

1. Iowa Code § 364.2 – Vesting of power – franchise
2. Iowa Code § 480A.3 – Fees
3. Iowa Code § 480A.6 – Franchise ordinance not superseded
4. Iowa Code § 423B.5 – Local sales and service tax
5. Iowa Code § 423E.3 – Collection of tax (See City's Brief in Support of its Motion for Summary Judgment).

Plaintiff, however, recognizes only Iowa Code § 364.2 in her brief. She does not discuss or even mention the other four statutes.

Her omission is even harder to understand when one considers what is in her brief.

As expected, Plaintiff attempted to rely upon City of Hawarden v. U.S. West Communications, 590 N.W.2d 504 (Iowa 1999). She cites it on page nine of her brief in support of her motion. But while she purports to rely upon the Hawarden, Plaintiff might be hard pressed to claim she read it thoroughly. Because if she had read the decision she would have found:

We note that subsequent to this litigation the legislature amended § 364.2(4)(a) to omit "telephone" from the list of utilities for which a city franchise may be granted. See 1998 Iowa Acts ch. 1148, § 1(a) (now codified at Iowa Code § 364.2(4)(a) (1999)). The same legislation also added a new section restricting a local government from recovering "any fee from a public utility for the use of its rights-of-way, other than a fee for its management costs," subject to the parties' obligations under franchise agreements already in existence. See *id.* §§ 5, 8 (now codified at Iowa Code §§ 480A.3, 6).

Hawarden, 590 N.W.2d at 506, note 2, (emphasis added).

Plaintiff's failure (or perhaps, refusal) to consider and discuss Iowa Code §§ 423B.5 and 423E.3 is equally confusing. Plaintiff claims the franchise fees at issue are really illegal sales taxes in disguise. Both § 423B.5 and § 423E.3 deal precisely with the topics of sales taxes and franchise

fees. Yet, like the proverbial ostrich, Plaintiff plants her head deep in the sand and simply pays the statutes no mind.

Such behavior is dangerous. First, the Plaintiff must overcome the strong presumption of validity which attaches to the ordinance. State v. City of Iowa City, 490 N.W.2d 825, 829 (Iowa 1992). Second, she must also overcome the presumptions of reasonableness and constitutionality which attach to the ordinances. Dilley v. City of Des Moines, 247 N.W.2d 187, 190 (Iowa 1976). Third, she bears the "heavy burden" of proof in attempting to overturn the ordinance. *Id.* at 191.

One might surmise that it is hard to overcome strong presumptions and shoulder heavy burdens while conducting an incomplete statutory analysis. One would be correct. We need look no further than the beginning of Plaintiff's argument to see the error of her ways made manifest.

On Page 8 and 9 of her brief, Plaintiff does discuss Iowa Code § 364.2. She concludes it has applicability to this case. Then, based upon her reading of § 364.2, and only upon her reading of § 364.2, she concludes that the legislature has "impliedly" and "indirectly" authorized franchise fees and that those fees "must be related to the cost of providing the franchise benefit to the customer." (Plaintiff's Brief in Support of Second Motion for Summary Judgment).

Indeed, she uses some root form of the word 'implied' no fewer than eight times on pages 8 and 9 of her brief. Sadly, she mentions Iowa Code §§ 480A.3 and 480A.6 not once. If she had but looked at § 480A.3 she would have found the following language, which puts an emphatic end to any notion that franchise fees are merely implied in the law:

This section does not prohibit the collection of a franchise fee as permitted in section 480A.6.

Iowa Code § 480A.3.

There is nothing implied and nothing indirect about the above language. It is clear. It is concise. It is unequivocal. And Plaintiff's failure to consider the clear, concise and unequivocal language of §§ 480A.3 and 480A.6 (along with her failure to consider Iowa Code §§ 423B.5 and 423E.3) is fatal to her cause.

CONCLUSION

Plaintiff carries a seemingly cavalier attitude into the very serious business of attempting to overturn city ordinances that significantly affect the City's budget. Her legal argument is noteworthy only for its omissions. Intentionally or otherwise, she fails to discuss, or even mention, four of the five statutes that bear most directly upon the issue she raises. Her second motion for summary judgment must fail as a result.

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PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on 11-4-05

By: U.S. Mail FAX
 Hand Delivered Overnight Courier
 Federal Express Other

Signature Diane Roscoe