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Mr. Robert Orth
P.O.Box 50785
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Re: Orth, Robert

Dear Robert:

You have asked me to brief a question relating to the St Paul City Ordinance requiring an $ 1,100 annual license fee for a foreclosed vacant house.

Fee or Tax. The question is whether the license fee is valid if it raises revenue, i.e. does the alleged fee exceed the cost of services rendered as to vacant houses.

Factual Background: I believe you have indicated that the fee exceeds costs of services to vacant houses, because all costs relative to vacant houses, except the cost of issuing the license, are already paid by other fees. This appears to be correct. As I understand it a vacant house license must be obtained as to a property purchased at foreclosure and city ordinances require that the vacant house be inspected for which a fee is required. All repairs and improvements are also subject to inspection and fees. Therefore all costs pertaining to vacant houses except the cost of issuing the license are paid by other fees. Since the cost of issuing the license is relatively minor, the vacant house fee exceeds the cost of regulation and is a tax. The tax is unauthorized and therefore void.

Legal Authorities. Minnesota law is that if a fee is in fact a tax, the law must empower the city to tax the subject matter. In Hendricks v. City of Minneapolis, 290 N W 428(Mn, 1940) the Court considered whether a fee imposed by the City of Minneapolis for parking was excessive as a revenue raising measure. The Supreme court stated:

"Finally it is urged that the ordinance is a revenue and not regulatory measure, because fee for metered parking is excessive. The ordinance must stand if a regulation and fall if a tax. …(cases cited)…**This is because, although, as the city contends, it has the power to regulate parking…it has no power to tax it**….The distinction between the taxing power and the police power will be found in the purpose for which the particular power is exercised…The declarations of the ordinance are relevant, although not conclusive. The ordinance requires a fee of five cents for parking an hour, or, in some places for half an hour. The ordinance declares this amount to be 'levied and assessed as a fee to cover the cost of inspection and regulation, control and operation'. The claim is

that five cents is an excessive charge and will result in receipts far beyond the cost of enforcement and regulation. If so the ordinance must fail as a revenue measure. Mankato v. Fowler, supra. (20 NW 361)Clark v. City of New Castle, 32 Dist & Co Rep. 371(Pa Common Pleas Ct. 1938). In the last cited case it was said that such would be the result if there was a 'lack of proportion between the cost of service rendered and the fee actually charged.'" at 290 N W at p.430.

The City has the power to tax real property with a general property tax, but it does not have the power to tax vacant properties to raise revenue. Therefore assuming that the revenues from the tax exceed the cost of regulation, the fee is a tax and the city has no power to impose a tax on vacant properties.

Attached hereto are the following cases upholding the former rule:

Hendricks v. City of Minneapolis, 290 N W 428(Mn, 1940)

Country Joe Inc v. City of Eagan, 560 N W 2d 681(MN, 1997)

I have also requested additional information from the City Attorney under the data practices law regarding this matter.

Yours Truly,

NEIL B. DIETERICH PA

Neil B. Dieterich

290 N.W. 428
207 Minn. 151, 290 N.W. 428
(Cite as: 207 Minn. 151, 290 N.W. 428)

Supreme Court of Minnesota.
HENDRICKS
v.
CITY OF MINNEAPOLIS et al. (COLLINS, Intervener).

No. 32409.
Feb. 9, 1940.

Appeal from District Court, Hennepin County; E. A. Montgomery, Judge.

Suit by Edwin A. Hendricks against the City of Minneapolis and others to enjoin the city from entering into a contract for installation of parking meters in a restricted area of its 'loop' district, wherein Frank J. Collins intervened as a taxpayer claiming a special interest. From an order denying a temporary injunction, plaintiff and intervener appeal.

Affirmed.

West Headnotes

[1] Municipal Corporations 268 ⇐1000(5)

268 Municipal Corporations
268XIV Taxpayers' Suits and Other Remedies
268k1000 Actions
268k1000(5) k. Pleading and Evidence. Most Cited Cases

Information supplied by affidavits submitted on application for temporary injunction restraining city of Minneapolis from entering into contract for installation of parking meters held insufficient to justify issuance, on ground that specifications were so narrowly drawn as not to permit full and free competition.

[2] Municipal Corporations 268 ⇐238

268 Municipal Corporations
268VII Contracts in General
268k234 Proposals or Bids
268k238 k. Form and Requisites. Most Cited Cases

Specification calling for supervision of installation of parking meters by city engineer was controlling though bid called in the alternative for bidder's method of installation, and hence alleged variance between specifications and successful bid was not fatal.

[3] Municipal Corporations 268 ⇐873

268 Municipal Corporations
268XIII Fiscal Matters
268XIII(A) Power to Incur Indebtedness and Expenditures
268k872 Aid to Corporations, and Subscription to or Purchase of Corporate Stock
268k873 k. In General. Most Cited Cases

A contract for purchase of parking meters was not an illegal "appropriation of public funds for benefit of a private corporation" because the meters were to be paid for only from receipts.

[4] Automobiles 48A ⇐5(3)

48A Automobiles
48AI Control, Regulation, and Use in General
48Ak5 Power to Regulate or Prohibit
48Ak5(3) k. Stopping, Parking, or Standing. Most Cited Cases

The city of Minneapolis may regulate parking but has no power to tax it. Mason's Minn.St.Supp.1938, § 2720-158 (M.S.A. § 169.04).

[5] Automobiles 48A ⇐7

48A Automobiles
48AI Control, Regulation, and Use in General
48Ak7 k. Local Regulations. Most Cited

Ordinance for installation of parking meters would fall as a "revenue measure" if the five cent

charge for parking would result in receipts far beyond cost of enforcement and regulation. Mason's Minn.St.Supp.1938, § 2720-158 (M.S.A. § 169.04).

[6] **Municipal Corporations 268 ⟹1000(5)**

268 Municipal Corporations
268XIV Taxpayers' Suits and Other Remedies
268k1000 Actions
268k1000(5) k. Pleading and Evidence. Most Cited Cases

Showing made on application for temporary injunction restraining city of Minneapolis from entering into contract for installation of parking meters did not establish that fee of five cents, to be charged for parking, so much exceeded cost of installation, maintenance, and regulation as to condemn ordinance as a "revenue measure." Mason's Minn.St.Supp.1938, § 2720-158.

Syllabus by the Court.

1. On present showing in support of application for temporary injunction, it can not be said that specifications for parking meters were so narrowly drawn as not to permit full and free competition.

2. Inasmuch as the meters are, in any event, to be installed under the supervision of the city engineer, there was no fatal variance because the successful bidder stipulated two prices, the lower to apply if its own method of installation is used.

3. The ordinance in question does not contemplate illegal appropriation of public funds because the meters are to be paid for only from receipts.

4. It does not appear that the fee of five cents, to be charged for parking regulated by meters, so much exceeds the cost of installation, maintenance and regulation as to result in a tax and condemn the whole project as for revenue rather than regulation.

***152 **429** Thomas O. Kachelmacher, of Minneapolis, for plaintiff-appellant.

Jacob Garon, of Minneapolis, for intervener-appellant.

Richard S. Wiggin, City Atty., and John F. Bonner, Asst. City Atty., both of Minneapolis, for respondents.

STONE, Justice.

Plaintiff, Hendricks, a taxpayer, sues to enjoin the city of Minneapolis from entering into a contract for the installation of parking meters in a restricted area of its 'loop' district. Reinforcing plaintiff, Mr. Collins intervened as a taxpayer claiming a special interest by reason of ownership of an automobile and tenancy in a building located in the proposed parking meter zone. From the order denying a temporary injunction, plaintiff and intervener appeal.

After investigation to determine their practicability, the city council decided to install automatic parking meters and directed the purchasing agent and city engineer to draw plans and specifications. Bids were invited. There were two, one by the Dual Parking Meter Corporation and one by the Graybar Electric Corporation. The former was successful. One provision in the specifications, relating to the method of installation, read as follows: 'The contractor is to install the meters under the supervision of the City Engineer who will, likewise, locate all meters. The City Engineer shall specify the method of installation with due respect for underground vaults, conduits, pipes, etc.'

***153** The lowest and successful bid was $49.50 for each of 1,100 machines. Attached was the alternative that $2 could be deducted if the bidder's method of installation be used. The bid was accepted at $47.50.

At the outset, it should be said that the grounds of attack present questions of fact. There has been no trial, the matter being submitted below on affidavits. So there are issues which can not be finally determined at this stage.

[1] 1. The first point for appellant is that the specifications were discriminatory. The law is

settled that municipal authorities must frame such specifications so as to permit 'free and full competition.' Diamond v. Mankato, 89 Minn. 48, 93 N.W. 911, 61 L.R.A. 448. That does not deny the city's right, within reasonable limitations, to require bidders to meet proper standards. The city can, within reason, require specific materials or particular methods of financing so long as the requirements are in the best interests of its inhabitants, and this although the effect is somewhat to limit the number of possible bidders. Davies v. Village of Madelia, 205 Minn. 526, 287 N.W. 1, 123 A.L.R. 569.

The specifications in some respects were quite detailed. For example, 'The portion of the pallet which engages the teeth of the escapement wheel shall be of monel metal or steel.'

If there is good reason in this instance (and others where the specifications were just as specific and narrow) why such materials should be required rather than others, the provision is not discriminatory, even though it restricted the field of bidders. If, on the other hand, no sound reason exists for such requirement, the provision is discriminatory even though some manufacturers could comply.

It is alleged that the specifications were built around the parking meters made by the Dual company; that they were the only ones able to comply, and that the bid of the Graybar company did not do so. The complete facts are not before us. The trial *154 court can be depended upon to scrutinize the transaction for evidence of unlawful discrimination.

[2] 2. The next assault is upon a supposed variance between specifications and successful bid. The point is that the specifications **430 called for supervision of installation by the city engineer, while the bid called for the bidder's method of installation. Even so, the specification controls. It remains for the city engineer to 'specify the method of installation with due respect for underground vaults', etc. At the present stage, we see no substantial variance.

[3] 3. The next argument is that the contract calls for illegal appropriation of public funds for the benefit of a private corporation. The meters were to be paid for from their own collections. Each month, until the price is paid, the city treasurer is to remit 60% of the receipts from meters operating on an hour basis and 30% from those on a shorter period. The balance is to be used as the council shall prescribe. Even though not paid for at the end of 12 months, the meters are to become property of the city, with no further cost. We see no ground for challenge here. Municipalities have the power to purchase equipment and finance it by the revenue derived from its use. Williams v. Village of Kenyon, 187 Minn. 161, 244 N.W. 558.

It is also charged that there is attempt to violate the city charter by paying money from the meters directly to the contractor, rather than into the current expense fund of the city. The ordinance makes no such provision. It may be construed to require deposit of the meter receipts in the current expense fund, payments to be made therefrom. The parking meter ordinance itself may be a sufficient appropriation. If not, the council can make the appropriations as needed.

[4] 4. Finally, it is urged that the ordinance is a revenue and not a regulatory measure, because the fee for metered parking is excessive. The ordinance must stand if a regulation and fall if a tax. Mankato v. Fowler, 32 Minn. 364, 20 N.W. 361; State ex rel. Harkow v. McCarthy, 126 Fla. 433, 171 So. 314. *155 This is because, although, as the city contends, it has the power to regulate parking (Mason Minn.St.1927, 1938 Supp. section 2720-158), it has no power to tax it.

'The distinction between the taxing power and the police power will be found in the purpose for which the particular power is exercised.' City of Buffalo v. Stevenson, 27 N.Y. 258, 100 N.E. 798, 800. The declarations of the ordinance are relevant, although not conclusive. The ordinance requires a fee of five cents for parking an hour, or, in some

places, for half an hour. The ordinance declares this amount to be 'levied and assessed as a fee to cover the cost of inspection and regulation, control and operation.'

[5] The claim is that five cents is an excessive charge and will result in receipts far beyond the cost of enforcement and regulation. If so the ordinance must fall as a revenue measure. **Mankato v. Fowler, supra**; Harkow v. McCarthy, supra; Clark v. City of Newcastle, 32 Dist. & Co. Rep. 371 (Pa. Common Pleas Ct.1938). In the last-cited case it was said that such would be the result if there was a 'lack of proportion between the cost of the service rendered and the fee actually charged.'

[6] In a case of this kind, with no actual trial of the system and the claims of plaintiff and defendant in conflict as to reasonableness of the fee, it would require a clear showing by plaintiff to demonstrate that the fee is too high. It would not be enough to show that the fee will exceed the cost for one period, or by a small amount. It must be made plain that the scheme of the ordinance is such that receipts will continuously and by a substantial amount exceed the cost of installation, maintenance, and regulation.

The city may intend by this means to pay for the whole cost of the regulation of parking-the cost of the machines, their repair, the pay of the policemen who will be required to enforce the ordinance, and generally the expense of providing and keeping clear places in which drivers may park. In the face of the city's ***156** showing, by affidavits narrating the experience of other cities with parking meters, we can not now say that it clearly appears that the fee is a tax.

The wisdom, or lack of it, of the project, presents no question for judges. If in that field there is error, the appeal is to the voters, not the courts. The executive and legislative departments of government have, properly, an extensive field of action, wherein, if they err, there results no justiciable question. The resulting political issue, if any, is not for settlement in court.

Here no public money is to be spent in installation or purchase. Pending trial and decision of the legal issues, the parties (particularly the contractor) will proceed at their own risk-not that of the city treasury.****431**

Because all the issues are of fact, yet to be tried and finally determined, and because there is no proof of abuse of discretion (Behrens v. City of Minneapolis, 199 Minn. 363, 271 N.W. 814), we can not reverse. It is not to be thought that, if proper showing is made, the case will not be advanced for trial. The public interest is apparent, and the issues are important.

We have passed as without merit a claim that in drawing the specifications the city engineer usurped the function of the council. It is enough that there was complete ratification by the council.

All the issues remain for final decision below, including that of the right of plaintiff and intervener to sue.

Order affirmed.

Minn. 1940
Hendricks v. City of Minneapolis
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