

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

<p>LISA KRAGNES, et al</p> <p>Plaintiff,</p> <p>vs.</p> <p>CITY OF DES MOINES, IOWA,</p> <p>Defendant.</p>	<p>Equity No. 49273</p> <p>PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR CERTIFICATION OF A CLASS ACTION</p>
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STATEMENT OF FACTS

Lisa Kragnes, Plaintiff in this case, has been a resident of the City of Des Moines for a period of approximately 7 years. (Kragnes Depo. P. 4-5). She rented her first home on Prospect Road in Des Moines, Iowa and acquired her second home on Rutland Avenue in Des Moines, Iowa during that 7 year period. (Kragnes Depo. P. 4-5). She paid gas and electric bills, which included the franchise fee imposed by the City of Des Moines by virtue of its Ordinances.

The present action is an action for declaratory judgment brought by Lisa Kragnes. This action was filed on July 27, 2004.

The nature of this case stems from the City of Des Moines' imposition of a franchise fee charged to the gas and electric utility customers located within the city limits of the City of Des Moines. This litigation has been limited by the Plaintiff for the period of time commencing July 27, 1999 through the conclusion of this litigation. Ultimately, Plaintiff seeks to secure a refund of the monies illegally collected by the City of Des Moines under the franchise ordinances imposing the illegal fees. Plaintiff plead this matter as a class action in her original petition filed with the Court and served upon the Defendant City.

The applicable ordinances passed by the City of Des Moines were first enacted in 1987, amended in 2004 and again amended in 2005 going through the present time. In 1987, the City, by franchise ordinance enacted pursuant to Iowa Code § 364.2(4) Code of Iowa (2005) placed a 1 percent franchise fee to be charged to both gas and electric consumers within the city limits of the City of Des Moines. The fee charged stayed at the 1 percent level until 2004 when the City of Des Moines passed an amended ordinance governing the gas and electric franchise in the City of Des Moines. That ordinance imposed a franchise fee in an amount equal to 3 percent of the gross receipts derived by MidAmerican Energy Company from the transmission or distribution of gas to customers within the corporate limits of the City excluding, however, the sale of gas to the City, and allowed for a franchise fee increase to an amount not greater than 6 percent. (Section 6 City of Des Moines Ordinance 14, 341 and 14,342). On March 28, 2005, the Des Moines City Council passed a resolution increasing the franchise fee charged to gas and electric customers within the corporate limits of the City to 5 percent, which is its current level.

It is undisputed how the City computed and collects the franchise fee from consumers within the city limits of the City of Des Moines of electric and gas utility. The franchise fee being exacted is not computed or ascertained by the City based on any cost incurred by the City. The franchise fee is collected as a revenue generating measure and was originally increased in 2004 for the purpose of funding the hiring more police and fire fighters, increased library hours and street reconstruction. The money is placed in the general fund of the City and spent in the manner the City Council sees appropriate.

The Plaintiff's claim asserts that the franchise fees charged to the gas and electric utility customers within the city limits of the City of Des Moines actually constitutes an illegal tax outside the City's legal authority to tax.

STATEMENT OF ISSUES

I. THE PLAINTIFF URGES THAT A TAX ILLEGALLY COLLECTED MUST BE REFUNDED.

This case involves the imposition of a tax that the City has denoted as a fee. The City currently imposes a fee of 5% on Gas and electric customers obtaining service within the City Limits of the City of Des Moines. The Plaintiff has limited the period of time for which she seeks a refund from the conclusion of this litigation to a period five years preceding the filing of this litigation or July 27, 1999. In the event that the court determines the fee is illegal all persons, firms and corporations that paid the fee are entitled to a refund under applicable Iowa law. Partial Motions for Summary Judgment have been filed by the Plaintiff, simultaneously with this brief, which ultimately seek a court determination that the franchise fee charged and paid by gas and electric utility customers is illegal. Should the Court find the fees charged to be illegal, a refund of the fees should ultimately result. Class certification of this matter would therefore be appropriate.

In the case of *Burlington Northern Railway Company v. Board of Supervisors of Adair*, 418 N.W.2d 72 (Iowa 1988), the Supreme Court held that mandamus will lie "to compel a refund of a tax illegally collected." Likewise, the case of *Crown Concrete Company v. Conklings*, 247 Iowa 609, 75 N.W.2d 351, the Court held that "a tax, voluntarily paid, must be refunded if it was erroneously or illegally exacted or paid." See also *Jewett Realty Company v. Board of Supervisors of Polk County*, 239 Iowa 988; *Morrison-Knudsen Company, Inc. v. State Tax Commission of Iowa*, 242 Iowa 33, 44 N.W.2d 449; *Isbelle v. Board of Supervisors of Woodbury County*, 54 N.W.2d 508.

Likewise, the Supreme Court stated, in the case of *Isbelle v. Board of Supervisors of Woodbury County*, 54 N.W.2d 508 (1952):

“A levy by the property legislative authority is the first step in taxation, and no taxes can be assessed or collected until a legal levy is ordered by such authorities... A tax must be levied...by the legislative power to which it is referable... A local tax is not valid unless it is duly levied by the proper local authorities... We have uniformly held a valid levy is a very essential jurisdictional step in the imposition of a tax... We have repeatedly held that where a tax is illegal and void, as we think this one is, and not merely irregular, equity will enjoin its enforcement.”

In the case of *Griswold Land & Credit Company v. County of Calhoun*, 201 N.W.2d 11, the Supreme Court laid down the rule that:

“A tax is erroneous or illegal and refund may be enforced when such tax is levied (1) without statutory authority; or (2) upon property not subject to taxation; or (3) by some officer or officers having no authority to level same; and (4) in some other similar illegal respect.”

It is well settled that taxes erroneously paid or illegal must be refunded.

In the event that the Court rules the fees collected by the City are illegal or erroneous the Court should order the City to refund the monies so collected. As such, cases of this nature are particularly suited for disposition as Class Actions which is more specifically discussed Supra.

II. ONE OR MORE MEMBERS OF A CLASS MAY SUE OR BE SUED AS REPRESENTATIVE PARTIES ON BEHALF OF ALL IN A CLASS ACTION IF: (1) THE CLASS IS SO NUMEROUS OR SO CONSTITUTED THAT JOINING OF ALL MEMBERS, WHETHER OR NOT OTHERWISE REQUIRED OR PERMITTED, IS IMPRACTICABLE; AND (2) THERE IS A QUESTION OF LAW OR FACT COMMON TO THE CLASS. Iowa Rule of Civil Procedure 1.261.

Rule 1.262 states, in part as follows:

- 1 Unless deferred by the Court, as soon as practicable after the commencement of a class action, the Court shall hold a hearing and determine whether or not

the action is to be maintained by a class as a class action and, by Order, certify or refuse to certify it as a class action.

- 2 The Court may certify an action as a class action if it finds all of the following: (1) the requirements of *R.C.P.* 1.261 have been satisfied; (2) a class action should be permitted for the fair and efficient adjudication of the controversy; and (3) the representative parties fairly and accurately will protect the interest of the class.

I.R.C.P. 1.261 provides that:

One or more members of a class may sue or be sued as representative parties on behalf of all in a class action if both of the following occur:

- (1) The Class is so numerous or so constituted that joinder of all members, whether or not otherwise required or permitted, is impracticable.
- (2) There is a question of law or fact common to the class.

In the instant case, the Plaintiff intends to prove that the City has illegally assessed or imposed and collected a tax, which should be refunded. If the tax is refunded, it should be refunded to all persons who paid the tax. An Order entered by the Court in favor of Plaintiff should result in a refund to all taxpayers who paid the illegal tax. The City of Des Moines is the Capital City of the State of Iowa and has the highest population of any City in the State. The franchise fee at issue in this case was charged to all gas and electric energy consumers within the City Limits from July 27, 1999 to the present.

In *City of Dubuque v. Iowa Trust*, 519 N.W.2d 786 (1994), the Supreme Court stated:

A class action should be certified if it allows a fair and efficient adjudication of the controversy, and if the class representatives will adequately protect the interests of the class... The burden of establishing that a proposed class of plaintiffs meets these prerequisites rests with the proponent... A failure of proof of any one of the prerequisites is fatal to class certification... however, the proponent's burden is light... We have held that as long as the Court has before it sufficient information to form a reasonable judgment on the certification issue, it need not inquire further into the facts supporting plaintiff's petition... Any doubts regarding joinder and practicability should be resolved in favor of upholding the class.

Certification of a class action does not depend upon determination of whether the Plaintiff will ultimately prevail on the merits, but whether the requirements of the *Rules of Civil*

Procedure 42.1[now 1.261] and 42.20[now stricken] are met. *Kramersmeir v. R.J. Dickinson & Company*, 440 N.W.2d 87 (1989); *Vignaroli v. Blue Cross of Iowa*, 360 N.W.2d 741 (1985).

For a class certification proceeding, the appropriate inquiry is not the strength of each class member's personal claim, but rather, whether they, as a class have common complaints. *Vignaroli v. Blue Cross of Iowa*, 360 N.W.2d 741, 744 (1985). The basic question is whether the potential class, including absent members, seeks to remedy a common legal grievance. *Id.* Here, it is clear that all individuals or entities that paid the tax should receive a refund of said tax upon a court's determination that the tax or fee was illegal. As such, it is clear that this class action brought on behalf of all persons or entities that paid the fee or tax to the City are proper class members and have a commonality of claims.

The Rules of Civil Procedure require the class to be "so numerous or so constituted" that joinder of all members is impracticable. Iowa Rule of Civil Procedure 1.261. The general rule of numbers is that if the class is large, then the numbers alone should be dispositive. 1 H. Newburg, *Newburg on Class Actions*, 142 (2nd Edition 1985). Forty or more have been recognized as the range where numbers alone would suffice to show impracticability of joinder. *Id.* at 141-42; 3B Newburg, paragraph 23.05(1) at 23-143 to 23-145.

In the case at bar, the evidence will demonstrate that the number of individuals who paid the fee to the City under the franchise ordinances for electric and gas utilities is so numerous that joinder is impracticable. The potential class in this case will include persons, firms and corporations who were gas and electric utility customers within the City of Des Moines who paid the fee from July 27, 1999 to the conclusion of this case. The number of individuals, firms or corporations who paid the fee during the applicable period is well in excess of 100,000, which makes this case particularly well suited for class adjudication.

The potential class members are similarly situated and have common interests and claims. In the event that the Court determines the fee to be illegal and it should ultimately order a refund of the sums illegally collected. There can be no dispute that the interests of the potential class would be the same, the refund of all fees paid to the City under the franchise ordinances by the gas and electric customers located within the City of Des Moines.

It is unlikely that the City will dispute that the Plaintiff in this case will fairly and adequately protect the interest of the class. The ultimate goal of the Plaintiff in this case is to right a wrong. She has secured competent counsel to represent her interests and the interests of the class should the court certify this matter. She is and was a payor of the fee imposed by the City's franchise ordinance and ultimately seeks to secure a refund for the class as a whole. While the City undoubtedly disagrees that a wrong has transpired, I do not anticipate any question by the City as to her motives or her ability to represent the class.

Once the requirements of Rule 1.261 are met, the Court must then examine the thirteen criteria listed in Iowa Rule of Civil Procedure 1.263 to determine if a class should be permitted for the fair and efficient adjudication of the controversy. The trial court is to determine the appropriate weight to be given to each of these criteria:

1. Whether a joint or common interest exists among the members of the class;
2. Whether the prosecution of separate actions by or against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for a party opposing the class;
3. Whether adjudication is with respect to individual members of the class as a practical matter would be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interests;

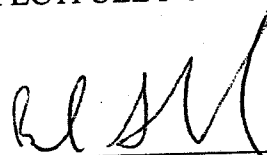
4. Whether a party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole;
5. Whether common questions of law or fact predominate over any questions affecting only individual members;
6. Whether other means of adjudicating the claims and defenses are impractical or inefficient;
7. Whether a class action offers the most appropriate means of adjudicating claims and defenses;
8. Whether members not representative parties have a substantial interest in individually controlling the prosecution or defense of separate actions;
9. Whether the class action involves a claim that is or has been the subject of a class action, a governmental action, or other proceeding;
10. Whether it is desirable to bring a class action in another forum;
11. Whether management of the class action poses unusual difficulties;
12. Whether any conflict of laws issues pose unusual difficulties; and
13. Whether the claims of individual class members are insufficient in the amounts or interests involved, in view of the complexities of the issues and the expenses of the litigation to afford significant relief to the members of the class.

A failure to grant the class action would create the risk of inconsistent or varying adjudications with respect to any litigation among present day fee payors. It is anticipated that this matter will have far reaching effects and will in all likelihood result in a final un-appealable decision as required by the franchise ordinances themselves. As a result adjudication with respect to individual members of the class as a practical matter would be dispositive of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interests. It is clear that adjudicating the claims in a class action was the most efficient method to handle the outstanding issues, the only certain way to avoid inconsistent results, and the most appropriate way to dispose of this matter. This type of litigation would be

cost prohibitive to bring in most cases considering the amount typically paid by residents of the City of Des Moines during the applicable period in question, when taken in light of the complexity of the issues, costs and expenses of litigation, and the anticipated duration of litigation. Class action adjudication is the most cost effective method of adjudicating this claim for individual claimants. In considering the criteria set forth in I.R.C.P 1.263 the criteria weigh heavily in favor of Certification of this matter as a class action.

Wherefore, the Plaintiff respectfully requests that the Court rule on the plaintiff's request to certify this matter as a class action, as more particularly plead in Plaintiff's petition filed with the Court July 27, 2004, and enter orders consistent therewith as required by Iowa law, and for such other and further relief as the Court deems equitable in the premises.

RESPECTFULLY SUBMITTED BY:



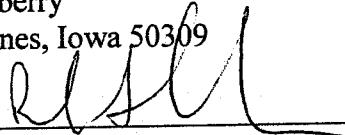
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ORIGINAL FILED.

Copies of the foregoing have
been hand-delivered this 11th
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By:  _____