IN THE IOWA DISTRICT COURT FOR POLK COUNTY

MCC IOWA LLC d/b/a MEDIACOM, Plaintiff, v. CITY OF WEST DES MOINES and WEST DES MOINES CITY COUNCIL, Defendants.	CASE NO. EQCE086347 **DEFENDANTS' REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS THE AMENDED PETTION**

Defendants City of West Des Moines and West Des Moines City Council ("the City") submit the following Reply Brief in Support of their Motion to Dismiss the Amended Petition:

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INTRODUCTION

This case is about an incumbent service provider improperly using the legal system to try to interfere with the City constructing public infrastructure in an effort to facilitate competition for, and universal access to, high-speed internet service in West Des Moines. In support of this misguided effort, Mediacom has submitted a verbose and obfuscating Amended Petition and Resistance which conflate and confuse the issues, ignore the facts that are incontrovertibly established by public records, and misrepresent the law. It is apparent that Mediacom will spin any story it can to try to prevent competitors from entering the West Des Moines market, all to the detriment of the citizens and taxpayers of West Des Moines.

The public records establish beyond dispute that the City followed the processes adopted by the legislature and affirmed by the Iowa Supreme Court for financing and implementing economic development urban renewal projects. The law gave Mediacom legitimate avenues for opposing the City's proposed actions. Mediacom could have filed a petition for an election on the proposed bonds. It could have attended the public hearing and voiced opposition. It could have appealed the City Council's decision to authorize the bonds to the district court. It could have filed a certiorari action to challenge the City Council's adoption of the urban renewal plan. Mediacom did none of those things and instead sat on its hands. It waited until six months after the City approved the urban renewal plan and bonds, and three months after the City issued its first bonds in support of the project, to file this lawsuit. However, the law includes plainly worded provisions to prevent Mediacom from doing exactly what it is trying to do. All the City is asking the Court to do is enforce those protections. The City's defenses can be resolved based on the facts pled in the Amended Petition and public records specifically referenced in the Amended Petition. If the Court does not enforce the law now, and the City is forced to continue to respond to scorched earth

litigation tactics by an upset incumbent provider, it is the people of West Des Moines that will be forced to bear that burden. The Court should dismiss Mediacom's untimely and frivolous lawsuit before more harm can be done.

REPLY ARGUMENTS

I. Mediacom's claims for injunctive relief should be dismissed because Mediacom had an adequate remedy at law in the form of an action for certiorari.

A. The City did not waive the certiorari argument.

Mediacom argues that the City waived its certiorari argument by not raising it in its motion to dismiss the original Petition, citing Iowa Rule of Civil Procedure 1.421. Resistance at 22. Mediacom's position has no merit. Rule 1.421(4) provides that certain categories of defenses are waived if not raised together in a single pre-answer motion to dismiss. These defenses include improper venue, lack of personal jurisdiction, insufficiency of service or process, motions to recast or strike, and motions for more specific statement. Iowa. R. Civ. P. 1.421(4). The City is not attempting to add one of these defenses to its second motion to dismiss, which might implicate the waiver rule. Rather, the City's first motion to dismiss was for failure to state a claim and the City's current motion to dismiss is likewise for failure to state claim. There is nothing in Rule 1.421 that prevents the City from asserting additional arguments as to why Mediacom's Amended Petition fails to state a claim.

Moreover, the City's argument regarding certiorari implicates not only failure to state a claim but also lack of subject matter jurisdiction. *See Sergeant Bluff-Luton Sch. Dist. v. City Council of City of Sioux City*, 605 N.W.2d 294, 297 (Iowa 2000) ("An untimely petition for writ of certiorari deprives the reviewing court of subject matter jurisdiction."). Neither of these defenses is subject to waiver under Rule 1.421(4). *See* Iowa R. Civ. P. 1.421(4) ("If a pre-answer motion does not contain any matter specified in rule 1.421(1) or 1.421(2) that matter shall be

deemed waived, *except lack of jurisdiction of the subject matter or failure to state a claim upon which relief may be granted.*") (emphasis added). The City did not waive this argument.

B. Binding precedent from the Iowa Supreme Court establishes that certiorari was the proper remedy to challenge the City's adoption of the urban renewal plan.

Mediacom next argues that binding Supreme Court precedent establishes that certiorari was not a proper remedy to challenge the City's urban renewal plan, citing *Wallace v. Des Moines Independent Community School District Board of Directors*, 754 N.W.2d 854 (Iowa 2008). Remarkably, Mediacom ignores the actual Iowa Supreme Court decision which controls this issue. As set forth in the City's primary brief, in *Sergeant Bluff-Luton Sch. Dist. v. City of Sioux City*, 562 N.W.2d 154 (Iowa 1997), the Iowa Supreme Court held that certiorari is the appropriate vehicle to challenge the legality of a city council's actions in adopting an urban renewal plan following a public hearing pursuant to Iowa Code section 403.5(3). *Id.* at 156. This is so because the adoption of an urban renewal plan "involves proceedings in which notice and an opportunity to be heard are required." *Id.* (citing *Buechele v. Ray*, 219 N.W.2d 679, 681 (Iowa 1974)).

Mediacom does cite to a *Sergeant Bluff* case, but it is the wrong *Sergeant Bluff* case. The *Sergeant Bluff* litigation went up on appeal twice. The decision where the Court determined that certiorari is the appropriate remedy is the one cited above which was decided in 1997 ("*Sergeant Bluff I*"). That is the decision which controls this issue. Mediacom does not cite or discuss this decision. Instead, Mediacom cites to the second *Sergeant Bluff* decision from 2000. *See* Resistance at 19-20 (citing *Sergeant Bluff-Luton Sch. Dist. v. City of Sioux City*, 605 N.W.2d 294 (Iowa 2000)) ("*Sergeant Bluff II*"). The *Sergeant Bluff II* decision did not address the issue of whether certiorari is the appropriate remedy. Rather, the issue in *Sergeant Bluff II* was when the 30-day deadline for filing a certiorari action is triggered. *See Sergeant Bluff II*, 605 N.W.2d at 297

(stating that the controlling issue on appeal was "whether the school district's certiorari petition was filed in a timely manner as required by Iowa rule of civil procedure 307(c).").

Mediacom also grossly misstates the underlying facts of the *Sergeant Bluff* litigation. Mediacom states that the litigation involved "a municipality's decision to annex the school district and include it within a pre-existing urban renewal plan." Resistance at 19. This is not at all accurate. The city did not annex the school district. The city annexed a residential addition. *Sergeant Bluff I*, 562 N.W.2d at 154 ("On or about December 19, 1994, the city annexed the Virginia Meadows addition…"). Moreover, the action that the school district sought to enjoin was not the annexation, but the city's amendment of its urban renewal plan to add the neighborhood to its urban renewal area. *Id.* ("A school district brought this equitable action against a city, seeking a permanent injunction to restrain the city from including a high-income residential area as part of an economic development area under Iowa Code chapter 403."). Mediacom also misstates the Court's analysis, claiming that in *Sergeant Bluff II* "[t]he Iowa Supreme Court held that the remedy of certiorari was available to the school district because the municipality's decision to include it in the urban renewal area ***directly affected*** the school district interests—it ***overtly*** acted upon those interests themselves, rather than merely taking general action that had collateral consequences, as with routine policy decisions." Resistance at 20 (emphasis in original) (purportedly citing *Sergeant Bluff II*, 605 N.W.2d at 295-298). However, review of the pages cited by Mediacom shows no analysis or holding that in any way resembles what is described by Mediacom. In fact, as discussed above, *Sergeant Bluff II* did not even analyze the issue of whether certiorari was an appropriate remedy because that issue was already decided in *Sergeant Bluff I*.

Moreover, in *Sergeant Bluff I*, the Court did not base its decision on the fact that the city's actions "directly affected" the school district or that the city "overtly acted" upon the school's

district interests as claimed by Mediacom. *See* Resistance at 20. Rather, the Court held that certiorari is the appropriate remedy to challenge the actions of a city exercising a governmental function where the proceedings require "notice and an opportunity to be heard." *Sergeant Bluff I*, 562 N.W.2d at 156. The Court held that the city's actions in amending its urban renewal plan after a public hearing pursuant to Iowa Code section 403.5(3) "clearly" fit this definition. *Id.* That holding applies equally here.

Mediacom points out that the *Sergeant Bluff* decisions pre-dated the *Wallace* case. However, the *Wallace* case did not overrule *Sergeant Bluff I* and it remains good law and is binding on this Court. Moreover, *Wallace* is easily distinguishable from this case. In *Wallace*, taxpayers filed a certiorari action challenging a school board's decision to close certain schools. *Wallace*, 754 N.W.2d at 856. The Court recognized that certiorari is appropriate where "the questioned act involves a proceeding in which notice and an opportunity to be heard are required." *Id.* at 858. However, the Court found that the procedures for school closures did not "guarantee individuals, including the taxpayers, of an individual right to be heard during the Board's consideration of the issues." *Id.*

In contrast to the proceeding in *Wallace*, the adoption of an urban renewal plan does guarantee individuals the right to be heard. Iowa Code section 403.5(3) requires the local governing body to "hold a public hearing on an urban renewal plan after public notice thereof …." Iowa Code § 403.5(3). A "public hearing" is different from a public meeting; it "affords more substantial rights than does a meeting." *Buchholz v. Bd. of Adjustment of Bremer Cty.*, 199 N.W.2d 73, 77 (Iowa 1972). "A hearing requires that interested parties be given an opportunity to appear and object." *Id.* While a public meeting "does not require the public body to allow any individual or group to be heard on the subject being considered," this "[m]ost assuredly … cannot be said of

a public hearing." *Id.* Because the adoption of an urban renewal plan requires notice and a right to be heard, *Wallace* is distinguishable and does not control this issue. *Sergeant Bluff I* controls this issue.

Mediacom also argues that the Iowa Supreme Court's decision in *McMurray v. City Council of West Des Moines*, 642 N.W.2d 273 (Iowa 2002) recognized the "fundamentally legislative character" of a city's actions in adopting an urban renewal plan and, therefore, certiorari is not available to challenge such decisions. Resistance at 18-19. While the Court in *McMurray* noted that certain determinations made by a city council in adopting an urban renewal plan were legislative in nature, the Court did not reject the quasi-judicial nature of the proceeding itself and did not hold that certiorari was inappropriate. To the contrary, the *McMurray* case was a certiorari action. *See McMurray*, 642 N.W.2d at 276 ("Opponents filed a petition for writ of certiorari and declaratory judgment seeking to declare the City's adoption of the urban renewal plan and related TIF district illegal."). Thus, *McMurray* reaffirms the holding in *Sergeant Bluff I* that certiorari is the proper vehicle for challenging the adoption of an urban renewal plan.

C. Mediacom cannot seek injunctive relief relating to the Google Fiber agreement or future actions of the City to implement the conduit network project.

Mediacom next argues that even if some of the City's decisions at the July 6, 2020 hearing could have been challenged via a certiorari claim, this would not apply to the City's adoption of the Google Fiber agreement because "the City negotiated the Google Agreement in secret" and the agreement was "not subject to a notice and hearing requirement." Resistance at 21. This is not accurate. Pursuant to Iowa Code section 364.6, when state law does not specify a procedure for exercising city power, "a city may determine its own procedure for exercising the power." Iowa Code § 364.6. There is no state law setting forth specific procedures for entering into a conduit network license. Accordingly, the City adopted a process similar to the urban renewal plan and

published notice of and held a public hearing on the Google Fiber agreement. ATT-186-18. Since this proceeding, like the urban renewal proceeding, involved notice and the right to be heard, certiorari is likewise the proper remedy to challenge the City's action.

Mediacom also argues that even if certiorari is the appropriate remedy for challenging the City's action, "this would not preclude Mediacom from challenging ***future*** unlawful actions by Defendants" in implementing the conduit network project. Resistance at 21-22 (emphasis in original). This same argument was rejected by the Iowa Supreme Court in *Sergeant Bluff II.* In that case, the school district failed to file a petition for writ of certiorari within 30 days of the city council's action to amend its urban renewal plan to include the Virginia Meadows Addition. Instead, the school district filed its certiorari action in response to the city's subsequent approval of the tax levy which included Virginia Meadows in the urban renewal area. *Sergeant Bluff II*, 605 N.W.2d at 296. The district court held that the city's tax levy based on the inclusion of Virginia Meadows in the urban renewal area was illegal and that the school district's certiorari action was timely because it was filed within 30 days of the illegal tax levy. *Id.* The Iowa Supreme Court reversed. The Court held that the gist of the school district's challenge was the city's decision to amend its urban renewal plan to include Virginia Meadows, even if the school district was not injured until the tax levy:

> While it may be true that the interests of the school district were not affected until the date the tax was actually levied, we believe the relevant date for purposes of rule [1.1402] is the date of the alleged illegal decision or act by the city, not the date of the alleged injury to the school district. Stated another way, the legality of the tax levy is dependent upon the legality of the classification of the property from which the levy flows.

605 N.W.2d at 298. The Court also rejected the argument that the alleged illegality of the city's decision was a continuing act, holding that the legality of the tax levy was based upon the city's single decision to amend the urban renewal area to include Virginia Meadows. *Id.* at 298-99.

Because the school district did not file its certiorari action within 30 days of that decision, the school district's challenge was untimely. *Id.*

Just as in *Sergeant Bluff II*, the gist of Mediacom's challenge is that the City acted illegally on July 6, 2020 in approving the urban renewal plan. Mediacom failed to challenge that action within 30 days as required by Iowa Rule of Civil Procedure 1.1402(3). Mediacom cannot challenge future actions of the City that merely implement that decision.

II. Mediacom's claims under the Urban Renewal Law fail as a matter of law and are precluded by the City's statutory defenses.

A. The Court should reject Mediacom's attempt to conflate the City's separate and distinct actions.

Throughout its Amended Petition and its Resistance to the City's Motion to Dismiss, Mediacom consistently conflates the City's separate and distinct actions—the adoption of the urban renewal plan, the authorization of the bonds, and the approval of the Google Fiber agreement—under one umbrella of "arbitrary and capricious" acts. For example, Mediacom argues that the City's bond notice was defective because it failed to disclose information about the Google Fiber agreement. Resistance at 26. Similarly, Mediacom argues that the City's urban renewal plan is invalid because of the exclusivity provision in the Google Fiber agreement. *Id.* at 23. However, the City's actions were separate actions, following separate procedures, and must be reviewed by the Court as such. Such review will confirm that the City followed Iowa law explicitly.

1. Adoption of an urban renewal plan.

The first action of the City was adoption of an urban renewal plan. Chapter 403 outlines the process a city must follow in adopting an urban renewal plan. First, the urban renewal plan must be submitted to the city's planning and zoning commission for review and recommendation.

Iowa Code § 403.5(2). Second, the city must hold a public hearing on the plan after appropriate notice. *Id.* § 403.5(3). Third, the city must adopt a resolution determining the area to be a slum area, blighted area, or economic development area an urban and designate the area as appropriate for an urban renewal project. *Id.* § 403.5(1). And finally, the city must adopt a "resolution of necessity" finding that (1) one or more slum, blighted, or economic development areas exist in the municipality, and (2) the rehabilitation, conservation, redevelopment, development, or a combination thereof, of the area is necessary in the interest of the public health, safety, or welfare of the residents of the municipality. *Id.* § 403.4.

It is undisputed that the City followed this procedure in adopting the urban renewal plan. First, the plan was submitted to and approved by the City's Planning and Zoning Commission. Amended Petition ¶ 159. Next, the City published notice of the public hearing on the urban renewal plan. Amended Petition ¶ 177; ATT-5-15. The City then held a public hearing on the urban renewal plan. ATT-33-36. Following the public hearing, the City adopted a resolution determining the urban renewal area to be an economic development area eligible for designation as an urban renewal area and finding that "rehabilitation, conservation, redevelopment, development, or a combination thereof, of such area is necessary in the interest of the public health, safety or welfare of the residents of this City." ATT-47. Accordingly, the City complied with Iowa law in adopting the urban renewal plan.

Mediacom argues, however, that the City violated chapter 403 by designating substantially the entire city as an urban renewal area. Resistance at 23. Mediacom cites no authority that this is illegal. The purpose of this economic development urban renewal plan is to construct a city-wide conduit network which can be licensed to third-party internet service providers to increase fiber connectivity throughout the city for purposes of attracting additional commercial, industrial,

and residential development in the City. ATT-52. It is entirely appropriate and necessary for an economic development urban renewal area which is intended to benefit the entire city to be geographically authorized city-wide. Moreover, Mediacom's complaint that the urban renewal area contains "large swaths of well-developed residential neighborhoods where there is no shortage of safe, affordable housing" is not well-founded. One of the express purposes of chapter 403 is to "prevent unemployment and a shortage of housing," meaning that the City "was not required to find unemployment or a housing shortage *presently* exist before it declares the area an urban renewal area." *McMurray*, 642 N.W.2d at 279. Rather, chapter 403 expressly authorizes the City to "prevent unemployment and shortage of housing by encouraging 'the location and expansion of commercial enterprises to more conveniently provide needed services and facilities of the commercial enterprises to municipalities and the residents of the municipalities.'" *Id.* (quoting Iowa Code § 403.2(3)).

Mediacom's other allegations of violations of chapter 403 are in reality complaints about the terms of the Google Fiber agreement. Resistance at 23 (alleging that the urban renewal plan violates chapter 403 "since the Google Agreement directly undermines the Plan's purported purpose of increasing competition and public access to broadband…."). The fact that Mediacom takes issue with provisions in the Google Fiber agreement does not render the urban renewal plan—which merely calls for the construction of a conduit network of pipes in the ground—invalid.

2. Authorization of bonds.

The second action the City took was to authorize the issuance of $42.8 million in urban renewal capital loan notes. Iowa Code section 384.24A(3) authorizes the City to enter into loan agreements (secured by issuance of general obligation capital loan notes) and requires the City to

follow the same authorization procedures required for the issuance of general obligation bonds. *See* Iowa Code §§ 384.24A(3) and 384.25(2). Urban renewal projects are considered an "essential corporate purpose." *See* Iowa Code § 384.24(3)(q). Accordingly, section 384.25(2) sets forth the process the City must follow. First, the City is required to publish notice of the proposed action, including the amount and purpose of the bonds, and the time and place of the meeting. Iowa Code § 384.25(2). In addition, because the bonds are urban renewal bonds, the notice is required to be published at least ten days prior to the date of the meeting and must notify residents of their right to petition for an election. Iowa Code §§ 384.24(3)(q); 384.26(5)(a). At the public meeting, the council receives and considers objections from residents or property owners of the city. Iowa Code § 384.25(2). After all objections have been received and considered, the council either takes additional action for the issuance of bonds or abandons the proposal. *Id.*

It is undisputed the City followed this procedure. On June 19, 2020 the City published notice of its proposed action to issue $42.8 million in urban renewal bonds. Amended Petition ¶ 155. The notice stated the amount of the bonds, the date, time, and place of meeting, and the right of residents to petition for an election on the bonds. ATT-4. On July 6, 2020, more than ten days after the notice was published, the City held a public meeting where it received objections from the public. ATT-19-23. After all objections were received and considered, the City Council adopted a resolution to institute proceedings and take additional action for the authorization and issuance of $42.8 million in urban renewal bonds. ATT-22.

As with the urban renewal plan, Mediacom's complaints regarding the bonds are really complaints about the Google Fiber agreement. *See* Resistance at 23, 26 (alleging that the bonds are illegal because the conduit network is custom-designed for Google Fiber's exclusive use and the City's notice failed to disclose this information to the public). As discussed above, however,

the fact that Mediacom takes issue with provisions in the Google Fiber agreement does not render the bonds invalid because such bonds were authorized in accordance with Iowa law.

3. Approval of the Google Fiber agreement.

The third action the City took was to approve the Google Fiber agreement. As discussed above, Iowa law does not set forth a specific procedure for entering into a conduit network license agreement. Accordingly, pursuant to Iowa Code section 364.6, the City was authorized to determine its own procedure for exercising such power. Iowa Code § 364.6. The City elected to adopt a process similar to the urban renewal plan and published notice of and held a public hearing on the Google Fiber agreement. ATT-186-18.

Mediacom does not challenge the legality of this procedure. Rather, Mediacom alleges that the agreement itself is illegal because it violates the Iowa Constitution and Iowa Code chapters 388, 26, and 477. As argued herein and in the City's primary brief, Mediacom's claims of illegality are entirely without merit. However, even if they did have merit, it would only invalidate the Google Fiber agreement itself. It would have no effect whatsoever on the urban renewal plan or the bonds, both of which were properly authorized as set forth above.

B. Mediacom's claims related to the bonds are barred by the 15-day statute of limitations in Iowa Code section 384.25(2).

1. Mediacom cannot circumvent the statute of limitations by making its specious defective notice claim.

Mediacom argues that its challenge to the bonds is not barred by the 15-day statute of limitations because the City's notice of the proposed action was defective, citing *Grove v. City of Des Moines*, 280 N.W.2d 378 (Iowa 1979). Resistance at 25. Specifically, Mediacom argues that the City failed to disclose in the notice "its intention to allow Google Fiber to custom-design and

have exclusive use of the Conduit Network for years to come" and the amount of licensing fees the City would actually receive from Google Fiber. Resistance at 26.

The *Grove* case does not support Mediacom's attempt to circumvent the statute of limitations by making a specious claim of defective notice. In *Grove*, the plaintiffs raised the notice issue in the context of a timely appeal taken within fifteen days of the city's decision to take additional action for the issuance of revenue bonds. *Grove*, 280 N.W.2d at 383 ("Plaintiffs appealed to the district court under section 384.83(2)."); Iowa Code § 384.83(2) (providing that any resident or property owner can appeal a decision of the governing body to take additional action for the issuance of revenue bonds within fifteen days of the additional action). Thus, the statutory time limit to appeal was not at issue in *Grove*. *See Stanfield v. Polk County*, 492 N.W.2d 648, 651 (Iowa 1992) (recognizing that *Grove* did not support the plaintiff's defective notice argument because *Grove* did not address "the statutory time-limit to appeal."). In contrast, Mediacom makes its notice claim in lawsuit a brought well outside the 15-day statute of limitations for challenging the bonds. As recognized in *Stanfield*, '[t]he very purpose of a statute of limitation is to cure imperfection and to give repose against litigation." 492 N.W.2d at 652. "If the bondholder affirmatively proves the legality of all prior procedure, he has no occasion to plead the statute of limitation." *Waller v. Pritchard*, 201 Iowa 1364, 202 N.W. 770, 773 (1925). Accordingly, Mediacom cannot get around the statute of limitations by claiming defective notice.

Moreover, the *Grove* case is completely distinguishable on the merits. In *Grove*, the Court held that the City acted illegally by authorizing revenue bonds for two separate purposes in one proceeding. 280 N.W.2d at 384. The Court also held that the city's notice failed to adequately state the amount of the proposed bond issue as required by Iowa Code section 384.83(2) because it gave one total amount for both purposes and did not specify the amounts for the respective

purposes. *Id.* That holding is completely inapposite here. The bonds authorized by the City Council on July 6, 2020 were authorized for one purpose—to pay the costs of aiding in the planning, undertaking, and carry out of the urban renewal plan for the Economic Development Digital Enterprise Urban Renewal Area, including the construction of a city-wide conduit network. ATT-22. The public notice disclosed this purpose, the amount of bonds, and the date, time, and place of the meeting. ATT-4. That is all that is required by the Code. *See* Iowa Code § 384.25(2) (providing that the notice must include "a statement of the amount and purposes of the bonds, and the time and place of the meeting…."); *Green v. City of Cascade*, 231 N.W.2d 882, 885 (Iowa 1975) (finding notice sufficient where it stated that the council would meet at a specified date, hour, and place to institute proceedings for the issuance of $50,000 of general obligation bonds 'for the purposes of defraying the costs of constructing and repairing street improvements, constructing facilities useful for the collection and disposal of sewage wastes, and the undertaking of the construction of a street improvement jointly with the County of Jones"). The other information Mediacom contends should have been disclosed in the notice is simply not required by Iowa law. *Fults v. City of Coralville*, 666 N.W.2d 548, 556 (Iowa 2003) ("absent in [section 384.25(2)] is any language that the city shall provide notice of these particular matters").

2. The statute of limitations bars Mediacom from enjoining the expenditure of bond proceeds.

Mediacom argues that the 15-day limitations period does not prevent it from challenging the expenditure of illegal bond proceeds, citing *Harding v. Bd. of Sup'ers of Osceola County* for the proposition that "[e]quity will always grant relief to a taxpayer by injunction against illegal diversion of public funds." Resistance at 27 (quoting *Harding*, 213 Iowa 560, 237 N.W. 625, 631 (Iowa 1931)). However, in *Harding*, the taxpayer plaintiff was not challenging the authority of the county to issue the bonds but rather was seeking to enjoin the county from using bond proceeds

for a different purpose than for which they approved. *Id.* at 626. Here, Mediacom is not seeking to enjoin the City from using the bond proceeds for a different purpose. Mediacom is seeking to enjoin the City from using the bond proceeds for the very purpose for which they were issued—the conduit network project. The sole basis for Mediacom's injunction claim is that the City lacked authority to approve and issue the bonds because the conduit network project violates chapter 403, the City failed to provide a lawful notice and hearing process prior to the approvals, and chapter 384 does not otherwise authorize the City to approve or issue general obligation bonds to construct the conduit network. Amended Petition ¶¶ 385-389. The legality of the City's expenditure is thus dependent upon the legality of the authorization of the bonds. The 15-day statue of limitations in Iowa Code section 384.25(2) bars any such challenge.

As explained by the Iowa Supreme Court in *Stanfield*, Iowa Code section 384.25(2) "provides a fifteen-day window of time wherein a resident or property owner … may appeal a decision of [the council] and challenge it on the basis that [the council] exceeded its authority." *Stanfield v. Polk Cty.*, 492 N.W.2d 648, 652–53 (Iowa 1992). If no such appeal is filed, however, then the council's decision is "final and conclusive." *Stanfield*, 492 N.W.2d. at 653; Iowa Code § 384.25(2). "This allows a taxpayer an opportunity to challenge the legality of the action, but closes the door when no challenge is made." *Stanfield*, 492 N.W.2d at 653; *Van Den Boom v. City of Eldora*, 829 N.W.2d 589 (Table), 2013 WL 988632 at *5 (Iowa Ct. App. Mar. 13, 2013). Moreover, section 384.25(2) "limits further challenge by providing that the 'notice, hearing, and appeal, are in lieu of any other law.'" *Id.*; Iowa Code § 384.25(2).

Because Mediacom did not appeal the City's decision to take additional action for the issuance of $42.8 million in urban renewal bonds within 15 days of July 6, 2020, the City's decision is final and conclusive and the door is closed on any challenge to the authority of the City

to incur this debt. Since the only basis for Mediacom's claim to enjoin the expenditure of bond proceeds is that the City lacked the authority to issue the bonds, such claim is likewise barred. The appeal process under section 384.25(2) is "in lieu of any other law," including Mediacom's claim for injunctive relief. Iowa Code § 384.25(2). Moreover, injunctive relief would not be appropriate because Mediacom had an adequate remedy at law in the form of the appeal process afforded by section 385.25(2). *See Sergeant Bluff I*, 562 N.W.2d at 155-56 (denying injunctive relief related to an urban renewal plan because the plaintiff had an adequate remedy at law in the form of an action for certiorari). Accordingly, the Court should dismiss any claim relating to the bonds.

3. The 15-day statute of limitations was triggered by the City's additional action on July 6, 2020.

Mediacom next argues that the City's July 6, 2020 resolution to take additional action for the issuance of $42.8 million did not trigger the 15-day limitations period of section 384.25(2) because the City must take subsequent actions to finalize and issue the actual bonds themselves. Resistance at 28-29. Tellingly, Mediacom does not cite to any statutory language or case law supporting this interpretation. This is undoubtedly because there is no support for Mediacom's position. The language of section 384.25 is clearly to the contrary.

Prior to incurring general obligation essential purpose debt, section 384.25 requires the council to call and hold a public meeting to alert the public to the city's intent to incur such debt. Iowa Code § 384.25(2). The notice must identify the amount and purpose of the bonds as well as the time and place for the public to address the council. *Id.* "At the meeting, the council shall receive oral or written objections from any resident or property owner of the city." *Id.* "After all objections have been received and considered, the council may, at that meeting or any adjournment thereof, take additional action for the issuance of bonds or abandon the proposal." *Id.* (emphasis added). Section 384.25 thus requires the council—*at the public meeting*—to either

formally state its intention to move forward or abandon the project altogether. Failure to act after at the meeting serves to eliminate the city's ability to move forward. Conversely, affirmatively taking "additional action" in furtherance of the debt initiates the public's additional procedural protections in filing a lawsuit in district court.

Thus, section 384.25 is clear that the "additional action" which triggers the 15-day challenge period is the action of the council at the public meeting to move forward with incurring debt as opposed to abandoning the project. This is supported by the plain language of the statute as well as application of the statute in Iowa case law. *See, e.g., Boom v. City of Eldora*, 871 N.W.2d 704 (Table), 2015 WL 5285795, at * (Iowa Ct. App. Sept. 10, 2015) (holding that the City's adoption of a resolution at the public meeting which stated that it was the "additional action" contemplated by the statute and which set forth the city's intent to incur debt in a sum certain was the "additional action" which triggered the 15-day limitations period in section 384.25(2)); *Green v. City of Cascade*, 231 N.W.2d 882, 884 (Iowa 1975) (explaining that the city held a public meeting after publishing notice; received, considered, and overruled written objections; and took additional action toward the issuance of bonds, from which the plaintiff appealed to the district court); *Grove*, 280 N.W.2d at 382-83 (explaining that the plaintiff appealed from the city council's resolution adopted at the public meeting to "institute proceedings and take[] additional action for the sale and issuance … of not to exceed $12,250,000 Parking System Revenue Bonds….");

In this case, the City held a public meeting on July 6, 2020 after published notice, received and considered objections, and proceeded to adopt a resolution to "institute proceedings and take additional action for the authorization and issuance in the manner required by law of not to exceed $42,800,000 General Obligation Urban Renewal Capital Loan Notes…." ATT-21-22. This is the "additional action" which triggered the public's 15-day deadline to challenge the authority of the

City to incur this debt. Iowa Code § 384.25(2). Mediacom failed to file this action by July 21, 2020 and, accordingly, is forever barred from challenging the authority of the council to issue the bonds. The fact that there are subsequent actions after the hearing relating to the approval of bond terms, sale of the bonds, etc. does not re-start the 15-day limitations. *See Boom*, 2015 WL 528795 at *3 (holding that the city's subsequent actions which merely implemented the original authorization to incur the debt did not trigger a new 15-day challenge period); *Stanfield*, 492 N.W.2d at 653 (stating that the failure to file the appeal renders the city's authorization "final and conclusive" and that section 384.25(2) "limits further challenge by providing that the 'notice, hearing, and appeal, are in lieu of any other law.'").

Mediacom's efforts to distinguish *Stanfield* and *Van Den Boom* and *Boom*[1] from this case are unavailing. Mediacom argues that *Stanfield* is distinguishable because it involved a challenge to a county's lease purchase agreement. Resistance at 29. However, the procedure for a county to adopt a lease purchase agreement for an essential county purpose is identical to and contains the same 15-day limitations period as the process for a city to authorize essential purpose loan agreements or general obligation bonds. *Compare* Iowa Code §§ 331.301(10)(d) (providing that, in order to authorize a lease purchase agreement payable from the debt service fund, the board must follow substantially the same authorization procedure required for the issuance of general obligation bonds issued for the same purpose to authorize); 331.443 (providing that any resident or property owner may appeal the decision of the board to take additional action to the district court of the county within 15 days after the additional action is taken) *with* Iowa Code § 384.25(2).

[1] The City of Eldora litigation went up on appeal twice. *See Van Den Boom v. City of Eldora*, 829 N.W.2d 589 (Table), 2013 WL 988632 at *5 (Iowa Ct. App. Mar. 13, 2013) and *Boom v. City of Eldora*, 871 N.W.2d 704 (Table), 2015 WL 5285795, at * (Iowa Ct. App. Sept. 10, 2015). The City relies on both decisions.

Accordingly, the Court's interpretation of the 15-day limitations in section 331.443(2) applies equally to the 15-day limitations period in section 384.25(2).

Mediacom attempts to distinguish *Van Den Boom* and *Boom* by claiming that the litigation involved a plaintiff's attempt to challenge a general fund loan agreement "over one month after the municipality had finalized and approved the loan agreement." Resistance at 30. According to Mediacom, the court's holdings are inapplicable in this case because "Mediacom does not seek to challenge a bond deal or loan that was given final approval more than fifteen days ago" but rather "seeks to challenge bond issuances that have not occurred." *Id.* Mediacom's description of *Van Dan Boom* and *Boom* is completely inaccurate. As explained in *Boom*, the city's action which triggered the running of the 15-day limitation periods was the adoption of a resolution stating:

> The City Council hereby determines to enter into the Loan Agreement in the future and orders that bonds or notes be issued at such time, in evidence thereof. The City Council further declares that this resolution constitutes the "additional action" required by Section 384.24A of the Code of Iowa.

Boom, 2015 WL 5285795, at *1 (emphasis added).

Thus, contrary to Mediacom's assertion, the "additional action" which triggered the 15-day limitations period in *Boom* was not the final act of the council to consummate the debt. Rather, it was the council's resolution at the public meeting to move forward with the debt rather than abandon the proposal. The council's resolution clearly contemplated future action by the council to actually enter into the loan agreement and issue notes. That is precisely the situation here. Just as in *Boom*, the City Council adopted a resolution "for the authorization of a Loan Agreement and the issuance of not to exceed $42,800,000 General Obligation Urban Renewal Capital Loan Notes… ATT-22. Just as in *Boom*, the resolution expressly stated that it was the "additional action for the issuance of bonds." *Id.* Accordingly, the mere fact that subsequent action would need to

be taken by the City Council to finalize the debt does not in any way distinguish this case from *Boom.*

C. Mediacom's urban renewal claims are barred by the 60-day statute of repose found in Iowa Code section 384.33.

Mediacom argues that the 60-day statue of repose found in Iowa Code section 384.33 does not apply to this case because Mediacom is not seeking to invalidate the $13,565,000 in bonds that were issued on September 3, 2020. Resistance at 30. Mediacom's reading of this statute is far too narrow. The statute does not just bar actions to "invalidate" bonds. Rather, it bars any action which questions (1) "the legality of general obligation bonds," (2) "the power of the city to issue the bonds," or (3) "the effectiveness of any proceedings relating to the authorization and issuance of the bonds…." Iowa Code § 384.33.

Mediacom's lawsuit questions all those things. Mediacom alleges that the $13,565,000 in bonds "were issued unlawfully and without lawful and adequate notice, public hearing, and approval," thereby questioning the legality of the bonds. Amended Petition ¶ 266. Mediacom alleges that the City "lacked authority to approve the issuance of bonds" and was "not empowered by statute or any other law to approve or issue bonds," thereby questioning the power of the city to issue the bonds. Amended Petition ¶¶ 386, 388. And Mediacom alleges that the City "failed to designate a lawful urban renewal area and failed to approve a lawful urban renewal plan" and "failed to provide a lawful notice-and-hearing process prior to their approvals related to the bonds," thereby questioning the effectiveness of the City's July 6, 2020 proceeding. Amended Petition ¶¶ 386-387. Mediacom seeks to enjoin the City from spending bond proceeds or issuing additional bonds based on these allegations. However, all of these claims were barred "after sixty days from the time the bonds are ordered issued by the city." Iowa Code § 384.33. The City issued the first $13,565,000 in urban renewal bonds on September 3, 2020. Amended Petition ¶ 265. The 60-day

statute of repose expired on November 2, 2020. Mediacom did not file this action until December 10, 2020. Accordingly, all of Mediacom's claims related to the bonds are barred by the statute of repose.

D. Mediacom's urban renewal claims are barred by Iowa Code section 403.9(6) because the City has already issued urban renewal bonds for the conduit network project.

Mediacom argues that Iowa Code section 403.9(6) does not apply to this case because the statute only applies to a "proceeding involving the validity or enforceability of any bond issued under this chapter," and this action does not qualify because Mediacom does not seek to invalidate the $13,565,00 in bonds already issued. Resistance at 32. Mediacom's obvious attempt to circumvent the City's statutory defense by amending its petition to allege that it is not seeking to "invalidate" the bonds should be rejected for the farce that it is. Mediacom's Amended Petition is replete with allegations that the bonds are invalid or illegal and that the City acted illegally in authorizing the bonds. *See, e.g.*, Amended Petition ¶¶ 23, 204, 211, 213, 266, 268, 270, 385, 386, 387, 388, 389, 390, 392, 402. In fact, Mediacom seeks to enjoin the City from spending the bond proceeds because the bonds were allegedly illegal. Amended Petition ¶¶ 268, 495(c), (m). Accordingly, notwithstanding Mediacom's artful pleading, it is clear that this lawsuit is a proceeding "involving the validity or enforceability of any bond issued under this chapter…." Iowa Code § 403.9(6).

Next, Mediacom argues that "[n]o Iowa court has ever adopted Defendants' novel, overreaching interpretation of section 403.9(6)" and that it "speaks volumes" that "no municipality has asserted, much less convinced a court to adopt, this interpretation…." Resistance at 33. This argument is meritless. While no reported case has asserted, addressed, or adopted the City's interpretation, it is likewise true that no reported case has asserted, addressed, or adopted

Mediacom's interpretation. It is an issue of first impression. That circumstance offers absolutely nothing to the question of who is correct.

Mediacom next argues that section 403.9(6) "affects only the enforceability of the issued bonds, not the collateral legality of the Plan itself or of the Google Fiber Agreement…." Resistance at 33. That assertion is contrary to the plain language of the statute. The statute provides that when a bond is issued with language reciting that it has been issued in connection with an urban renewal project, the bond "shall be conclusively deemed to have been issued for such purpose **and such project shall be conclusively deemed to have been planned, located, and carried out in accordance with the provisions of [chapter 403]**." Iowa Code § 403.9(6) (emphasis added). Mediacom is attempting to delete the bolded text from the statute. However, the court "will not interpret a statute so as to render any part of it superfluous." *State v. Pub. Emp. Rels. Bd.*, 744 N.W.2d 357, 361 (Iowa 2008) (quoting *Am. Legion v. Cedar Rapids Bd. of Review*, 646 N.W.2d 433, 439 (Iowa 2002)). Mediacom's argument that section 403.9(6) does not affect "the collateral legality of the Plan itself" would do just that and should be rejected.

Mediacom also argues that section 403.9(6) should be read narrowly to apply only to "actions or proceedings to invalidate or cancel bonds held by innocent purchasers" in order to "ensure that innocent purchasers are not harmed by a municipality's failure to follow the law." Resistance at 34. The problem with this argument is that it is contrary to the language of the statute. Section 403.9(6) applies to any suit "involving the validity or enforceability of any bond issued under this chapter," not just actions seeking to invalidate or cancel bonds. Iowa Code § 403.9(6). Moreover, section 403.9(6) does not just protect the "innocent purchasers," it also protects the public. Cities receive favorable interest rates on their bond offerings because such bonds are "virtually incontestable." *Waller*, 202 N.W.2d at 773. Section 403.9(6) prevents

malcontents like Mediacom from making such bonds contestable through an attack on the legitimacy of the underlying urban renewal plan. This purpose is served by preventing attacks on bonds already issued, as well as preventing such attacks on bonds to be issued in the future pursuant to the same urban renewal plan, which is exactly what section 403.9(6) states.

Mediacom next argues that the City's interpretation of section 403.9(6) "raises significant due process concerns because it would create an irrebuttable presumption that past ***and future*** conduct is valid and legal." Resistance at 35 (emphasis in original). According to Mediacom, a presumption in a civil case violates due process if operates to deny a fair opportunity to rebut it. *Id.* Contrary to Mediacom's argument, section 403.9(6) does not create an irrebuttable presumption in a civil case. Rather, like a statute of limitations, it limits the time period during which a member of the public can challenge an urban renewal financing by providing that any such challenge must occur prior to the issuance of urban renewal bonds. The right to challenge at all is "a matter of legislative grace because the legislature did not have to provide the process." *Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682, 692 (Iowa 2002) (upholding the 10-day window to petition for an election on urban renewal bonds). Accordingly, limitations on exercising that right are acceptable.

Finally, Mediacom argues that if section 403.9(6) applies, the Court should "impose limitations" on the statute so that the presumption only applies with respect to bonds already issued and with respect to constructions projects paid for with the issued bonds. However, these limitations are not supported by the plain language of the statute. The statute plainly provides that in any action involving the validity or enforceability of urban renewal bonds, if urban renewal bonds have been issued with the required language then the "project shall be conclusively deemed to have been plan, located, and carried out in accordance with provision of this chapter." It does

not state that it shall be "conclusively deemed" only with respect to the specific bonds or only with respect to the specific construction activities paid for by the bonds. It states that it shall be "conclusively deemed" in the action. The Court should reject Mediacom's invitation to "add words or change terms under the guise of judicial construction." *In re Detention of Geltz*, 840 N.W.2d 273, (Iowa 2013).

E. Because Mediacom cannot challenge the financing of the conduit network project, Mediacom's claims alleging violations of the Urban Renewal Law are moot.

As described above, Mediacom's claims relating to the financing of the conduit network project fail as a matter of law based on the City's statutory defenses. Because Mediacom cannot challenge the financing of the conduit network project, its claims alleging violations of the Urban Renewal Law are moot. This is so because the Urban Renewal Law merely provided the means for the City to finance the project. The City does not need the Urban Renewal Law to build public infrastructure, spend money, or enter into a license agreement with Google Fiber. The City has broad home rule authority to take such actions. *See* Iowa Code § 364.1 ("A city may, except as expressly limited by the Constitution of the State of Iowa, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of city or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents."). Because the Urban Renewal Law only matters for financing, and because Mediacom cannot challenge the financing, any ruling on Mediacom's claims under the Urban Renewal Law will have no practical legal effect upon this controversy and, accordingly, such claims are moot. *Iowa Mut. Ins. Co. v. McCarthy*, 572 N.W.2d 537, 540 (Iowa 1997).

III. Mediacom has not alleged viable claims under the Iowa Constitution.

A. Public money for private purposes.

As stated in the City's opening brief, to assert a claim for violation of section 31 of Article III of the Iowa Constitution, Mediacom must establish there is an absence of all possible public purpose. *Richards v. City of Muscatine*, 237 N.W.2d 48, 61 (Iowa 1975). In its Resistance, Mediacom argues that there is no public purpose behind the conduit network project because the City is excluding other ISPs from the conduit network. Resistance at 37. There are multiple problems with this argument. First, Mediacom continues to conflate the conduit network project with the Google Fiber agreement. The conduit network project is merely a series of pipes installed in the right of way into which fiber can be installed by private companies to provide high-speed internet services to residents who connect to the fiber. Amended Petition ¶ 3. The construction of this public infrastructure, which will allow fiber internet service to be provided on a city-wide basis, indisputably has a public purpose. Mediacom's real complaint is not with the conduit network but with the exclusivity provision in the Google Fiber agreement. However, that is an entirely separate matter. Accordingly, there is no basis to enjoin the City from financing and building the conduit network.

Second, even if Mediacom's allegation that the City is excluding other ISPs from using the conduit network was accurate—which it is not[2]—this would still not violate the Iowa Constitution. Building a conduit network to attract a fiber internet service provider to offer high-speed internet service on a city-wide basis clearly has a public purpose, as does the licensing of the conduit network to the ISP to offset the cost of constructing the conduit network. The fact that it also

[2] The Google Fiber agreement provides for an 18-month validation period during which Google Fiber has the exclusive right to use the conduit network, except for areas designated as congested or approaching congested. ATT-76 (§ 1.55); ATT-83 (§ 4.5). After this 18-month validation period, there is nothing in the Google Fiber agreement that precludes other fiber ISPs from licensing other available ducts in the conduit network.

benefits the private enterprise is of no constitutional significance. *See McMurray*, 642 N.W.2d 283. Mediacom argues, however, that "[t]his is precisely the kind of naked favoritism that is 'perceptible by every mind at first blush,'" quoting *Brady v. City of Dubuque*, 495 N.W.2d 701, 706 (Iowa 1993). The *Brady* case does not state that the Iowa Constitution is violated when "naked favoritism" is perceptible by every mind at first blush. Rather, a violation occurs when there is a *complete absence of public purpose* which is perceptible by every mind at first blush. *Id.* Mediacom cannot establish such an absence with respect to the conduit network project.

B. Equal protection.

Mediacom is also apparently asserting an equal protection claim under the Iowa Constitution. Resistance at 37-38. Mediacom claims the City "arbitrarily and capriciously excluded Mediacom and other ISPs from using the Conduit Network, in violation of the Iowa Constitution's Equal Protection Clause." *Id*. The Iowa Constitution guarantees "[a]ll laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens." Iowa Const. art. I, § 6. To state an equal protection claim, there must be an allegation that two classes of similarly situated persons have been singled out for differential treatment. *LSCP, LLLP v. Kay-Decker*, 861 N.W.2d 846, 859 (Iowa 2015). "If a plaintiff fails to articulate, and the court is unable to identify, a class of similarly situated individuals who are allegedly treated differently under the challenged statute, our analysis ends and we need not consider whether the ends are legitimate and the means rationally related." *Id.* This is so because "[i]f people are not similarly situated, their dissimilar treatment does not violate equal protection." *Bowers*, 638 N.W.2d at 689.

Mediacom's Amended Petition does not allege similarly situated citizens are being treated differently. On the contrary, Mediacom's Amended Petition points out the dissimilarity between the product that can be installed in the City's conduit—fiber—and the product Mediacom would like to install—coaxial cable. *See* Amended Petition ¶ 99 ("[t]he Conduit Network has been designed to accommodate only the technology used by Google Fiber and so could not be used by Mediacom for placement of coaxial cable; thus the Conduit Network will not be available for use by Mediacom even in congested areas."). Specifically, the Amended Petition alleges:

> Mediacom's network is not exclusively fiber based. The City's arbitrary and capricious limitation that only fiber-based networks will be allowed into the Conduit Network, coupled with its "fiber-to-home" installation agreements with property owners, will effectively prohibit Mediacom from ever using the Conduit Network.

Amended Petition ¶¶ 299-301.

Mediacom, as a non-fiber ISP, is not similarly situated to a fiber ISP such as Google Fiber as it relates to the conduit network because the conduit network is designed to house fiber. Nothing in the equal protection clause requires the City to construct a conduit network that will accommodate Mediacom's outdated coaxial technology. While this may result in Mediacom not being able to lease the conduit, the equal protection clause does not require the City to ensure "uniformity of consequences." *City of Coralville v. Iowa Utils. Bd.*, 750 N.W.2d 523, 530–31 (Iowa 2008).

The case cited by Mediacom to support its equal protection argument is inapplicable. In *Behm v. City of Cedar Rapids*, the plaintiffs expressly alleged provisions of the City's Automated Traffic Enforcement (ATE) ordinance created three different classifications of drivers who were excluded from enforcement. *Behm*, 922 N.W.2d 524, 528 (Iowa 2019). The plaintiffs argued that "from a safety viewpoint, it is irrational to exclude semi-trailer trucks and government-owned

vehicles from the ATE system." *Id.* at 556. Here, there is no allegation of differing classifications under a City ordinance which treats similarly situated citizens differently. Review of the urban renewal plan, bond resolution, and Google Fiber agreement reveals no such classification.

The contract between the City and Google Fiber merely allows Google Fiber to use the Conduit Network for a specified period of time in exchange for payment of fees to the City. ATT-82-85. The Iowa Supreme Court has long held that cities are authorized to grant certain privileges in exchange for obligations promised by a contracting party if the law establishes a basis for the subject of the contract.

> It requires no argument or citation of authorities to sustain the proposition that, if the city had the power to make the contract for its supply of water, it would not be void because of exclusiveness, for all contracts for service of this kind must, in their very nature, be exclusive

Davenport Gas & Elec. Co. v. City of Davenport, 124 Iowa 22, 98 N.W. 892, 896 (1904). The City is expressly granted the authority to execute a contract in furtherance of an urban renewal project. Iowa Code § 403.6(1). The fact that a contract contains a period of exclusivity does not invalidate it under Iowa law. *See City of Davenport*, 98 N.W. at 896. The law does not require the City to offer a contract to every citizen in order to be valid.[3] Therefore, Mediacom fails to state a valid claim for relief under Article I, Section 6 of the Iowa Constitution.

IV. The City's license of the conduit network to Google Fiber does not create a joint venture city utility.

Mediacom argues that the City and Google Fiber are creating a de facto city utility because "[b]oth parties will own and jointly control essential parts of the city utility." Resistance at 39.

[3] By contrast, cities are expressly prohibited from granting exclusive rights for the operation of electricity, gas, telegraph, cable, public transit, water, or sewer. *See* Iowa Code § 364.2. The Iowa Supreme Court has determined the doctrine of selective inclusion can be used to determine legislative intent. Had the legislature intended to limit cities' authority to grant exclusive rights by contract to broadband providers, it would have expressly said so in section 364.2. *Oyens Feed & Supply, Inc. v. Primebank*, 808 N.W.2d 186, 194 (Iowa 2011).

According to Mediacom, the City is contributing the conduit network while Google Fiber is providing the fiber and will administer delivery of broadband. *Id.* Mediacom's conclusory allegation of "joint ownership and control" is not supported by well-pleaded facts and is refuted by the terms of the Google Fiber agreement, a matter of public record. The Google Fiber agreement is clear that the City owns and controls the conduit network and Google Fiber owns and controls the fiber. ATT-82 (§ 4.3). The conduit network is pipes in the ground and does not provide telecommunications services. Amended Petition ¶ 312. The Google Fiber agreement merely gives Google Fiber a license to use the conduit network so that Google Fiber can provide telecommunication services to residents. ATT-80-81 (§ 4.1). The granting of a license does not create a joint venture or partnership. *See, e.g., Anderson v. Walker*, 256 Iowa 1324, 1330, 131 N.W.2d 524, 528 (holding that lease agreement did not create a partnership); *Chariton Feed & Grain, Inc. v. Harder*, 369 N.W.2d 777, 784 (Iowa 1985) (holding that stock-share lease did not create a partnership); *Green v. Racing Ass'n of Cent. Iowa*, 713 N.W.2d 234, 240 (Iowa 2006) (holding that a lease between a government entity and a private corporation does not create state action). If a license was sufficient, then Mediacom and the City would likewise be operating a de facto city utility since Mediacom is also licensing portions of the City's existing conduit. Amended Petition ¶ 139. Moreover, The Iowa Supreme Court has found a lease to create a partnership "only where the parties themselves expressly described their arrangement in those terms." *Chariton Feed*, 369 N.W.2d at 784. The Google Fiber agreement expressly disavows any such relationship, stating that the agreement "does not create a partnership or joint venture between the Parties." ATT-97.

Mediacom next argues that the City's public statements confirm the partnership because "[t]he City explained in a public notice that the Google Agreement was a public-private partnership

to administer a city utility." Resistance at 39. This is totally inaccurate. The notice of the public hearing for the Google Fiber agreement stated that the proposed agreement was a "license agreement pursuant to which a third-party service provider will agree to license fiber chambers throughout the proposed City-wide conduit network in exchange for a license fee…." ATT-18. The notice said nothing about a public-private partnership or a city utility. The notice did state at the bottom that notice of public hearing was being given by order of the City Council "as provided by Section 364.5 of the City Code of Iowa." ATT-18. The citation to section 364.5 was an obvious clerical error. Section 364.5 does not state anything with respect to notice and hearing procedures. Section 364.6, on the other hand, provides that if state law does not establish a procedure for a city to exercise a particular power, "a city may determine its own procedure for exercising the power." Iowa Code § 364.6. As discussed earlier in this brief, there is no established state law procedure for approving a conduit network license agreement. Thus, the notice and hearing procedure established by the City Council was pursuant to Iowa Code section 364.6.

Mediacom is seizing on this clerical error because, by sheer coincidence, section 364.5 happens to mention the term "city utility." However, the reference to "city utility" in section 364.5 has no applicability to this case. Section 364.5(1) merely states that "[a] city *or a board established to administer a city utility*, in the exercise of any of its power, may act jointly with any public or private agency as provide chapter 28E." Iowa Code § 364.5(1). This case does not involve any "board established to administer a city utility," and thus the reference to "city utility" in section 364.5 is inapplicable and the citation to 364.5 would make no sense. Accordingly, the clerical error in the City's notice does not support Mediacom's claim that the City is operating a de factor city utility.

Mediacom next argues that a sharing of losses is not necessarily required to form a joint venture, citing *Farm-Fuel Products Corp. v. Grain Processing Corp.*, 429 N.W.2d 153, 158 (Iowa 1988) and *Herold v. Shagnasty's Inc.*, 690 N.W.2d 699 (Table), 2004 WL 2002433, at *8 (Iowa Ct. App. Sept. 9, 2004). In both of those cases, the Iowa Court of Appeals held that the sharing of profits alone was sufficient to create a fact question on whether a joint venture exists. However, both of those cases were decided prior to the Iowa Supreme Court's decision in *Peoples Tr. & Sav. Bank v. Sec. Sav. Bank*, 815 N.W.2d 744 (Iowa 2012). In *Peoples Tr. & Sav. Bank*, the Court held that a mere sharing in profits is insufficient to establish a joint venture. *Id.* 756. Rather, "a gateway requirement of a joint venture is a showing that the participants have agreed to share in the profits and losses." *Id.* "Where each participant does not share an upside and downside risk in profits and losses, … a joint venture is not present." *Id.*

Regardless, Mediacom cannot establish that the City has agreed to share *either* in Google Fiber's profits or losses. The Google Fiber agreement requires Google Fiber to pay the City a monthly license fee based on the number of addresses that are connected to the conduit network. ATT-85 (§ 5.1.1). Google Fiber's payment of a set, monthly license fee does not constitute profit sharing as a matter of law. Moreover, there is nothing in the agreement that provides for sharing of losses. Mediacom argues, however, that there is sufficient evidence of loss sharing because the City is constructing a $50 million conduit network and "if the business venture fails, Defendants will be left with an expensive Conduit Network that may be unusable by the other ISPs that currently offer internet services in the City." Resistance at 42. The fact that the City is spending money on the conduit network and the conduit network could potentially be unsuccessful for the City does not establish the *sharing* of losses with Google Fiber. It establishes only that the City is

risking its own resources. That is obviously insufficient to create a joint venture because otherwise any contractual relationship would qualify.

Mediacom also argues that its utility claim should survive dismissal based on its allegation that there are other, non-public or implied agreements between the City and Google Fiber to share in the profits and losses. Resistance at 42. As noted in the City's opening brief, such a conclusory, non-specific allegation is not a well-pleaded fact that should be accepted as true. *Kingsway Cathedral v. Iowa Dep't Of Transp.*, 711 N.W.2d 6, 8 (Iowa 2006) ("A motion to dismiss admits the well-pleaded facts in the petition, but not the conclusions."). Moreover, the only legally significant agreements are those which are formally approved by the City Council. Iowa Code section 364.3(1) provides that "[a] city council shall exercise a power only by the passage of a motion, a resolution, an amendment, or an ordinance." Iowa Code § 364.3(1). "A city's compliance with Iowa Code section 364.3(1) is crucial." *City of Akron v. Akron Westfield Cmty. Sch. Dist.*, 659 N.W.2d 223, 225 (Iowa 2003). Thus, "[i]t is clear that any contract with a city entered without a formal motion, resolution, amendment or ordinance is void." *Id.* "If we permitted parties to enforce void contracts, we would essentially allow municipalities to do indirectly what they are statutorily prohibited from doing directly." *Miller v. Marshall County*, 641 N.W.2d 742, 751 (Iowa 2002). Thus, limitations on a city's power to contract "may not be exceeded, defeated, evaded, or nullified under guise of implying a contract." *Horrabin Paving Co. v. City of Creston*, 221 Iowa 1237, 262 N.W. 480, 484 (1935). Because any alleged non-public or implied agreements between the City and Google Fiber would be void as a matter of law, Mediacom cannot rely on such an allegation to support its city utility claim.

In sum, all that the City owns and controls is a series of pipes in the ground. Those pipes are not a city utility, and the mere leasing of those pipes to an internet service provider for a fee does not create a partnership or joint venture.

V. The Google Fiber agreement was not subject to the competitive bidding statute.

Mediacom argues the City's agreement with Google Fiber violates the competitive bidding statute because there may be other construction related projects the City has assigned to Google Fiber that Mediacom is unaware of that could violate the law, and because the City cannot show that the tasks assigned to Google Fiber are exempted from chapter 26. Resistance at p. 44. Neither of these arguments has merit.

First, as discussed above, the City can only act through its City Council. The conduit network license agreement was approved by the City Council by Resolution No. 20-07-06-21 on July 6, 2020. *See* ATT-29-30. It is the only agreement mentioned in the Amended Petition. Mediacom cannot rely upon a future fishing expedition to support its allegation that the Google Fiber agreement should be publicly bid.

Second, the plain language of chapter 26 is inapplicable to contracts for goods and services. Iowa Code § 26.2(3)(a). The public bidding law applies to contracts for "public improvements." A "public improvement" is defined as:

> a building or construction work that is constructed under the control of a governmental entity and for which either of the following applies:
>
> (1) Has been paid for in whole or in part with funds of the governmental entity.
>
> (2) A commitment has been made prior to construction by the governmental entity to pay for the building or construction work in whole or in part with funds of the governmental entity.

Iowa Code § 26.2(3)(a). The agreement with Google Fiber fails to meet this definition in two primary ways: (1) it does not allow Google Fiber to construct the conduit network; and (2) the City

is not obligated to pay for any part of the services Google Fiber is agreeing to provide under the agreement. Under the agreement, the City must construct the conduit network. ATT-79-80. The agreement provides Google Fiber may use the completed infrastructure as follows:

> for purposes of installing, testing, maintaining, replacing, or removing its fiber and Equipment, and for purposes of connecting its own conduit to the Licensed conduit…and to provide any lawful service provided that such use is not an Interfering Use for any other Third Party User within the Conduit Network.

ATT-82. The agreement therefore does not meet the first part of the definition of "public improvement." Iowa Code § 26.2(3)(a).

In addition, the agreement does not require the City to commit to pay for Google Fiber's services under the agreement. In fact, in exchange for the use of the conduit network, Google Fiber must pay monthly license fees to the City. ATT-85. Under the express terms of the public bidding law, the agreement was simply not required to be bid.

The City agrees with Mediacom that the purpose of the public bidding statute is to protect the taxpayers. "The paramount purpose of the competitive bidding statute is to protect the public as taxpayers, and that purpose must not be impaired in interpreting the statute." *Master Builders of Iowa, Inc. v. Polk Cty.*, 653 N.W.2d 382, 394 (Iowa 2002). In fact, under Iowa law, bidders who are not awarded a public improvement contract lack standing to sue the City because "competitive-bidding statutes were 'not intended to be a bestowal of litigable rights upon those desirous of selling to the government....'" *Garling Const., Inc. v. City of Shellsburg*, 641 N.W.2d 522, 523 (Iowa 2002) (quoting *Elview Constr. Co. v. North Scott Cmty. Sch. Dist.*, 373 N.W.2d 138, 141 (Iowa 1985) (internal quotations and citations omitted)). Indeed, the "truly damaged party is the taxpayer, not one who has lost a bid through some claimed error." *Id.*

Google Fiber is not contracting with the City to construct a public improvement and the City is not paying Google Fiber any money for its services. There would be no benefit to taxpayers

from requiring the City to publicly bid the services provided under the agreement. The public bidding law does not provide a legal basis for Mediacom to challenge a contract between the City and Mediacom's competitor. *See City of Shellsburg*, 641 N.W.2d at 523. Count III of the Amended Petition fails to state a claim upon which relief may be granted under any state of facts and should be dismissed.

VI. The City's advertising of the conduit network is exempt from chapter 23A.

Mediacom argues the City's conduit network advertising activities are not exempted from chapter 23A because the City's urban renewal plan was not a valid exercise of authority. Resistance at 47. However, as discussed above and in the City's opening brief, the conduit network project is conclusively deemed to have been planned, located, and carried out in accordance with the Urban Renewal Law. *See* Iowa Code § 403.9(6); Iowa Code § 384.24(3)(q). Because Mediacom is time-barred from challenging the City's compliance with the Urban Renewal Law, Mediacom cannot rely upon these arguments in support of its claim under chapter 23A.

Mediacom next argues that the City's advertising activities are not exempted as urban renewal activities because such advertising was not contemplated in or approved under the plan. Resistance at 47. However, as the Amended Petition makes clear, the City's marketing and advertising efforts are aimed at encouraging connections to the conduit network. *See, e.g.*, Amended Petition ¶ 472. Getting residents to connect to the conduit network is essential to the urban renewal project's goal of constructing a *city-wide* conduit network for purposes of facilitating enhanced fiber connectivity. ATT-52. "Municipalities are vested with '*all the powers* necessary or convenient to carry out and effectuate the purposes and provisions of [chapter 403].'" *McMurray*, 642 N.W.2d at 277 (quoting Iowa Code § 403.6). The urban renewal plan specifically authorizes the City to utilize all powers conferred by chapter 403 in furtherance of the objectives

of the plan. ATT-51-52. Accordingly, the City's advertising of its conduit network is authorized by chapter 403 and the urban renewal plan and, therefore, is exempt from chapter 23A.

Finally, Mediacom argues it would be inappropriate to dismiss its chapter 23A claim based the exemption for activities "intended to assist in economic development" because such exemption depends on subjective intent. Resistance at 47-48. Contrary to Mediacom's argument, a legislative action is to be judged on its face. "Except as they may be disclosed on the face of the act or are inferable from its operation, the courts will not inquire into the motives of legislators in passing or doing an act, where the legislators possess the power to pass or do the act and where they exercise that power in a mode prescribed or authorized by the organic law." 5 McQuillin Mun. Corp. § 16:89 (3d ed. 2020). Therefore, motives of a City Council in passing an ordinance will not, as a rule, be inquired into by the courts. *Midwest Investment Co. v. City of Chariton*, 80 N.W.2d 906, 911 (Iowa 1957). "[B]ad motives might inspire a law which appeared on its face and proved valid and beneficial, while a bad and invalid law might be, and sometimes is, passed with good intent and the best of motives." *Houston v. City of Des Moines*, 156 N.W. 883, 891 (Iowa 1916). An ordinance is not rendered invalid, for example, because of lobbying activities or because council members had been subject to duress and coercion in enacting the ordinance, or because persons interested had made fraudulent misrepresentations to council members to induce their action. *Id.* The time period for challenging the City's determination that the plan furthers economic development has expired. Accordingly, the City's determination is conclusive, and the exception under 23A for such activities applies as a matter of law.

VII. Chapter 477A does not require the City to permit access to its conduit network.

Mediacom argues that its Amended Petition states a claim under chapter 477A because the City has denied Mediacom access to the conduit network. Resistance at 52. Under chapter 477A,

a city "shall allow the holder of a certificate of franchise authority to install, construct, and maintain a communications network within a public right-of-way." Iowa Code § 477A.9(1). "Public right-of-way" is defined for purposes of Chapter 477A as follows:

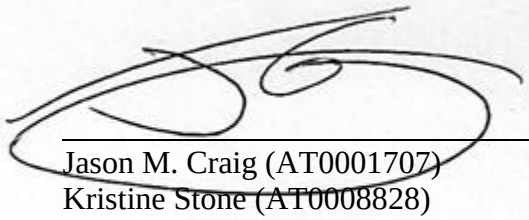
> [T]he area on, below, or above a public roadway, highway, street, bridge, cartway, bicycle lane, or public sidewalk in which the municipality has an interest, including other dedicated rights-of-way for travel purposes and utility easements. "Public right-of-way" does not include the airwaves above a public right-of-way with regard to cellular or other nonwire telecommunications or broadcast services or utility poles owned by a municipality or a municipal utility.

Iowa Code § 477A.1(14).

The City has not denied Mediacom access to the public right-of-way for purposes of "install[ing], construct[ing], and maintain[ing] a communications network." *Id.* 477A.9(1). Mediacom's allegation is instead that the City is limiting its access to City-owned infrastructure located underground within City right-of-way. Amended Petition ¶ 493. As Mediacom has made clear, the City's conduit network amounts to a series of "pipes in the ground." Amended Petition ¶ 312. These pipes are not "public right-of-way" to which the City is required to grant franchise holders unrestricted access. Iowa Code § 477A.1(14).

CONCLUSION

The well-pleaded facts in Mediacom's Amended Petition along with the public records specifically discussed in the Amended Petition establish as a matter of law that Mediacom cannot prevail on any of its claims. Accordingly, the Court should dismiss this lawsuit in its entirety and allow this important economic development project to move forward.



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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on: March 12, 2021

By:
- ☐ U.S. Mail
- ☐ Fax
- ☐ Hand delivery
- ☐ Private Carrier
- ☒ Electronically (*via EDMS*)
- ☐ E-mail

Signature: /s/ Jason M. Craig