

IN THE IOWA DISTRICT COURT
FOR POLK COUNTY

LISA KRAGNES, et. al.,)
) Law No. CE 49273
Plaintiff,)
)
vs.) BRIEF IN SUPPORT OF MOTION
) FOR SUMMARY JUDGMENT
CITY OF DES MOINES, IOWA,) BY DEFENDANT CITY OF
) DES MOINES UNDER IOWA CODE
) SECTIONS 670.4(2) and 670.4(3)
Defendant.)

FACTS

In the interest of economy, the City hereby adopts as the facts for this Brief its Statement of Material Facts Not in Dispute filed contemporaneously with this motion and brief.

ARGUMENT

BRIEF POINT I

THE PLAINTIFF HAS EXPLICITLY PLEAD THAT THE FRANCHISE FEES AT ISSUE ARE ILLEGAL TAXES AS ASSESSED AND COLLECTED. THAT MEANS THE CITY IS ENTITLED TO SUMMARY JUDGMENT BECAUSE IOWA CODE § 670.4(2) IMMUNIZES THE CITY FROM "ANY CLAIM IN CONNECTION WITH THE ASSESSMENT OR COLLECTION OF TAXES."

Iowa Code § 670.4(2) reads in pertinent part:

The liability imposed by section 670.2 shall have no application to any claim enumerated in this section. As to any such claim, a municipality shall be liable only to the extent liability may be imposed by the express statute dealing with such claims and, in the absence of such express statute, the municipality shall be immune from liability.

2. Any claim in connection with the assessment or collection of taxes.

In a Chapter 670 immunity setting the phrase "in connection with" has been determined to

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be a “broad term that conveys a legislature attempt to cover a wide range of situations.” Adams v. City of Des Moines, 629 N.W.2d 367, 370 (Iowa 2001), citing to Kulish v. Ellsworth, 566 N.W.2d 885, 891 (Iowa 1997). That determination is consistent with the finding that another, similar phrase in another subsection of § 670.4 is similarly wide in scope. Baker v. City of Ottumwa, 560 N.W.2d 578, 582 (Iowa 1997) [In swimming pool immunity case involving § 670.4(12), the phrase “relating to a swimming pool” was found to create “a very broad classification of claims”].

The expansive reading afforded § 670.4 in the cases above is consistent with a long line of cases in which the Supreme Court has given wide ranging reading to the immunity statute.

In addition, this court has on other occasions characterized statutory immunities as having a broad scope and we have given words used in such immunity statutes a broad meaning . . .

Cubit v. Mahaska County, 677 N.W.2d 777, 784 (Iowa 2004). The court continued:

See, e.g. Adams v. City of Des Moines, 629 N.W.2d 367, 371 (Iowa 2001) (giving broad interpretation to section 670.4(11), relying on “this court’s application of a companion exception in *Baker v. City of Ottumwa*, 560 N.W.2d 578 (Iowa 1997),” where we held the language of that section “created a very broad classification of claims”); *Kulish*, 566 N.W.2d at 891 (characterizing the “language of section 670.4(11)- ‘in connection with an emergency’ and ‘including but not limited to’” –as “broad”); *Humphries v. Trustees of the Methodist Episcopal Church*, 566 N.W.2d 869, 873 (Iowa 1997) (giving broad interpretation to language used in section 668.10(2), stating: “The word ‘street’ should be interpreted broadly so as to foster the legislative intent favoring immunity.”); *Baker*, 560 N.W.2d at 582 (refusing to read immunity bestowed by section 670.4(12) narrowly in view of “the broad language of [that] section”); *Hansen v. State*, 528 N.W.2d 547, 549 (Iowa 1995) (referring to “the broad scope of the immunities granted by section 668.10(1) and section 668.10(2),” relating to state and municipal immunity regarding installation of traffic devices and removal of snow and ice from the highway); *cf. Walker v. Mlakar*, 489 N.W.2d 401, 405 (Iowa 1992) (interpreting statutory *exception* to common law immunity narrowly).

Id.

By her pleadings, Plaintiff has steered her case squarely within the broad tax assessment and collection immunity afforded cities under Iowa Code § 670.4(2).

In her petition, the Plaintiff is unequivocal that her claim centers upon the assessment and collection of taxes. She says:

Said “franchise fees”, which are, or are to be charged and collected by the City through its franchise agreement (sic) with MidAmerican Energy constitutes a tax and revenue generating measure which has been or will be illegally imposed and collected from the Plaintiff and other members of the Class though the adoption of said ordinance (sic) and imposition of said “franchise fees.”

(Plaintiff’s Petition, ¶ 6; App. ____). She also says:

Chapter 364.3(4) provides that a City may not levy a tax unless specifically authorized by state law.

(Plaintiff’s Petition, ¶ 7; App. ____). She also says:

The Defendant has illegally exacted from the Plaintiff, and those similarly situated, illegal taxes as a revenue generating measure under the guise of the “franchise fees” and said exaction is illegal and void and should be refunded.

(Plaintiff’s Petition, P.4; App. ____).

Cases like hers have failed because of the immunity of § 670.4(2). Caudill v. Shelby County, 519 N.W.2d 423, 424-25 (Iowa 1994).¹ Here, the Plaintiff sued and seeks reimbursement of franchise fees paid on the basis of an illegal assessment. (See Petition). In Caudill, the property owner sued and sought reimbursement of property taxes paid because of an

¹ The state tort claims act, Iowa Code Chapter 669.14(2) contains a similar immunity. Hearst Corp. v. IA. Dep’t of Rev. and Finance, 461 N.W.2d 295, 309 (Iowa 1990).

erroneous measurement. Id. at 424. The trial court granted summary judgment to Shelby County. The Supreme Court affirmed, saying, “We determine Iowa Code § 670.4(2) (1993) controls this claim. Id. See also: City of West Branch v. Miller, 546 N.W.2d 598, 606 (Iowa 1996) [§ 670.4(2) immunity would have applied had it not been waived].

CONCLUSION

The Plaintiff’s petition places her cause of action solidly within the broad language of the tax assessment and collection immunity of § 670.4(2). Having plead her claim into the immunity, she cannot now escape it. The City is entitled to summary judgment as a matter of law.

BRIEF POINT II

THE DECISIONS TO ASSESS AND/OR INCREASE THE GAS AND ELECTRIC FRANCHISE FEES, WERE POLICY DECISION MADE AT THE HIGHEST LEVELS OF CITY GOVERNMENT AFTER CONSIDERATION OF SUCH FUNDAMENTAL MUNICIPAL ISSUES AS PROPERTY TAXES, STATE FINDING PUBLIC SAFETY STAFFING LEVELS AND LIBRARY HOURS. AS SUCH, THE DECISION ARE ENTITLED TO “DISCRETIONARY FUNCTION” IMMUNITY UNDER IOWA CODE § 670.4(3).

Iowa Code § 670.4(3) reads:

The liability imposed by section 670.2 shall have no application to any claim enumerated in this section. As to any such claim, a municipality shall only to the extent liability may be imposed by the express statute dealing with such claims, and in the absence of such express statute, the municipality shall be immune from liability.

3. Any claim . . . based upon the exercise or performance, or the failure to exercise or perform a discretionary function or duty on the part of the municipality or an officer or employee of the municipality, whether or not the discretion is abused.

The discretionary function immunity is applicable to this case because each increase in the franchise fees was a matter of choice involving policy level consideration economic, political and social in nature.

The power of a city to enter into a franchise agreement with a utility, and to charge a franchise fee pursuant to that agreement, is discretionary. The city may, but is not required, to enter into a franchise agreement. Iowa Code § 364.2. If the city does enter into a franchise agreement, it may, but is not required, to assess a franchise fee or part of that franchise agreement. Iowa Code § 364.3(4) and Kragnes v. City of Des Moines, 714 N.W.2d 632, 639 (Iowa 2006).

The franchise agreement itself may be granted only by ordinance. Iowa Code § 364.2(4)(a). An ordinance is one of four ways in which a city council may exercise its powers, the other three being motion, resolution or amendment. Iowa Code, § 364.3(1). The city council is the governing body of a city. Iowa Code § 362.2(8). An ordinance is a city law of general and permanent nature. Iowa Code § 362.2(16).

Thus, when a franchise fee decision is made it means that the governing body of a city, exercising its discretionary statutory powers, has passed a local law of general and permanent nature. Iowa Code §§ 364.2, 364.3(1), 362.2(8) and 362.2(16).

Or, put another way, it means the city has exercised a discretionary function. Id.

Because each decision to assess or franchise fee was made at the highest level of city government, after debate about such policy issues as property tax increases, state funding shortfalls, public safety staffing, and curtailed library hours, each decision is entitled to the discretionary function immunity afforded by Iowa Code § 670.4(3).

The purpose of the discretionary function immunity to tort liability:

. . . is well known. It is to “prevent judicial ‘second guessing’ of legislative and administrative decisions grounded in social, economic and political policy through the medium of an action in tort.”

Shelton v. State, 644 N.W.2d 27, 30 (Iowa 2002), quoting Goodman v. City of Éclair, 587 N.W.2d 232, 237, quoting in turn Berkovitz v. U.S., 486 U.S. 531, 536-37, 108 S.Ct. 1954, 1959, 100 L.Ed.2d 531, 541 (1988).

To be entitled to discretionary function immunity, an action or omission must be able to pass two tests. First, “a court must consider whether the action is a matter of choice . . .” Goodman, 587 N.W.2d at 237 (Iowa 1998), quoting from Berkovitz, 486 U.S. at 536, 108 S.Ct. at 1958-59, 100 L.Ed.2d at 540-41 (1988). And:

Second, even though the challenged conduct involves an element of judgment,

A court must determine whether that judgment is of the kind that the discretionary function exception was designed to shield. The basis for the discretionary function exception was Congress’ desire to “prevent judicial ‘second-guessing’ of legislative and administrative decisions grounds in social, economic, and political policy through the medium of an action in tort.” The exception, properly construed, therefore protects only governmental actions and decisions based on considerations of public policy. In sum, the discretionary function exception insulates the Government from liability if the action challenged in the case involves the permissible exercise of policy judgment.

Goodman, 587 N.W.2d at 237, 238 quoting from Berkovitz, 486 U.S. at 536-37, 108 S.Ct. at 1950, 100 L.Ed.2d at 541 (citations omitted).

In Goodman, a developer sued the City of LeClaire over its decisions to declare excavated material as a nuisance, remove the material and assess the costs of removal to the developer.

Goodman, 587 N.W.2d at 233-35.

The Court began its analysis by noting that it was neither necessary nor possible to define discretionary function immunity with precision. Id. at 237. Instead, said the Court, as to the first test, the focus should be on the nature of the conduct and whether it provided room for discretion. Id.

The Court noted that the laws surrounding the Goodman case, laws relating to dumps, landfills and such, gave the city “no specific criteria to follow.” Goodman, 587 N.W.2d at 239. Thus, said the Court, the city met the first part of the text as “the conduct of the acting government employee must be the product of judgment or choice.” Id.

The City of Des Moines meets the first discretionary function immunity test as well. No immutable guidelines are imposed upon the city in setting the amount of the franchise fee. In setting the amount of the franchise fees, the fees need only be “reasonably related” to the city’s costs of “inspecting, licensing, supervising or otherwise regulating the activity the city is regulating.” Kragnes, 714 N.W.2d at 642. The fees need not “calculate its administrative expenses to a mathematical certainty.” Id. The fee may include:

... not the expense merely of direct regulation, but all the incidental consequences that may be likely to subject the public to cost in consequence of the business licensed.

Kragnes, 714 N.W.2d at 642.

Moreover, no statute or case law decision mandates any particular formula or process to be used in setting franchise fees. No statute or case law mandates what “reasonably related” means in terms of franchise fees and costs. No statute or case law decision says what a cost or an “incidental consequence” is or is not. No guidance is given as to what processes or formula should be used to determine the costs.

In short, the City is left with a wide array of choices to make in setting franchise fees. With no specific regulation, statutes or case law decisions to follow, the City may exercise its discretion in setting franchise fees. We know this as a matter of law because the law of the case says so.²

But the limitation of the license fee to the necessary expenses will still leave a considerable field **for the exercise of discretion** when the amount of the fee is to be determined.

Kragnes, 714 N.W.2d at 642, quoting Star Transp. Co. v. Mason City, 195 Iowa 930, 953, 192 N.W.2d 873, 882 (1923) (boldface added).

Then, said the Court, the focus of the second step should be on whether the action implicated policy concerns. Here, the Court specifically noted that regulation of the conduct of private individuals was plainly intended to fall within the discretionary function immunity. Goodman, 587 N.W.2d at 239-40.

The Courts focus on the regulation of the conduct of private individuals is significant because:

Any franchise fee charged by a city must be reasonably related to the city's administrative expenses in the exercise of its police power. These expenses include the reasonable costs of inspecting, licensing, supervising, or **otherwise regulating** the activity the city is franchising. This holding, however, does not require the city to calculate its administrative expenses to a mathematical certainty. *See Bloom v. City of Fort Collins*, 784 P.2d 304, 308 (Colo. 1989) (holding special fees are not required to be determined to a mathematical exactitude as long as the ordinance creating the fee is

² The doctrine of the law of the case represents the practice of courts to refuse to reconsider what has once been decided. *In re Hermence's Estate*, 235 Iowa 745, 748, 15 N.W.2d 905, 907 (1944). It is a rule which provides that the legal principles announced and the views expressed by a reviewing court in an opinion, right or wrong, are binding throughout further progress of the case upon the litigants, the trial court and this court in later appeals. *State v. Di Paglia*, 248 Iowa 97, 99, 78 N.W.2d 472, 472-73 (1956); *Des Moines Bank and Trust Co. v. Iowa Southern Utilities Co.*, 245 Iowa 186, 189, 61 N.W.2d 724, 726 (1953). *State v. Grosvenor*, 402 N.W.2d 402, 405 (Iowa, 1987).

“reasonably designed to defray the cost of the particular service rendered by the municipality”).

Kragnes, 714 N.W.2d at 642 (boldface added). Thus, the franchise fee is directly tied to the regulation of the private individual – in this case MidAmerican Energy.

In addition, all of the policy judgments that went into setting the fees, serve to place the fee decisions comfortably within the immunity.

In Goodman, the City of LeClaire was faced with what to do with the excavated material. If left alone, it might create an environmental hazard. If left alone, there might be administrative fines or lawsuits. The decisions to declare the material a nuisance and move it, therefore, “were based on considerations of public policy grounded on social, economic and political reasons.” Goodman, 587 N.W.2d at 240-41.

Anderson v. State, 692 N.W.2d 360 (Iowa 2005) is another instance where discretionary function immunity was applicable. There a university student sued after a slip and fall. The district court granted a directed verdict to the state on one claim based upon discretionary function immunity. The Court of Appeals reversed. The Supreme Court reversed the Court of Appeals and reinstated the immunity. Id. at 363.

The fighting issue was whether the state’s decision not to close the UNI library on a night of bad weather was entitled to discretionary function immunity. Id. at 364. The University policy was to keep the library open, if possible, so as to maximize the educational experience of students. Staffing levels were considered. Number of users were considered. And all of these considerations, being social, economic and political in nature, were policy level consideration. As a result, the state was entitled to discretionary function immunity. Id. at 366-67.

Here, the Des Moines City Council was faced with a budget problem. Revenue from the state had declined. More police officers and firefighters were needed. Library hours were threatened. A property tax increase was considered. Kragnes, 714 N.W.2d at 636.

Faced with these competing economic, social and political interests, the Council made choices. The Council chose to eschew a property tax increase. Instead, the Council chose to increase the franchise fees. Budget concerns, staffing levels and hours of operation of public facilities all were considered by the Des Moines City Council as it debated the franchise fee increases and ultimately passed the same by way of ordinances. Id.

Because the decisions by the Council to increase the franchise fees were matters of choice grounded in economic, social and political policy, the decisions were discretionary functions and the City is entitled to the immunity of § 670.4(3). Goodman, 587 N.W.2d at 239-40; Anderson, 692 N.W.2d at 366-67.

CONCLUSION

Faced with no specific guidelines as to how a franchise fee should be determined, and after considering and balancing such policy issues as a potential property tax increase, police and fire staffing and library hours, the City raised gas and electric franchise fees. Because the City has considerable discretion in the setting of the fees, and because that discretion was exercised at the highest level of City government after balancing competing policy interests of economic, political and social concern, the City is entitled to discretionary function immunity under Iowa Code § 670.4(3) and summary judgment should be entered in its favor.



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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 4-29-08
By: U.S. Mail FAX
 Hand Delivered Overnight Courier
 Federal Express Other:
Signature Orlene Rascoe