IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

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| LISA KRAGNES,<br><br>Plaintiff,<br><br>vs.<br><br>CITY OF DES MOINES, IOWA,<br><br>Defendant. | NO. CE 49273<br><br>RULING ON MOTION TO ENLARGE AND AMEND FINDINGS AND CONCLUSIONS AND TO MODIFY RULING ON SUMMARY JUDGMENT |

FILED POLK COUNTY, IA.
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CLERK DISTRICT COURT

## INTRODUCTION

The above captioned matter came before the Court for consideration on the Defendant's Motion to Enlarge and Amend Findings and Conclusions and to Modify Ruling on Summary Judgment. After being fully apprised of the arguments of counsel and reviewing the briefs filed by the parties, this Court now enters the following ruling:

## STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

The Plaintiff's action arises out of certain electric and gas utility franchise fees paid by the Plaintiff to the City of Des Moines. On July 27, 2004, the Plaintiff, Lisa Kragnes, filed suit against the Defendant, the City of Des Moines, Iowa, alleging that portions of the gas and electric utility franchise fee paid by the Plaintiff constituted an illegal tax. The Plaintiff seeks declaratory and injunctive relief, including a refund of any and all fees in excess of the City's costs of administration.

The Defendant filed a Motion for Partial Summary Judgment on October 6, 2006. The City argues that even if it was not entitled to collect all of the franchise fees it has collected, the Plaintiff is legally precluded from obtaining a refund of the franchise fees. In its July 27, 2007 ruling, the Court concluded that "a genuine issue of material fact

continues to exist as to whether all or part of the franchise fees charged by City on gas and electric services are reasonably related to the City's administrative expenses in exercising its police power."

## STATEMENT OF THE LAW

Iowa Rule of Civil Procedure 1.904(2) states, in pertinent part, as follows:

> On motion joined with or filed within the time allowed for a motion for new trial, the findings and conclusions may be enlarged or amended and the judgment or decree modified accordingly or a different judgment or decree substituted. But a party, on appeal, may challenge the sufficiency of the evidence to sustain any finding without having objected to it by such motion or otherwise. Resistances to such motions and replies may be filed and supporting briefs may be served as provided in rules 1.431(4) and 1.431(5).

A rule 1.904(2) motion is a way for courts to enlarge or modify findings already in the record. In re Marriage of Bolick, 539 N.W.2d 357, 361 (Iowa 1995). The Iowa Supreme Court further states, "They are not vehicles for parties to retry issues based on new facts." Id. (citing Osborne v. Iowa Natural Resources Council, 336 N.W.2d 745, 747 (Iowa 1983)). Such a motion is essential for the preservation of error when "when the district court fail*s* to resolve an issue, claim, or other legal theory properly submitted for adjudication." Meier v. Senecaut, 641 N.W.2d 532, 539 (Iowa 2002) (quoting Explore Info. Servs. v. Court Info. Servs., 636 N.W.2d 50 (Iowa 2001)).

## ANALYSIS

The Defendant City asks the Court to correct its July 27, 2007 ruling and grant its Motion for Partial Summary Judgment on the issue of a refund. The City argues that the Court misapprehended the purposes of its Motion and has failed to appropriately resolve the issue before it. For the purposes of its Motion for Partial Summary Judgment, the City concedes that the factual possibility of a refund exists, but argues that the Plaintiff is

legally precluded from obtaining a refund of the excess franchise fees. The City's argument is based largely on Kraft v. City of Keokuk. 14 Iowa 86, 1862 WL 275, *1 (Iowa 1875). In Kraft, the Plaintiff applied for a liquor license pursuant to a city ordinance, the ordinance being based on a state statute. Id. The Iowa Supreme Court later held the statute to be unconstitutional, and the Plaintiff applied for a refund of the money he had paid for the license. Id. The Court held that the Plaintiff was not entitled to such a refund, as "the claim is based upon no charge of fraud, duress, deceit, or even mistake of fact." Id. The Court continued,

> The act against which he seeks relief is his own voluntary act, by which he must now abide. No want of good faith can be imputed to the defendant, and to allow the plaintiff to overhaul a transaction thus closed, and to recover back money voluntarily paid, any time within the statute of limitations, would, under the circumstances, be unjust and mischievous in its consequences.

Id. The Iowa Supreme Court has also articulated what may constitute the voluntary payment of taxes or fees. In Harbeck v. Sioux City, the Court stated:

> It is also the rule that where a person or municipality exacts and receives more than is legally due from the payer, while such payer is under the menace of injurious interference with or seizure of his property or person, such payment will not be deemed voluntary. If the payer be menaced only with a personal action against him, he is thereby presented with a sufficient opportunity to test the legality of the demand against him. If he chooses to pay rather than to contest, his payment is deemed voluntary. On the other hand, where the public body has the power of summary procedure such as the power to seize the property or person, or to evict the payer, or to cut off his supply of water, or gas, or of electricity as the case may be, and thereby to effect immediate injury to the payer or to his business, the payer is deemed to stand not in equality with a municipality or other body which makes such demand.

Harbeck v. Sioux City, 202 N.W. 507 (Iowa 1925).

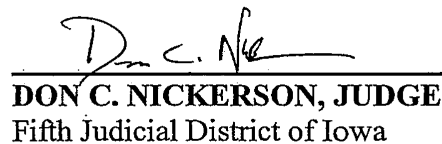
The Court concludes that there is a genuine issue of material fact as to whether the Plaintiff's payments of the franchise fee were voluntary. The Plaintiff has put forth

specific facts in resistance to the City's Motion that failure to pay the franchise fee would ultimately lead to the disconnection of services, as Mid-American does not distinguish between non-payment of the franchise fee and non-payment of its fees for providing service. The threat of disconnection of service is an effective means to collect payment. The City of Des Moines franchise ordinance also requires Mid-American to collect the City's franchise fee. Consequently, the Court believes that the analysis articulated in Harbeck is relevant to the facts of this case. The Plaintiff is not threatened merely with a personal action against her for non-payment of the franchise fee, the Plaintiff is threatened with the loss of electrical utility services, an injury which prevents her from standing in equality with the City. Id.

**ORDER**

**IT IS THE ORDER OF THE COURT** that the Court's July 27, 2007 ruling is **MODIFIED** to include the analysis articulated above. The Defendant's Motion for Partial Summary Judgment is **DENIED.**

**IT IS SO ORDERED** this 30th day of October, 2007.



**DON C. NICKERSON, JUDGE**
Fifth Judicial District of Iowa

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