the County, through the Board of Supervisors, approved a proposed amendment to the Agreement to "remov[e] Mahaska County from all aspects of the [28E Agreement]." (App. pp. 814-815). The Cities also rejected this

proposed amendment. (App. pp. 816, 817). On June 17, 2017, the Mahaska County Board of Supervisors voted to unilaterally remove themselves from the 28E Agreement, passing a proposed amendment to "remov[e] Mahaska County from all aspects of the [28E Agreement] . . . [and] to terminate any and all obligations and responsibilities from the current 28E Agreement." (App. pp. 819-820). The County also unilaterally removed its representative from the SCRAA Board of Supervisors. (App. p. 821). Following this, the two lawsuits underlying this appeal were initiated.

ARGUMENT

I. THE 28E AGREEMENT FOR A REGIONAL AIRPORT IS A PROPER APPLICATION OF THE GOVERNING LAW AND IS LEGALLY ENFORCEABLE REGARDING ALL PARTIES.

Error Preservation: The Cities do not dispute that error was preserved on the various challenges to the application and operation of Iowa Code Chapter 28E.

Standard of Review: All of the issues raised by the Appellants were decided below on summary judgment. The standard of review of a district court's granting of summary judgment is for corrections of error at law. *Campbell v. Delbridge*, 670 N.W.2d 108, 109 (Iowa 2003). Where, as here, the material facts are not in dispute, the Court must determine whether the district court correctly applied the law to the facts. *First State Bank v. Clark*, 635 N.W.2d 29, 30 (Iowa 2001). Some of the County's challenges to the 28E Agreement here raise constitutional issues. The

Court reviews those issues *de novo*. *Weizberg v. City of Des Moines*, 923 N.W.2d 200, 211 (Iowa 2018).

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The County and the Landowners assert numerous and somewhat overlapping challenges to the way the Iowa Code Chapter 28E was employed to build the Regional Airport. The Cities will respond to those challenges in this division. Preliminarily, however, they will explain the background of Chapter 28E as it applies to this case.

A. Iowa Code Chapter 28E Exists Precisely to Enable Projects Like the Regional Airport.

In 1966, the Legislature provided Iowa municipalities an avenue to jointly exercise their powers for the betterment of their communities and residents. As our society becomes increasingly advanced and interconnected, tremendous strains are placed upon local governments' ability to provide the infrastructure, services, and amenities needed to keep their communities thriving. Many large-scale projects and services that are necessary for modern communities to flourish are difficult, if not impossible, for local governments standing alone to provide. However, if the resources are spread across multiple municipalities, these large projects and services become feasible, and not only benefit one community, but each community involved in the joint project.

Iowa Code Chapter 28E was created for this purpose.[2] The statute's aim is to make local government more productive and efficient by allowing municipalities to join together and share the powers they each have in common. The statute is to be interpreted liberally, in order to maximize the production and efficiency of government and to widen the types of infrastructure, services, and amenities that can be provided through collective action. That was the Legislature's specific command:

> The purpose of this chapter is to permit state and local governments in Iowa to make efficient use of their powers by enabling them to provide joint services and facilities with other agencies and to cooperate in other ways of mutual advantage. *This chapter shall be liberally construed to that end*.

Iowa Code § 28E.1 (emphasis added).

This appeal at its core represents a provincial and narrow-minded challenge to the scope and character of cooperative ventures authorized by Chapter 28E. If the Appellants are successful, Chapter 28E will be dramatically diminished in force and effect. This Court should not indulge this attempt to put sand in the gears of an engine of progress.

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[2] Chapter 28E is by no means unique. More than 30 other states have enacted similar statutes permitting the joint exercise of powers by municipal and other government entities. (App. pp. 898-904).

B. The Subject 28E Agreement Is Not an Improper Delegation of Legislative and Police Powers.

Both the County and the Landowners argue the Parties' 28E Agreement unlawfully delegates to SCRAA legislative and police powers belonging to the County. (County Br. at Div. IV.A;[3] Landowners Br. Div. II.A). Their claim is that the County's legislative and police powers were delegated to it by the Iowa Legislature and that these powers cannot be further delegated by the County through the 28E Agreement.

To begin with, the power of eminent domain can be exercised without any delegation at all. The Parties' 28E Agreement authorizes eminent domain powers to be exercised *either* by SCRAA or by the County itself. (App. p. 778 Art. X § 1). If exercised by the County, the eminent domain power will not have been delegated but instead will be exercised by the Party that always possessed it, fully in compliance with the County's complaint. The County ignored this eminent domain alternative entirely in its briefing.

But even assuming all powers are exercised by SCRAA, the County's position is contradicted by Iowa Code Chapter 28E, the language of which the County and

[3] The County's argument is spread across a couple of brief points (County Br., Divisions IV.A. and B.1.), but the argument is the same in both places.

Landowners tellingly omit quoting in their briefs. Their position also ignores a basic principle in this Court's pronouncements in the area.

The Legislature in Chapter 28E described the powers that could be jointly exercised by an entity—like SCRAA—expansively: "*Any* power or powers, privileges or authority exercised or capable of exercise by a public agency may be exercised and enjoyed jointly with any other public agency of this state having such power or powers, privilege or authority. . ." Iowa Code § 28E.3 (emphasis added). The Legislature's intent is clear: Municipalities that are party to a 28E Agreement may jointly share and exercise *any* powers that they each hold in common (including eminent domain).

The argument advanced by the County and Landowners is well summed up from this stark declaration in the County's brief: "The Legislature alone decides to whom to delegate its authority." (County Br. Div. IV.A). Yet in Chapter 28E, that delegation is exactly what the Legislature did—it expressly informed municipalities that they may jointly exercise any power or authority they each commonly enjoy, and that separate legal entities—like SCRAA—could be created to carry out the joint exercise of those powers. Iowa Code §§ 28E.3, .4. Surely, if the Legislature is capable of delegating its own authority to municipalities for municipalities to carry out individually, it is also capable of permitting municipalities to come together to jointly exercise those same powers.

Indeed, this Court has specifically stated that the Legislature may permit redelegation of municipal powers in the exact form as has occurred in Chapter 28E (an exception notably left unmentioned in the opposing briefing):

> A municipal corporation may, by contract, curtail its right to exercise functions of a business or proprietary nature, *but, in the absence of express authority from the legislature*, such a corporation cannot surrender or contract away its governmental functions and powers, and any attempt to barter or surrender them is invalid. Accordingly, a municipal corporation cannot, by contract, ordinance, or other means, surrender or curtail its legislative powers and duties, its police power, or its administrative authority.

Marco Dev. Corp. v City of Cedar Falls, 473 N.W.2d 41, 42 (Iowa 1991) (quoting 62 C.J.S. *Municipal Corporations* § 139, at 281–82 (1949) (emphasis added)).[4] *See also Sycamore, LLC v. City Council of Iowa City*, 939 N.W.2d 121 (Table), 2019 WL 3716364 at *3 (Iowa Ct. App. Aug. 7, 2019) (contains the same language). The legislature is presumed to know existing case law when it enacts statutes, thus, if the legislature did not want to permit the joint sharing of powers under Chapter 28E, it would have said so. *Iowa Farm Bureau Fed. v. Env't. Protection Com'n*, 850 N.W.2d 403, 434 (Iowa 2014); *Aldrich v. Tracy*, 269 N.W. 30, 32 (Iowa 1936).

Moreover, the restriction the County and Landowners seek to impose on the operation of Chapter 28E is antithetical to the statute's very purpose. If many or most joint exercises of powers granted by the Legislature to municipalities are

[4] Interestingly, the County cited *Marco Development Corp*. in support of this argument it its brief. (County Br. Div. IV.A).

considered prohibited "delegations" of those powers to another entity, how can a 28E entity, or the members who formed it, jointly do anything? This signal legislation would be hollow were the Appellants' view adopted by this Court. *State v. Mathias*, 936 N.W.2d 222, 232 (Iowa 2019) ("We always look for an interpretation of a statute that is reasonable and avoids absurd results.") (citing *Colwell v. Iowa Dep't of Human Servs.*, 923 N.W.2d 225, 233 (Iowa 2019)).

None of this Court's precedents assist the Appellants. The defect in the Chapter 28E agreement in *Clarke Cty. Reservoir Comm'n v. Robins*, 862 N.W.2d 166 (Iowa 2015), was not that municipalities made an improper delegation to a 28E entity but rather that one of the members of that entity was a private, not public, agency. That destroyed the commonality of powers among the 28E members necessary for them to jointly exercise those powers. *Id*. at 176 ("We hold that a 28E entity with private members lacks the power of eminent domain."). Otherwise, the case law cited by the Appellants—most of which is archaic—does not even involve Chapter 28E.[5]

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[5] *See Kennedy v. Civil Srv. Comm'n of City of Council Bluffs*, 654 N.W.2d 511 (Iowa 2002) (challenge to civil service commission's delegation of authority over disciplinary hearings to a hearing officer); *Warren Cnty. Bd. of Health v. Warren Cnty. Bd. of Supervisors*, 654 N.W.2d 910 (Iowa 2002) (case involving county board of health delegation of its employment authority to board of supervisors); *Bunger v. Iowa High Sch. Athletic Ass'n*, 197 N.W.2d 555 (Iowa 1972) (case involving association's enactment of rule punishing student athletes for consuming alcohol); *Arkansas-Missouri Power Co. v. City of Kennett, Mo.*, 78 F.2d 911 (8th Cir. 1935) (Missouri case involving private electric company action to enjoin city's efforts to

Case law from other jurisdictions supports the position advanced by the Cities and SCRAA. First, in *Burbank-Glendale-Pasadena Airport Authority v. Hensler*, 83 Cal. App. 4th 556 (Cal. Ct. App. 2000), a case strikingly similar to this one, the court held that three cities could delegate their eminent domain powers in furtherance of relocating an airport. There, as here, a landowner seeking to avoid condemnation argued the cities could not delegate their eminent domain powers to a joint powers agency.

The court rejected that argument and held the cities could delegate their eminent domain powers pursuant to a joint powers agreement authorized by the California equivalent of Chapter 28E. *Id.* at 562. The court held particularly the airport authority, created under the joint powers agreement (like the 28E Agreement here), could exercise the eminent domain power derived from the member cities, each of which had the power of eminent domain. *Id.* at 563–64.

More recently, the Supreme Court of Nebraska likewise held that public agencies could jointly exercise their eminent domain powers under Nebraska's Interlocal Cooperation Act ("ICA") (like Iowa's Chapter 28E) to provide public

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construct and operate its own electrical facility); *Schneiders v. Town of Pocahontas*, 213 Iowa 807, 234 N.W. 207 (1931) (challenge to city ordinance granting franchise of private telephone company the use of city streets, alleys, and other public places for telephone purposes); *Snouffer v. Cedar Rapids & M. City R. Co.*, 118 Iowa 287, 92 N.W. 79 (1902) (case involving contract between city and private railroad company).

services and facilities. *Estermann v. Bose*, 296 Neb. 228, 892 N.W.2d 857 (2017). There, several natural resource districts (an "NRD") (each a political subdivision) entered into an agreement under the ICA to form a separate entity ("N-CORPE") which was charged to regulate and manage water. *Id.*, 892 N.W.2d at 862.

A landowner sought to enjoin the condemnation, arguing the ICA did not grant N-CORPE eminent domain powers and that the NRD members could not jointly exercise their powers.[6] *Id.*, 892 N.W.2d at 863, 868. Affirming summary judgment against the landowner, the court held governmental agencies are specifically authorized to jointly exercise their powers under the ICA. *Id.*, 892 N.W.2d at 868. Under Nebraska law, the NRD's were expressly granted the power of eminent domain, which may be exercised by N-CORPE under the ICA. Indeed, because each NRD member separately had the power of eminent domain, the court held the N-CORPE created by them could likewise exercise the powers of the underlying members. *Id.* Moreover, the Court held that by creating N-CORPE

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[6] The landowner argued the "Legislature did not specify in the ICA or elsewhere that an interlocal agency created pursuant to the ICA could have the power of eminent domain" and that "the only way an interlocal agency could have condemnation powers is if the Nebraska Legislature had included language in the ICA to the effect that all agencies created under the ICA have eminent domain power" and that "only the Legislature is capable of delegating the eminent domain power and that because the Legislature did not explicitly state that interlocal agencies . . . may have eminent domain power [that such agencies] do[] not have the power to exercise eminent domain." *Id.*, 892 N.W.2d at 868.

under the ICA, the member NRDs "did not lose any of the powers, privileges, or authorities that they separately held, including the power of eminent domain" and that, instead, "the powers, privileges, and authorities that the NRD's were capable of exercising separately could be exercised jointly with the other NRD's through the mechanism of their joint entity, N-CORPE." *Id*., 892 N.W.2d at 868–69.[7]

C. The Chapter 28E Procedures for Obtaining and Developing Property Are Consistent with Statutory and Constitutional Requirements.

1. To the Extent Condemnation is Necessary to Build the Regional Airport, the 28E Agreement Violates Neither Due Process Nor Iowa Eminent Domain Statutes.

The County argues that any exercise of eminent domain under the 28E Agreement violates the procedural due process rights of the affected landowners and the eminent domain procedures set forth in Iowa Code Chapter 6B. In essence, the County argues that the landowners have no right to be heard because SCRAA's condemnation decisions are foregone conclusions and that the landowners are

[7] Notably, the enabling statutes in Iowa and Nebraska are very similar. *Compare Estermann*, 892 N.W.2d at 867–68 (citing Neb. Rev. Stat. §13-802 (ICA purpose is "to permit local governmental units to make the most efficient use of their . . . powers by enabling them to cooperate with other localities on a basis of mutual advantage and thereby to provide services and facilities.")); *to* Iowa Code § 28E.1 (allowing political agencies to enter into agreement "to make efficient use of their powers by enabling them to provide joint services and facilities with other agencies and to cooperate in other ways of mutual advantage.").

deprived of a right to oppose condemnation before their elected representatives. (County Br. Div. IV.B). Constitutionally and statutorily, the County is just wrong.

To begin with, there is no pre-deprivation right to due process under Iowa's eminent domain regime. In upholding that regime against a procedural due process challenge, the Eighth Circuit stated:

> With regard to the requirements for the proper exercise of [eminent domain], in this circuit "it is well settled that a sovereign vested with the power of eminent domain may exercise that power consistent with the [C]onstitution without providing prior notice, hearing, or compensation, so long as there exists an adequate mechanism for obtaining compensation."

Rex Realty Co. v. City of Cedar Rapids, 322 F.3d 526, 528–29 (8th Cir. 2003) (quoting *Collier v. Springdale*, 733 F.2d 1311, 1314 (8th Cir. 1984)).[8]

Even if there were a constitutional right to pre-deprivation of due process in Iowa eminent domain proceedings, the landowners have that right available to them here. Iowa Code sections 6A.24 and 6B.3A authorize an action in district court to challenge a condemnation. That action likewise can be challenged at common law. *See Owens v. Brownlie*, 610 N.W.2d 860, 865–66 (Iowa 2000) (finding that injunction, mandamus, or certiorari "remedies give the condemnee a procedural

[8] *Rex Realty* was decided under the United States Constitution. The County does not claim, nor ask this Court to decide, that the Due Process Clause of Article I, Section 9 of the Iowa Constitution provides different rights in the context of eminent domain than its federal equivalent. Nor is there good reason to do so.

vehicle to promptly challenge the propriety of the condemnation, including the issue of whether the property sought to be condemned is necessary for public use"). *See also Rex Realty*, 322 F.3d at 529. In *Owens*, this Court rejected a procedural due process challenge to an exercise of eminent domain on this basis, finding that the availability of a district court challenge provided the condemnee any due process to which he was entitled.[9] *See also Rex Realty*, 322 F.3d at 529 (rejecting due process challenge to eminent domain in part on basis that plaintiff had, but did not use, the alternative of district court litigation before the deprivation).

The County is equally off the mark in claiming that an exercise of eminent domain to build the Regional Airport violates the requirements of Iowa Code Chapter 6B. This argument is, at best, premature. No need to begin condemnation proceedings has yet occurred, nor is it obvious that one ever will. Before condemnation can commence, there must be an attempt at a negotiated purchase of the property. *See* Iowa Code § 6B.2B. Nothing in the record suggests that any application for condemnation has been filed yet. Indeed, SCRAA has only began negotiating for voluntary purchases of property. Negotiations are ongoing, and it is uncertain which properties—if any—eminent domain would have to be exercised

[9] Note that *Owens* was decided without the benefit of the *Rex Realty* holding that there is no pre-deprivation due process right under Iowa's eminent domain scheme.

on. Because no condemnation proceedings have begun, the County is at best guessing when it alleges those proceedings will violate Chapter 6B.

Nonetheless, the County presses two arguments. First, on the assumption that SCRAA conducts the condemnation proceedings, the County argues that the public hearing provided by Iowa Code Section 6B.2A will be held in front of the wrong officials; it should, the County claims, be held before the landowners' "elected representatives," the Mahaska County Board of Supervisors. (County Br. Div. IV.B).

This argument is wrong. Nothing in Chapter 6B requires a public hearing before elected representatives. The public comment opportunity is simply to be before the "acquiring agency." *See* Iowa Code §§ 6B.2B, 6B.2D. An "acquiring agency" is defined as "the state of Iowa or any person or entity conferred the right by statute to condemn private property or to otherwise exercise the power of eminent domain." Iowa Code § 6B.1(2). That definition does not mandate that the acquiring agency officials who conduct the hearing be elected.

Moreover, the 28E Agreement provides two alternatives for the "acquiring agency." First, under that Agreement, eminent domain power may be exercised by SCRAA itself. Because, as argued above, *see supra* at 26–30, SCRAA may exercise eminent domain powers on its own by operation of Chapter 28E, it is an "entity conferred the right by statute" to exercise eminent domain powers. *Id.*

Alternatively, under the 28E Agreement, the condemnor could be the County. (App. p. 778 Art. X, § 1). In that case, the public hearing could indeed be held before the Board of Supervisors, exactly as demanded by the County here. But either situation is compliant with Chapter 6B.

The County's other argument is that any public hearing will be a "sham" because SCRAA has already made up its mind to acquire the property needed to build the Regional Airport. (County Br. Div. IV.B). Again, this argument is premature. Because it is unknown what parcels of land, if any, will need to be condemned, it is far too soon to say whether the acquiring agency—whether it is SCRAA or the County Board—will commit an actionable breach of its public duties when deciding about that condemnation.[10] The County's complaint about the eminent domain process is also a universal one, nonspecific to the Regional Airport. Any time eminent domain proceedings are commenced, some agency has made a decision that property should be condemned, and that agency has a predisposition to follow through with that process—that is why it is called an "*acquiring* agency." That truism does not equate to a violation of Chapter 6B.[11]

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[10] Similarly, there is no *a priori* reason to assume that, if the County is the acquiring agency, its representative on the SCRAA board, after the County holds the public hearing, would be unable to influence that Board's decisions about what land to condemn.

[11] The County's citation to *Taylor v. Drainage Dist. No. 56*, 167 Iowa 42, 148 N.W. 1040 (1914), for the proposition that the landowner is entitled to an impartial

The one case the County cites on this issue that involves this "sham" challenge to eminent domain is inapplicable to these facts. In *Redevelopment Agency v. Norm's Slauson*, 173 Cal. App. 3d 1121 (Cal. Ct. App. 1985), a city agency made a contract to transfer four specific lots to a private developer for the construction of a condominium complex and issued bonds to finance the acquisition of the lots, all before initiating condemnation proceedings. *Id*. at 1125. While the County cites this case for the proposition that a condemnation hearing with a predetermined outcome is illegal, that is not literally the basis upon which the Court upheld a finding that the agency had no right to condemn the property; instead the decision turned on a conventional finding that there was insufficient evidence to prove the elements to justify a taking of property. *Id*. at 1128–29. More importantly, however, in *Norm's Slauson*, the predetermined outcome involved a *specific property* that would be condemned at the outset. Here, by contrast, the 28E Agreement, at most, predetermined that the Regional Airport would be constructed. It did not predetermine exactly what parcels of property would be condemned, nor was it obvious at the time that such condemnation would ever occur. Later California cases

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tribunal is misleading. The impartiality referred to in *Taylor* concerned the condemnee's due process right to "compensation [that] is an essential element of due process of law," not the condemnee's ability to protest the fact of the condemnation. *Id.*, 148 N.W. at 1042.

have distinguished *Norm's Slauson* on that basis. *See, e.g., City of San Buenaventura v. Karno*, 2012 WL 5987533, at *4 (Cal. Ct. App. 2012).[12]

2. Chapter 28E Allows for the County to Agree to Exercise its Authority Over Roads and Zoning.

In addition to eminent domain, the County also argues that the 28E Agreement impermissibly forces the County to exercise its authority to close roads or make zoning changes as needed to permit the construction for the Regional Airport, without abiding by certain statutory procedures. (County Br. Div. IV.C).[13] The question is whether the County was capable in the 28E Agreement of delegating its powers over road location and zoning. Given the very broad sweep of Section 28E.3 ("*any* power or powers, privileges or authority exercised or capable of exercised by a public agency…"), the answer is plainly yes. There is nothing special about road location or zoning that makes it different from the delegation of eminent domain where, as here, that delegation is statutorily authorized under Chapter 28E.

The County cites no cases involving Chapter 28E or its equivalents in other states. The non-28E case of *Marco Development Corp.* does not support the

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[12] The other case cited on this issue by the County, *Dacy v. Village of Ruidoso*, 114 N.M. 699, 845 P.2d 793 (1992), does not deal with eminent domain at all and, like *Norm's Slauson*, deals with a city contractually making a zoning decision about a *specific property* rather than having options regarding properties.

[13] A couple of slight sentence fragments with no legal support notwithstanding, (County Br. Div. IV.C), there is no claim that constitutional rights are involved.

County's position. First, that case is distinguishable from this one because the delegation of authority was to a private entity, not to a cooperating public agency as here. *See Marco Dev. Corp*., 473 N.W.2d at 42. More importantly, the existence of Chapter 28E, which had no application to the facts in *Marco Development*, authorizes the delegation here. As noted above, the critical language in *Marco* stated that "*in the absence of express authority from the legislature*, such a [municipal] corporation cannot surrender or contract away its governmental functions and powers…" *Id*. at 42 (quoting 62 C.J.S. *Municipal Corporation's* § 139, at 281–82 (1949)). Here there is express authority from the Legislature.

Moreover, the hearing process provided in the Code for road relocations or vacations is not intended to give the public veto power over those decisions; rather it is to fix compensation for affected parties. That is why the only right of appeal from those proceedings is regarding the amount of damages awarded. *See* Iowa Code § 306.17.

D. The Mahaska County Board of Supervisors' Grant of Authority to the South Central Regional Airport Agency Does Not Impermissibly Limit the Authority of Future Boards.

The Appellants argue broadly that Chapter 28E agreements cannot be binding upon future elected bodies of the entities that entered into those agreements. (County

Br. Divs. V, VI; Landowners Br. Div. II.A).[14] Once again, the Appellants seek a drastic reduction on the force and effect of Chapter 28E that is unsupported by precedent in Iowa or elsewhere. Their argument also is inconsistent with what the Legislature intended when it enacted 28E.

It is difficult to imagine how a joint project among governmental entities, at least one involving the construction of infrastructure, could ever be completed if any one of those entities, on a whim, could torpedo the project by refusing to comply with its contractual obligations. Yet the Appellants have attempted to stretch the principle that existing legislative bodies ordinarily may not bind future legislative bodies as to policy matters into just that proposition. This case, in which the Mahaska County Board of Supervisors changed its mind, is a poster child for why the Appellants' view of the law would gut Chapter 28E.

A reading of Chapter 28E reveals that the Legislature, which is presumed to have adopted Chapter 28E with the principle cited by the Appellants in mind, *Iowa Farm Bureau Federation*, 850 N.W.2d at 434; *Aldrich*, 269 N.W. at 32, did not intend the results Appellants seek here.[15] First, a legislative body that enters into a

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[14] Again, the County's argument is spread across two brief points, here Divisions V. and VI., but essentially the same argument is made in both places.

[15] The legal principle on which the County bases this argument well predates the 1966 enactment of Chapter 28E. *See, e.g.*, County Br. at 65–66 (citing *City of Humboldt v. Knight*, 120 N.W.2d 457 (Iowa 1963); *Tuttle Bros. & Bruce v. City of Cedar Rapids*, 176 F. 86 (8th Cir. 1910)).

Chapter 28E agreement does not erase the possibility that a future body can act differently on the matter, it instead *delegates* that possibility. Pursuant to the broad delegation of authority in Section 28E.3, it is now SCRAA that has the ability to change outcomes or undo decisions, not one of the constituent members of SCRAA. The Legislature specifically contemplated this in another section:

> No agreement made pursuant to this chapter shall relieve any public agency of any obligation or responsibility imposed upon it by law *except* that to the extent of actual and timely performance thereof by a joint board or other legal or administrative entity created by an agreement made hereunder, *said performance may be offered in satisfaction of the obligation or responsibility*.

Iowa Code § 28E.7 (emphasis added). In other words, to the extent that future legislative bodies must retain the authority to review the enactments of past ones, that review by SCRAA occurs "in satisfaction of the obligation or responsibility." *Id.*

Other parts of Chapter 28E also refute the constraint pressed by the Appellants. First, Section 28E.14 provides that "[a]ny contract or agreement authorized by this chapter shall not be limited as to period of existence, except as may be limited by the agreement or contract itself." Were subsequent decisions of constituent members of a Chapter 28E consortium automatically considered to be constraints on the durations of contracts, this section would not exist. This shows the Legislature intended contracts pursuant to Chapter 28E to be durable. Likewise, Chapter 28E requires every agreement formed under the chapter to explicitly state

the duration. Iowa Code § 28E.5(1).[16] If 28E Agreements can terminate following subsequent elections of governing boards for 28E consortium members, why then would the Code require a duration be stated? The Appellants' argument would impermissibly render various portions of the Chapter 28E superfluous. *See State v. Pickett*, 671 N.W.2d 866, 870 (Iowa 2003).

It is telling—indeed, perhaps, dispositive—that here the Appellants do not cite a single case involving Chapter 28E or its equivalent in another state. That is crucial because, in the signal case trumpeted by the Appellants, this Court expressly carved an exception in the rule they rely on for statutory authorizations from the Legislature. *See Marco Dev.*, 473 N.W.2d at 42 ("A municipal corporation may, by contract, curtail its right to exercise functions of a business or proprietary nature, but, in *the absence of express authority from the legislature*, such a corporation cannot surrender away its governmental functions and powers, and any attempt to barter or surrender them is invalid.") (emphasis added). Iowa Code Chapter 28E is exactly the kind of delegation referred to by this Court.

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[16] The Landowners argue that the 28E Agreement is unenforceable because it has an indefinite duration. (Landowners Br. Div. III). However, the 28E Agreement does have a date in which it will end: the date the Regional Airport ceases operation. App. p. 780 Art. XIII, § 2.) Section 28E.5 does not, by its express terms, require an exact date for when an agreement formed pursuant to Iowa Code Chapter 28E is to expire. Instead, it only requires the parties provide a "duration." Iowa Code § 28E.5(1). The Landowners provide no authority (or explanation for that matter) why no duration was provided in the 28E Agreement here.

By contrast to the inapposite and often outdated Iowa authority relied on by the Appellants, cases from other states involving joint actions agreements under statutes like Chapter 28E find that those agreements do not transgress any legislative principle about binding successor bodies. *See Terminal Enters., Inc. v. Jersey City*, 54 N.J. 568, 258 A.2d 361, 365–66 (1969) (in reviewing statute similar to 28E, held: "The first allegation—that the defendants have illegally obligated themselves to legislate in the future—is based upon two theories, i.e., that defendants had neither the authority to contract away their police powers nor the power to bind the hands of future city and county officers. *Initially, it should be noted that the officers of a municipal corporation may limit by contract their own police powers as well as those of their successors where the agreement is authorized by statute.*") (emphasis added, citations omitted); *Public Hosp. Dist. No. 1 of King Cty. v. University of Washington*, 182 Wash. App. 34, 327 P.3d 1281, 1285–86 (2014).

E. For Municipalities to "Jointly Exercise" Their Powers Under Iowa Code Chapter 28E, the Municipalities Need Only be Able to Generally Exercise the Power Within Their Jurisdiction.

Despite the broad language and purpose of Iowa Code Chapter 28E, the County argues that Iowa municipalities can only "jointly" exercise their powers if each and every party to the agreement could *individually* carry out that *same* power to accomplish the project the agreement involves. (County Br. Div. VII). So, for example, the County contends that the Parties can jointly exercise eminent domain

powers to construct the Regional Airport only if each of the Parties could *individually* condemn the *same* property for that airport themselves. This constricted interpretation of Chapter 28E is legally unsupported and would effectively destroy the Legislature's purpose in enacting the statute.

The flaw in the County's position starts with the text of Chapter 28E:

> Any power or powers, privileges or authority exercised or capable of exercise by a public agency[17] of this state *may be exercised and enjoyed jointly with any other public agency of this state having such power or powers, privilege or authority, and jointly with any public agency of any other state or of the United States to the extent that laws of such other state or of the United States permit such joint exercise or enjoyment*. Any agency of the state government when acting jointly with any public agency may exercise and enjoy all of the powers, privileges and authority conferred by this chapter upon a public agency.

Iowa Code § 28E.3 (emphasis added). Chapter 28E thus permits a municipality in Iowa to *jointly* exercise its powers with other Iowa municipalities (or with municipalities in other states or the federal government). But the County's position begs this question: If Chapter 28E can only be used if each individual member can individually carry out the purpose of the agreement on its own, what are the *joint* powers that Chapter 28E enables? There are none.

Thus, the powers under Chapter 28E are contemplated to extend beyond a municipality's jurisdiction, so long as the municipality is able to *generally* exercise

[17] Iowa Code Chapter 28E defines "public agency" to mean, "political subdivision of this state; any agency of the state government or of the United States; and any political subdivision of another state." Iowa Code § 28E.2(2).

those powers within its borders. Consider, for example, an agreement in which Des Moines and West Des Moines decided to construct a bike trail along the shores of the Raccoon River, and each performed work on the parts of the trail within its borders. They share costs, construction scheduling, etc., but they never set foot in the other's land. This action would simply be a unilateral exercise of each City's powers and there would be no need for Chapter 28E. This effort would be "coordinated," perhaps, or "shared," but it would not be "joint."

The text of section 28E.3 both says too much and too little to support the County's interpretation. It says too much because, under the County's interpretation, words like "powers," "authority," and "jointly" would need to be replaced by much less expansive and enabling terms. *See Petition of Chapman*, 890 N.W.2d 853, 857 (Iowa 2017) ("To determine legislative intent, we look at the words the legislature chose when it enacted the statute.") (citing *Ramirez-Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 770 (Iowa 2016)). The County's interpretation makes the expansive terms chosen by the Legislature impermissibly superfluous. *See id.*, 890 N.W.2d at 857 (citing authority).

Likewise, section 28E.3 says too little to support the County's interpretation because if the Legislature meant to confine the joint exercise of powers in a Chapter 28E Agreement to those powers exercisable only within the borders of particular municipalities, it would have said so. *See Ramirez-Trujillo*, 878 N.W.2d at 770

("[W]e look to the language chosen by the legislature and not what the legislature might have said.") (citing *Schadendorf v. Snap-On Tools Corp.*, 757 N.W.2d 330, 337 (Iowa 2008)).

The reading of Chapter 28E that the Cities and SCRAA advance is simple and consistent with the text of Chapter 28E: If each party to a 28E Agreement has the general authority to exercise a certain power within its borders (e.g., the power to relocate roads), it may exercise that power jointly with other parties to the 28E Agreement, so long as each other party may exercise that power in general terms. *See* Iowa Code §§ 28E.1, .3–.4.

Despite the County's suggestion otherwise, no authority from this Court supports the County's attempts to hobble the joint powers in Chapter 28E agreements. In particular, *Goreham v. Des Moines Metro. Area Solid Waste Agency*, 179 N.W.2d 449 (Iowa 1970), which broadly *upheld* Chapter 28E against a variety of constitutional and other challenges, does not support the County's argument. In *Goreham*, Polk County was found, before the Legislature authorized otherwise, to be precluded from participating in aspects of the 28E agreement in question because it *did not in general possess the same power* as the other 28E members to issue general revenue bonds. *Id.* at 461–62. In the instant case, by contrast, the relevant powers are all equally and generally possessed by the SCRAA members; it was the absence of that parity that created the issue in *Goreham*.

Such parity was likewise lacking in *Clark Cnty. Reservoir Commission*, 862 N.W.2d at 169, 175–77, because one member of the 28E consortium was a private entity that lacked the pertinent power, eminent domain. The facts in *Barnes v. Department of Housing and Urban Development*, 341 N.W.2d 766 (Iowa 1983), are even more different. In that case the question of common powers was not presented at all because neither the 28E agency nor the relevant constituent participant (the City of Hampton) had complied with a substantive housing statute requiring city council approval for the project in question. *Id*. at 767–68.

By contrast, when the exact objection lodged by the County was presented to the California Supreme Court under a joint-action statute with pertinent language materially identical to that in section 28E.3,[18] that court rejected the challenge and authorized the joint exercise of the powers:

> In substance, [the auditor] urges that the statute above referred to authorizing the joint exercise by municipalities of powers 'common' to them does not contemplate or permit the joint exercise of powers that may be separately or independently exercised by them, but only permits of the joint exercise of powers already possessed in common. *Such a construction of the statute is strained and would render it meaningless. In other words, if municipalities possessed a power in common there would be no need for a statute authorizing their joint exercise.* The statute means nothing if it does not mean that cities may contract in effect to delegate to one of their number the exercise of a

[18] "Section 1 thereof, among other things, provides that two or more municipalities 'by agreement entered into respectively by them and authorized by their legislative bodies, may jointly exercise any power or powers common to the several contracting parties.'" *City of Oakland v. Williams*, 15 Cal. 2d 542, 103 P.2d 168, 171 (Cal. 1940) (internal citations removed).

> power or the performance of an act in behalf of all of them, and which each independently could have exercised or performed.

City of Oakland v. Williams, 15 Cal.2d 542, 103 P.2d 168, 171 (Cal. 1940) (emphasis added). The court found that California's equivalent to Chapter 28E "grants no new powers but merely sets up a *new procedure* for the exercise of existing powers." *Id*., 103 P.2d at 172 (emphasis added). So, it is with Chapter 28E itself. Likewise, there would have been a different result in *Burbank-Glendale-Pasadena Airport Authority* and *Estermann v. Bose*, *see supra* at 30–32, under the eminent domain regime argued for by the County.

II. IOWA CODE CHAPTERS 330 AND 330A POSE NO BARRIER TO THE DEVELOPMENT OF THIS REGIONAL AIRPORT.

The County claims that the 28E Agreement is invalid because it does not comply with the provisions of Iowa Code Chapters 330 and 330A regarding airports. (County Br. Div. III).[19] However, there are more than two ways to build an airport in Iowa. Despite its lengthy arguments, the County almost entirely missed the boat—okay, missed the plane—on the governing legal framework. The issue is not, as the County claims, whether the 28E Agreement must comply with Iowa Code Chapters 330 and/or 330A, but rather, whether that Agreement is *preempted* by the

[19] The Landowners' slight mention of Chapters 330 and 330A, (Landowners Br. Div. II.A), is also subsumed in this division.

two Chapters. No such preemption exists. Chapters 330 and 330A are irrelevant to this case.

This Court recognizes "three types of preemption"—express preemption, implied-field preemption, and implied-conflict preemption. *Hensler v. City of Davenport*, 790 N.W.2d 569, 85 (Iowa 2010) (citations omitted). "Express preemption occurs where the legislature has explicitly prohibited local action in a given area." *Madden v. City of Iowa City*, 848 N.W.2d 40, 49 (Iowa 2014) (citation omitted). Implied-field preemption occurs "when the legislature has so covered a subject by statute as to demonstrate a legislative intent that regulation in the field is preempted by state law." *Hensler*, 790 N.W.2d at 585 (quotation omitted). Implied-conflict preemption occurs when a resolution or ordinance "conflicts with a statute." *Madden*, 848 N.W.2d at 49. None of these preemption doctrines prevent municipalities from jointly exercising their home rule authority to construct and operate an airport pursuant to Chapter 28E.

A. Iowa Code Chapters 330 and 330A Do Not Expressly Preempt Iowa Code Chapter 28E from Being Used to Construct the Regional Airport.

A reading of Chapters 330 and 330A shows that they do not expressly preempt the 28E Agreement. Rather, the chapters are two options that a joint enterprise *may* choose to follow. Indeed, Chapter 330 states:

> Agreements between [municipalities] for joint exercise of any powers relating to airports *may* provide for the creation and establishment of a

> joint airport commission which, when so created or established, shall function in accordance with the provisions of sections 330.17 to 330.24 *insofar as provided by said agreements*.

Iowa Code § 330.4 (emphasis added). In other words, the statute simply says that this Chapter *may* be chosen, and if so, one must comply with the Chapter's provisions. However, the Chapter *does not* state that this Chapter *must* be chosen. The statutory term "may" is "usually permissive." *Kopecky v. Iowa Racing and Gaming Comm'n*, 891 N.W.2d 439, 443 (Iowa 2017). Absent a clear expression of intent to the contrary, use of the term "may" is construed to provide a non-exclusive power or remedy. *See Ferguson v. Exide Technologies, Inc.*, 936 N.W.2d 439, 433 (Iowa 2019); Iowa Code § 4.1(30) ("The word 'may' confers a power"). Chapter 330A is equally optional in its application, stating:

> 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.

Iowa Code § 330A.3 (emphasis added). The County conveniently ignores both of these sections. It simply concludes that because Chapters 330 and 330A relate to the construction of airports, they must be controlling. However, nowhere did the Legislature expressly state that Chapters 330 and 330A constitute the only manner in which municipalities may jointly exercise their home rule authority to construct and operate an airport. In fact, Chapter 330A expressly states the contrary:

> *The powers conferred by this chapter shall be in addition and supplemental to any other law and this chapter shall not be construed*

> *so as to repeal any other law*, except to the extent of any conflict between the provisions of this chapter and the provisions of any other law, in which event the provisions of this chapter shall be controlling and shall, to the extent of any such conflict, supersede the provisions of any other law.

Iowa Code § 330A.17 (emphasis added). Indeed, Chapter 330A was enacted *after* Chapter 28E. *See* Acts 1965 (61 G.A.) ch. 83; Acts 1969 (63 G.A.) ch. 216.

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." (County Br. III.A). 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. If it were the Legislature's intent that Chapters 330 and 330A controlled a 28E agreement to build an airport, it would have said so somewhere. *See State v. Veach*, 630 N.W.2d 598, 600 (Iowa 2000) ("legislative intent is expressed by what the legislature has said, not what it could or might have said….Intent may be expressed by the omission, as well as the inclusion, of statutory terms") (internal citations removed). However, it did not.

The County presents *Barnes* as controlling. While not willing to admit that the legal issue is preemption, the County nonetheless argues that *Barnes* shows that the Parties' 28E Agreement must be "tethered and bound" to an underlying statute, in this case, Chapters 330 and 330A. The County misinterprets *Barnes*.

In *Barnes*, the City of Hampton and the United States Department of Housing and Urban Development (HUD) formed a regional housing authority pursuant to Chapter 28E for the purpose of converting a former hospital for use as a housing project. *Id.* at 767. The plaintiff argued the housing authority—even though formed under Chapter 28E—must still comply with Chapter 403A ("Municipal Housing Projects"), and specifically its requirement that any housing recommendation first be approved by a "majority of *the* local governing body". *Id.* (citing Iowa Code § 403A.5). The housing authority—which did not receive such approval—argued it was not a "municipal housing agency" formed under Chapter 403A, and thus, Chapter 403A.5 had no application. *Id.*

The Court agreed with the plaintiff. *Id.* Its holding, however, was based on statutory language not found in Chapters 330 and 330A:

> A municipality *or* a municipal housing agency may not proceed with a housing project until a study or a report and recommendation on housing available within the community is made public by the municipality or agency and is included in its recommendations for a housing project. Recommendations must receive majority approval from the local governing body before proceeding on the housing project.

Iowa Code § 403A.5(6) (emphasis added). This requirement applies to both a "municipal housing agency" *and* any "municipality" itself. *Barnes*, 341 N.W.2d at 768. As a result, a municipality's home rule power to construct a housing project is necessarily limited by Chapter 403A.5, whether acting through a "municipal housing

agency", pursuant to Chapter 28E, or by itself. *Id.* Further, unlike Chapters 330 and 330A, Chapter 403A expressly states its intent that the statute to govern and control matters relating to municipal housing projects: "The provisions of this chapter shall be controlling, notwithstanding anything to the contract contained in any other law of this state, or local ordinance." Iowa Code § 403A.24. Because the City itself "did not have the power to complete a housing project without council approval", neither could the Chapter 28E housing authority, of which it was a member. *Barnes*, 341 N.W.2d at 768.

Barnes does not hold, as the County claims, that "28E is not a substantive statute but merely a vehicle to jointly implement other statutes". (County's Br. Div. III.A). Rather, it holds only that a Chapter 28E entity cannot exercise powers its members do not otherwise already have. By contrast—and as explained in greater detail below—neither Iowa Code Chapter 330 nor 330A have any clause indicating they are the controlling authority on the ability for an Iowa city or county to construct an airport. Iowa Code Chapter 28E is clear that only those powers actually enjoyed by all parties can be jointly exercised. Iowa Code § 28.3.

The County's other cases are likewise unavailing. *See Goreham*, 179 N.W.2d at 455–56 (holding only that "Chapter 28E does not attempt to delineate the various governmental or proprietary functions which the individual governmental units may be implementing…[I]t is not unconstitutional so long as the cooperating units are

not exercising powers they do not already have."); *Clarke Cnty. Reservoir Comm'n*, 862 N.W.2d at 176 (holding that entity created under Chapter 28E could not exercise eminent domain because party to 28E Agreement was a private entity which did not enjoy eminent domain powers, but saying nothing about 28E needing to comply with and be bound to underlying statute). Other authority cited by Plaintiff does not even involve Chapter 28E.[20] Express preemption does not apply in this case.

B. Implied-Field Preemption Does Not Prohibit the Parties' Use of Chapter 28E to Construct the Regional Airport.

For implied-field preemption to apply, "there must be some clear expression of legislative intent to preempt a field from regulation by local authorities, or a statement of the legislature's desire to have uniform regulations statewide." *Hensler*, 790 N.W.2d at 585 (quotation omitted). Even "extensive regulation in a certain field is not enough." *Id.* at 585–86 (citation omitted). Rather, "there must be *persuasive concrete evidence* of an intent to preempt the field in the language that the legislature actually chose to employ." *Id.* (quotation omitted) (emphasis added). Here, there is no evidence—let alone "persuasive concrete evidence"—of a legislative intent to preempt the field relating to the ways in which municipalities

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[20] *See Lewis Consol. Sch. Dist. of Cass Cnty. v. Johnston*, 127 N.W.2d 118 (Iowa 1964) (case involving challenge to decision to remove a school district form list of approved schools thereby preventing school district from collecting state funds to fund school).

may jointly exercise their home rule authority to construct and operate an airport. *Madden*, 848 N.W.2d at 49.

Indeed, the legislature has provided municipalities with home rule authority to construct airports. Iowans amended their Constitution in 1968 and 1978 to include its "home rule amendments." IOWA CONST., Art. III, §§ 38A, 39A. "The purpose of the home rule amendment[s] was to give local government the power to pass legislation over its local affairs subject to the superior authority of the legislature." *Mall Real Estate, L.L.C. v. City of Hamburg*, 818 N.W.2d 190, 195 (Iowa 2012) (quotation omitted). This principle is reaffirmed in the Code:

> The enumeration of a specific power of a city does not limit or restrict the general grant of home rule power conferred by the Constitution of the State of Iowa. A city may exercise its general powers subject only to limitations expressly imposed by a state or city law.

Iowa Code § 364.2(2).

> The enumeration of a specific power of a county, the repeal of a grant of power, or the failure to state a specific power does not limit or restrict the general grant of home rule power conferred by the Constitution and this section. A county may exercise its general powers subject only to limitations expressly imposed by a state law.

Iowa Code § 331.301(3).

Prior to the adoption of the home rule amendments, Iowa followed the "Dillon Rule," which declared that "municipalities were creatures of the legislature and had only those powers expressly granted by the legislature." *City of Davenport v. Seymour*, 755 N.W.2d 533, 538 n.1 (Iowa 2008). An express grant of power to

municipalities to construct and operate airports was provided by the version of Code Chapter 330 then in effect:

> Powers. Cities and towns shall have the right to acquire, establish, improve, maintain and operate airports, either within or without their corporate limits, and either within or without the territorial limits of this state.

Iowa Code § 330.2 (1946).

> Powers extended. All powers herein conferred upon and granted to cities and towns are hereby specifically extended and granted to and conferred upon all other political subdivisions within this state, including villages, townships, and counties.

Iowa Code § 330.3 (1946). Following passage of the home rule amendments, these provisions were repealed. *See* Acts 1972 (64 G.A.) ch. 1088, § 263; Acts 1981 (69 G.A.) ch. 117, § 1097.

Since the home rule amendments have gone into effect, municipalities "ordinarily have the power to determine local affairs as they see fit unless the legislature has provided otherwise." *Madden*, 848 N.W.2d at 49. Because the legislature intended for municipalities to have home rule authority to construct and manage airports, it is clear that the legislature did not intend that Chapters 330 and 330A would "occupy" the entire field for municipality airport construction and prohibit other avenues from being used to construct airports. Implied-field preemption does not apply.

C. Implied-Conflict Preemption Does Not Prohibit the Parties' Use of Chapter 28E to Construct the Regional Airport.

Finally, implied conflict preemption is also not applicable. The home rule amendments grant municipalities "home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have power to levy any tax unless expressly authorized by the general assembly." IOWA CONST., Art. III, §§ 38A, 39A. The exercise of such powers, however, "is not inconsistent with a state law unless it is irreconcilable with the state law." Iowa Code §§ 331.301(4), 364.2(3). "In order to be 'irreconcilable,' the conflict must be obvious, unavoidable, and not a matter of reasonable debate." *Madden*, 848 N.W.2d at 49 (internal quotation omitted). *See also, e.g.*, *Green v. City of Cascade*, 231 N.W.2d 882, 890 (Iowa 1975) (defining "inconsistent with state law" to mean "incongruous, incompatible, irreconcilable" or "impossible to make consistent or harmonious"). In applying implied-conflict preemption, courts are to "interpret the state law in such a manner as to render it harmonious with the ordinance." *Madden*, 848 N.W.2d at 49 (internal quotation omitted). Where a municipality's actions are not "irreconcilable" with state law, "it is permitted exercise of home-rule authority." *Id.*

Here, the proper construction of Chapters 330, 330A, and 28E are plainly "a matter of reasonable debate," and any conflict between and amongst these statutory provisions is not "unavoidable." *Madden*, 848 N.W.2d at 49 (internal quotation

omitted). The construction proposed by the Cities and SCRAA—that Chapters 330 and 330A provide two, non-exclusive ways for municipalities to cooperate in the creation and operation of an airport, and that Chapter 28E provides another—is plainly reasonable and avoids the unnecessary conflict the County seeks to create. The County cannot point to any express statutory language or a "clear expression of legislative intent" to the contrary. The statutory provisions can be interpreted "in such a manner as to render [them] harmonious" with the Parties' 28E Agreement. *Madden*, 848 N.W.2d at 49 (internal quotation omitted). Indeed, the County cannot point to any express statutory language or a "clear expression of legislative intent" to the contrary. As a result, the Parties' 28E Agreement and the formation of SCRAA to effectuate the purpose of that agreement is plainly not "irreconcilable with the state law." Iowa Code §§ 331.301(4), 364.2(3). Implied-conflict preemption is inapplicable.

III. THERE IS NO CONSTITUTIONAL VIOLATION OF THE "ONE PERSON-ONE VOTE" PRINCIPLE.

The Landowners contend that the 28E Agreement violates the Equal Protection Clause of the United States Constitution because the City of Pella and the City of Oskaloosa have more members on the SCRAA Board of Directors than the County does, which the Landowners assert violates the "one person, one vote" principle. (Landowners Br. Div. III). The Landowners' argument is meritless.

The equal protection guarantee of "one person, one vote" is simply not applicable to the SCRAA Board. It is well-established that the "one person, one vote" standard does not apply to government-related boards filled through *appointment*. *Sailors v. Bd. of Educ. of Kent Cnty.*, 387 U.S. 105, 111, 87 S.Ct. 1549, 18 L.Ed.2d 650 (1967) (stating "the principle of 'one [person], one vote' has no relevancy" to challenge to composition of board of education because board membership was filled through appointment, rather than public voting); *Hadley v. Junior Coll. Dist. of Metropolitan Kansas City, Mo.*, 397 U.S. 50, 58, 90 S.Ct. 791, 25 L.Ed.2d 45 (1970) ("[W]here a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not 'represent' the same number of people does not deny those people equal protection of the laws."). The Landowners practically concede that the "one person, one vote" standard does not apply, stating "[t]he Landowners admit that the SCRAA board is appointed rather than elected." (Landowners' Br. at 45). Accordingly, since "one person, one vote" does not apply, there is no violation of the Equal Protection Clause. *E.g.*, *Ehm v. Bd. of Trs. of Metro. Rapid Auth. of San Antonio*, 251 Fed.Appx. 930, 932 (5th Cir. 2007).

Even if the Equal Protection Clause were applicable, the Landowners' claim would still fail, as the allocation of SCRAA board members has a rational basis. "Rational basis" review applies to most equal protection claims, unless the

classification at issue relates to alienage, race, ancestry, gender, etc. *See, e.g.*, *Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 681, 132 S.Ct. 2073, 182 L.Ed.2d 998 (2012).[21] An equal protection claim fails under rational basis review "so long as there is a plausible policy reason for the classification, the legislative facts on which the classification is apparently based rationally may have been considered to be true by the governmental decision maker, and the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational." *Goings v. Chickasaw Cnty., IA*, 523 F.Supp.2d 892, 918 (N.D. Iowa 2007). A policy reason is "plausible" if "there is any reasonably conceivable set of facts that could provide a rational basis" for it. *Armour*, 566 U.S. at 681.

Here, there is a rational basis for why Mahaska County has less representation on the SCRAA Board of Supervisors than the Cities: The County is not contributing *any* money for the Regional Airport. The Cities fund everything. The relevant provision of the Agreement states:

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[21] Strict scrutiny generally applies when a suspect classification (alienage, race, and ancestry) or a fundamental right is at issue. *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 312, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976). Under a "strict scrutiny" analysis, the government action fails unless the government can show the action has been narrowly tailored to serve a compelling government interest. *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985). Intermediate scrutiny applies to "suspect classifications," specifically gender and illegitimacy. *E.g. Finley v. Astrue*, 601 F.Supp.2d 1092, 1103 (E.D. Ark. 2009). Under this standard, the government action must be substantially related to an important government objective. *Clark v. Jeter*, 486 U.S. 456, 461, 108 S.Ct. 1910, 100 L.Ed.2d 465 (1988).

> Section 6. Allocation of Construction Cost: Construction expenditures not funded by the Federal Aviation Administration shall be allocated as follows:
>
> City of Oskaloosa 50%
>
> City of Pella 50%

(App. p. 777 Art. VII, § 6). Accordingly, the Landowners' claim fails.

IV. THE DISTRICT COURT ERRED IN DENYING THE CITIES' MOTION FOR SUMMARY JUDGMENT ON MAHASKA COUNTY'S COUNTERCLAIM.

The District Court's February 4, 2019 Ruling wrongly denied the Cities' Second Motion for Summary Judgment, relating to the County's Counterclaim for breach of contract, which alleges that the Cities breached the 28E Agreement by "requiring" the County to "close or abandon" roads, when the 28E Agreement only permits roads to be "relocated." (App. pp. 109-110). The Court denied the Motion, finding that whether the Cities "are requiring road closure based upon the proposed plans" was a fact question. (App. p. 228). The District Court's Ruling was in error, and must be reversed.

The elements for a breach of contract claim are well-established:

> (1) the existence of a contract; (2) the terms and conditions of the contract; (3) that [Mahaska County] has performed all the terms and conditions required under the contract; (4) [Pella's and Oskaloosa's] breach of the contract in some particular way; and (5) that [Mahaska County] has suffered damages as a result of the breach.

Iowa Arboretum, Inc. v. Iowa 4-H Found., 886 N.W.2d 695, 706 (Iowa 2016) (quoting *Iowa Mortgage Ctr., L.L.C. v. Baccam*, 841 N.W.2d 107, 110–11 (Iowa 2013)). However, the County cannot possibly show it has satisfied the final three elements.[22] Accordingly, the District Court's Ruling must be reversed.

First, it is undisputed that Mahaska County breached the 28E Agreement by attempting to unilaterally withdraw from it and by removing its member from the SCRAA Board. The County does not dispute that these actions violate the terms of the 28E Agreement. Instead, the County focuses on having the lawful 28E Agreement found void.

Second, the Cities have not breached the 28E Agreement. As of July 1, 2013, the Mahaska County Board of Supervisors had indicated that closing 220th Street was likely acceptable. (App. p. 179). The Mahaska County Board of Supervisors' minutes reflected that they understood that Mahaska County was "required by the 28E agreement to address the roadway issue." (App pp. 180-181). But, on June 17, 2017, the Mahaska County Board of Supervisors attempted to remove themselves from the Agreement. (App. pp. 819-820). By June 20, 2017, the Mahaska Board of Supervisors had notified its representative on the SCRAA Board that Mahaska

[22] The County's counterclaim also contradicts its own position, as on the one hand, the County argues repeatedly that the 28E Agreement is unlawful and void, but on the other hand, argues that the Cities breached it. The County cannot have it both ways.

County "no longer had a seat on the board and that [Warrick] was relieved of his duties." (App. p. 821).

As a matter of law, Pella and Oskaloosa have not breached the contract because Mahaska County took the nuclear option by trying to withdraw from the Agreement to avoid its obligation to cooperate in good faith with Pella and Oskaloosa regarding road relocations. Mahaska County's representatives had not presented 220th Street as an unsurpassable hurdle to the airport project. (*See* App. pp. 202-211). The closure of 220th Street had been raised as an issue, but Mahaska County had been working with the SCRAA to come up with mitigation options regarding 220th Street. (App. p. 212-215). The parties had indicated that they hoped to keep communication open in the upcoming year, and offered to meet with Mahaska County to conduct work sessions or provide reports. (App. p. 212). Pella and Oskaloosa cannot breach the Agreement by failing to address a problem that they believed was in the process of being resolved.

Finally, the County cannot show any damages. It is black-letter law that the damages must arise from the alleged breach and have been in the contemplation of the parties when the contract was made. *See Royal Indemn. Co. v. Factory Mut. Ins. Co.*, 786 N.W.2d 839, 847 (Iowa 2010). If the party cannot prove damages, the claim for breach of contract fails as a matter of law. *See NevadaCare, Inc. v. Dep't*

of Human Servs., 783 N.W.2d 459, 468 (Iowa 2010) (denying plaintiff's breach of contract claim based on inclusion of data where breach caused no damage).

Here, the 28E Agreement permits roads to be closed, stating:

> Best Efforts: Each Party agrees to cooperate in good faith with the Board and the other Parties, exercise diligence in performing its obligations hereunder, and use its best efforts to carry out the provisions of this Agreement. In addition, Oskaloosa and Pella agree to work with Mahaska County in good faith *to resolve road relocations which may be required*.

(App. p. 776 Art. XII, § 1) (emphasis added). "[R]oad relocations" is not defined in the 28E Agreement; however, Merriam-Webster's Dictionary defines "relocation" to mean, "to move to a new location." *Relocation*, Merriam-Webster's Dictionary (11th ed. 2003). This shows that "road relocations," as used in the Agreement, expressly allows for the closure of roads. In order for a relocation to occur, the thing itself must be moved. A thing cannot be said to have "moved to a new location" if it still remains in its prior location. In other words, for a "relocation" to occur, the road must be closed at its original position.

It is undisputed that the portion of 220th Street to be disconnected is exclusively within Mahaska County's control. Neither Pella nor Oskaloosa have any control over the road. As such, Plaintiffs have no power to compel Mahaska County to close 220th Street. Thus, Plaintiffs cannot be found to have breached the Agreement as a matter of law.

Further, the County itself expressly stated that it would close 220th Street in a letter sent to the SCRAA Board, stating:

> Upon completion of the required environmental documentation and a favorable environmental determination from the Federal Aviation Administration, *Mahaska County will disconnect 220th Street* to accommodate development of the proposed airport.

(App. p. 179) (emphasis added). This letter also shows the County is basing its breach of contract claim on conduct that it previously informed SCRAA that it was willing and able to do.

In other words, the County's counterclaim is based upon conduct that is permitted under the terms of the 28E Agreement. Even if it were not, the Cities have no power to compel the County to close the road. Accordingly, the County cannot be said to have suffered any damages. Its counterclaim therefore fails as a matter of law. *See NevadaCare*, 783 N.W.2d at 468. The district court's ruling must be reversed.

CONCLUSION

For all of the reasons stated above, the shotgun-like and sometimes shrill attack by the Appellants on the scope and operation of Chapter 28E in general, and on the Parties' 28E Agreement in particular, should be rejected. The rulings of the district courts in these consolidated appeals granting summary judgment regarding the enforceability of the 28E Agreement should be affirmed. The ruling of the district court in the County case denying summary judgment to the Cities on the

County's counterclaim should be reversed, and judgment on that counterclaim should be entered for the Cities as a matter of law.

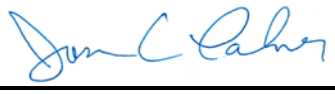
REQUEST FOR ORAL ARGUMENT

This is self-evidently a very complex appeal that raises substantial issues concerning local government in Iowa. It is puzzling that neither the County nor the Landowners think this appeal is worthy of oral argument. The City of Pella and the City of Oskaloosa see things differently and request the opportunity to present oral argument on the issues raised by this appeal.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

1. This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this Brief contains 13,290 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 Microsoft Word 2010 in 14 point, Times New Roman.



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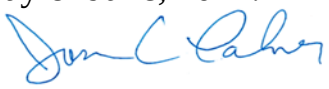
CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of Defendants-Appellants' Final Brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon the following persons by EDMS on the 1st day of June, 2021.



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