

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

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LISA KRAGNES, et al Plaintiff, vs. CITY OF DES MOINES, IOWA, Defendant.	Equity No. 49273 <p align="center">PLAINTIFFS' BRIEF IN SUPPORT OF PLAINTIFFS' RESISTANCE TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT</p>
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COMES NOW the Plaintiff, Lisa Kragnes, on behalf of herself and all others similarly situated, and submits this brief in support of her resistance to the Defendant's motion for summary judgment filed October 11, 2005.

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INTRODUCTION

Simultaneously the Plaintiff and the Defendant filed Motions for Summary Judgment on liability issues in this case. Accordingly, the Plaintiff would hereby incorporate the arguments the Plaintiff makes in her Second Motion for Partial Summary Judgment filed October 11, 2005, as to both facts and legal arguments. It will be the attempt of the Plaintiff in this brief to set forth a response to the specific arguments set forth by the Defendant in its motion for summary judgment.

ARGUMENT

THE GAS AND ELECTRIC UTILITY FRANCHISE FEES IMPOSED BY THE CITY OF DES MOINES ARE ILLEGAL TAXES.

A. STATE LAW SPECIFICALLY RESTRICTS CITIES FROM IMPOSING TAXES UNLESS AUTHORIZED BY THE LEGISLATURE AND THE FRANCHISE FEES IMPOSED BY THE CITY OF DES MOINES CONSTITUTE AN ILLEGAL TAX.

The Defendant attempts to argue specific authorization for a franchise fee and argues that such fees are authorized by the legislature as a revenue generating measure. In the first section of their brief they attempt to set forth the specific legislative authority by referencing several code sections that currently exist in the Iowa Code. Their argument in that regard is entirely without merit.

In analyzing the existing legislative grants, one must do so by recognizing the specific restriction imposed by the Iowa legislature on cities, which incidentally was conspicuously absent in the Defendant's brief and argument. In 1968, a Constitutional amendment was made in § 38A of the Constitution of the State of Iowa which provided:

"Municipal corporations are granted home rule power and authority, not inconsistent with the laws of the general assembly, to determine their local affairs in government, except that they shall not have the power to levy any tax unless expressly authorized by the general assembly."

That constitutional restriction on a municipality's power to levy a tax was codified in §364.3(4), which provides, "a city may not levy a tax unless specifically authorized by a state law." The existence of such a strict, unambiguous restriction on city power is important for the purpose of analyzing the imposition of the "franchise fee" by the City of Des Moines.

The Defendant commences its argument by reciting provisions contained in §364.2 relative to the grant of franchises by municipalities. However, in analyzing the City's argument with regard to the powers conferred on municipalities relative to the grant of a franchise for gas and electric it may be helpful to consider the history of municipal franchise power prior to the enactment of home rule as is codified in Chapter 364.2 Iowa Code (2005.)

Chapter 364 Iowa Code first came into existence in the form we know it today in 1975, when its predecessor was repealed and amendments were made in response to the constitutional amendment granting home rule authority. Prior to an adoption after franchise provisions in Chapter 364, franchise were part of Chapter 397. As such, §397.2 Code of Iowa which existed from 1958 until July 1, 1975 provided municipal authority relative to the grant of a franchise and operation of utilities.

§397.2 provided:

"They may grant to individuals or private corporations the authority to erect and maintain such works or plants for a term of not more than 25 years, and may renew, amend, or extend the terms of the grant; but no exclusive franchise shall be granted, amended, extended, or renewed." ^{1,2}

¹ Attached in Plaintiff's First Supplemental Appendix are the Code Sections from the 1973 Code to assist the Court in its review of the sections that are cited herein.

² Interestingly the 1960 ordinances passed by the City of Des Moines conferring the franchise to MidAmerican's predecessor, Iowa Power and Light, imposed a franchise occupational use tax equal to one percent on electric and 2% for gas. The ordinance uses the term aforementioned terms and identifies the charge as a tax. See these Ordinances attached in Plaintiff's First Supplemental Appendix.

After the constitutional amendment granting home rule authority to cities, §364.2 was enacted effective July 1, 1975 and the prior code provisions contained in then §397.2 of the Iowa Code were eliminated and the franchise power was vested as enumerated in §364.2 Code of Iowa (1975.)³ This new code provision provided:

"364.2(4)(a). A City may grant to any person a franchise to erect, maintain and operate plants any systems for electric light and power, heating, telephone, telegraph, cablevision, district telegraph and alarm, motor bus, trolley, street railway or other public transit, water works or gas works within the city for a term of not more than 25 years. The franchise may be granted, amended, extended, or renewed by an ordinance, but no exclusive franchise shall be granted, amended, extended or renewed.

The franchise "ordinance" may regulate the conditions required in the manner of use of the streets and public grounds of the city and may for the purpose of providing electrical, gas, heating, or water service, confer the power to appropriate and condemn private property upon the person franchised."
§362.2(4)(e).

Nothing in the original statute referenced a "franchise fee" or "tax". At the same time, §364.3(4) was passed and provided, "A city may not levy a tax unless specifically authorized by a state law." Not until 1984 did the Iowa legislature add subsection (f) to §364.2(4) which provides: "If a city franchise fee is assessed to customers of a franchise, the fee shall not be assessed to the city as a customer." Iowa Code §364.2(4)(f).

The importance of these changes is patent. The franchise provision governing the regulation and the use of rights-of-way within the city was moved to the existing Chapter 364 without any reference to franchise fees. Not until 1984 was the reference to franchise fees included in the statute through the enactment of subsection (f) which provided that if a franchise fee is assessed to customers of a franchise, the fee shall not be assessed to the city as a customer.

³ A copy of §364.2 from the Iowa Code, 1975, is also attached in Plaintiff's First Supplemental Appendix to aid the Court.

See *Iowa Code* §364.2(4)(f). Interestingly enough, the term “tax” was not chosen by the legislature in its adoption of that reference in 1984.

While the Defendant appears to argue that the inclusion of the provisions in §364.2(4)(f) somehow created the right to assess franchise fees upon utilities without limitation as to the nature or the amount of the fee, the history of the legislative enactments since the grant of home rule authority indicate differently. Not until 1984 was there any reference to a “franchise fee” enacted by the legislature. However, in making such an enactment, there was no reference to a “tax”. In Iowa, municipalities cannot levy taxes without specific state law authority.

The grant of home rule authority to cities and the creation of a different statutory framework by the legislature in 1975, without any language being included relative to franchise fees until 1984, leads to the necessary analysis of what authority, prior to 1984, was possessed by cities for the imposition of a fee. A detailed and thorough analysis has been undertaken by the Iowa Supreme Court in *Homebuilders Association of Greater Des Moines v. The City of West Des Moines*, 644 N.W.2d 399 (2002) which held:

Having examined the sources and scope of the City's taxing authority, we now examine its authority to charge fees under its police power. Before municipalities had home rule authority, this court had interpreted the regulatory authority granted by statute to cities to include the power to charge a fee to meet the expenses of the city in exercising its regulatory authority. *Felt v. City of Des Moines*, 247 Iowa 1269, 1273, 78 N.W.2d 857, 859 (1956) (holding that fee charged to cover city's expenses in exercising its statutory authority was "a proper incident to the authority granted under the statute"); see *City of Pella v. Fowler*, 215 Iowa 90, 98, 244 N.W. 734, 738 (1932); *Solberg v. Davenport*, 211 Iowa 612, 617, 232 N.W. 477, 480 (1930). The same principle applies with respect to a city's home rule authority: a city may charge a fee to cover its administrative expenses in exercising its police power. Thus, the reasonable cost of inspecting, licensing, supervising, or otherwise regulating an activity may be imposed on those engaging in the activity in the form of a license fee, permit fee, or franchise fee. See *City of Hawarden*, 590 N.W.2d at 506-07. In addition to regulatory fees, a municipality may charge a citizen when it provides a service to that citizen. See *Newman*, 232 N.W.2d at 573.

The City may charge a fee for the cost of its administrative expenses in exercising its police power. That City power existed both before and after the grant of home rule authority.

With those powers in mind, the addition of the 1984 amendment by the Iowa Legislature of §364.2 adding subsection (f) providing, "If a city franchise fee is assessed to customers of a franchise, the fee shall not be assessed to the city as a customer." becomes clear. Cities such as the Defendant had authority to recover the costs of its administrative expense in exercising their police powers. The addition of Iowa Code §364.2 (4)(f) by the legislature nine years after the grant of home rule authority in such terms can only be construed to limit the cities' regulatory power so as to assure that cities did not charge the city as a customer.

The Defendant also curiously relies on § 480A.3 Iowa Code, which provides:

"A local government shall not recover any fee from a public utility for the use of its right-of-way, other than a fee for its management costs. A local government may recover from a public utility only those management costs caused by the public utility's activity in the public right-of-way. A fee or other obligation under this section shall be imposed on a competitively neutral basis. One of local government's management costs cannot be attributed to one entity, those costs shall be allocated among all users of the public rights of way, including the local government itself. The allocation shall reflect proportionally the costs incurred by the local government as a result of the various types of uses of the public rights of way. This section does not prohibit the collection of a franchise fee as permitted in § 480A.6."

Section 480A.6 provides that this chapter does not modify or supersede the rights and obligations of a local government in the public utility established by the terms of any existing or future franchise granted, approved, and accepted pursuant to §364.2, subsection 4. A city which collects a city franchise fee from an entity pursuant to §364.2(4), under an existing or future franchise shall not also collect a management fee from that entity pursuant to §480A.3.

Again the city's reliance on those code sections as authority for the proposition that an unrestricted franchise fee can be imposed on the **customers** of a franchise is entirely without merit. First, the specific language of §480A.6 prohibits the collection of a management fee from

an entity (public utility) if under an existing or future franchise, a franchise fee is collected from said entity. In this case, a franchise fee is being collected from the customers of that entity pursuant to the specific terms of the ordinance adopted by the City of Des Moines. Iowa Code §480A.6 merely restricts the city which collects a franchise fee from collecting a fee for the city's management costs of its right-of-way. The language does not suggest that the franchise fee can be more than management costs of its right-of-way nor that there is no limit on a franchise fee. In fact, the implication is that the franchise fee must bear a relation to costs and simply restricts the city which is collecting the franchise fee from "double-dipping" by collecting an additional fee for those management costs.

Contrary to the argument of the Defendant, what the law actually states reflects limitations have been imposed on the City's imposition of the "franchise fee" by the legislature.

The pertinent provisions of §364.2(4) provide:

e. The franchise ordinance may regulate the conditions required and the manner of use of the streets and public grounds of the city, and it may, for the purpose of providing electrical, gas, heating, or water service, confer the power to appropriate and condemn private property upon the person franchised.

f. If a city franchise fee is assessed to customers of a franchise, the fee shall not be assessed to the city as a customer."

Iowa Code §364.2(4)(e) and(f) (2005). The legislature gave the City in these sections the ability, by ordinance, to "regulate the conditions required and the manner of use" of city streets and public grounds for utility purposes, and confer the power to condemn private property. Therefore, pursuant to *Hawarden* and *Home Builders*, the reasonable cost of inspecting, licensing, supervising, or otherwise regulating an activity may be imposed on those engaging in the activity in the form of a license fee, permit fee, or franchise fee. *Id.*

This is further supported by reviewing the legislative definitions set forth in Chapter 4 of the Iowa Code. Iowa Code § 4.1(38) provides that words and phrases shall be construed according to the context and the approved usage of the language; but technical words and phrases, such others as may have acquired a peculiar and appropriate meaning in law shall be construed according to such meaning. The legislature, in this case, has taken away rate and charge making authority in its repeal of the pertinent provisions of Chapter 397 Code of Iowa (1975) and its enactment of Iowa Code §362.2(4) and its amendments over the years. The use of the term “fee” by the legislature, in light of the construction of statutory words or phrases, must be done consistently with case law and common law. Words that have a well-defined meaning in the common law have the same meaning in statues dealing with similarly subject matter. *Harvey vs. Care Initiatives, Inc.*, 634 N.W.2d 681, 684, citing *T&K Roofing Company vs. Iowa Department of Education*, 593 N.W.2d 159, 162 (Iowa 1999); *State vs. Pace*, 602 N.W.2d 764, 771 (Iowa 1999); *Sorbier vs. State*, 498 N.W.2d 720, 723 (1993); *2B Norman Jay Singer, Sutherland Statutory Construction* Section 50.03 at 150 (Clark Boardman Callahan Sixth Edition 2000). Words that have well-defined meaning in the common law have the same meaning in statues dealing with similar subject matter. *Id.*

In this case, the limiting language adopted through the inclusion of §364.2(4)(f) Code of Iowa limiting the imposition of the franchise fee on the City as a customer can only be said to constitute a limitation of the fee charging authority explained by the Supreme Court arising to recover the costs of the City’s regulation of “the conditions required and the manner of use of the streets and public grounds of the city, and it may, for the purpose of providing electrical, gas, heating, or water service, confer the power to appropriate and condemn private property upon the person franchised.” The City has not undertaken to even attempt to establish the costs of its

regulation, but instead has treated the franchise fee as a revenue generating “tool”. Taxes are for the primary purpose of raising revenue. See *City of Hawarden v. US W. Communications, Inc.*, 590 N.W.2d 504, 507 (Iowa 1999). This municipal tax against consumers of utilities was not authorized by the legislature, in favor of the City, and is, therefore, illegal under Iowa Code §364.3(4).

B. The Decision In *City of Hawarden v. US West Communications* Is Helpful Authority For The Plaintiff.

The Defendant City of Des Moines anticipated that the Plaintiff may rely upon *City of Hawarden v. US West Communications*, 590 N.W.2d 504 (Iowa 1999). It is true that the Plaintiff did cite to the *Hawarden* case in its initial brief on her Second Motion for Partial Summary Judgment. It is also agreed that *Hawarden* has differences of fact which makes the case not on all fours with the present case. However, contrary to the Defendant’s assertion, *Hawarden* is still persuasive and appropriate authority for this Court.

First, it is agreed that *Hawarden* concerned a telephone utility. The present case does deal with gas and electric utilities. Secondly, however, *Hawarden* is not concerned with a “right of way user fee” as opposed to a “franchise fee”. At the time of the *Hawarden* case, there was no right of way management fee as provided in Iowa Code Chapter 480A. Rather, the *Hawarden* case arose under the concept of a regulation authority of the City of Hawarden. In other words, the police power of the city in *Hawarden* as it relates to its regulatory authority was at issue. The city in *Hawarden* was determined not to have a right to charge beyond the charge of the cost of regulation. That is similar to this case.

Third, as to “franchise fee”, the Iowa Supreme Court adopted the following definition as a functional test:

If the fee is a reasonable estimate of the cost imposed by the person required to

pay the fee, then it is a user fee and is within the municipality's regulatory power. If it is calculated not just to recover a cost imposed on the municipality or its residents but to generate revenues that the municipality can use to offset unrelated costs or confer unrelated benefits, it is a tax, whatever its nominal designation.

See *City of Hawarden v. US West Communications*, 590 N.W.2d 504, 510 (Iowa 1999) citing to *Diginet, Inc. v. Western Union ATA, Inc.*, 958 F.2d 1388, 1399 (7th Cir. 1992). The Court further noted that a city cannot avoid its taxing limitations by calling a tax something else, such as a "franchise fee". *Id.* at 509.

Fourth, *Hawarden* is appropriate for consideration in that it reminds that statutory schemes which govern "distinctly different utilities under different statutory schemes," are not necessarily controlling. In other words, all of the cases cited by the Defendant at Pg. 13 of its Brief arise in different states under different statutory schemes and under different court interpretations. Accordingly, *Hawarden* is direct authority for the proposition that just because another state has made a different decision relating to what a "franchise fee" is and what "franchise fee" can be charged under its statute, does not mean the courts of the State of Iowa should so hold. Rather, the State of Iowa case law and the State of Iowa statutory law need to be considered to determine whether or not the cities in the State of Iowa are allowed to charge a franchise fee in any amount and in any manner they want. Plaintiff asserts, as in her Second Motion for Partial Summary Judgment previously filed, that the law of Iowa makes this an illegal tax in this case, and not an appropriately imposed franchise fee.

C. The Franchise Fees in Question Are Taxes.

The last section of the Defendant's brief asserts that the franchise fees, whose legality are challenged in this lawsuit, are not taxes. Plaintiff contends exactly the opposite, i.e. that the franchise fees as imposed by the City of Des Moines are illegal taxes. Plaintiff has separately argued this point in its Second Motion for Partial Summary Judgment, which was filed and

briefed on October 11, 2005. Plaintiff incorporates by this reference all arguments and authorities therein asserted. The following discussion is intended to supplement that earlier discussion and to respond to the specific arguments made by the Defendant in its Brief in support of its Motion for Summary Judgment.

The Defendant starts its discussion out by trying to consider the definition of “franchise”. Relating to this, however, not only should the court consider the definition of “franchise”, but also the definition of the words “tax” and “franchise fee”. As to all of these terms, which are not defined in the Iowa statutes, the case law of the Courts of Iowa provide the appropriate definitions. In *Harvey v. Care Initiatives, Inc.* 634 N.W.2d 691, 695 (Iowa 2001) the following was stated:

The statute does not define the term "employee." Thus, we first look to the ordinary and common meaning of the term. Iowa Code § 4.1(38); *T & K Roofing Co. v. Iowa Dep't of Educ.*, 593 N.W.2d 159, 162 (Iowa 1999). Furthermore, we construe statutory language consistent with our case law and the common law. See *State v. Pace*, 602 N.W.2d 764, 771 (Iowa 1999) (common law); *Sourbier v. State*, 498 N.W.2d 720, 723 (Iowa 1993) (case law). Words that have a well-defined meaning in the common law have the same meaning in statutes dealing with similar subject matter. See 2B Norman J. Singer, *Sutherland Statutory Construction* § 50.03, at 150 (Clark Boardman Callaghan 6th ed.2000).

Accordingly, we need to look at the case law of Iowa to see what these statutorily used terms are understood to mean in the statutes involved herein. The Defendant does discuss the case law of Iowa as to what a “franchise” is understood to be within the franchise statute involved, Iowa Code §364.2(4). This is developed in the cases of: *Cedar Rapids Water Co. V. City of Cedar Rapids*, 118 Iowa 234, 91 N.W.2d 1081 (1902) and *McLaughlin c. City of Newton*, 189 Iowa 556, 178 N.W. 540 (1920). These two cases, which still stand as good law today on this point, basically provide the following as to the term “franchise”: A “franchise is a special privilege conferred by governmental authority upon individuals, and which does not belong to

citizens of the country generally, as a matter of common right.” ; “The word is often used with reference to a privilege granted by the state, or by some minor municipality acting under the authority of the state, to conduct a business of public utility, --such, for instance, as supplying the public with water, light, transportation, and other conveniences”; it can also be called a “license”. It is a contract.

Unfortunately, the Defendant fails to go on to discuss the case law as it relates to the definition of a “franchise fee” and a “tax”. Those terms also are not defined by statute and are then to be defined by the case law. *Harvey v. Care Initiatives, Inc.* 634 N.W.2d 691, 695 (Iowa 2001). As Plaintiff discussed in her previous brief submitted herein, the commonly accepted definition of these terms are as follows:

As to “franchise fee”, the Iowa Supreme Court adopted the following definition as a functional test:

“If the fee is a reasonable estimate of the cost imposed by the person required to pay the fee, then it is a user fee and is within the municipality's regulatory power. If it is calculated not just to recover a cost imposed on the municipality or its residents but to generate revenues that the municipality can use to offset unrelated costs or confer unrelated benefits, it is a tax, whatever its nominal designation.”

See *City of Hawarden v. US West Communications*, 590 N.W.2d 504, 510 (Iowa 1999) citing to *Dignet, Inc. v. Western Union ATA, Inc.*, 958 F.2d 1388, 1399 (7th Cir. 1992). The Court further noted that a city cannot avoid its taxing limitations by calling a tax as something else, such as a “franchise fee”. *Id.* at 509.

The following is the most recent summary by the Iowa Supreme Court as to what a tax is in the case of *Home Builders Association of Greater Des Moines v. City of Des Moines*, 644 N.W.2d 339, 346 (Iowa 2002):

“This court has defined a tax as "a charge to pay the cost of government without regard to special benefits conferred." *In re Shurtz's Will*, 242 Iowa 448, 454, 46

N.W.2d 559, 562 (1951); accord *Newman v. City of Indianola*, 232 N.W.2d 568, 573 (Iowa 1975). In other words, taxes are for the primary purpose of raising revenue. See *City of Hawarden v. US W. Communications, Inc.*, 590 N.W.2d 504, 507 (Iowa 1999). If the fee at issue here is determined to be a tax, it would fall within the category of an excise tax--a tax imposed on a transaction or as a condition to the exercise of a privilege. See *Waters Landing Ltd. P'ship v. Montgomery County*, 337 Md. 15, 650 A.2d 712, 716-17 (1994) (holding that development impact tax was an excise tax, not a property tax or a personal property tax); 9 Beth A. Buday & Julie Rozwadowski, *The Law of Municipal Corporations* § 26.18, at 50 (3d ed., rev.vol.1995) (stating that a tax imposed as a condition of licensure is an excise tax, not a property tax) [hereinafter "*The Law of Municipal Corporations*"]; see also *Cedar Valley Leasing v. Iowa Dep't of Revenue*, 274 N.W.2d 357, 361 (Iowa 1979) (defining excise tax as a tax on a transaction or the privilege to conduct the transaction); *Black's Law Dictionary* 563 (6th ed.1990) (defining "excise tax" as "[a] tax imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege")."

In the present case, the Defendant City of Des Moines seems to recognize the undisputed fact that the "franchise fee" in this case is clearly a revenue generating measure. See, e.g., its statement of undisputed facts and the testimony of its assistant city manager wherein it asserts that (a) if Des Moines had not increased its franchise fees by way of ordinance, there is a strong likelihood that property taxes would have been increased; see Defendant's statement of Material Facts No. 10; (b) Rather than raise property taxes, the City decided that it would be best to instead raise franchise fees; see Deposition of Matthes, Plaintiff's App. p. 83); (c) after the franchise fee was instituted, the City enacted in 2005 one of the biggest tax cuts in its history; see Defendant's Statement of Material Facts, No. 11 and Plaintiff's App. p. 1; (d) the intent of the increases in the franchise fee was to commit the funds to the basic services of the city; see Deposition of Matthes, Plaintiff's App. p. 83-84; (e) the franchise fee funds are deposited into the general fund and are not separated within that fund in any particular fashion; see Deposition of Matthes, Plaintiff's App. p. 85; (f) the City does not believe that the fee, like any user fee, should bear a relationship to the cost to the city of the utility's occupancy of public areas in the city; see Deposition of Matthes, Plaintiff's App. pp. 72, and Defendant's Brief in Support of

Motion for Summary Judgment, p. 6, 7 12. With this “fee” actually constituting a revenue generating measure, it constitutes a tax, not a fee.

However, the Defendant City attempts to focus attention to the contention that a franchise, when executed, amounts to a contract. The assertion seems to be that because the City issues the franchise to MidAmerican, MidAmerican agrees to it and receives benefits. To claim that this supports the allowance of this “fee” defies reason.

First, the “fee” in this case is charged to the residents, not MidAmerican. In other words, MidAmerican agrees with Defendant City of Des Moines that the residents of Des Moines, are to pay a “fee”. This is the contract—two entities agree that someone else is going to pay a fee. So what does MidAmerican give up in this “contract”? It has not agreed to pay anything. It has agreed to continue to serve the residents of Des Moines at the profitable rate it has in its monopolistic position. The City has agreed to let MidAmerican continue to make that profit as long as MidAmerican agrees to collect money from the residents and forward that money to the City. Further, since the money being paid to the City is only pass through, then it does not adversely affect the revenue stream of MidAmerican and the Iowa Utility Board does not give any review or approval to the “fee”.

Second, as noted earlier, a city cannot avoid its taxing limitations by calling a tax something else, such as a “franchise fee”. *City of Hawarden v. US West Communications*, 590 N.W.2d 504, 510 (Iowa 1999). To determine if this is a “fee” as alleged by the Defendant City, we can follow the analysis of the Iowa Supreme Court in *Home Builders Association of Greater Des Moines v. City of Des Moines*, 644 N.W.2d 339, 346 (Iowa 2002).

1. Is it a is a regulatory fee? As noted above, the fees charged under the city ordinance are not based on the cost of regulating, but rather are based on the revenue needs

of the City. Because the fee has no relation to the expenses of the city in administering the electric and gas franchises, it cannot be justified as an incident of the exercise of its police powers. See *City of Hawarden*, 590 N.W.2d at 507 (distinguishing a fee from a tax by focusing on whether the fee is reasonably related to and does not exceed the city's necessary and probable administrative and regulatory expenses); *Solberg*, 211 Iowa at 617, 232 N.W. at 480 (stating that where charge "is imposed in the exercise of the police power, the amount which may be exacted may include and must be limited *and measured by* the necessary or probable expense of issuing the license and such inspection, regulation, and supervision as ... may be lawful and necessary" (emphasis added)); *City of Pella*, 215 Iowa at 98, 244 N.W. at 738 (holding that franchise fee calculated as a percentage of the franchisee's gross earnings was not proper because the exaction was not "based on the cost of regulation or supervision"); 9 *The Law of Municipal Corporations* § 26.15, at 42 (stating that fee permitted as an incident of police regulatory power is "only as will legitimately assist in regulation and will not exceed the necessary or probable expense of issuing the license and of inspecting and regulating the business or other subject that it covers"). See *Home Builders Association of Greater Des Moines v. City of Des Moines*, 644 N.W.2d 339, 346 (Iowa 2002).

2. The City attempts to justify its revenue fee on the basis that City is providing a benefit to MidAmerican. Yet, this is without merit for several reasons. As noted above, MidAmerican is paying nothing for this "benefit". Also, the benefit of the supplying of gas and electric applies to all persons who use the city. See *Wielepski v. Harford County*, 98 Md. App. 721, 635 A.2d 43, 47 (1994) (noting road improvements benefit the public in general, so fee charged to bordering property to pay for improvements cannot be justified on basis

that improvements benefit that particular property), *vacated on other grounds by Harford County v. Wielepski*, 336 Md. 281, 648 A.2d 192, 193 (1994); *Milton O. & Phyllis A. Thorson Revocable Estate Trust v. City of West Des Moines*, 531 N.W.2d 647, 650 (Iowa Ct.App.1995) (noting in the context of special assessment that public improvement usually confers special benefits to property owners and a general benefit to the city and its residents). *cf. Goodell v. City of Clinton*, 193 N.W.2d 91, 95 (Iowa 1971) (holding in special assessment case that benefits accruing to the public at large are not special benefits that may be assessed against individual properties). See *Home Builders Association of Greater Des Moines v. City of Des Moines*, 644 N.W.2d 339, 346 (Iowa 2002).

3. Even if we were to assume that MidAmerican pays the fee and receives a special economic benefit, it still cannot sustain the fee as an exercise of the City's police power. That is because the fee is not premised on the cost of regulation of the special benefits bestowed on MidAmerican nor limited to the cost of providing those special benefits. Rather, the fee is based on the revenue needs of the City at large and as a perceived replacement for property taxes, an expense representing the general benefit to the community at large. Therefore, the franchise fee is not based on the cost of special benefits conferred so as to fall outside the definition of a tax. See *E. Diversified Props., Inc.*, 570 A.2d at 855 (holding that an "impact fee" was not a regulatory fee where it was not based on the "service provided to the property owner"); *Haugen v. Gleason*, 226 Or. 99, 359 P.2d 108, 111 (1961) (holding fee charged as condition of plat approval was an illegal tax because the fees were not required to be used for "the direct benefit of the regulated subdivision"). To conclude otherwise would in essence permit the City to assess taxes without regard to the limitations on its taxing authority under chapter 384. See generally 9 *The Law of Municipal*

Corporations § 26.18, at 50 (noting that unless it is shown that the fee collected is devoted to the cost of regulation, "there would be nothing to distinguish a revenue ordinance from a police ordinance"). See *Home Builders Association of Greater Des Moines v. City of Des Moines*, 644 N.W.2d 339, 346 (Iowa 2002).

As to the consideration of the cases cited by the City from other jurisdictions wherein certain courts from other jurisdictions have upheld franchise fees, the Plaintiff would cite to the following from *Home Builders Association of Greater Des Moines v. City of Des Moines*, 644 N.W.2d 339, 346 (Iowa 2002):

"In reaching our conclusion that the parks fee cannot be sustained under the City's police power, we have considered the cases cited by the City from other jurisdictions wherein courts have upheld impact fees similar to the fee before us. Notwithstanding those cases, Iowa statutory and case law is clear and well established with respect to the powers of local government. The home rule amendment, while giving local government broad authority to promote the peace, safety, health, welfare, comfort, and convenience of its residents, did not bestow such broad powers with respect to the financing of local government activities. A municipality may charge a fee to cover the cost of regulation or the cost of providing a service, but beyond that the municipality must have specific authorization from the legislature to raise revenue for general city purposes."

The Defendant has cited a multitude of cases from a multitude of jurisdictions with different statutory structures, i.e.: *City of Homewood v. City of Vestavia*, 374 So2d 271,272 (AL 1979)(Holding that license tax could be assessed by City on rental property where specific statutory authorization existed); *Arizona Public Service Co. v. City of Phoenix*, 716 P.2d 430,432 (AZ 1986)(didn't discuss validity of franchise fee but instead decided that franchise fee payment is properly taken as a tax credit on a tax return); *City of Montrose v. P.V.C. of Colorado*, 732 P.2d 1181, 1184 (CO 1987)(Franchise fee imposed on public utility by City was considered a cost considered by utility commission in rate making); *Delaware Power and Light Co. v. City of Newark*, 140 A.2d 258,262 (DE 1958)(found franchise fee ordinance was invalid as in excess of

the City's authority); *Florida Power Corporation v. City of Winter Park*, 827 So.2d 322, 323 (FL 2002)(City owned power facilities sold to public utility and included a franchise fee relative to future operation to be paid by utility); *City of Calhoun v. North Georgia Electric Membership Corp.*, 443 S.E.2d 469, 470-71 (GA 1994)(Statutory authorization to charge fee); *Alpert v. Boise Water Corp.*, 795 P.2d 298, 306-07 (ID 1990)(3% franchise fee is paid by utility and considered as a cost in rate making under Idaho statutory scheme); *City of Chicago v. Illinois Commerce Comm.*, 666 N.E.2d 1212, 1217 (IL 1996)(Case requires franchise fees to be determined in rate making as a cost of the utility); *W.S. Dickey Clay Manufacturing Co. v. Star Corp. Comm.*, 740 P.2d 585, 587 (KS 1987)(procedural case no bearing to case at bar).; *Berea College Utilities v. City of Berea*, 691 S.W.2d 235, 237 (KY 1985)(franchise tax paid by utility with no prohibition in statutory scheme); *Town of Hainesville, Inc. v. Entergy Corp.*, 840 So.2d 957, 598-99 (LA 2003); *City of St. Paul v. Northern States Power Co.*, 462 N.W.2d 379, 385 (MN 1990)(Statute specifically authorizes imposition of fee on utility); *Delta Elec. Power assoc. v. Miss. Power and Light Co.*, 149 So.2d 504,507 (MS 1963)(interpreting effect of various statutory changes over duration of franchise ordinance and effect on competitors rights); *In Re Adjustments to Franchise Fees v. New Mexico Public Regulation Comm.*, 14 P.3d 525, 527 (NM 2000)(franchise fees charged to utility with several authorizing statutes); *In Re Application of Brooklyn Union Gas Co. v. City of New York*, 428 N.Y.S.2d 564, 567 (NY 1980)(discusses the franchise fee as a tax credit on Utility tax return); *State v. Oklahoma Gas & Electric Co.*, 536 P.2d 887, 893 (OK 1975)(Holds a rule disallowing from ratemaking consideration franchise fee expenses of utility); *U.S. West Comm. v. City of Eugene.*, 81 P.3d 702, 702-03 (OR 2003)(Home rule granted cities authority to tax and specific statutes authorize taxation of telecommunications by cities.); *South Carolina Electric & Gas Co. v. Town of Awenda*, 596 S.E.2d 482, 485-89 (SC 2004)(specific

statutory authorization for imposition of charge for use of streets); *City of San Benito v. Rio Grande Valley Gas Co.*, 109 S.W.3d 750, 753 (TX 2003)(pertains to validity of opt out of class action without City Council approval); *City of Norfolk v. Chesapeake and Potomac Telephone Co. of Virginia*, 218 S.E.2d 531, 532-33 (VA 1975)(utility Board allowed utility to recoup amount of taxes or fees imposed on utility by City in excess of 1.5% of the aggregate bills of its customers); *William v. Washington Utilities and Transportation Comm.*, 93 P.3d 909, 910-11 (WA 2004)(discussion and finding of statutory validity of utility commission presumption); *Northern Gas Co. v. Town of Sinclair*, 592 P.2d 1138, 1140-41 (WY 1979)(unclear as to its import in that statutory structure is not included).

Plaintiff disagrees with the Defendant's assertion that any of these cases are on point. All of them deal with issues different than that posed in this case. They are all based on different statutory schemes with different common law background applicable in those states. Iowa case law is clear and not in line with those decisions.

Of possible benefit, however, is a case not cited by the Defendant. It is the recent case of *Montana-Dakota Utilities Co. V. City of Billings*, 318 Montana 407, 80 P.2d 1247 (2003). Similar to the position advocated by the Plaintiff in this case, the Montana Supreme Court determined that if charges are primarily to raise money, they are taxes; if the charges are primarily tools of regulation, they are not taxes. *Id.* at 1253. Further, like Iowa, the municipality was prohibited from charging a tax unless specifically allowed by the legislature. They cited to *Hawarden* and determined that the franchise fees there were actually a tax and, thereby illegal. *Id.* at 1255. Plaintiff asserts this is helpful authority.

The City also refers this Court to "concessionaire agreements" and the "cable franchise fee" as enacted by the federal law, 47 U.S.C.A. §542. Again, the City's references miss the

point. As to the concessionaire agreements, we again have a different situation and a different purpose. As admitted by the City, we have "concessionaire agreements" not "utility franchise" ordinances. So, we once again have different terminology. With different terminology comes different concepts and legal applications. A concessionaire agreement is not controlled by Iowa Code §362.4. It is not considered a utility franchise. It is not involved in this case. Its legal restrictions and requirements are not a matter for this Court to determine.⁴

As to the cable franchise fee, 47 U.S.C.A. §542, Congress took advantage of its right to define terms as it defined "franchise fee" to include "any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such." In other words, rather than relying upon the common law to define the term "franchise fee" (which likely would have limited the term to regulatory costs or cost of providing a special benefit as Iowa law does), Congress defined the term to include "tax" and to include "fee". This demonstrates clearly the difference between the approach of the Iowa legislature and the Congress. That difference in approach results in the difference in result as urged by the Plaintiff herein.

⁴ Reference to the National Parks concessionaire requirements under 16 U.S.C. §5952, seems to evidence Congressional authority to allow for "compensation" to be part of the franchise process, although of less importance than other goals. See 16 U.S.C. §5952 where proposals are to be submitted via a bidding process (not followed for utility services in this case); the proposals were to address "all fees and other forms of compensation provided to the United States by the concessionaire"; the "minimum acceptable franchise fee or other forms of consideration to the Government" (in other words more than franchise fees were contemplated to be paid); and finally that this altered franchise fee shall be set so as to give "consideration of revenue to the United States shall be subordinate to the objectives of protecting, conserving, and preserving resources of the unit of the National Park System and of providing necessary and appropriate facilities to the public at reasonable rates". The Congress gave statutory approval to the concept that the fees to be paid by a concessionaire were to include more than just regulatory cost reimbursement. The law is not similar to the situation involved in this case.

The City also addresses *City of Des Moines v Iowa State Commerce Comm*, 285 N.W.2d 12 (Iowa 1979). However, the City fails to acknowledge that no issue was raised in that case as to the question as to the legality/illegality of the franchise fee/tax. Rather, the only questions presented to the Court were whether the predecessor to the Iowa Utility Board could allocate the method of calculation as to who pays the fee/tax and as to whether its decision was supported by the record. As no issue was raised as to whether the City was imposing a “tax” or a “franchise fee” to be directly passed through to the consumer, the issue has not been decided and the determinations in *City of Des Moines v Iowa State Commerce Comm* would be dicta and not binding authority. *State v Iowa District Court for Polk County*, 492 N.W.2d 666, 667 (Iowa 1992)(to be binding precedent, a prior appellate opinion must be interpreted in reference to the questions that necessarily had to be decided in that case).

The City also addresses statutory provisions in Iowa Code §423B.5, referring to a local option tax and §423E.3(2), the school infrastructure sales tax. It is unclear what the point of the Defendant is as to how reference to these sections of law supports its position. A close review of these sections constitute authority for the proposition that cities cannot charge the local option tax or school infrastructure tax if they are charging a franchise fee. This does not help the Defendant’s argument that the franchise fee is a legal fee or even that it has authority to charge an unlimited franchise fee. Indeed, it seems to argue against the City’s position. The fact that the legislature has used the term “franchise fee” as distinguished from “local option tax” and “school infrastructure tax”, the legislature has again demonstrated its understanding and intent that fees are different from and distinguishable from taxes. They know the different terms mean different things.

CONCLUSION

To conclude (and using essentially the same form, words and conclusion as *Homebuilders*): The franchise fee is a tax because it is "a charge to pay the cost of government without regard to special benefits conferred." *In re Shurtz's Will*, 242 Iowa at 454, 46 N.W.2d at 562. The fee is not compensation for a direct service to MidAmerican or the resident paying the fee, nor is it intended to cover the administrative costs of the City. To the contrary the fee is, pure and simple, a measure to raise revenue for public infrastructure. *See Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene*, 126 Idaho 740, 890 P.2d 326, 330 (1995) (holding that an impact fee was a tax because it served "the purpose of providing funding for public services at large, and not to the individual assessed"); *Hillis Homes, Inc. v. Snohomish County*, 97 Wash.2d 804, 650 P.2d 193, 196 (1982) (ruling that an impact fee was an illegal tax because the primary purpose of the fee was "to offset the costs of providing specified services" rather than to regulate development); 9 *The Law of Municipal Corporations* § 26.17, at 48 (stating "if the charge exceeds the expense of issuance of a license and costs of regulation, it is a tax"). Because such a tax has not been expressly authorized by the legislature, the City was without authority to impose it. Accordingly, the Court should enter declaratory judgment that the franchise fees imposed by the City's ordinance are illegal. *See* 9 *The Law of Municipal Corporations* § 26.32.20, at 97 ("Permit fees exacted for revenue-raising purposes or to offset the cost of general governmental functions are invalid."). The court should order a hearing for the calculation of damages and the grant of an injunction preventing the future collection of such fees.

Respectfully Submitted,

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