IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 17-0686

POLK COUNTY NO. CVCV049988

CITY OF DES MOINES, IOWA
CITY OF MUSCATINE, IOWA
AND CITY OF CEDAR RAPIDS, IOWA

Petitioners-Appellants,

vs.

IOWA DEPARTMENT OF TRANSPORTATION and IOWA TRANSPORTATION COMMISSION,

Respondents-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY, IOWA
HONORABLE SCOTT D. ROSENBERG, DISTRICT COURT JUDGE

PETITIONERS-APPELLANTS' BRIEF

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I. ROUTING STATEMENT

This consolidated appeal should be retained by this Court, as it involves substantial questions of first impression and fundamental and urgent issues of broad public importance requiring prompt or ultimate determination by the Supreme Court. Iowa R. App. P. 6.1102(2)(c),(d).

II. STATEMENT OF THE CASE

A. Nature of the Case

This case is about whether the IDOT has the power to regulate the particular manner in which Iowa's municipalities enforce their traffic laws, when the general assembly has neither legislatively abrogated the cities' home rule powers in this respect nor vested the IDOT with any rule making powers regarding the same.

Procedurally, this consolidated appeal arises from a district court ruling on judicial review which affirmed the agency action of the Iowa Department of Transportation and the Iowa Transportation Commission (collectively "Appellees" or the "IDOT") and ordered Appellants to remove certain automated traffic enforcement ("ATE") equipment within their jurisdictional boundaries.

In affirming the IDOT's agency action, the district court erroneously declared that the IDOT had the authority to promulgate rules restricting

Appellants' ability to utilize ATE equipment as a safety countermeasure and further concluded that the IDOT's adoption and application of those rules against the Appellants in this case complied with Iowa Code chapter 17A. The district court affirmed the agency action and made these determinations despite the IDOT's procedural deficiencies in adopting the rules, despite obvious safety benefits realized by the Appellants, despite the constitutional and statutory grant of home rule authority that inheres to Iowa municipalities, and despite the absence of any legislative abrogation of these home rule powers as they relate to enforcement of traffic regulations within municipal boundaries.

B. Course of Proceedings and Disposition

In 2010-2011, the Cities of Des Moines, Muscatine, and Cedar Rapids each installed ATE equipment within their city limits to enforce various traffic violations which, because of location or frequency, posed certain safety hazards to the residents and motorists traveling in or through their city.[1] App. 105-177, 641-642, 709, 715-716, 721. Appellants installed this equipment only after substantial consultation with and approval from the IDOT. App. 105-177.

[1] This ATE equipment was authorized by Ordinance in each City. *See* Des Moines Municipal Code Sec. 114-243; Muscatine Municipal Code Title 7, Chapter 5; and Cedar Rapids Municipal Code Sec. 61.138.

Shortly after the Appellants installed the ATE equipment, the IDOT erroneously determined that it had authority to promulgate guidelines and rules relating to ATE equipment. After making this erroneous determination, the IDOT purported to issue guidelines for Automated Traffic Enforcement in June 2012, followed by revisions in January 2013 and April 2013. App. 180-191.

Among other requirements, these guidelines claimed to impose the requirement for a local jurisdiction to submit an annual justification report concerning the use of ATE equipment to the IDOT prior to April 15. App. 186.

Thereafter, the IDOT began the formal rule making process in October 2013. Iowa Administrative rules on the subject were finalized in February 2014 requiring a justification report prior to May 1 of each year. *IAC 761-144.7.* App. 695-698.

In spring of 2014, Appellants each timely submitted their Annual report for the calendar year 2013 to the IDOT as a matter of comity. App. 709-714, 715-718, 719-1,063.

The IDOT reviewed these justification reports and, on March 17, 2015, separately notified Des Moines, Cedar Rapids, and Muscatine of its evaluation of their reports ("Evaluation(s)"). In the March 17, 2015

Evaluations, the IDOT ordered each of the Appellants to remove certain ATE equipment within their jurisdictional boundaries, generally alleging that they have been ineffective as a safety counter measure or did not comport with newly adopted placement requirements. App. 1,097-1,116.

The City of Muscatine appealed the IDOT's evaluation to IDOT Director Paul Trombino III ("Trombino") on April 15, 2015. App. 1,117-1,119. The cities of Cedar Rapids and Des Moines appealed the IDOT's evaluation to Trombino on April 16, 2015. App. 1,120-1,132, 1,133-1,263.

In appealing the IDOT's decision, the cities argued, *inter alia*, that the IDOT lacked authority to regulate the mechanism by which cities enforced their traffic laws, that the IDOT's adoption of rules governing the use of ATE equipment violated the constitutional and statutory grant of home rule authority, and that the IDOT's adoption and enforcement of the rules violated Iowa Code § 17A. App. 1,117-1,263.

On May 11, 2015, the IDOT, through Director Trombino, issued its final decision in response to the Cities' appeals. App. 1,264-1,292. In issuing its decision, the IDOT rejected each of the Cities' arguments, determined that it had the authority to adopt the rules, and determined that its adoption and enforcement of those rules comported with the Iowa Code Chapter 17A. App. 1,264-1,292. As a result of these determinations, the IDOT reaffirmed

its order that Appellants remove the ATE equipment as ordered in its original March 17, 2015 Evaluation. App. 1,103-1,108, 1,264-1,292. This May 11, 2015 decision of the Director constituted final agency action pursuant to Iowa Code chapter 17A. No contested case hearing was made available.

In June 2015, the Cities of Muscatine, Des Moines, and Cedar Rapids separately filed Petitions for Judicial Review pursuant to Iowa Code Chapter 17A regarding the final agency action of the Iowa Department of Transportation and the Iowa Transportation Commission. App. 1-5, 6-21, 22-57. On August 4, 2015, these actions were consolidated into Case No. CVCV049988 in recognition of the commonality of issues and desire for judicial efficiency. App. 58-61.

The Cities requested that the Court allow additional evidence, including expert testimony. The District Court denied the request.

On April 25, 2017, the District Court issued its ruling, affirming the final agency action of the IDOT in all respects. App. 87-101. On April 27, 2017, the City of Des Moines filed its Notice of Appeal. App. 102. On April 28, 2017, and May 1, 2017, the City of Muscatine and the City of Cedar Rapids filed their Notices of Appeal, respectively. App. 103-104.

III. STATEMENT OF FACTS

The legislature has not adopted legislation regulating the manner in which Iowa cities may enforce their traffic laws, nor has the legislature adopted legislation regulating the use of ATE equipment as a safety countermeasure. Moreover, the legislature has not delegated rule making power to the IDOT regarding the same.

Despite the absence of any such legislation, the IDOT declared for itself that it had the authority to regulate the manner in which Iowa's municipalities enforce the traffic laws within their jurisdiction, and after making such a determination, purported to adopt agency rules which it enforced against the Appellants in this case and relied upon to order the removal of certain ATE equipment within their jurisdictions. App. 178-291, 695-702, 1,097-1,116, 1,264-1,292. Neither the IDOT's adoption of nor enforcement of the Rules comported with Iowa Code 17A, as further detailed below.

A. Rule Making Deficiencies

On or about October 2, 2013, the IDOT proposed a set of rules which would address the use of automated traffic enforcement systems (ATE) placed upon primary roadways. App. 278-298. The IDOT subsequently began accepting written comments and suggestions that were accepted

through the month of October 2013. App. 278, 291. On October 30, 2013, a hearing was held offering citizens the opportunity to be heard and provide comments to the proposed rules. App. 635-656.

On or about December 10, 2013, the IDOT's Transportation Commission held a meeting in Ames, Iowa to present the proposed rules. App. 657-668. The Commission provided a summation of the comments it had received in October 2013; however, no testimony other than that presented by the IDOT was allowed. App. 657-668.

Curiously, the IDOT Commission Order that was issued on that date included an additional provision to the originally-proposed rules—the 1,000-foot rule. App. 658. This rule provides that ATE systems cannot be placed within 1,000 feet of a lower speed limit. App. 658; *See* Iowa Administrative Code§761-144.6(1)(b)(10)).

At no time after the December 10, 2013 Commission Order was there any additional notice or comment period about the addition of the 1,000-foot rule.

The IDOT, with approval from the Transportation Commission, adopted the new Chapter 144 of the Iowa Administrative Rules Section 761 which included the 1,000-foot rule, with an effective date of February 12, 2014. App. 692-702.

After implementation of the Rules, the IDOT then relied, *inter alia*, upon this 1,000-foot rule to mandate that cities remove certain ATE systems. App. 1,097-1,116. For example, the City of Muscatine was ordered to remove a westbound camera on US61 because the ATE camera is located approximately 830 feet after a lower speed limit sign. App. 1,106. In addition, the City of Cedar Rapids was ordered to remove ATE cameras on Interstate 380 and J Avenue NE for the very same reason. App. 1,114-1,115.

B. Overview of Site Selection, Installation, and Success of ATE Equipment as a Safety Countermeasure in Muscatine, Des Moines, and Cedar Rapids.

The Cities of Muscatine, DM, and CR began utilizing ATE Equipment in 2010 or 2011 as a safety counter measure at the locations which were the subject of the IDOT's removal order. App. 709, 715, 721. The Cities identified and selected sites based on unique safety concerns present at those sites, which could not be adequately remediated by traditional law enforcement due to road configuration and driver/officer safety issues. App. 550-551, 650, 712-715, 1,087-1,092. The ATE equipment was installed in each City in close consultation with, and pursuant to the approval of, the IDOT because it was agreed that citing drivers for speeding is one method for enhancing safety. App. 105-177. Since being initially installed, the ATE equipment has proven to be an effective tool at remediating the safety

concerns present at the subject intersections. App. 709-714, 715-718, 719-1,063.

For instance, in the City of Muscatine ("Muscatine"), the ATE equipment which the IDOT ordered removed from the subject intersection captured 12,857 motorists driving in excess of 10 mph above the posted speed limit during the ten (10) month period that the equipment was operational in 2011, whereas the ATE equipment only captured 8,018 such motorists during the full twelve (12) month period that it was operational in 2014. App. 1,124. These numbers represent an approximately 38% decrease in motorists traveling in excess of 10 mph over the posted speed limit. App. 1,124.

In the City of Des Moines ("DM"), the City installed ATE equipment on I-235 between the 4700-4200 blocks ("DM Site") of DM, which is the busiest site on Iowa's roadways and presents a major safety issue due to grade, traffic congestion and volume. App. 709-714, 1,064. Between the time that the ATE equipment was first utilized and April 2015, DM has realized a 37% decrease in crashes at this location. App. 1,118.

In the City of Cedar Rapids ("CR"), the City installed ATE equipment at what is referred to as the "S" curve on I-380. App. 721. This portion of I-380 is considered a high risk area due to its topography and presents

substantial safety concerns for officers enforcing speed violations. App. 727. Pre-ATE installation crash data showed an average of two (2) deaths per year for several years, along with a high number of injury-related crashes. App. 730. Since installation of the ATE equipment, the data shows that not only has the total number of crashes been reduced per year, but there have been fewer injuries related to crashes, and zero fatal crashes since the installation and use of the ATE equipment. App. 730. Furthermore, pre-installation data shows that a majority of crashes resulted in some type of injury, with the number of personal injury crashes being greater than the total number of property damage crashes. App. 730. Although crashes still occur, they result in fewer injuries; and no crashes have resulted in death since ATE installation. App. 730. Post-installation data reveals the number of crashes with property damage only (and no personal injury) is now higher than injury the number of crashes resulting in injury(ies). App. 730.

Based on the foregoing, it is evident that the ATE equipment has been a successful safety countermeasure for the Appellants in this case at the very locations from which the IDOT ordered the equipment removed. Despite the proven success of this equipment, the IDOT has argued, *inter alia*, that the ATE equipment has been ineffective. App. 1,264-1,292. In making this determination, the IDOT failed to consider the enhanced safety realized by

the Appellants as noted above and as well documented in the agency record.

The particulars of each City's site selection process, experience with the ATE equipment, and involvement with the IDOT are further detailed below.

1. City of Muscatine

In 2010, the Muscatine reviewed accident data and speed and red light surveys to identify eight (8) approaches and five (5) intersections within its jurisdiction that presented safety concerns including:

> Washington Street at Park Avenue (north and south approaches)
> Cleveland Street at Park Avenue (north and south approaches)
> Cedar Street at Houser Street (east and west approaches)
> University Drive at US Highway 61 (westbound approach)
> Mulberry Avenue at US Highway 61 (westbound approach)
> ("Intersections").

App. 152, 715-718, 1,066-1,068.

The safety concerns were precipitated by the number of drivers violating the law via speed and red light violations at the Intersections. App. 715-718, 1,104-1,108. Thereafter, Muscatine worked with Gatso USA ("Gatso"), a vendor of automated traffic enforcement camera systems ("ATE's") and the Appellees to engineer construction plans and ensure that the construction of the ATE systems and placement of signs were completed in accordance with the Appellees' wishes. App. 715-718.

The Intersections include posted speed limit signs and red light signs that clearly notify drivers that photo enforcement equipment is used. App. 715. Muscatine also has put up "traffic laws photo enforced" signs on every corporate limit sign on roadways entering the jurisdiction. App. 715.

Prior to the implementation of the ATE equipment, Muscatine held public meetings, distributed informational pamphlets, emailed communications, and posted information on the internet to ensure that the public was aware of the proposed deployment of ATE's. App. 716. In addition to enforcement, video footage obtained by the ATE equipment has been used multiple times as evidence in court for citations issued due to traffic crashes in the area of the relevant intersection. App. 716.

Between March and May, 2011, the ATE equipment was activated at the Intersections. App. 716. Each intersection had a period of thirty (30) days during which warnings were mailed to violators, but citations were not issued. A speed citation will not be issued unless the violating vehicle is traveling more than ten (10) miles per hour over the speed limit. App. 1,121. All such speed and red light citations are considered civil violations, which do not get reported on an individual's driver's license, and which are significantly lower in cost than a speed or red light citation received from a police officer. App. 1,121.

During the approximately ten (10) months that the ATE equipment was active in 2011, there were a total of 19,748 citations issued—of those, 1,927 citations were for red light violations and 17,821 citations were for speed violations. App. 716-718, 1,121. During 2012, there were a total of 15,462 citations issued—of those, 2,677 citations were issued for red light violations and 12,785 citations were for speed violations. App. 716-717, 1,122. By prorating the partial year in which ATE's were active in 2011, these figures represent a 32% decrease in violations from 2011 to 2012. App. 498, 1,122. During 2013, there were a total of 13,369 citations issued—of those, 2,547 citations were issued for red light violations and 10,822 citations were for speed violations. App. 716, 1,122. Comparing this data to the violations issued in 2012, these figures represent a 14% decrease in violations from 2012 to 2013.

In March through December 2010 (prior to ATE implementation) there were thirty (30) motor vehicle crashes at the Intersections. App. 1,122. In March through December 2011, there were twenty-one (21) motor vehicle crashes at the Intersections. App. 1,122. This is a 30% decrease in crashes at the Intersections. During 2013, there were nineteen (19) motor vehicle crashes at the Intersections. In comparison, there were twenty-six (26) motor

vehicle crashes at these Intersections in 2012. These figures show a 27% decrease in motor vehicle crashes from 2012 to 2013. App. 1,122.

The ATE figures for Muscatine used throughout this Appeal for comparative purposes are based on an approximately ten (10) month period in 2011 versus a full twelve (12) month period for all years thereafter.

On or about April 29, 2014, Muscatine submitted its Report to the Appellees ("Muscatine Report"). The Muscatine Report set forth the citation and crash data presented above as evidence of the effectiveness of Muscatine's ATE units. App. 715-718.

On or about March 17, 2015, the Appellees notified Muscatine of its evaluation of the Muscatine Report ("Muscatine Evaluation"). In the Muscatine Evaluation, the Appellees ordered Muscatine to permanently remove the ATE equipment at University Drive at US Highway 61 (westbound approach) ("University Drive") for the following reasons: (i) crashes have increased since the camera was installed, (ii) high number of speed violations, and (iii) camera is within 1,000 feet of a lower speed limit. The Muscatine Evaluation approved the continued operation of ATE's at the remaining Intersections. App. 1,103-1,108.

When Muscatine initially was considering where to place the ATE units, its focus for the University Drive intersection—a location leading into

the city's business district—was to reduce speed to secure greater safety for the higher volume of vehicles and pedestrians. App. 1,123-1,124. During the approximately ten (10) months of 2011 in which the ATE unit was active at the University Drive intersection, there were 12,857 citations issued at this location. App. 1,123. Since 2011, this number has been reduced significantly to 8,018 citations per year in 2014 (which is based on a full twelve (12) month period). The one (1) additional motor vehicle crash at the University Drive intersection—10 before activation (total for 2009 and 2010); 11 after activation (total for 2012 and 2013)—that the Appellees use to justify its position in the Muscatine Evaluation does not paint an accurate picture of the progress that has been made at this site as the reduction of speed at the University Drive location was always the focus for Muscatine; the ATE camera has been extremely successful in this regard. App. 715-718, 1,103-1,108, 1,123-1,124.

The Muscatine Evaluation also indicates that the ATE unit at the University Drive location must be removed because it is located approximately 830 feet after a lower speed limit sign (55 mph to 45 mph) in violation of Iowa Administrative Code 761—144.6(1)(b)(10), which provides that automated enforcement should not be placed within the first 1,000 feet of a lower speed limit. App. 1,106.

However in 2011, the Appellees designed the sign layout at the University Drive intersection, and *installed* the University Drive signs in question. There are approximately ten (10) different signs warning of a speed reduction and ATE cameras, and eight (8) orange flags on four of those signs. At that time, the sign placement complied with the Appellees' relevant regulations. App. 152-156.

On or about September 9, 2014, Muscatine's Chief of Police emailed Appellees to request relocation of the speed limit signs—which they had designed and installed—to meet the new rules and regulations. App. 1,069-1,070. After hearing no response to his September 9th correspondence, the police chief again contacted the Appellees and asked for the signs to either be moved or consider the signs "grandfathered in." To date, there has been no response to either correspondence. App. 1,065, 1,069-1,070, 2,069-1,070, 1,103-1,108, 1,124-1,125, 1,270-1,281.

Muscatine appealed the Muscatine Evaluation which was summarily denied without benefit of a contested case hearing. App. 1,120-1,132.

2. City of Des Moines

In October 2011, also using the technology of Gatso, DM installed a camera to monitor the speed of vehicles traveling eastbound on I-235 between the 4700-4200 blocks ("DM Site") in DM. App. 1,101. With the

assistance of the Appellees, the DM Site was selected due to heavy traffic and its grade and layout making it unsafe for law enforcement officers to position themselves to monitor speed or to respond to accidents. App. 712, 1,064. The Appellees also posted DM owned signage warning of the use of cameras for enforcement purposes. Violation notices only issue upon detected speeds of eleven (11) miles per hour and above the posted speed limit. App. 709, 1,064.

In accordance with IDOT's rules, DM timely submitted its 2013 Annual Report ("DM Report") to the Appellees including data and documentation in support of its use of a fixed traffic cameras. App. 709. Data included in the DM Report cited in support of its use of ATE's Appellees' own statistical report that the busiest site on Iowa's roadways is on I-235 where the ATE is utilized. App. 711. The average daily traffic in 2012 was 118,300 vehicles per day. Traffic volume from 2012 to 2013 increased: in 2012, there were approximately 2.5 million vehicles on the roadway and approximately 2.6 million vehicles using I-235 in 2013, representing a 1% increase in volume. App. 711. The ATE monitored roadway curves and narrows including a smaller width left shoulder abutting the median barrier and was the site of a fatal accident in 2013 along with 5

other accidents. Traffic volume and roadway design make it unsafe for traditional speed enforcement. App. 712.

On March 17, 2015, DM received an email communication from Appellees' Steve J. Gent, Director Traffic and Safety, Iowa Department of Transportation entitled "Review of Des Moines ATE Report". Attached to the communication was an undated and unsigned document entitled, "Evaluation of Des Moines Automated Traffic Enforcement Report-Primary Highway System" ("DM Evaluation"). App. 1,097. Pertinent to the instant matter, the DM Evaluation concluded with "Resulting Action: Remove the eastbound I-235 cameras near Mile Marker 4.9". Two bullet points below the "order" indicated that "Crash rate was low before the cameras were installed" and "Iowa Administrative Code 761-144.4(1)(c). Limited use on interstate roadways." The unsigned document also advised DM of the right of appeal. App. 1,101.

On April 16, 2015, DM sent a Notice of Appeal to Appellees. Included in its Notice, DM specifically requested a contested case hearing on the matter as authorized by Iowa Code Chapter 17A. App. 1,117.

On May 11, 2015, Appellees' Director Paul Trombino III summarily denied the appeal; no response ever was made regarding an opportunity for a contested case hearing. App. 1,264.

3. City of Cedar Rapids

In February, 2009, Cedar Rapids passed its ATE ordinance, now codified at Cedar Rapids Municipal Code §61.138. App. 1,135. Among other provisions, the ordinance includes a process for both an administrative hearing and judicial review in state court by means of a municipal infraction pursuant to Iowa Code §364.22. App. 1,135. The ordinance also dictates that citations generated through the ATE program are civil violations, the penalties for which are lower than fines associated with misdemeanor prosecution and without implication for driving or registration privileges with the Appellees. App. 1,135.

Prior to passage of the ATE Ordinance, between November 2008 and March 2009, Cedar Rapids and the Appellees worked closely together to examine issues of traffic safety in Cedar Rapids. This was part of a broader effort on the part of the Appellees. The work resulted in multiple studies and reports, as well as recommendations compiled into a document titled "Road Safety Audit for I-380 through Cedar Rapids and Hiawatha and Linn County, Iowa- Final Report-March 2009." ("Audit"). App. 774-862. As that Audit noted: its recommendations arose from a concern shared by the Cedar Rapids Police Department and District 6 office of the Iowa Department of

Transportation about safety in I-380 (App. 779); and the IDOT identified speed as the leading cause of crashes on I-380. App. 787.

Based on its extensive consultations with the Appellees, Cedar Rapids applied for and received IDOT permits, beginning in March and continuing through December 2010. App. 105-151. The permits allowed for installation and operation of all ATE equipment at all the locations which are the subject of these judicial review proceedings. App. 105-151. During that same period in 2010, the equipment at each location was activated using Gatso technology. Before any citations were generated, however, Cedar Rapids implemented a public warning period of thirty (30) days coupled with extensive public announcements and news releases, internet postings, education and other outreach about the forthcoming ATE program. App. 1,136.

As previously noted, the Appellees issued and distributed in June 2012 ATE "Guidelines," formally titled Primary Highway System Automated Traffic Enforcement Guidelines, purporting to regulate ATE programs. App. 180. Those Guidelines were revised in January 2013. App. 184. However, the guidelines were not the result of any rulemaking process pursuant to Iowa Code Chapter 17A or the Department's own rulemaking procedures. Then, by letter dated April 3, 2013, Appellees' District Engineer

Jim Schnoebelen notified Cedar Rapids Police Chief Wayne Jerman that it would begin the formal rulemaking process for ATE systems on primary highways "[b]ecause the Iowa legislature has not moved forward with any automated traffic enforcement laws this session." App. 1,178. That letter purported to require cities with ATE programs to submit a report on or before May 1, 2013 with information specified in the letter. While reserving all rights under law to challenge any purported regulation pursuant to the Guidelines, Cedar Rapids sent the Appellees a letter dated May 1, 2013 providing information as a matter of comity. App. 1,181.

One year later, after the Appellees adopted Iowa Administrative Rules purporting to govern ATE, Cedar Rapids submitted to Appellees an Automated Traffic Enforcement Report ("CR's Report") covering 2013 ATE operations. App. 719. CR's Report referred to various other reports and studies by numerous agencies, along with citations to favorable findings specifically about Cedar Rapids and its ATE system, not merely ATEs in general, including: the "Statewide Safety Improvement Candidate Location" (SICL) list published by the Appellees; the InTrans study "Evaluating the Effectiveness of Red Light Running Camera Enforcement in Cedar Rapids and Developing Guidelines for Selection and use of Red Light Running Countermeasures;" and "America's Best Driver's Report." App. 721. CR's

Report also set forth the engineering countermeasures implemented and, most importantly, pre- and post-ATE implementation data concerning the number, type and severity of crashes, as well as citation totals at all ATE locations. App. 730-731.

On or about September 8, 2014, Cedar Rapids responded to an August 22, 2014 e-mail from Appellees' Steve Gent requesting additional information about Cedar Rapids' ATE program, including the distances between reductions in speed on I-380 and ATE units. App. 1,253. On or about September 9, 2014, Cedar Rapids responded to another e-mail from Appellees' Tim Crouch dated September 8, 2014, which requested additional information about CR's ATE program. App. 1,257.

On or about September 12, 2014, Cedar Rapids representatives conferred by phone with Appellees' representatives including Steve Gent and Director Paul Trombino. App. 1,261. During that call, the parties explored their respective positions concerning application of Appellees' ATE Rules to Cedar Rapids' ATE program. In follow up, Cedar Rapids Police Sergeant Michael Wallerstedt sent Steve Gent an e-mail dated September 15, 2014, setting out multiple means by which the DOT could satisfy itself that CR's ATE program was properly placed and operated on

the primary highway system pursuant to DOT permit. App. 1,261-1,263. Cedar Rapids has never received a response to that letter.[2]

On or about March 17, 2015, the Appellees notified Cedar Rapids of the Evaluation with Resulting Actions ("CR Evaluation") and specified a 30 day deadline to appeal or, alternatively, an April 17, 2015 deadline to implement the Resulting Actions. It is Cedar Rapids' understanding that the Appellees intended the CR Evaluation to be an assessment of CR's Report submitted the prior May (2014), and the "Resulting Actions" to be orders that Cedar Rapids implement certain changes to its ATE program. App. 1,109-1,116. Pursuant to Rule 761-144.9 of the Iowa Administrative Code, Cedar Rapids appealed the Appellees' Resulting Actions in the CR Evaluation, on or about April 16, 2015, by submitting to Director Trombino a Written Explanation of Issues with extensive documentation attached as Supporting Information. App. 1,133-1,263. On or about May 12, 2015, Appellees' Director Trombino issued his decision denying Cedar Rapids' appeal and affirming the CR Evaluation with no opportunity for a contested case hearing or other hearing. App. 1,282-1,292. Director Trombino's letter

[2] Despite appealing the March 17, 2015 Evaluation, Cedar Rapids would welcome a response to its September 15, 2014 e-mail.

to Cedar Rapids was largely the same as that for Des Moines and Muscatine. App. 1,264-1,281.

IV. ARGUMENT

Summary of Argument

The IDOT's adoption of Iowa Administrative Rules 761-144 and any agency action predicated thereon is invalid because A) it violated the City's constitutional and statutory grant of home rule authority, B) the IDOT's actions were *ultra vires*, in that the legislature has not delegated rule making authority to the IDOT –neither as it relates to the particular manner by which Iowa's municipalities may enforce their traffic laws nor as it relates to the use of the ATE equipment at issue in this case, C) the IDOT's agency actions violated Iowa Code section 17A, and D) the IDOT's rule making procedures as they relate to Iowa Administrative Rule 761-144.6(1)(b)(10) failed to comply with the statutory requirements.

Standard of Review

In reviewing a district court's decision on judicial review, the appellate court applies " 'the standards of section 17A.19(10) to determine if [it] reach[es] the same results as the district court.' " *Brakke v. Iowa Dep't of Natural Res.*, No. 15-0328, 2017 WL 2616928, at *5 (Iowa June 16, 2017) (citing *Renda v. Iowa Civil Rights Comm*'n, 784 N.W.2d 8, 10 (Iowa 2010)).

Iowa Code §17A.19(10) requires a reviewing Court to reverse, modify, or grant other appropriate relief from agency action, if the party seeking judicial review establishes (1) that the agency action was improper in one or more of 14 different ways, and (2) that because of the impropriety of the agency action, the party's substantial rights have been prejudiced. *Brakke,* 2017 WL 2616928; *Zieckler v. Ampride*, 743 N.W.2d 530, 532 (Iowa 2007).

Notwithstanding the deference to which an Administrative Agency is often entitled upon judicial review, there are limits to the deference a court should afford. *Barker v. Iowa Dep't of Transp., Motor Vehicle Dep't*, 431 N.W.2d 348, 349 (Iowa 1988) (range of discretion must be within a reasonable range"). As the Iowa Supreme Court has recently underscored, the Iowa Administrative Procedures Act expressly recites at Iowa Code § 17A.23(3), that "[a]n agency shall have only that authority or discretion delegated to or conferred upon the agency by law and shall not expand or enlarge its authority or discretion beyond the powers delegated to or conferred upon the agency." *Brakke*, 2017 WL 2616928 at *5. As the Iowa Administrative Procedures Act provides, in determining whether an agency's actions fall within the meaning of paragraphs 17A.19(10)(a – n), a reviewing Court should not defer to the agency's views as to whether the legislature has vested that agency with discretion on any particular matter.

Iowa Code §17A.19(11)(a). Similarly, where the reviewing Court determines that the legislature has not in fact vested the agency with discretion as to a particular matter, the Court must not defer to the agency's views on that matter. Iowa Code §17A.19(11)(b). As to these matters, the reviewing Court must instead make its own determinations as a matter of law.

A. THE IDOT'S ADOPTION AND ENFORCEMENT OF RULES REGULATING ATE EQUIPMENT VIOLATED APPELLANTS' HOME RULE POWERS

Preservation of Error

Appellants preserved error on this issue by challenging the IDOT's actions before that agency and thereafter seeking judicial review. (Notices of Appeal to IDOT from Appellants, Petitions for Judicial Review (CVCV049979, CVCV083255, and CVCV049988), filed June 2015; Brief in Support of Petition for Judicial Review, filed 12/9/2016).

Discussion

The district court erred in failing to find that the IDOT's adoption of Iowa Administrative Code § 761-144 and its enforcement of the same against Appellants in this case violated Appellants' home rule powers and was invalid as a result.

1. Historical and Modern Trends Regarding Municipal Power

In a bygone era of municipal jurisprudence, municipalities were deemed only to have those powers expressly granted to them by the state legislature. *City of Clinton v. Cedar Rapids & Mo. River R.R. Co.*, 24 Iowa 455 (1868). The rationale underlying this rule was that because municipalities were creatures of the state legislature, they could only act to the extent authorized by the legislative body that created them. *Id.* This rule is sometimes referred to as "creature theory" or, more locally, as the "Dillon Rule," named after the Chief Justice of the Iowa Supreme Court who pronounced the theory in Iowa.

Today, the vast majority of municipalities throughout the country enjoy substantially more legislative independence than they did in preceding decades. Most municipalities throughout the country have been granted home rule authority. 2 Eugene McQuillin, *The Law of Municipal Corporations* § 4:11 (3rd ed. 2017). Home rule authority flipped Dillon's rule on its head and generally permits cities to exercise any lawful power, unless the state legislature has restricted the cities' power to act in a particular regard. *City of Asbury v. Iowa City Development Bd.*, 723 N.W.2d 188, 198 (Iowa 2006); *Home Builders Ass'n of Greater Des Moines v. City of West Des Moines,* 644 N.W.2d 339, 345–46 (Iowa 2002).

2. Iowa's Cities have Home Rule Authority to act unless Preempted

Iowa's jurisprudence concerning municipal powers has followed this national trend. *See City of Asbury*, 723 N.W. 2d at 198; *Berent v. City of Iowa City*, 738 N.W.2d 193, 196 (Iowa 2007). No longer can Iowa cities act only when expressly authorized. *City of Asbury*, 723 N.W. 2d at 198. Rather, Iowa cities have been granted, by constitutional and statutory enactment, the authority to exercise any power, other than the power to levy a tax, unless that power has been stripped away. Iowa Const. art. III, §§ 38A; e.g., Iowa Code § 364.1. Specifically, Iowa's constitutional grant of home rule authority provides as follows:

> Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs and government, except that they shall not have the power to levy any tax unless expressly authorized by the general assembly. The rule or proposition of law that a municipal corporation possesses and can exercise only those powers granted in express words is not a part of the law of this state.

Iowa Const. art. III, §§ 38A. Iowa's statutory grant of home rule authority provides as follows:

> 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 the city or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents.

Iowa Code § 364.1. Based on the foregoing, cities have the authority to exercise any power, which necessarily includes the power to decide the particular mechanism by which they enforce their local traffic laws, so long as not "inconsistent with the ***laws*** of the general assembly." Iowa Code § 364.1.

Iowa courts have developed robust precedent concerning the circumstances under which a city's exercise of its powers will be deemed inconsistent with the laws of the general assembly. *See generally Berent*, 738 N.W.2d 193; *City of Des Moines v. Gruen*, 457 N.W.2d 340, 343 (Iowa 1990); *Goodell v. Humboldt County*, 575 N.W.2d 486, 492-93 (Iowa 1998*); Iowa Grocery Indus. Ass'n v. City of Des Moines*, 712 N.W.2d 675, 680 (Iowa 2006). Under this Court's precedent, the exercise of a city power will be deemed inconsistent with the laws of the general assembly only if it is preempted by state law. *City of Davenport v. Seymour*, 755 N.W.2d 533, 538 (Iowa 2008).

3. <u>The Legislature has not Preempted Cities' Ability to Utilize ATE</u>

There are three forms of preemption: express preemption, field preemption, and implied conflict preemption. *City of Davenport*, 755 N.W.2d at 533. As for express preemption, there is no state law which expressly preempted a city's ability to enforce its traffic regulations via ATE

equipment, and the IDOT concedes as much. *See* IDOT's Trial Br. 30 (stating, "Many states, like Iowa, have no direct ATE legislation."); *see also*, *Journal of the 87th General Assembly* (regarding failed ATE bills).

As to field preemption and implied conflict preemption, this Court has already specifically addressed this question and has held as a matter of law that field and implied conflict preemption do not apply to preempt municipal use of ATE equipment. *City of Davenport*, 755 N.W.2d at 542-43. In particular, in holding that field preemption did not prohibit the municipal use of ATE equipment, the Iowa Supreme Court held as follows:

> [T]he length, breadth, and comprehensiveness of Iowa Code chapter 321 offers support for the application of field preemption to the Davenport ATE ordinance. Yet, the introductory language in Iowa Code section 321.235 regarding uniformity must be read in tandem with the subsequent language *expressly vesting power in municipalities to enact additional traffic regulations that are not "inconsistent" with Iowa Code chapter 321.* This subsequent language eliminates any basis for field preemption because the legislature has expressly authorized municipalities to enact local ordinances regarding the subject matter--namely, traffic regulations--that are "not inconsistent with" the Code. Indeed, when it comes to traffic regulations, the legislature has expressly declined to preempt the field, so long as conflicts are not present.

Id. at 543 (emphasis added). Likewise, in holding that implied conflict preemption did not apply to prohibit such use, the Court stated as follows:

> [T]he legislature has expressly authorized local governments to establish rules of conduct related to rules of the road. The legislature used no words of limitation in the section. Further, as pointed out by the City, the legislature in other sections of

> the Code has authorized municipal action over traffic subjects not contained in section 321.236. *See, e.g.,* Iowa Code §§ 321.255 (traffic devices), 321.273 (traffic reports), 321.293 (speed). We do not regard the fourteen categories in Iowa Code section 321.236, therefore, as exclusive or as overriding the general command of Iowa Code section 321.235 that authorizes additional traffic regulations where they are not contrary to or inconsistent with state law.

Id. at 542. Thus, cities are not preempted from utilizing ATE equipment to enforce their traffic laws; in fact, they are specifically authorized to utilize it.

4. IDOT's Actions thus violated Appellants' Home Rule Powers

In this case, Appellants each adopted an ordinance permitting them to enforce various traffic laws via use of ATE equipment at designated intersections.[3] The ordinances in the instant case are similar to the ordinance that was the subject of review in *City of Davenport*, in which this Court found no implied conflict or field preemption. *Id*. at 543. Pursuant to the authority granted to Appellants by their respective ordinances, the Appellants each utilize(d) ATE equipment to enforce various traffic laws within their jurisdictions. As the legislature has abrogated neither Appellants' right to adopt ATE ordinances nor their rights to enforce their traffic laws utilizing the same, Appellants' use of such equipment is constitutionally and statutorily authorized by the Cities' home rule powers.

[3] *See* Des Moines Municipal Code Sec. 114-243; Muscatine Municipal Code Title 7, Chapter 5; and Cedar Rapids Municipal Code Sec. 61.138.

City of Davenport, 755 N.W.2d 533 (use of ATE equipment not preempted by state law and was therefore valid exercise of home rule power).

To the extent that the IDOT adopted its own agency rules despite any legislative abrogation of the Cities' powers in this respect, the IDOT's adoption and enforcement of such rules ran afoul of the Cities' home rule powers and is invalid as a result.[4] The agency rules should therefore be declared invalid and any agency action predicated thereon should be reversed.

B. THE LEGISLATURE DID NOT GIVE THE IDOT AUTHORITY TO REGULATE THE METHODS BY WHICH CITIES ENFORCE SPEED REGULATIONS WITHIN THEIR OWN JURISDICTIONS

Preservation of Error

Appellants preserved error on this issue by challenging the IDOT's actions before that agency and thereafter seeking judicial review. (Notices of Appeal to IDOT from Appellants, Petitions for Judicial Review

[4] It is important to note that, unlike the home rule powers afforded to Iowa's municipalities, the power of state agencies remains restricted by the "creature theory" that once tied the hands of local governments. That is to say, an agency only has the power to act to the extent expressly authorized by the state legislature. *Branderhorst v. Iowa State Highway Comm'n on Behalf of State,* 202 N.W.2d 38, 41 (Iowa 1972). As more fully discussed below, the Iowa legislature never granted the IDOT the authority to regulate ATE equipment at issue in this case. Indeed, as evidenced by *City of Davenport*, the court has expressly reserved the ability of cities to enact their own enforcement regulations. The IDOT's actions were thus *ultra vires* and, by extension, invalid, as discussed more fully below.

(CVCV049979, CVCV083255, and CVCV049988), filed June 2015; Brief in Support of Petition for Judicial Review, filed 12/9/2016).

Discussion

The IDOT lacked the authority to promulgate the administrative rules at issue in this case. Under the Iowa Administrative Procedures Act "[a]n agency shall have only that authority or discretion delegated to or conferred upon the agency by law and shall not expand or enlarge its authority or discretion beyond the powers delegated to or conferred upon the agency." Iowa Code § 17A.23. There is no statute dealing with ATE, but the IDOT nevertheless created rules related to automated traffic enforcement. It did so by interpreting various statutes as giving legislative authority to regulate a municipality's use of ATE to enforce speed limits.

When reviewing an agency's interpretation of law, the Court's "level of deference afforded . . . depends on whether the authority to interpret that law has 'clearly been vested by a provision of law in the discretion of the agency.'" *Burton v. Hilltop Care Center*, 813 N.W.2d 250, 256 (Iowa 2012), (quoting Iowa Code § 17A.19(10)(c)). If the legislature did not clearly vest the agency with interpretive authority, the Court reviews for correction of errors at law. Iowa Code § 17A.19(10)(c). An agency has been "clearly vested" with interpretive authority only when the court has a "firm

conviction" that "the legislature actually intended . . . to delegate to the agency interpretive power with the binding force of law." *Renda v. IA Civil Rights Com'n,* 784 N.W.2d 8, 11 (Iowa 2010) (quoting Arthur E. Bonfield, Amendments to Iowa Administrative Procedure Act, Report on Selected Provisions to Iowa State Bar Association and Iowa State Government at 63 (1998) [Bonfield]).

No Iowa statute expressly vests the IDOT with interpretive authority. The IDOT asserts that it has been vested with authority to regulate automated traffic enforcement by pointing to a general grant of authority and to several other statutes that are unrelated to ATE equipment, which necessarily means that the IDOT has assumed it has been clearly vested with interpretive authority. As made clear by Iowa Code § 17A.19(11)(a), however, this Court owes no deference to what the IDOT asserts in terms of its theoretical interpretive power. *See* Iowa Code § 17A.19(11)(a) (stating the Court "shall not give any deference to the view of the agency with respect to whether particular matters have been vested by a provision of law in the discretion of the agency.").

The legislature does authorize the IDOT to "adopt rules in accordance with chapter 17A as the director deems necessary for the administration of the department and the exercise of the director's and department's powers

and duties." Iowa Code § 307.12. Importantly, however, this authority to adopt rules only extends to matters within the scope of the IDOT's powers. As such, before this provision can be relied upon to support an argument that the IDOT had rule making authority, it must first be determined that the IDOT had the power to regulate a particular matter in the first place. Moreover, this limited authority to make rules is not synonymous with "authority to interpret all statutory language." *Evercom v. Iowa Utils. Bd.*, 805 N.W.2d 758, 762 (Iowa 2011). The director of the IDOT is also "vested with the power and is charged with the duty of observing, administering, and enforcing the provisions" regarding motor vehicles and the law of the road. Iowa Code § 321.3. This includes authorization "to adopt and promulgate administrative rules governing procedures as may be necessary to carry out the provisions of this chapter; and to carry out any other laws the enforcement of which is vested in the department of public safety." Iowa Code §321.4.

This is a very general mandate that makes reference to other areas of the Code as the source of more specific authority from the legislature. Since those other Code sections provide authority, "an analysis of statutes is necessary in determining this basic question." *Merchants Motor Freight v. State Highway Comm'n*, 32 N.W.2d 773, 775 (1948). "[B]ecause the

legislature does not usually explicitly address in legislation the extent to which an agency is authorized to interpret a statute, most of [the Court's] cases involve an examination of the phrases or statutory provisions to be interpreted, their context, the purpose of the statute, and other practical considerations to determine whether the legislature intended to give interpretive authority to an agency." *Renda,* 784 N.W.2d at 11-12.

There are hundreds of sections under the transportation portions of the Code that do in fact clearly lead to regulations directly related to and authorized by those code sections. However, nowhere in the Code is there authority for the IDOT to regulate how local peace officers enforce speed limits within their jurisdictions. To the contrary, such authority has been specifically reserved to local jurisdictions, as detailed by the following statutes:

Iowa Code § 306.4:

> Jurisdiction and control over the municipal street system shall be vested in the governing bodies of each municipality; except that the department and the municipal governing body shall exercise concurrent jurisdiction over the municipal extensions of primary roads in all municipalities. Iowa Code § 306.4.

Iowa Code § 321.235:

> The provisions of this chapter shall be applicable and uniform throughout this state and in all political subdivisions and municipalities therein and no local

> authority shall enact or enforce any rule or regulation in conflict with the provisions of this chapter unless expressly authorized herein. Local authorities may, however, adopt additional traffic regulations which are not in conflict with the provisions of this chapter. Iowa Code § 321.235.

Iowa Code § 321.236(2):

> The provisions of this chapter shall not be deemed to prevent local authorities, with respect to streets and highways under their jurisdiction and within the reasonable exercise of the police power, from doing any of the following… Regulating traffic by means of police officers and or traffic-control signals. Iowa Code § 321.236 (2).

Iowa Code §321.492:

> A peace officer is authorized to stop a vehicle to require exhibition of the driver's license of the driver, *to serve a summons or memorandum of traffic violation*, to inspect the condition of the vehicle, to inspect the vehicle with reference to size, weight, cargo, log book, bills of lading or other manifest of employment, tires, and safety equipment, or to inspect the registration certificate, the compensation certificate, travel order, or permit of the vehicle. Iowa Code § 321.492.

Iowa Code § 801.4:

> Peace officers", sometimes designated "law enforcement officers", include… police officers of cities. Iowa Code § 801.4:

As can be seen by the previous Code sections, the legislature carved out authority for a municipality and its law enforcement to maintain control

over roads and traffic within its jurisdiction, which includes enforcement of speed limits. The Iowa Supreme Court recognized as much in *City of Davenport v. Seymour,* 755 N.W.2d 533, 542 (Iowa 2008) (finding that the legislature specifically reserved power for cities to enforce traffic violations so long as not inconsistent with laws of the general assembly). Moreover, the legislature has not granted the IDOT authority to control how municipalities enforce its traffic regulations, and never even addressed Automated Traffic Equipment used to track speeding.[5]

Despite the absence of legislative authorization, the IDOT adopted regulations about Cities' uses of ATE. In its regulations, in the absence of a clear delegation of authority to regulate ATE, the IDOT purports to be carrying out authority granted in Chapters 318, 306.4, 307.12, 321.348, and 321.366. *See* 761 IAC 144. As such, the IDOT is interpreting these statutes as giving it authority to regulate ATE and is effectively expanding the provisions of Iowa Code § 306, 307, 318 and 321 by doing so.

These code sections which the IDOT claims grant it the authority to regulate the use of ATE equipment are discussed below, in turn. Analysis of

[5] As noted in the Home Rule argument, the legislature proposed several versions of bills related to Automated Traffic Enforcement in 2017 that did not result in new legislation. Judicial Notice of proposed legislation was taken by the district court.

each of these code sections is necessary for two purposes. First, to determine whether interpretive authority of each has been granted to the IDOT. If so, the second inquiry is whether the IDOT's interpretations comport with Iowa Code § 17A.

In looking at each of these sections, it is evident the legislature did not give explicit authority to the IDOT to regulate the use of technology for speed detection and enforcement in local jurisdictions and any reading to that effect is wholly illogical. Following is an "analysis of statutes" as deemed necessary to determine the basic question of whether the agency was with authority to act, as required by the Iowa Supreme Court. *See Merchants Motor Freight v. State Highway Comm'n*, 32 N.W.2d 773, 775 (1948).

Iowa Code chapter 318

Iowa Code Chapter 318 is entitled "Obstructions in Highway Rights-of-Way" and deals, not surprisingly, with objects on the roadway that impede traffic flow. The purpose of Chapter 318 "is to enhance public safety for those traveling the public roads and allow economical maintenance of highway rights-of-way." Iowa Code § 318.2. The types of issues it addresses include prohibiting excavation, filling, or making of any physical changes to any part of the highway right-of-way, except as provided under section 318.8, cultivation or growing of crops within the highway right-of-way,

destruction of plants placed within the highway right-of-way, placing of fences or ditches within the highway right-of-way, alteration of ditches, water breaks, or drainage tiles within the highway right-of-way, placement of trash, litter, debris, waste material, manure, rocks, crops or crop residue, brush, vehicles, machinery, or other items within the highway right-of-way, placement of billboards, signs, or advertising devices within the highway right-of-way, placement of any red reflector, or any object or other device which shall cause the effect of a red reflector on the highway right-of-way which is visible to passing motorists. Iowa Code §318.3. These are not especially technical terms that require expertise. There is no interpretive authority granted herein.

This Chapter has nothing to do with the use of technology to detect speeding. There is no reasonable interpretation of the facts of this case that would equate ATE devices to physical obstructions as contemplated by Chapter 318. Hence, there is no grant of legislative authority found in Iowa Code Chapter 318 to allow the IDOT to regulate a City's use of ATE under its lawful delegation to enforce speeding laws in its own jurisdiction and it would be wholly illogical to conclude that authority from the plain words and context of the statute.

Iowa Code chapter 306.4

Iowa Code § 306.4 is entitled "Establishment, Alteration, and Vacation of Highways" and it addresses the creation and maintenance of roads. It also carves out, as noted above, jurisdiction over roads—specifically it states that municipalities have jurisdiction over its roads except that municipal extensions of primary roads in all municipalities will enjoy concurrent jurisdiction between the state and the municipality. This section does not address the laws of the road or enforcement of the same. It is focused on infrastructure and care of the entire road system as is evidenced by the following:

> In the construction, improvement, operation or maintenance of any highway, or highway system, the agency which has control and jurisdiction over such highway or highway system, shall have power, on its own motion, to alter or vacate and close any such highway or railroad crossing thereon, and to establish new highways or railroad crossing thereon which are or are intended to become a part of the highway system over which said agency has jurisdiction and control.

Iowa Code § 306.10.

Even if this section could be construed to include enforcement of speeding laws, it does not authorize the IDOT to exercise control over the municipal roads. Rather, the state and city share concurrent jurisdiction on primary roads within a city's boundaries. Therefore, there is no legislative authority granted in Iowa Code § 306.4 to allow the IDOT to regulate a

City's use of ATE under its lawful delegation to enforce speeding laws in its own jurisdiction or where there is concurrent jurisdiction. Any interpretation as such is wholly illogical.

Iowa Code chapter 307.12

Iowa Code § 307.12 is entitled "Duties of the Director" and enumerates the mandate for the head of the IDOT in administering the agency. In pertinent part, "The director shall… adopt rules in accordance with chapter 17A as the director deems necessary for the administration of the department and the exercise of the director's and department's powers and duties." Iowa Code § 307.12. Nothing in the duties specify authority beyond the general mandate to create rules as authorized by the statute. Rather, it points back to the statute as the source for more specific authority. Absent express authority, the agency cannot just point to general rulemaking authority. *Barker*, 431 N.W.2d at 350. There is no grant of legislative authority found in § 307.12 for the IDOT to regulate a City's use of ATE under its lawful delegation to enforce speeding laws in its own jurisdiction and any interpretation as such is wholly illogical.

Iowa Code chapter 321.348

Iowa Code § 321.348 entitled "Limitations of Cities" contains designations of authority; they just do not apply to ATE devices or other

speed detecting technology. This section states, "It shall be unlawful for any city to close or obstruct any street or highway which is used as the extension of a primary road within such city, except at times of fires or for the purpose of doing construction or repair work on such street or highway, or for other reasons with the consent of the department, *and it shall also be unlawful for any city to erect or cause to be erected or maintained any traffic sign or signal inconsistent with the provisions of this chapter*." Iowa Code § 321.348 [Emphasis added]. To state again, there is no statutory references to ATE devices or other speed detection technology, so the Cities' use of ATE is not contrary with provisions of Chapter 321. However, to follow the argument beyond that, it is important to analyze the traffic signs and signals mandate.

The IDOT has adopted the 2009 edition of the Manual on Uniform Traffic Control Devices for Streets and Highways. Pursuant to that adoption, traffic control devices,

> ….shall be defined as all signs, signals, markings, and other devices used to regulate, warn, or guide traffic, placed on, over, or adjacent to a street, highway, pedestrian facility, bikeway, or private road open to public travel by authority of a public agency or official having jurisdiction, or, in the case of a private road, by authority of the private owner or private official having jurisdiction.

Federal Highway Administration, *Manual on Uniform Traffic Control Devices for Streets and Highways* (2009 Edition).

There are several sections therein that are illustrative of what is covered, stop signs, warning signs, railroad crossing signs, stoplights. One case determined that rumble strips are traffic control devices because they are meant to provide an audible signal that one must stop ahead. *Prell v. Wood*, 386 N.W.2d 89, 92 (Iowa 1986). Traffic control devices communicate information to drivers in order to regulate stopping, starting and orderly movement of traffic. Speed detecting devices are not traffic control devices. Interpreting them as such flies in the face of IDOT's adopted Manual. As such, Iowa Code § 321.348 does not grant legislative authority to the IDOT to regulate a City's use of ATE under its lawful delegation to enforce speeding laws in its own jurisdiction.

Iowa Code chapter 321.366

Iowa Code § 321.366 is entitled "Acts Prohibited on Fully Controlled-Access Facilities" and is contained under a section of miscellaneous provisions. The term "controlled access facility" means:

> …a highway or street especially designed for through traffic, and over, from or to which owners or occupants of abutting land or other persons have no right or easement or only a controlled right or easement of access, light, air or view by reason of the fact that their property abuts upon such controlled access facility or for any other reason."

Iowa Code § 306A.2.

It is unlawful for a person, except a person operating highway maintenance equipment or an authorized emergency vehicle, to do any of the following on a fully controlled access facility:

> a. Drive a vehicle over, upon, or across a curb, central dividing section, or other separation or dividing line.
>
> b. Make a left turn or a semicircular or U-turn at a maintenance cross-over where an official sign prohibits the turn.
>
> c. Drive a vehicle except in the proper lane provided for that purpose and in the proper direction and to the right of the central dividing curb, separation, section, or line.
>
> d. Drive a vehicle into the facility from a local service road.
>
> e. Stop, park, or leave standing a vehicle, whether attended or unattended, upon the paved portion.
>
> f. Stop, park, or leave standing a vehicle, whether attended or unattended, upon the shoulders, or the right-of-way except at designated rest areas or in case of an emergency or other dire necessity."

Iowa Code § 321.366.

This Chapter likewise has nothing to do with the use of technology to detect speeding. There is no reasonable interpretation of the facts of this case that would equate the stationary ATE devices at issue in this case to unlawful use of controlled access facilities as contemplated by Chapter 321.366. Hence, there is no grant of legislative authority found in Iowa Code Chapter 321.366 to allow the IDOT to regulate a City's use of ATE equipment under its lawful delegation to enforce speeding laws in its own

jurisdiction and it would be wholly illogical to conclude that authority from the plain words and context of the statute.

In sum, there is no legislative authority granted to the IDOT to regulate a City's use of ATE under its lawful delegation to enforce speeding laws in its own jurisdiction. The purported enabling statutes upon which the IDOT relies, when properly analyzed, fail to grant the IDOT any kind of authority to regulate local law enforcement methods for carrying out the duty to enforce the speeding laws of Iowa and the cohort ordinances of the Cities. Even if, *arguendo*, the Court finds that IDOT has interpretive powers, it is wholly irrational to read authority over a municipality's use of ATE from these statutes.

This much was acknowledged by the IDOT in an email contained in the record when its representative stated:

> Many folks are currently challenging to DOTs [sic] authority on the proposed rules…so going further into issues that DOT has less authority would certainly make the process more difficult …if not Impossible [sic]" and "the key point here is that the issue the DOT feels we do have authority is regarding the overall responsibility for safety on the primary highway system. Your issue is more about how enforcement is done. [Vol. 1, page 416].

The admission is, the IDOT does not have authority to dictate how cities enforce speed regulations and these Rules are doing exactly that.

None of the code sections offered by the IDOT give an explicit grant of authority to regulate ATE. None of the code sections offered by the IDOT grant interpretive authority to the agency. Absent authority by statute, the agency was without power to adopt the ATE rules at issue in this case and, by extension, cannot direct the Cities to remove their ATE devices. *Merchants Motor Freight v. State Highway Comm'n*, 32 N.W.2d 773, 775 (1948). Even if interpretive authority can be read into the offered statutes, an interpretation that IDOT can regulate ATE based on the plain meaning and context of each proffered statute is wholly illogical. "The plain meaning of a statute cannot be altered by administrative rule." *Brakke*, No. 15-0328, 2017 WL 2616928, at *5 (citing *Schmitt v. Iowa Dep't of Soc. Servs.*, 263 N.W.2d 739, 745 (Iowa 1978)). The Court should declare the IDOT's rules and actions to be *ultra vires*.

C. THE DISTRICT COURT ERRED IN DETERMINING THAT THE IDOT'S ACTIONS DID NOT VIOLATE IOWA CODE 17A

Preservation of Error

Appellants preserved error on this issue by challenging the Appellees' actions before that agency and thereafter seeking judicial review, including as a basis for judicial review paragraphs (a) through (n) of Iowa Code §17A.19(10). (Notices of Appeal to IDOT from Appellants; Petitions for

Judicial Review (CVCV049979, CVCV083255, and CVCV049988), filed June 2015; Brief in Support of Petition for Judicial Review, filed 12/9/2016).

Discussion

In their Petitions for Judicial Review, the Cities asserted that the Appellees have acted in contravention of Iowa Code §17A.19(10)(a) through (n) inclusive. In particular, the Cities address in this portion of the Arguments, the provisions of Iowa Code §17A.19(10)(i.)(j) and (n.). As applied to the facts and circumstances of this case, those three provisions are so closely interrelated that many arguments as to one provision overlap substantially with arguments for another. In addition, Iowa Code § 17A.19(10)(l) requires the Court to grant relief even where the agency action involves the application of law to fact that has been clearly vested by a provision of law in the discretion of the agency, if that application is irrational, illogical, or wholly unjustifiable. *Brakke*, 2017 WL 2616928 at *15 (affirming the District Court finding that an order by the Iowa Department of Natural Resources was irrational, illogical, and wholly unjustifiable under Iowa Code section 17A.19(10)(l) because DNR had acted outside the legislature's grant of authority). *See also Intlekofer v. Div. of Labor Servs., Iowa Workforce Dev*., No. 10-1367, 2011 WL 5396031, 808 N.W.2d 754 (Table) (Iowa App. Nov. 9, 2011). As is demonstrated by the

recent *Brakke* case, the basis for relief under paragraph (l) of Iowa Code §17A.19(10) is very much the same as that which is more thoroughly developed in section B. of the Arguments in this Brief (concerning the Appellees' lack of regulatory authority over ATE operations). Thus, although no separate heading is devoted in this section C. to Iowa Code section 17A.19(10)(l), the Cities incorporate herein by reference the arguments set forth in section B. of its Arguments and respectfully request that the Court grant relief on the basis found in Iowa Code section 17A.19(10)(l).

1. ***The Appellees' Actions were the product of reasoning that is so illogical as to render it wholly irrational within the meaning of Iowa Code §17A.19(10)(i).***

The Appellees broadly claim that the ATE regulations and subsequent directives to remove ATE equipment are in furtherance of the Appellees' mandate to promote safety. However, there is no evidence, nor have Appellees ever purported to proffer any evidence, that either the adoption of Iowa Administrative Rules 761-144.4(1)(c) and 761-144.6(1)(b)(10) or their application to the Cities bears any rational relationship to enhancing public safety. In the Evaluations as well as Director Trombino's denial of the Cities' appeals therefrom, the Appellees contend that Cities have failed to "provide convincing evidence that the cameras are making [roadways]

safer." From a public safety perspective, however, the Appellees' insistence on such a showing for ATE is wholly irrational. Traditional patrol has long been presumed to enhance public safety. Logically, the same presumption applies with respect to ATE. In fact, by its very nature, the ATE equipment at issue in this case is safer than traditional patrol because, as described more fully throughout this brief, traditional patrol requires a traffic stop which disrupts the flow of traffic. Moreover, there is no evidence for the sole public safety argument the Appellees put forth for the so called 1,000-foot rule, set out in 761-144.6(1)(b)(10), which is that such a rule stops motorists from slamming on the brakes as soon as they become aware of ATE equipment. Yet the argument is entirely illogical: the risk is at least as high if not higher that motorists might slam on their brakes upon seeing a traditional patrol car. While ATE includes advanced warning signs that speed limits are photo enforced, there are no advance warnings of patrol car's presence. It stands to reason there has never been a 1,000-foot rule for the Cities' use of traditional patrol car, and it stands to reason there should be no such rule for the use of ATE equipment, particularly where, as here, the legislature has not authorized the Appellees to treat ATE any differently than traditional patrol.

Also with regard to the 1,000-foot rule (Iowa Administrative Rule 761-144.6(1)(b)(10), it is both contrary to law and logic to create a buffer zone in which ATE cannot be used so that motorists have additional time to reduce their speed upon entering the lower speed zone. It is undisputed that speed limits are established at the very point where a sign is posted indicating that limit and that enforcement would be proper at that point. The Appellees have acknowledged that fact (p. 416 in Volume 1 of the Agency Record). The ostensible "reason" for requiring 1,000 feet -- to allow motorists to adjust their speed downward after they have reached a lower speed zone, rather than before reaching it -- is wholly irrational. For one thing, the same "slowing" distance is required on an interstate, where the speed is to be reduced from 60 mph to 55 mph as it is, for instance, where the speed is to be reduced from 35 mph to 30 mph. Moreover, the Cities' ATE equipment is not triggered unless a vehicle is traveling 11 (in Des Moines and Muscatine) or 12 (in Cedar Rapids) miles per hour over the posted speed limit in 55 and 60 mile per hour zones. With such a high threshold for triggering an ATE citation to a vehicle entering a slower speed zone, it is nonsensical to create an additional buffer against enforcement. By way of example, a driver entering the 55 mph zone in Cedar Rapids does so after having just traveled more than three miles in a 60 mph zone. Any

driver traveling 67 mph as she or he enters the 55 mph zone has already violated the 60 mph speed limit for at least three miles prior to reaching the 55 mph zone. It is illogical and irrational to conclude such a driver needs or is entitled to still more time and distance to adjust her or his speed to the lower limit.

Turning to Iowa Administrative Rule 761-144.4(1)(c), it provides that "Automated enforcement should only be considered in extremely limited situations on interstate roads *because* they are the safest class of any roadway in the state and they typically carry a significant amount of non-familiar motorists" (emphasis supplied). Much of the Appellees' actions against the Cities rely on this rule. Yet, there is no legitimate reason, logic or rationale in this rule or its application to the Cities. In no other circumstances do the Appellees regulate law local agencies enforce speed laws based on the class of roadway, nor is there any reason Cities should be precluded from making safe roads even safer than they already may be. ATE greatly reduces the need for traffic stops on heavily traveled roads, which is a well-known and undisputed safety risk in and of itself. ATE also reduces the number of serious crashes, which in turn reduces the number of occasions on which first responders must attend to a crash. Consequently,

the number of secondary crashes is reduced, still further reducing the need for other first responders.

Also contributing to the irrational nature of the ATE Rules and their application to the Cities is the lack of any objective standards or even general guidelines by which the Cities can ascertain what would satisfy 761-144.4(1)(c), further illustrating the illogical, irrational nature of the rule and its application to the Cities. Finally, the fact that interstate roads carry a significant amount of non-familiar motorists does not make it rational to require local law enforcement to be less stringent with non-familiar drivers. The Appellees have observed that out of state drivers "often do not see/read the photo enforced signs and therefore may not monitor their speed accordingly." But every driver has a legal duty to monitor vehicle speed in relation to the posted speed signs, whether familiar with an area or not, and public safety requires even handed imposition of traffic laws. To use this as a basis for limiting the use of ATE is so illogical as to be irrational, not to mention well beyond the authority of the Appellees to promulgate as a rule. Just as there are no restraints on traditional patrol with regard to out-of-state drivers, there should be no such restraints on ATE in order to be more lenient with out of state motorists. This is particularly true given that there is no dispute that ATE is purely and mechanically objective in its application.

Similarly, there is no logic or rationale underlying the Appellees' reasoning in the various Evaluations that a relatively high number of citations at a given location somehow makes the location inappropriate for ATE. Following the reasoning reflected in Iowa Administrative Rule 761-144.4(1)(c), at least as applied to the Cities, enhanced enforcement of traffic violations is warranted where the incidence of speeding violations is relatively low but is not warranted where the incidence is relatively high. That sort of reasoning is so directly contrary to logic, as to be wholly irrational, not to mention in direct conflict with Appellees' legislative purpose of advancing public safety. For purposes of evaluating the logic of Iowa Administrative Rule 761-144.4(1)(c) as applied to the Cities, it is important to note that all locations at issue in this case were established well before that rule was promulgated. Working in close association with the Appellees, the locations were selected based on studies and statistical analyses which the Appellees themselves commissioned. It is wholly irrational to suggest these decisions were rendered incorrect by the mere passage of time or changes in state administration and political climate. The Appellees have proffered no data or other objective information to warrant a change in the analyses on which they issued permits for the very ATE operations they now seek to limit or eliminate.

With regard to Cedar Rapids' ATE operations, another example of wholly irrational decision making is found in the Appellees' position that there is no need for paired cameras on the S Curve of I-380 through the heart of Cedar Rapids. By all accounts, including the that of the Appellees, the S Curve is a dangerous stretch of roadway, where traditional enforcement is dangerous and quite limited in relation to the volume of traffic. The CR Evaluation, affirmed by Director Trombino, requires Cedar Rapids to (a) move the two ATE locations for inbound traffic so that they are closer to the "beginning of the curve" and in compliance with the 1,000-foot rule; and (b) remove altogether the ATE locations for traffic leaving the S curve. The reasoning is internally inconsistent, and so illogical as to be wholly irrational: if motorists require additional time to adjust their speed, as the Appellees suggest, then enforcement should be set up to encourage the reduction in speed well before the beginning of the dangerous S curve, not closer to it. In addition, it is contrary to logic to remove ATE equipment which monitors vehicles leaving the S curve because it removes any incentive the drivers have to maintain a lower speed throughout the dangerous S curve. Without the ATE locations for traffic leaving the curve, motorists can slow just before they enter the S curve and then accelerate

again, precisely when they should be maintaining a safe speed of 55 mph, a speed which, by the way, the Appellees have prescribed.

To the extent the Appellees insist on proof that ATE increases public safety as a means to ensure the Cities' ATE programs are not merely generating revenue, its reasoning, again, is so illogical as to be wholly irrational, not to mention illegal. First, the generation of revenue is entirely consistent with discouraging unsafe driving behavior, as is self-evident in the fact fines that are imposed for misdemeanor traffic citations. As more than one United States District Court Judge has observed, there is nothing improper about ATE reducing the number of people violating traffic laws while simultaneously raising revenue. *Hughes v. City of Cedar Rapids*, 112 F. Supp. 3rd 817, 840 (N.D. Iowa 2015), *aff'd in relevant part, rev'd on unrelated grounds at* 840 F.3d 987 (8th Cir. 2016); *Idris v. City of Chicago*, 552 F.3d 564, 566 (7th Cir.2009). Second, any given driver who exceeds the speed limit faces significantly higher penalties if issued a misdemeanor citation by means of traditional patrol, as opposed to an ATE citation.[6] Finally, the IDOT has no authority to decide whether or how much a locality can or should generate in revenue. If for some reason municipalities were

[6] To the extent the Appellees seek to control the aggregate amount of fines attributable to ATE, it is without legislative authority to do so.

able to quadruple their traditional traffic patrol, the Appellees would have no authority to limit that increased enforcement.

2. ***The Appellees' actions were the product of a decision making process in which the agency did not consider relevant and important matters relating to the propriety or desirability of the action in question that a rational decision maker in similar circumstances would have considered prior to taking that action within the meaning of Iowa Code §17A.19(10)(j).***

In the course of applying Administrative Rules 761-144.4(1)(c) and 761-144.6(1)(b)(10) to the Cities, the Appellees have failed to address, and in some cases ignored, important and relevant information submitted by the Cities which a rational decision maker would have considered in similar circumstances. Instead, the Appellees relied almost exclusively on national data, statewide crash data, and other aggregate comparisons which are of little or no value in assessing the propriety and desirability of maintaining ATE operations at the specific locations where a few years earlier, the Appellees and the Cities had made the joint decision to implement ATE.

For example, in the case of Muscatine, evidence shows significant reductions in violations: from approximately 13,000 per year before implementation to approximately 8,000 per year since. Yet the Appellees concluded there had been a "very high number of speed violations" at the location in question (which, if true, actually militates in favor of additional enforcement, not against it). Also, the Appellees cited an increase of one

crash for the area under consideration, but they never took into account the new development in the area which led to heavier traffic and the higher likelihood of crashes. Both the reduction in the incidence of speeding and the reasons for increased risk of crashes constitute importation information which relates directly to the propriety and desirability (or more to the point, the impropriety and undesirability) of the actions taken in the Appellee's Evaluation of Muscatine's ATE. Insofar as the Appellees do not address that information, the Appellees have failed to consider information a rational decision maker in similar circumstances would have considered prior to taking that action.

As for Des Moines, the Appellees were presented with data reflecting a 37% drop in crashes during the operational year 2013 for the location in question (I-235 Eastbound from the 4700 block to the 4200 block). Yet the Appellees either did not consider this data or they utterly disregarded it because they never even addressed the reduction in their Evaluation of Des Moines' ATE program. Instead, the Appellees merely stated that ATE should not be used in that location because it was not a high-crash location *by comparison to other locations*. Such a comparison is irrelevant, however, to whether ATE contributed to a still lower rate of crashes, as is reflected in the very data the Appellees disregarded. In addition, the Appellees stated

they were not convinced the I-235 location was unsafe for motorists or law enforcement conducting routine patrol. Yet, in fact, the Appellees initially approved of that very location due to the safety risks posed there for drivers as well as traditional speed enforcement activities. These statements, together with the lack of any discussion about the crash data Des Moines submitted, reinforce the fact that they disregarded that data. A rational decision maker, on the other hand, would have taken that data into account and addressed it in the Evaluation and/or the decision denying Des Moines' appeal of the Evaluation.

As is reflected more precisely in the Record, the Cities also submitted or brought to the Appellees' attention scholarly ATE studies and related authorities specific to the Cities' operations for the Appellees to consider during the evaluation and appeal processes. These included one, commissioned by the IDOT itself, titled *Evaluating the Effectiveness of Red Light Running Camera Enforcement in Cedar Rapids and Developing Guidelines for Selection and use of Red Light Running Countermeasures,* by Iowa State University's InTrans/Center for Transportation Research and Education (CTRE) (2011). Yet the Appellees did not take this study into account in forming its March 17, 2015 Evaluation. Assuming without conceding the Appellees even considered the study, they necessarily

disregarded its substance because no rational decision maker taking that study into account would have concluded the Cities should use other countermeasures before implementing ATE.

In addition, the Appellees' decisions limiting the Cities' use of ATE disregarded important and reliable evidence from the Cities about where to locate ATE equipment. The documentation the Cities provided to the Appellees included determinations by local law enforcement officials, those who actually conduct traffic patrol, that the locations where the Appellees had approved ATE permits were particularly well suited for that mode of enforcement. It is local law enforcement agencies who best know how to allocate their limited resources within the city, and the Appellees have disregarded that information, instead choosing to compare a location within one jurisdiction to locations outside of that jurisdiction. A rational decision maker in similar circumstances would not have done so, particularly where that same decision maker had previously assisted the localities in making those determinations and then ratified them. In a very real sense, the Appellees have disregarded relevant and important information they themselves helped to generate.

3. ***The Appellees' Actions were unreasonable, arbitrary, capricious or an abuse of discretion within the meaning of Iowa Code §17A.19(10)(n).***

Beyond being illegal under paragraphs (i) and (j) of Iowa Code §17A.19(10), the Appellees' actions against the Cities must be reversed because they are otherwise unreasonable, arbitrary, capricious and an abuse of discretion. *Boys & Girls Home & Family Servs*., *Inc. v. State Dep't of Human Servs*., No. 02-0866, 2003 WL 21361373, 669 N.W.2d 260 (Table) (Iowa App. June 13, 2003)(reversing agency action which lacked rationality, synonymous with unreasonableness and abuse of discretion, because it was clearly against reason and evidence; grounds for the action were clearly untenable); *Feller v. Scott County Civil Service Com.*, 435 N.W.2d 387 (Iowa App. 1988)(finding an arbitrary and capricious abuse of discretion after balancing interests of agency and party seeking relief); *Klein v. Civil Service Com.*, 260 Iowa 1147, 152 N.W.2d 195 (Iowa 1967). *See also*, *O'Donnell v. IBP*, No. 6-032/05-1097, 2006 LEXIS Iowa App 190, at *4, 715 N.W.2d 769 (Table) (Iowa App. Mar. 1, 2006) (abuse of discretion exists if agency's exercise of discretion was based on untenable grounds).

Of utmost significance to this Court's review for illegal agency action, is the fact that the Appellees offer no basis whatsoever for their position that the Cities' current ATE programs are less effective than the one the Appellees purport to require in the Resulting Actions from the Evaluations. When broken down in an analytical manner, Iowa Administrative Rules 761-

144.4(1)(c) and 761-144.6(1)(b)(10) provide policy or political considerations, which is the province of the Iowa Legislature, not the Appellees. The Appellees' Evaluations and Director Trombino's decision affirming them are devoid of evidence that safety would be enhanced by complying with the ATE rules. To the contrary, logic, common sense, and the data the Cities submitted all lead to the conclusion that safety suffers by removing ATE operations. Almost exclusively, the Appellees' written decisions consist of general information about ATE systems, with little to no proper data analysis specific to the Cities individual ATE operations. Generalizations about ATE and crash data for the whole state (regardless of the characteristics of the locations of those accidents or the type of enforcement mechanisms) are of almost no value in assessing the safety objectives for ATE in any particular location.

When the Cities implemented ATE operations under permit from the Appellees, they did so in reliance upon years of data which had been gathered in the first instance by the Appellees themselves, and then analyzed, at Appellees' request, by professional staff at Iowa State University's Center for Transportation Research and Education (CTRE). That analysis included crash data from the Appellees' own system called TraCS (Traffic and Criminal Software). Then, the political environment

changed for the Appellees, and, as set out in greater detail in Section D of the Arguments in this brief, the Appellees instituted what they termed Guidelines for Automated Traffic Enforcement, without even a rulemaking process. After the Cities protested the lack of proper rulemaking, the Appellees instituted a defective rulemaking process resulting in Iowa Administrative Rules 761-144.4(1)(c) and 761-144.6(1)(b)(10). Though the obligation, under the predecessor Guidelines, to provide written ATE justifications was doubtful, the Cities voluntarily submitted justifications, along with supporting data. But there were no standards by which the Cities justification reports were to be evaluated, because neither the Guidelines nor the ATE rules have ever provided any such standards. Thus, Appellees conducted Evaluations which are at best subjective and, as set out elsewhere, wholly irrational. Appellees' Evaluations, and Director Trombino's decisions upholding them are unreasonable, arbitrary, capricious and an abuse of discretion within the meaning of Iowa Code §17A.19(10)(n)

The Appellees purport to require that Cities prove safety countermeasures other than ATE are not sufficiently effective, purportedly pursuant to Iowa Administrative Rule 761-144.4(1)(c). This requirement does nothing other than limit the manner in which localities enforce traffic laws within their jurisdictions. Such a limit is itself unreasonable and an

abuse of whatever discretion, if any, the Appellees may have on the methods which local law enforcement agencies use to enforce traffic laws. Appellees make a bare assertion that ATE can lead to rear end crashes, with no record support other than non-specific national studies concerning ATE for red light enforcement. The record evidence can only support the conclusion that ATE is the most objective, effective and safe means of enforcing traffic laws. The only adverse impact on anyone is the fine incurred by those who exceed posted limits. Especially in light of the fact that since the outset of their ATE efforts, the Cities sought and obtained input, guidance and permission from the Appellees, the Appellees' actions are unreasonable, arbitrary, capricious and an abuse of discretion within the meaning of Iowa Code §17A.19(10)(n).

Where, as set out more fully elsewhere in the brief, an agency has no authority to adopt or administer rules on a given topic, the rules are invalid and any attempt to exercise discretion based on those rules is itself an abuse of discretion within the meaning of Iowa Code §17A.19(10)(n). Assuming, *arguendo*, the Appellees have ever had any measure of discretion to implement the ATE rules, it is an abuse of that discretion to implement them retroactively to the Cities. Perhaps the Appellees' actions could pass scrutiny under Iowa Code §17A.19(10)(n) if the Appellees had waived the rules as to

those jurisdictions with whom they had collaborated and for whom they had already issued permits. Alternatively, the Appellees could have addressed the 1,000-foot rule in a manner which would not have required Muscatine or Cedar Rapids to limit or eliminate certain ATE operations. App. 1,076-1,078. For instance, with little to no expense to the Appellees, they could have authorized the Cities to relocate the 55 mph speed limit signs at the Cities' expense to create the 1,000-foot distance. Or, the 1,000-foot rule in Cedar Rapids and Muscatine could have been waived altogether due to the *de minimis* difference between 1,000 feet and the actual distances in question (908.65 feet for one ATE location at issue on I-380 in Cedar Rapids and 950 feet for the other; 830 feet for the Muscatine location not on an interstate). Given that the 1,000-foot distance is the same regardless of the speed limit (in a 35 mph zone as well as a 55 mph zone), it is apparent that the rule is not based on a precise stopping or slowing distance. But in a truly arbitrary and capricious abuse of whatever discretion they may have had, the Appellees never even responded to any of these proposed solutions.

D. THE AGENCY'S ADOPTION OF THE 1,000-FOOT RULE FAILED TO COMPLY WITH THE RULEMAKING REQUIREMENTS, IS INVALID AS A RESULT, AND ANY AGENCY ACTION PREDICATED THEREON IS LIKEWISE INVALID.

Preservation of Error

Appellants preserved error on this issue by challenging the IDOT's actions before that agency and thereafter seeking judicial review. (Notices of Appeal to IDOT from Appellants, Petitions for Judicial Review (CVCV049979, CVCV083255, and CVCV049988), filed June 2015; Brief in Support of Petition for Judicial Review, filed 12/9/2016).

Discussion

The IDOT failed to follow the statutory rule making requirements when enacting Iowa Administrative Code 761-144.6(1)(b)(10), which provides that ATE systems cannot be placed within 1,000 feet of a lower speed limit (hereinafter "1,000-foot rule").

Iowa Code section 17A.4 sets forth the specific requirements that an agency must follow to adopt, amend, or repeal an agency Rule. *See generally*, Iowa Code § 17A.4. Pursuant to Iowa Code 17A.4, an agency seeking to adopt, amend, or repeal an agency rule is required to "[g]ive notice of its intended action by submitting the notice to the administrative rules coordinator and the administrative code editor." Iowa Code § 17A.4(1)(a). The notice must be published at least thirty-five (35) days in advance of the intended action, and must include a statement of either the terms or substance of the intended action or a description of the subjects and issues involved. *Id*. In addition, the notice must set forth the time when, the

place where, and the manner in which interested persons may present their views. *Id*.

Notice, however, is not all that is required. The agency must actually afford interested parties an opportunity to respond to the proposed agency rules. *See* Iowa Code § 17A.4(1)(a). The Code requires that the agency provide such an opportunity in two ways relevant to this action: 1) by granting interested parties at least twenty days to submit views or arguments in writing and 2) by permitting governmental subdivisions an opportunity to make oral presentation. *Id.* In addition to the requirement that the agency provide an opportunity to respond to the proposed action, Iowa Code section 17A.4 requires the agency to "consider ***fully*** all written and oral submissions respecting the proposed rule. Iowa Code § 17A.4(1)(b) (emphasis added).

By legislative mandate, "[a] rule is not valid unless adopted in substantial compliance with the requirements of [Iowa Code chapter 17A.4]." *See* Iowa Code § 17A.4(5). As Iowa Courts have recognized, 17A.4 is intended to "enforce strict compliance with statutory rule-making procedures, in view of the tendency by some administrators to skirt the requirements. The provision effectuates the general IAPA purposes of increasing public accountability of agencies, fostering public participation in rule-making, and assuring agency adherence to a uniform minimum

procedure." *Iowa Bankers Asso. v. Iowa Credit Union Dep't*, 335 N.W.2d 439, 447 (Iowa 1983) (internal quotations and citations omitted).

In this case, the IDOT's enactment of the 1,000-foot rule failed to comport with the statutory requirements under Iowa Code section 17A.4. As established by the Agency Record, the IDOT failed to publish a notice of intended action which included the 1,000-foot rule prior to the IDOT's adoption of the same. App. 278-298. Although on October 2, 2013, the IDOT published notice of its intended action to adopt, generally, Iowa Administrative Code 761-144, this notice did not include the specific 1,000-foot rule at issue in here and, as a result, did not provide Appellants with a fair opportunity to present their views on the contents of the final plan. App. 278-298.

In *Iowa Citizen/Labor Energy Coal., Inc. v. Iowa State Commerce*, the Iowa Supreme Court considered the circumstances under which a notice, or series of notices, of intended action would be deemed to adequately address final rules promulgated by an agency. 335 N.W.2d 178, 180 (Iowa 1983). In that case, the agency initially published notice of intended action indicating its intent to consider rule changes regarding procedures for reconnection of utility services when temperatures dropped below certain thresholds. *See generally, id*.

After holding a public hearing regarding the same, "[c]omments in the first hearing persuaded the commission to shift its focus from a temperature standard for shut-off procedures to an ability to pay standard." *Id*. at 180. The agency then issued a second notice of intended action which stated that the agency revised the proposed rule changes by replacing the "temperature standard" with an "ability to pay standard." *Id*. This notice included a draft of the proposed rule changes which implemented the ability to pay standard. *Id*.

After publishing the second notice, the agency then held a second hearing and afforded interested parties an opportunity to respond to the new proposed changes. *Id*. Ultimately, the agency adopted rules which incorporated portions of both proposed changes, including some procedures relating to the temperature based standard and some relating to the ability to pay standard. *Id*. Because the final rules adopted by the agency included features within the scope of both notices of intended action, the Iowa Supreme Court ultimately concluded that the notices of intended action satisfied the notice requirements of Iowa Code section 17A.4(1)(a), as the notices were "sufficiently informative to assure interested persons an opportunity to participate intelligently in the rulemaking process." *Id*. at 181.

The Court in the *Iowa Citizen* case noted that, even though the agency satisfied the notice requirements, agencies still have a duty to submit rules to additional comment when the prior notice was not "sufficiently informative to assure interested persons an opportunity to participate intelligently in the rulemaking process." *Id*. The Court further noted that "[t]he essential inquiry is whether the commenters have had a fair opportunity to present their views on the contents of the final plan." *Id.* (citing *BASF Wyandotte Corp. v. Costle*, 598 F.2d 637, 642 (1st Cir. 1979), *cert. denied*, 444 U.S. 1096, 100 S. Ct. 1063, 62 L. Ed. 2d 784 (1980)).

In this case, Appellants were not provided with any notice whatsoever that the IDOT intended to adopt a rule that prohibited the placement of ATE equipment within a 1,000 feet of a lower speed limit. App. 278-281, 657-669. The absence of notice regarding the 1,000-foot rule wholly prevented Appellants from engaging meaningfully in the rule making process.

For instance, in 2010/2011 the IDOT approved the site locations and installation of the ATE equipment at the intersection of U.S. Hwy 61 and University Drive in Muscatine and on Interstate 380 near J Ave in Cedar Rapids. App. 152-156, 180-191, 715-728; 719-1,063; 1,120-1,134. The notice published on October 2, 2013 gave appellants absolutely no indication that the IDOT intended to adopt or consider a rule which would effectively

render unlawful the placement/location of existing ATE equipment that had been specifically approved by the IDOT. App. 278-309, 635-656, 657-668. Because Appellants lacked any such notice, they did not have the opportunity to submit – and therefore did not submit – written or oral comments regarding the 1,000-foot rule or it's interaction with existing ATE equipment that the IDOT had specifically approved. App. 278-309, 635-656, 657-668. Despite the absence of notice and opportunity for Appellants to respond to the 1,000-foot rule, the IDOT adopted it on December 10, 2013 and then enforced it against the cities of Cedar Rapids and Muscatine by ordering the removal of the very equipment that the IDOT specifically approved. App. 671-675, 1,103-1,108. The IDOT's order to remove the ATE equipment based on this 1,000-foot rule was part of the final agency action which Appellants appealed from. App. 1,103-1,116, 1,120-1,263, 1,270-1,292.

It is self-evident that Appellants and others with existing ATE equipment had an interest in the general ATE rule making process and were specifically and uniquely interested in and affected by the 1,000-foot rule. The IDOT had the obligation to publish notice that was sufficiently informative to assure interested persons had an opportunity "present their view on the contents of the final plan." Because the IDOT's October 2, 2013

notice was not sufficiently informative to provide Appellants and other interested parties with notice of its intent to adopt the 1,000-foot rule, the IDOT had the obligation to submit the 1,000-foot rule to additional comment. Because it failed to do so, the rule is invalid. By extension, the agency action predicated on this rule is void as a matter of law and should be reversed. *See* Iowa Code section 17A.19(10)(b)(d). The district court erred in failing to so hold.

V. CONCLUSION

For these reasons, Petitioners-Appellants request that this Court reverse the district court's decision affirming the IDOT's March 17, 2015 order, and declare that Appellants' home rule powers permit the installation and operation of the ATE equipment until such time that Appellants' powers in this respect are abrogated by the Iowa legislature or, in the alternative, declare that the IDOT's adoption and enforcement of its agency rules against Appellants in this case violated Iowa Code chapter 17A.

STATEMENT REQUESTING ORAL ARGUMENT

Petitioners-Appellants hereby respectfully request that this case be submitted with oral argument.

Respectfully submitted,

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CERTIFICATE OF FILING

I hereby certify that I have filed the foregoing Appellant's Brief by EDMS to the Clerk of the Iowa Supreme Court on the 31st day of August 2017.

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CERTIFICATE OF COMPLIANCE

1. This Brief complies with this Court's June 30, 2017 Order to permitting Appellants to submit a brief containing no more than 16,200 words, in that the instant brief contains 15,774 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 the Brief has been prepared in a proportionally spaced typeface using Times New Roman font and utilizing the 2016 edition of Microsoft Word in 14 point font plain style.

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