BEFORE THE IOWA SUPREME COURT

No. 20-1323

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

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

CONSOLIDATED APPEAL FROM THE DISTRICT COURT
OF MAHASKA COUNTY (Case No. CVEQ088856)
Hon. Crystal Cronk
and
FROM THE DISTRICT COURT
OF MAHASKA COUNTY (Case No. EQEQ006593)
Hon. Shawn Showers

APPELLANT SITE A LANDOWNERS' 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 public importance. Iowa R. App. P. 6.1101(2)(c) and (d).

STATEMENT OF THE CASE

This combined appeal addresses the validity of an Iowa Code Chapter 28E agreement entered into between Mahaska County ("the County") and the Cities of Pella and Oskaloosa (collectively "the Cities") for the creation of the South Central Regional Airport Agency ("SCRAA") to develop and operate a regional airport in rural Mahaska County.

The 28E agreement purports to irrevocably and indefinitely delegate to SCRAA the County's legislative and police powers of eminent domain, location of its secondary roads, and zoning. (App. pp. 765-786). The delegation is indefinite in that it purports to bind the County "for the life of the Airport Facility." (App. p. 780). The delegation is irrevocable because the Cities' representatives constitute five of the six voting members on SCRAA—the County has just one vote despite the fact it has roughly the same number of constituents as each of the Cities—such that the Cities can compel the County

against its will to exercise its legislative powers through SCRAA. (App. pp. 765-786).

The Cities sought to do just that by suing the County in Case No. EQEQ088387 ("the Cities case"), asking the District Court to declare illegal the County's attempt to withdraw from SCRAA and reclaim its delegated legislative and police powers because the County's actions were done without the Cities' approval. (App. pp. 12-21). The County resisted and brought a counterclaim requesting the Court declare the contract illegal and void. (App. pp. 339-375).

Site A Landowners ("the Landowners") is an unincorporated nonprofit association whose members are constituents of Mahaska County and whose land has been designated by SCRAA for the airport site (and identified by SCRAA as "Site A"). The Landowners sought to intervene in the Cities case. (App. pp. 111-113). The Cities resisted the intervention, arguing the Landowners "can file a Petition for Declaratory Judgment . . . [which] will allow [the Landowners] to present their case…" (App. p. 888). The District Court acknowledged the Landowners "own land on or near the proposed [airport] site," and "that private landowners affected by this 28E agreement have more at stake in their own land [than other citizens]", but denied the

intervention on a "close call" because the likelihood of condemnation depended on whether "Mahaska County remains in the 28E agreement," as would be determined in that litigation. (App. pp. 154-159).

The District Court ultimately ruled against the County in Case No. EQEQ006593 (*see* App. pp. 225-231 (2/5/19 Ruling on 2d MSJ, which the County appealed)), at which point the Landowners brought a declaratory judgment action in Case No. CVEQ 088856, asking the Court to enjoin SCRAA and the Cities from exercising eminent domain powers to acquire land within Site A, and to declare the 28E agreement an illegal delegation of the County's legislative and police powers, and a violation of the equal protection clause. (App. pp. 675-687).

The County joined the Landowners' position, and the parties submitted cross-motions for summary judgment. Though the Cities and SCRAA did not move for summary judgment on the Landowners' standing (only a passing reference was made to its standing on page 61 of the Cities' reply brief), the District Court ruled *sua sponte* that the Landowners lacked standing to bring its claims until "the creation of the regional airport move[d] forward at Site A." (App. p. 661). The

District Court also denied the County's motion for summary judgment, and granted the Cities' cross-motion for summary judgment.

The Landowners filed a motion to enlarge or amend the District Court's ruling, highlighting a recorded deed showing SCRAA had already acquired land within Site A under threat of eminent domain, and asked that the District Court, in light of its *sua sponte* ruling on standing, consider additional evidence that the creation of the airport had moved forward at Site A. (App. pp. 1065-1072). The District Court denied the motion and declined to consider the additional evidence, and the Landowners and the County appealed the District Court's rulings. (App. pp. 1077-1083).

The County's appeals in Case Nos. EQEQ006593 and EQEQ 088856 were consolidated with the Landowners' appeal in Case No. CVEQ 088856 under supreme court no. 20-1323 by order of the Iowa Supreme Court on December 18, 2020.

STATEMENT OF FACTS

At the heart of this case is a proposed regional airport, to be located in rural Mahaska County, that has been the subject of controversy for well over a decade now. An early proposal for the airport was overwhelmingly rejected by popular vote (1614 to 447) in 2005. (App. p. 497). In 2012, though, the County and Cities entered into an Iowa Code Chapter 28E agreement in an attempt to bind the County in delegating its legislative and police powers of eminent domain, zoning, and road location to a regional airport authority (SCRAA) for the creation of the proposed airport. (App. pp. 765-786). SCRAA has six voting members—one from the County, two from Oskaloosa, and three from Pella. (App. pp. 237, 427). With their majority voting position in SCRAA, the Cities would effectively control the County's delegated legislative and police powers for purposes of the proposed airport.

The voters of Mahaska County responded by voting out the supervisors who entered into the 28E agreement (the "Ousted Board") and voting in supervisors who opposed the proposed airport (the "Current Board"), resulting in a series of resolutions by which the

Current Board sought to reclaim the County's legislative and police powers that the Ousted Board had purported to delegate to SCRAA through the 28E agreement, to wit:

- "In 2013, Mahaska - through its Board of Supervisors - voted to remove its eminent domain power from the SCRAA. *** Both Oskaloosa and Pella denied this proposed amendment to the agreement." (App. pp. 805-810).
- On January 17, 2017, through Resolution Number 2017-05, Mahaska - by its Board of Supervisors - voted to amend the Agreement to remove Mahaska (itself) as a party to the Agreement." Once again, the Cities denied the amendment. (App. pp. 814-815).
- "On June 19, 2017, through Resolution Number 2017-12, Mahaska- by its Board of Supervisors - again voted to amend the Agreement to remove Mahaska (itself) as a participant and to terminate the Agreement. *** Again, the governing boards of Pella and Oskaloosa again rejected this request." (App. pp. 819-820).
- "On April 1, 2019, the County formally rejected the plan approved in the Environmental Assessment. After withdrawing its consent for the proposal, Mahaska County demanded the Cities provide it a new plan to mitigate the closure of a portion of 220th Street." (App. p. 241) (5/22/20 County's MSJ App. p.27).

In response to the Current Board's actions, the Cities sued the County in June 2017 for breach of contract in case no. EQEQ0006593, and subsequently amended their petition to address the County's continuing efforts to withdraw from the 28E agreement. (App. pp. 234-254).

The chosen location of the airport at Site A is not in serious dispute. On May 23, 2012, "[a]fter a comprehensive review, SCRAA selected Site A as the best location for the construction of the Regional Airport. See Ex. D, Resolution Designating Site A as the Preferred Location for the Regional Airport."[1] (App. pp. 756 & 758, ¶¶ 30 & 39; App. p. 787). "This action was taken after the preparation and approval of an Environmental Assessment, approving Site A as the location for the Regional Airport to be constructed." (App. pp. 756 & 758, ¶¶ 30 & 39; App. p. 787). On March 25, 2020, SCRAA acquired land within Site A by warranty deed indicating "[t]his acquisition is for public purpose through an exercise of the power of eminent domain." (App. p. 1053) (Ex. attached to Landowners' 7/20/20 reply brief).

SCRAA has also sent letters to individuals and entities owning land within Site A, providing notice of its intent to acquire that land by eminent domain. (App. p. 224) (12/13/18 Exhibit AA to Defendants' Responses to Mahaska County's Statement of

[1] This allegation was denied only to the extent the Cities had taken inconsistent positions on this issue. Both the Landowners and the County took the affirmative position in their pleadings that Landowners' members owned and farmed agricultural land on the site identified by SCRAA for the airport. (App. p. 675, 688 & 892) (Landowners' Pet. ¶ 9 filed 8/13/19; County's Ans. at ¶ 9 filed 11/7/19; Landowners' SUF at ¶¶ 54, 55 filed 6/12/20).

Undisputed Material Facts in support of Summary Judgment)[2]. The opening paragraph of the notice stated: "Under the provisions of Chapter 6B of the Iowa Code, a governmental body which proposes to acquire agricultural land under power of eminent domain for a public improvement project is required to give notice of its intent to commence the project to all owners and record contract purchasers of uch agricultural land whose properties may be acquired in whole or in part for the project." *Id.* The notice went on to provide information regarding a scheduled public hearing "giving persons interested in the proposed project the opportunity to present their views and objections regarding the Project and proposed acquisition of agricultural property for the Project by eminent domain." *Id.*

SCRAA's May 2020 meeting minutes reflect its continued action based on its 2013 resolution designating Site A "as the primary site for the proposed South Central Regional Airport." (App. pp. 1073-1074).[3]

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[2] This document does not appear to have been a part of the Landowners case, but is part of this consolidated appeal, and is cited as still further evidence of the fact that Site A has been selected for the airport and SCRAA has taken affirmative steps toward acquiring land within Site A for this purpose.

[3] This evidence was submitted by Plaintiff in its motion to enlarge or amend on 10/2/20.

Site A Landowners' members are residents of rural Mahaska County who farm and own land within Site A. (App. pp. 893, ¶¶ 54, 55, and App. p. 894 - Rempe Aff.). SCRAA has actively contacted Landowners and its representatives for the purpose of acquiring their land for the airport. (App. pp. 893-894). Jack Rempe is a member of Landowners and testified in support of the Landowners' motion to intervene in case no. EQEQ0006593 "that his family was not going to sell the land he farms on or near the proposed airport site if the airport is constructed." (App. p. 154). The Landowners seek by this action to protect their farms, their rights to due process and equal protection, and their rights to a representative board of supervisors not bound indefinitely by the Ousted Board's unlawful delegation of powers.

ARGUMENT

I. The Landowners Have Standing to Challenge the 28E Agreement Because Their Land is Within the Designated Airport Site.

Scope of Review / Preservation of Error. "Generally, we review a district court's ruling on summary judgment for correction of errors at law. When the summary judgment was on a constitutional issue, however, our review is de novo." *Weizberg v. City of Des Moines*, 923

N.W.2d 200, 211 (Iowa 2018). Error was preserved on this issue as it was presented to and ruled upon by the District Court. (App. p. 1077).

A. The Landowners' Likelihood of Injury Was Sufficiently Demonstrated for Standing Purposes.

The elements of standing are "that a complaining party must (1) have a specific personal or legal interest in the litigation and (2) be injuriously affected." *Citizens for Responsible Choices v. City of Shenandoah*, 686 N.W.2d 470, 475 (Iowa 2004). Iowa law only requires "a likelihood of injury" to be shown. *Iowa Bankers Ass'n v. Iowa Credit Union Dep't*, 335 N.W. 2d 439, 445 (Iowa 1983). "A party need not demonstrate injury will accrue with certainty, or already has accrued." *Id.* (citing *City of Des Moines v. Public Employment Relations Board*, 275 N.W.2d 753, 759; *Interstate Broadcasting Co. v. Federal Communications Commission*, 285 F.2d 270, 272-73 & n.1); *Hall v. Planning Commission*, 435 A.2d 975, 976 (1980)).

The District Court erred when it ruled that the Landowners' "possible injury" of their land being condemned for the airport is "hypothetical, as nothing has been finalized regarding the airport site." (App. p. 1054). The Landowners' likelihood of injury was established by the fact that SCRAA had specifically identified Site A as the location for the airport, that SCRAA had in fact acquired land

within Site A under threat of eminent domain for this purpose, and that SCRAA or its representatives have contacted the Landowners' members for purposes of acquiring their land for the airport.

The District Court incorrectly relied almost exclusively on the absence of a signature on the formal resolution selecting Site A adopted by SCRAA. This reliance was in error first because SCRAA itself admits that Site A has been formally selected. (App. p. 179). Second, in light of the facts set forth above (*i.e.,* SCRAA's actual acquisition of land within Site A under threat of eminent domain), the lack of formal adoption of that particular resolution should not convert the Landowners' likelihood of injury into speculation.

Interpreting this requirement of "likelihood of injury," the Iowa Court of Appeals found plaintiffs to have standing to challenge the establishment of an urban renewal district which was necessary to implement the defendant county's plan of eventually creating a TIF district. *Brueggeman v. Osceola County*, 902 N.W.2d 591 (Iowa Ct. App. 2017). In that case, the court held that the plaintiffs had standing because the creation of the TIF district was "at least likely": "the adoption of the resolution creating the urban renewal area was part of an overall plan to create a TIF district, which was imminent, or

at least likely, at the time the plaintiffs filed their petition." *Id.* at 598 (citations omitted). The court further stated, "Because the defendants had to first pass Resolution 10-15/16 in order to create the TIF district, and it was likely Ordinance No. 47 would pass and the resulting specific harm would occur, the plaintiffs have standing to bring their challenge to the resolution." *Id.*

The analysis in *Brueggeman* is analogous to the instant case, where SCRAA has identified Site A for purposes of establishing the airport, resulting in the likelihood of eminent domain proceedings to acquire the necessary land within Site A. This evidence should, alone, be enough to establish standing to seek this declaratory judgment. The fact that SCRAA has in fact acquired land within Site A under threat of eminent domain puts the Landowners' standing well beyond the standard set forth in *Brueggeman*.

The instant case is also like *Sierra Club Iowa Chapter v. Iowa Dept. of Transp.*, 832 N.W.2d 636 (Iowa 2012), where the Sierra Club Iowa Chapter filed for declaratory judgment stating that Iowa Department of Transportation (IDOT) failed to comply with highway statutes regarding environmental protection and natural preservation when IDOT decided to locate highway adjacent to one nature preserve

and through a second preserve. *Id.* at 648-49. The Iowa Supreme Court held the issue was ripe for adjudication, even though actual building of highway was contingent on future funding, because the IDOT had committed funds to obtain right-of-way and for wetland mitigation at chosen location, and the group and its members would suffer hardship by postponing judicial action given that IDOT was actively obtaining right-of-way necessary for highway. *Id.* Here, like *Sierra Club Iowa Chapter*, SCRAA has dedicated resources and actually acquired land for purposes of the designated project, and Landowners would suffer hardship if judicial action was postponed in light of these actions.

The fact that the Landowners are challenging a government contract bolsters its standing. As the Iowa Supreme Court held in *Erickson v. City of Cedar Rapids*, 185 N.W. 46, 50-51 (Iowa 1921), "courts are always empowered to investigate and determine" legality of public contracts. Even under *Godfrey v. State*, 752 N.W. 2d 413 (Iowa 2008), cited by the District Court, a litigant challenging governmental action "must still demonstrate some personal injury connected with the alleged unconstitutional act." As a group whose members own land within Site A, where SCRAA undisputedly intends

to construct the airport and has in fact acquired land for that purpose, the Landowners have shown "some personal injury" in this matter.

As the Iowa Supreme Court has noted, "declaratory-judgment actions are peculiarly appropriate in controversies between the citizen and state. . . . Possibly in no branch of litigation is the declaration more useful than in the relations between the citizen and the administration. With the growing complexity of government and the constantly increasing invasions of private liberty, with ever widening powers vested in administrative boards and officials, the occasions for conflict and dispute are rapidly augmenting in frequency and importance. . . . [T]he individual, threatened by the imposition of governmental demands and requirements . . . may put to the test the legality of the restriction without risking the penalties of disobedience or the hazards and expense of injunction." *Lewis Consol. Sch. Dist. v. Johnston*, 127 N.W.2d 118, 122 (1964) (citations omitted).

Here, the record reveals much more than a bare intention by SCRAA to construct the regional airport on Site A. Taken together, these facts establish a clear likelihood that SCRAA will attempt to acquire land owned by the Landowners' members through eminent

domain. The District Court thus erred in denying the Landowners' standing to bring this action.

B. Landowners' Additional Evidence Should Have Been Considered.

In denying the Landowners' standing, the District Court declined to consider additional evidence offered by the Landowners as part of its motion to enlarge or amend in light of the District Court's *sua sponte* standing ruling. These exhibits included meeting minutes of the SCRAA and a resolution approved, as noted in the minutes, referencing the selection of Site A "as the primary site for the proposed South Central Regional Airport." (App. pp. 1073-1074). Also included in the exhibits were excerpts from the SCRAA Airport Master Plan and a list of Site A Landowners for the SCRAA Land Acquisition Site.

The District Court refused to consider this evidence, relying on the principle that new evidence is generally not permitted as part of a motion to enlarge or amend. *See McKee v. Isle of Capri Casinos, Inc.*, 864 N.W.2d 518, 525 (Iowa 2015) ("**Generally speaking**, a party cannot use a rule 1.904(2) motion to introduce new evidence.) (emphasis added) (citation omitted). However, the Landowners' submission of additional evidence was not an attempt to correct an

omission from earlier briefing on an issue properly raised. Instead, the Landowners were forced to submit this evidence in this way due to the District Court's *sua sponte* ruling on standing. As the District Court acknowledged, standing was the subject of the Cities' or SCRAA's motions for summary judgment—it was only "briefly mentioned by the Cities on page 61 of their reply brief." (App. p. 1062 9/18/20 ruling, pg. 9).

The Landowners should have been given a chance to directly respond to the District Court's *sua sponte* concerns regarding standing. *See Stewart Title Guar. Co. v. The Candle Co.*, 74 F.3d 835, 837 (7th Cir. 1996) ("We have found that *sua sponte* dismissals without [the opportunity to respond] conflict with our traditional adversarial system principles by depriving the losing party of the opportunity to present arguments against dismissal and by tending to transform the district court into a proponent rather than an independent entity. In addition, such dismissals often create avoidable appeals and remands, draining judicial resources and defeating the very purpose for which *sua sponte* actions are employed.") (internal quotations and citations omitted).

This standard has been recognized in state proceedings as well as in United States Supreme Court decisions. *See Tarver v. IRS*, 2016 Ohio 3199, 2016 WL 3032741 (Ohio App. 2d Dist. 2016) ("We do agree that the trial court has the right, if not the duty, to satisfy itself that it has jurisdiction before deciding a case on the merits. However, once the trial court sua sponte raises the question of its jurisdiction, the trial court should give notice of the court's intention to dismiss and an opportunity to respond.") (citation omitted); *Day v. McDonough*, 547 U.S. 198, 210 (2006) ("Of course, before acting on its own initiative, a court must accord the parties fair notice and an opportunity to present their positions.") (citations omitted); *Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 271 (2015) ("To be sure, the District Court had an independent obligation to confirm its jurisdiction, even in the absence of a state challenge. But, in these circumstances, elementary principles of procedural fairness required that the District Court, rather than acting *sua sponte*, give the Conference an opportunity to provide evidence of member residence.") (citations omitted); *Warth v. Seldin*, 422 U.S. 490, 502 (1975) ("At the same time, it is within the trial court's power to allow or to require the plaintiff to supply, by amendment to the complaint

or by affidavits, further particularized allegations of fact deemed supportive of plaintiff's standing. If, **after this opportunity**, the plaintiff's standing does not adequately appear from all materials of record, the complaint must be dismissed.") (emphasis added).

The Landowners were not given the opportunity to respond to the District Court's standing concerns and were thus forced to present evidence through its motion to enlarge or amend. Therefore, this situation does not fall within the "general" principle prohibiting the submission of new evidence under Rule 1.904(2). The Landowners' additional evidence should have been considered by the District Court. *See Bank of Am., N.A. v. Schulte*, 843 N.W.2d 876, 879 n.1 (Iowa 2014) ("The pleading was not a proper rule 1.904(2) motion. . .. However, the motion's content clarified its aim. After all, we treat a motion by its contents, not its caption.") (internal quotations omitted).

The District Court's refusal to consider the Landowners' additional evidence was incorrect. This additional evidence should have been considered and further supports the Landowners' standing, as the evidence provides further proof that SCRAA intends to

construct the airport on Site A, and acquire the Landowners' land to do so.

C. Alternatively, Fact Issues Precluded Summary Judgment.

At a minimum, the facts identified above generate a genuine issue of material fact as to the likelihood of SCRAA proceeding to acquire land within Site A, making summary judgment improper. "[I]f the movant for a summary judgment fails to sustain the burden placed upon him of establishing by evidentiary matter the absence of a genuine issue, the granting of a motion for summary judgment is not appropriate irrespective of any deficiency in the opposing party's" response. *Daboll v. Hoden*, 222 N.W.2d 727, 735 (Iowa 1974); *Mead v. Lane*, 203 N.W.2d 305, 307 (Iowa 1972). The District Court erred in granting the Cities' motion for summary judgment in view of these genuinely disputed facts.

II. The 28E Agreement Is Illegal and Unenforceable Because It Irrevocably Delegates the County's Legislative and Police Powers.

Preservation of Error and Standard of Review.

"Generally, we review a district court's ruling on summary judgment for correction of errors at law. When the summary judgment was on a constitutional issue, however, our review is de

novo." *Weizberg v. City of Des Moines*, 923 N.W.2d 200, 211 (Iowa 2018). Error was preserved on this issue as it was briefed and argued to District Court, though the District Court declined to fully examine these issues based on its denial of Landowners' standing. (*See, e.g.*, Landowners' Memo. of Auth. in Support of Mot. for Summ. Jdgmt. filed 6/12/20, pp.9-18). *See Lamasters v. State*, 821 N.W.2d 856, 863 (Iowa 2012) (error is preserved if the court is at least aware of the arguments and any "motion raising the court's failure to decide a purely legal issue . . . would preserve error"); *see also IBP, Inc. v. Burress,* 779 N.W.2d 210, 218 (Iowa 2010) (holding appellate court may, "in the interest of sound judicial administration," decide legal issues fully briefed and argued, even if the district court did not reach them).

Argument.

A. Counties Cannot Delegate or Divest Legislative Powers from Future Boards of Supervisors.

The Cities assert that, through their votes on the SCRAA, they can require Mahaska County to condemn whatever property selected by the SCRAA, rezone property when directed by the SCRAA, and close roads designated by the SCRAA, all based on the terms of the 28E agreement. *See* Art. X, § 1; Article XII, § 1. The Cities are correct

that, by its terms, the 28E agreement purports to delegate these powers to SCRAA. *See, e.g.,* App. p. 433 ("the SCRAA also may acquire real property . . . by the use 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 . . .") and App. pp. 464, 483 ("[I]f Mahaska County elects not to close 220th Street (or any other road) necessary to allow for construction of the Regional Airport, Mahaska County would be in breach of the 28E Agreement.")

But the delegation of such core legislative and police powers is unlawful. Eminent domain is a core legislative function. *Lewis Investments, Inc. v. City of Iowa City*, 703 N.W.2d 180, 185 (Iowa 2005); *Ermels v. City of Webster City*, 71 N.W.2d 911, 913 (Iowa 1955) (condemning for airports is legislative decision). Similarly, "zoning determinations are a legislative function." *Residential & Agric. Advisor Comm., LLC v. Dyersville City Council*, 888 N.W.2d 24, 40 (Iowa 2016); *Bowen v. Story Cty. Bd. of Sup'rs*¸ 209 N.W.2d 569, 571 (Iowa 1973) ("Zoning is an exercise of police power and the legislative authority under which a governmental unit acts is to be strictly construed. A statutory requirement of public hearing prior to

a zoning change is mandatory and jurisdictional."). Road decisions are likewise legislative functions. *Marco Development*, 473 N.W.2d at 43 ("Its proposed street widening was clearly a legislative function").

This purported delegation of Mahaska County's legislative and police powers to SCRAA, or the equivalent contractual commitment to carry out any directive given by the SCRAA under threat of breach, is illegal for at least two reasons.

First, such delegation is simply not permitted by Iowa Code Chapter 28E. The Iowa Supreme Court has made this exact point in the context of a 28E Agreement: "Only the legislature has the authority to delegate the power of eminent domain, and the members of the Commission cannot grant or delegate their own powers of eminent domain to the Commission but, rather, may only exercise their individual powers jointly." *Clarke Cnty. Reservoir Comm'n v. Abbot*, 862 N.W.2d 166, 176 (Iowa 2015) (citations omitted) (emphasis added); *see also Herman v. Bd. of Park Comm'rs of City of Boone*, 206 N.W. 35, 36 (Iowa 1925) ("the power of eminent domain is vested in the state and it can be exercised by the city only as such power is expressly delegated"). In the cases where such delegation is permissible at all: when a political subdivision delegates power, it

must be "free to revoke or change [the] delegation of power" by "the same type of procedures that created the delegation." *Warren Cty. Bd. of Health v. Warren Cty. Bd. of Supervisors*, 654 N.W.2d 910, 914 (Iowa 2002).

Here, the County is not voluntarily exercising its police and legislative powers jointly; instead, the Cities seek to force the County to use those powers at the will of the Cities (in view of their majority voting position in SCRAA) and against the County's express objections.

Second, the 28E Agreement purports to bind future Mahaska County Boards of Supervisors because it does not permit Mahaska County to ever withdraw from the agreement without the consent of each of the Cities. Under the terms of the 28E Agreement, each of the Cities individually retains the power to veto Mahaska County's attempt to withdraw from the agreement. (App. p. 779).

As mentioned above, five of the six members of the SCRAA are chosen by the Cities. Therefore, the decision on whether to withdraw from the 28E agreement, whether to condemn or rezone property in Mahaska County, which property to condemn, and when to condemn have all been taken away from the Mahaska County Board of

Supervisors. As such, the County is effectively a legislative hostage to the 28E agreement.

In this way, the 28E agreement violates the axiom that one legislative body cannot tie the hands of future legislative bodies on such matters. *See, elg., Board of Educ. v. Bremen Township Rural Indep. School Dist.*, 260 Iowa 400, 408, 148 N.W.2d 419, 424 (1967) and affirmed in *Marco Development Corp. v. City of Cedar Falls*, 473 N.W.2d 41, 43-44 (Iowa 1991) (stating "[n]o citation of authority is needed for the proposition that one legislature cannot bind future legislatures upon . . . policy matters . . . The same rule applies to boards or other groups properly delegated legislative authority."); *see also Tuttle Bros & Bruce v. City of Cedar Rapids*, 176 F. 86 (8th Cir. 1910) (applying Iowa law to find legislative bodies "may not lawfully circumscribe the legislative powers of their successors.").

This principle is based on the "general political philosophy that government is a creature of the people, and that the people have a right to retain control of political policy decisions by replacing a legislature which has acted against their interest with a new legislature which can repeal unpopular laws." 1977 Iowa Op. Att'y Gen. 106 (1977).

The statutory structure for establishing regional airports, found at Iowa Code chapters 330 and 330A, mirrors this principle. For example, Iowa Code Chapter 330A, which creates airport authorities, requires each municipality to have the authority to freely withdraw as long as no debt is owed by the municipality. Iowa Code § 330A.7(1). Under Iowa Code Chapter 330, governing airport commissions, such a commission cannot be created solely by a resolution or ordinance passed by a municipal legislature. Rather, the commission must receive an affirmative vote by the voters of the municipality. Iowa Code §330.17. If that occurs, then the commission can only be dismantled through a subsequent public vote. *Id.*

Here, the 28E Agreement violates these well established principles because it purports to bind future Mahaska County Boards of Supervisors by prohibiting Mahaska County from ever withdrawing from the agreement without the consent of each of the Cities. For these same reasons, the 28E agreement violates public policy. The 28E agreement should be declared illegal accordingly.

B. The Landowners Are Not Barred from Raising These Claims by *Res Judicata*.

The Cities may argue here, as they did below, that the Landowners are barred from raising these claims based on the

District Court's grant of summary judgment to the Cities in their separate lawsuit against Mahaska County. That argument should be rejected.

First, the Cities should be judicially estopped from making any such argument as they resisted the Landowners' efforts to intervene in the other proceeding, arguing that the Landowners "can file a Petition for Declaratory Judgment . . . [which] will allow [the Landowners] to present their case . . ." However, when the Landowners did exactly that by filing this Petition for Declaratory Judgment, the Cities argued below that its claims were barred by issue preclusion.

Judicial estoppel "is a 'common sense' rule, designed to protect the integrity of the judicial process by preventing deliberately inconsistent and potentially misleading assertions from being successfully argued in succeeding tribunals." *Wilson v. Liberty Mut. Group*, 666 N.W.2d 163, 166 (Iowa 2003). Therefore, the doctrine "prohibits a party who has successfully and unequivocally asserted a position in one proceeding from asserting an inconsistent position in a subsequent proceeding." *Id.* (internal quotations and citations omitted). Here, the Cities have taken deliberately inconsistent

positions. In the prior proceeding, the Cities argued that the Landowners should not be allowed to intervene because it "can file a Petition for Declaratory Judgment . . . [which] will allow [the Landowners] to present their case." Here, they argue the opposite – the Landowners cannot "present their case" because the Cities argue the Landowners are bound by the interlocutory summary judgment decision in the prior proceeding. This is the precise type of conduct that is prohibited by the doctrine of judicial estoppel.

Second, *res judicata*, whether under claim preclusion or issue preclusion, does not apply to the Landowners' claims because the ruling in the other proceeding was an interlocutory, partial summary judgment decision. *See City of Johnston v. Christenson,* 718 N.W.2d 290, 297 (Iowa 2006) *(quoting State v. Seager,* 571 N.W.2d 204, 208 (Iowa 1997)).

Third, the Landowners are not a party to the prior case, as a direct result of the Cities' opposition to the Landowners' attempts to intervene. The "desire to prevent repetitious litigation of what is essentially the same dispute" must be weighed against the "desire not to deprive a litigant of an adequate day in court." *Thompson v. Stephenson*, 332 N.W.2d 341, 344 (Iowa 1983) (*quoting* Restatement

(Second) of the Law of Judgments, § 27, at 252). Considering the Cities' opposition to the Landowners' effort to intervene in the prior case and their claim of issue preclusion in this case, the Landowners can draw no other conclusion than that the Cities are actively trying to deprive the Landowners "of an adequate day in court." This is especially troubling considering the Cities' representations in its opposition to the Landowners' effort to intervene, including that the Landowners had "no legal right or interest" that would be "directly impacted by" the prior litigation and that the Landowners "can file a Petition for Declaratory Judgment . . . [which] will allow [the Landowners] to present their case . . ." (County's MSJ Appx. filed 5/22/20 at 130-31, 171).

Fourth, the denial of the Landowners' attempt to intervene in the prior proceeding also precludes efforts to bind the Landowners to determinations in that proceeding. *See Estate of McFarlin ex rel. Laass v. City of Storm Lake*, 277 F.R.D. 384, 393 (N.D. Iowa 2011) (analyzing and applying Iowa law in ruling that "Because joinder of McFarlin's claims with those of the existing plaintiff is barred by this court's denial of his motion to intervene, the defendants may not preclude him from arguing their negligence in a later proceeding.").

Because the Landowners have "not yet had an opportunity to litigate [its] claims in any forum," denying the Landowners from their day in court "would be a more serious injustice" than any concerns underlying the claim of res judicata. *Lyons v. Andersen*, 123 F. Supp. 2d 485, 501 (N.D. Iowa 2000) (analyzing and applying Iowa law). In *Lyons*, the court noted that the plaintiff had not resisted efforts to consolidate his claims with the other proceeding. *Id.* The court also noted, as here, that the plaintiff "will present their case differently from the way [the previous plaintiff] presented her case." *Id.*

Finally, while the Landowners do raise some similar arguments as the prior litigation, it is not "so connected in interest with [Mahaska County] as to have had a full and fair opportunity to litigate the relevant claim or issue and be properly bound by its resolution." *Opheim v. Am. Interinsurance Exch.*, 430 N.W.2d 118, 120 (Iowa 1988) (*quoting Aid Ins. Co. (Mut.) v. Chrest*, 336 N.W.2d 437, 439 (Iowa 1983). This is a requirement to apply the doctrine of issue preclusion against a nonparty to the prior action. *Id.* Under this element, the "appropriate focus" is on whether the interest of the party sought to be precluded is "sufficiently connected" to the interest of the party that litigated the matter in the prior proceeding. Here,

Mahaska County and the Landowners have different interests. Mahaska County is seeking to obtain its governmental powers back after an unlawful delegation, and the Landowners' interest is in preventing SCRAA from condemning its members' land. As such, these interests are not sufficiently connected to justify the application of issue preclusion against a party who was prevented from participating in the prior case by the Cities.

III. The 28E Agreement is Void Because Its Term is Indefinite.

The 28E agreement's term is indefinite because, under Article XIII, Section 2, the duration of the agreement "shall extend for the life of the Airport Facility." (App. p. 780). Further, the 28E Agreement does not permit Mahaska County to ever withdraw from the agreement without the consent of each of the Cities.

This is illegal because Iowa Code § 28E.5(1) requires all 28E agreements to specify their duration: "Any such agreement shall specify the following: (1) Its duration." Defining the term of the 28E Agreement to be equal to the life of the to-be-created airport facility creates an indefinite term. As a result, the 28E Agreement is illegal because it violates Iowa Code § 28E.5.

III. The 28E Agreement Violates the Landowners' Right to Equal Protection.

Preservation of Error and Standard of Review.

"Generally, we review a district court's ruling on summary judgment for correction of errors at law. When the summary judgment was on a constitutional issue, however, our review is de novo." *Weizberg v. City of Des Moines*, 923 N.W.2d 200, 211 (Iowa 2018). Error was preserved on this issue as it was briefed and argued to District Court, though the District Court declined to fully examine these issues based on its denial of Landowners' standing. (*See, e.g.*, Landowners' Memo. of Auth. in Support of Mot. for Summ. Jdgmt. filed 6/12/20, pp.9-18). *See Lamasters v. State*, 821 N.W.2d 856, 863 (Iowa 2012) (error is preserved if the court is at least aware of the arguments and any "motion raising the court's failure to decide a purely legal issue . . . would preserve error"); *see also IBP, Inc. v. Burress,* 779 N.W.2d 210, 218 (Iowa 2010) (holding appellate court may, "in the interest of sound judicial administration," decide legal issues fully briefed and argued, even if the district court did not reach them).

Argument.

The 28E Agreement violates the Equal Protection Clause of the U.S. Constitution. As established in the 28E Agreement, voters in Mahaska County have a vanishingly small say on the governing board of the SCRAA (1 vote out of 6) compared with the approximately 68% of the constituents served by SCRAA living in Mahaska County. While this disproportionate representation should be enough to constitute a violation of the Equal Protection Clause, the Cities' conduct is particularly egregious. The Cities' are attempting to ram through a municipal construction project in rural Mahaska County, including acquiring the property by eminent domain, relocating roads, and rezoning land, all over the objection of the Mahaska County voters (including the Landowners' members), Board of Supervisors, and representative on the SCRAA governing board. If Mahaska County had been given proportionate representation, as the U.S. Constitution requires, the will of the voters could be honored, instead of moving forward with this sham of a board.

The United States Supreme Court has aptly explained that the right to vote is a fundamental right enjoyed by all citizens and the weight of one's vote should not be lessened: "The personal right to

vote is a value in itself, and a citizen is . . . shortchanged if he may vote for only one representative when citizens in a neighboring district, of equal population, vote for two." *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 698 (1989). A violation of the "one man, one vote" principle even at the local government level is per se unconstitutional, as a violation of the Equal Protection Clause. *Id.* at 692. Here, not only do the voters of Pella get to choose three times as many representatives to the SCRAA board, through their elected officials, but they have less than half of the population of Mahaska County. Therefore, a voter in Pella has six times the power of a voter in rural Mahaska County. This violates the Equal Protection Clause.

This principle of "one man, one vote" was held to apply to local governmental bodies representing separate districts:

> [T]he Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as practicable, that **equal numbers of voters can vote for proportionally equal numbers of officials**.

Id. at 693 (internal quotations omitted) (emphasis added).

The Landowners admit that the SCRAA board is appointed rather than elected. *See Sailors v. Bd. of Ed. of the City of Kent*, 387 U.S. 105 (1967). However, a state should not be permitted to contrive its political subdivisions so as to defeat a federally protected right. *Id.* at 108. It is hard to imagine a more apt illustrative of diluting a person's vote. The Landowners' members and other voters in rural Mahaska County have been overruled by the Cities with smaller populations on their very right to own their own land. "[E]qual protection is denied when the electorates of foreign municipalities through the election of their own town boards and supervisors (which in turn have the exclusive right to appoint these joint planning board representatives) have an equal or greater right to affect land use and stifle development in land outside the boundaries of their own municipalities." Albert J. Pirro Jr., *The Unconstitutionality of Consolidated Planning Boards: Interlocal Planning under New York Law*, 16 Pace L. Rev. 477, 484 n.35 (1996).

Because the SCRAA board severely dilutes the voting power of the Landowners' members and other voters in rural Mahaska County (and intentionally does so, at that), the 28E Agreement violates the Equal Protection Clause. Under the 28E Agreement, the Cities are

specifically relying on the Mahaska County voters being unable to affect any of the decision-making of SCRAA, even though Mahaska County has approximately twice as many residents as Pella and SCRAA is seeking to condemn, regulate, and rezone land owned by the rural Mahaska County voters. This is unconstitutional and illegal. Therefore, the 28E Agreement should be declared void.

CONCLUSION

The Landowners have standing to challenge the 28E agreement because there is a clear likelihood of injury given that SCRAA has identified their land within Site A for the airport, has contacted them about acquiring their land, and has acquired other land within Site A under threat of eminent domain. The 28E agreement is illegal for multiple reasons, including circumventing the many statutory protections against abuse of police and legislative powers at issue, and the District Court's decision to the contrary should be reversed.

POSITION REGARDING ORAL ARGUMENT

Site A Landowners does not believe oral argument is necessary, but should the court allow oral argument, Site A. Landowners respectfully requests to be heard orally upon the submission of this appeal.

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of May, 2021, I electronically filed the foregoing Appellants' Proof 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 9265 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 Georgia 14 pt.

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