

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LISA KRAGNES,	CASE NO. CE 49273
Plaintiff,	
vs.	RULING ON MOTIONS FOR SUMMARY JUDGMENT
CITY OF DES MOINES, IOWA,	
Defendant.	

A contested hearing on the parties' cross-motions for summary judgment was held before the undersigned on November 22, 2005 as previously scheduled. Upon consideration of the arguments made at the hearing, and having reviewed the court file and being otherwise duly advised in the premises, the court rules as follows:

The plaintiff seeks various forms of relief, both individually and on behalf of a purported class of similarly-situated individuals, all based on the contention that the franchise fees charged by the defendant to customers of Mid-American Energy who are residents of Des Moines is an illegal tax. Specifically, she seeks this court's declaration that the fees are illegal, an injunction prohibiting the continuing charging of the fees, and a refund of those fees which were improperly charged. In addition, she seeks class certification pursuant to IowaR.Civ.P. 1.262. This latter request is the subject of a separate motion, which will be taken up in the event the defendant is unsuccessful in its motion for summary judgment. The plaintiff has filed two motions for summary judgment; the first deals with this court's subject matter jurisdiction and has not been

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resisted. The plaintiff's second motion for summary judgment¹ (as well as the defendant's motion) pertains to the merits of the claim that the franchise fees are illegal.

The standards regarding summary judgment are well settled in Iowa. It is the moving party's burden to establish both the absence of any material factual issues, and its entitlement to judgment as a matter of law. Iowa R. Civ. P. 1.981(3); American Legion Hanford Post 5 v. Cedar Rapids Board of Review, 646 N.W.2d 433, 437 (Iowa 2002). In determining whether this burden has been met, the court reviews the record in a light most favorable to the nonmoving party. Barreca v. Nickolas, 683 N.W.2d 111, 116 (Iowa 2004).

If the motion is properly supported, the resisting party may not merely rely upon its pleadings; it "must set forth specific facts showing that there is a genuine issue for trial," or summary judgment would be appropriate. Iowa R. Civ. P. 1.981(5); Weinzettl v. Ruan Single Source Transport Co., 587 N.W.2d 809, 810 (Iowa Ct. App. 1998).

However, the converse is also true—"When the evidentiary matter tendered in support of the motion does not affirmatively establish uncontroverted facts that sustain the moving party's right to judgment, summary judgment must be denied even if no opposing evidentiary matter is presented." Griglione v. Martin, 525 N.W.2d 810, 813 (Iowa 1994).

In this case, there is no meaningful dispute as to the underlying facts. In 1987, the city of Des Moines passed ordinances extending franchises previously granted to Iowa Power and Light Company and Midwest Gas Company regarding the provision of electricity and natural gas. These ordinances included the assessment of a franchise fee,

¹ The plaintiff's second motion for summary judgment is in actuality a motion for partial summary judgment, as it does not deal with the scope of potential monetary remedies available to the plaintiff in the event the fees are declared to be illegal. That will be taken up at a later time, if necessary, once the court has also dealt with the companion motion for class certification.

originally in the amount of one percent (1%) of the gross receipts derived from the franchisees from the sale of electrical energy or natural gas to customers within the corporate limits of the city of Des Moines. The city was specifically excluded as a customer to whom the franchise fees were to be assessed. Effective September 1, 2004, the franchise fees were increased to three percent (3%).² At this time, the city also provided that the fees could be increased to as much as six percent (6%). Effective June 1, 2005, the fees were increased to five percent (5%).

In determining the amount of fee to assess, the city never looked at the costs attributable to the regulation of the operation of the public utilities covered by the franchises. Instead, the monies generated by the collection of the franchise fees³ were placed in the city's general fund and used for such purposes as hiring more police and firefighters, increasing library hours and street improvements. The plaintiff has been a resident of the city of Des Moines since 1994, and a customer of MidAmerican Energy and its predecessors for a comparable time. She seeks a refund of any franchise fees charged from and after July 27, 1999.

It is clear from the manner in which the franchise fees have been assessed and used that they serve the essential purpose of a tax; namely they constitute "a charge to pay the cost of government without regard to special benefits conferred." Home Builders Assoc. of Greater Des Moines v. City of West Des Moines, 644 N.W.2d 339, 346, 33346, 347 (Iowa 2002). The purpose of these fees is not to recover the city's expenses in inspecting, licensing, supervising or otherwise regulating an activity; rather, they have

² The 2004 ordinances also acknowledged the merger of Iowa Power and Light Company and Midwest Gas Company into a single entity—MidAmerican Energy Company. Separate ordinances were passed regarding the provision of electrical energy and natural gas.

³ The franchise fees were collected by the utilities from their customers, and in turn paid to the city.

been implemented to raise revenue well beyond the cost incurred by the city in overseeing the franchise extended to the utilities in question. See City of Hawarden v. US West Communications, Inc., 590 N.W.2d 504, 507 (Iowa 1999) The city is by no means shy regarding the purpose of the franchise fees; it has proudly acknowledged in its papers the extent of excess revenue generated by these fees—"franchise fees which contribute millions of dollars per year to the City treasury and which allowed for one of the biggest tax cuts in City history,...." Defendant's Brief in Support of City's Resistance to Plaintiff's Second Motion for Partial Summary Judgment, page 1. The question then becomes whether the city's claimed ability to levy such a tax can be justified under Iowa law.

In order to survive such scrutiny, the city must establish specific legislative authority to do so. "A city may not levy a tax unless specifically authorized by state law." Iowa Code §364.3(4) (2005)⁴ (quoted in Home Builders, 644 N.W.2d at 345). The city contends this authority comes from a number of statutes, which when read together allows for the imposition of a franchise fee in whatever amount the city deems appropriate.

There are numerous references in the Iowa Code to "franchise fees" that any municipality may impose involving the operation of a public utility. The primary reference is found at Iowa Code §364.2(4)(f), which contemplates the assessment of a "city franchise fee" upon "customers of a franchise." Iowa Code §364.2(4)(f) (2005). The fact that this statute is the source for such a fee is buttressed by the language found in Iowa Code §480A.6 (2005), which refers to the collection of a "city franchise

⁴ While prior editions of the Iowa Code are implicated due to the chronology of events covered in this litigation, the court will generally refer to the current language of any given statute, as there has been no change in the statutory language applicable to this ruling to the present.

fee...pursuant to section 364.2, subsection 4...." Clearly, the Code allows for the imposition of a franchise fee by a municipality such as the defendant. This does not end the analysis, however. The question then becomes whether the statutes allow for the use of such a fee as a revenue-generating measure, as has been undisputedly done in this instance.

Ordinarily, a fee imposed by a municipality may only be used to cover its administrative expenses in exercising its police power. Home Builders, 644 N.W.2d at 347. This has been the case both before and after the advent of home rule for municipalities. Id. (authorities omitted). Absent specific statutory authority to do so, a municipality may not justify a revenue-generating fee as an implied incident of its regulatory or police power. Id. at 350 ("[A]n implied power to tax [is] a notion antithetical to Iowa's home rule principles."). The city's argument that the aforementioned statutory references to franchise fees allow it to assess such fees "without limitation as to... the amount of the fee" (Defendant's Brief in Support of Motion for Summary Judgment, page 5) is at odds with this holding. In order to justify its franchise fees as revenue-generating measures, the defendant must establish statutory grounds for their use in such a manner. This it cannot do.

The defendant once again points to Iowa Code §480A.6 and its counterpart, Iowa Code §480A.3, as justification for the use of the franchise fee as a tax. Iowa Code §480A.3 allows for a user fee to be assessed against a utility to be used to recover the city's "management costs caused by the public utility's activity in the public right-of-way." Iowa Code §480A.3 (2005). On the other hand, Iowa Code §480A.6 does not allow for the assessment of a franchise fee against a utility where a user fee pursuant to

Iowa Code §480A.3 has been assessed. Iowa Code §480A.6 (2005). The defendant argues that this statutory dichotomy allows the use of franchise fees to generate revenues beyond the amount necessary to cover its expenses in regulating the franchisee. The defendant reads too much into this language. All these statutes mandate is that a municipality may use one of two methods to recover its regulatory expenses regarding a franchise: it may impose a user fee pursuant to §480A.3, or a franchise fee pursuant to §480A.6, but not both.³ These statutes do not constitute the specific authorization required to justify the franchise fees as a tax.

The legislature has not provided specific statutory authority for the use of a city's franchise fee as a revenue-generating measure. Therefore, it constitutes a tax which has been assessed in violation of Iowa Code §364.3(4). The plaintiff's second motion for summary judgment should be and is hereby granted. The court will enter an appropriate declaratory judgment, as well as an injunction prohibiting the continued assessment of the illegal tax.

IT IS THEREFORE ORDERED that the plaintiff's first motion for summary judgment is granted as unresisted. The district court has subject matter jurisdiction over the issues raised by the litigation in question, and the plaintiff's petition states a claim upon which relief may be granted.

IT IS FURTHER ORDERED that the plaintiff's second motion for summary judgment is granted. The court hereby declares and orders that the franchise fees

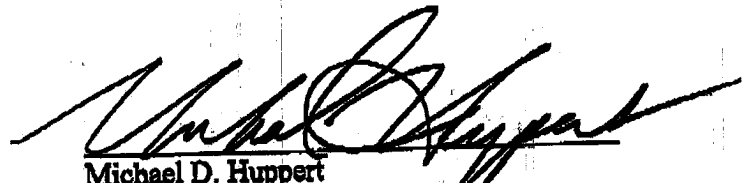
³ The same is true regarding the final statutes upon which the defendant claims justification for the use of the franchise fees as a revenue-generating measure, Iowa Code §423B.5 and §423E.3(2). Both these statutes refer to "a franchise fee or user fee" imposed on the sales price from the sale of electricity or natural gas. Absent more specific language, these references only pertain to the options available to a municipality in recovering its costs, not as grounds as the use of one (user fee) to recover costs and the other (franchise fee) to generate revenue.

assessed by the City of Des Moines to customers of MidAmerican Energy Company or its predecessors pursuant to Ordinance No. 6280, 6281, 14,341 or 14,342 from and after July 27, 1999 are illegal as constituting unauthorized taxes. The court further enjoins and otherwise prohibits the defendant, City of Des Moines, Iowa, from collecting or assessing any franchise fees pursuant to the aforementioned ordinances while this ruling remains in force and effect.

IT IS FURTHER ORDERED that issues relative to the monetary relief requested by the plaintiff, including an award of attorney fees and the issue of court costs, shall be determined by such future proceedings as are required, depending on the resolution of the plaintiff's motion for class certification which shall be dealt with in a separate ruling.

IT IS FURTHER ORDERED that the defendant's motion for summary judgment is denied.

Dated this 5th day of January, 2006.



Michael D. Huppert
Judge, Fifth Judicial District of Iowa

Copies to:

Brad Schroeder ✓
Mark Godwin ✓