IN THE IOWA DISTRICT COURT FOR HENRY COUNTY

REGIONAL UTILITY SERVICE SYSTEMS (RUSS), **Plaintiff,** **vs.** **THE CITY OF MOUNT UNION, IOWA,** **Defendant.**	**Cause No. LALA011662** **FINDINGS OF FACT, CONCLUSIONS OF LAW, JUDGMENT, AND ORDER**

I. INTRODUCTION

In 2008, the parties to this lawsuit executed a Joint Agreement for the Erection Maintenance and Operation of Plants and Systems for Sanitary Services (Joint Agreement). As a result, a wastewater collection and treatment system (sewer system) was built for the residents of Mount Union, Iowa. Since, several of the residents have failed or refused to pay the monthly user fee for the system. Regional Utility Service Systems (RUSS), the owner and administrator of the system, demanded that the City pay the delinquent accounts under Article 9 of the Joint Agreement. The City has refused.

RUSS then initiated this action for breach of contract.[1] RUSS claims the City of Mount Union breached Article 9 of the Joint Agreement by not paying the delinquent user fees. RUSS seeks a money judgment against the City of Mount Union for $29,050.62, for delinquent user fees as of January 31, 2014. The City of Mount Union agrees that the parties executed the Joint Agreement in 2008. However, the City asserts the Joint Agreement should not be enforced because it is voidable, in whole or

[1] The Plaintiff originally cast the Petition as a suit for specific performance. The Court determined that this characterization was inaccurate and has treated Plaintiff's claim as one for breach of contract.

in part, for a host of reasons, including: (1) RUSS coerced the City and the City signed the Joint Agreement under duress; (2) RUSS improperly delayed enforcement of the Joint Agreement and thus waived the right to collect a portion of the delinquent user fees; and (3) Section 9 of the Joint Agreement authorizing RUSS to collect delinquent user fees from the City is unconstitutional and void as against public policy.

For the reasons discussed and explained fully below, the Court **CONCLUDES** that RUSS is entitled to a judgment against the City of Mount Union for delinquent user fees in the amount of $27,862.10, as of December 31, 2013. The Court further holds that the City failed to prove any of the affirmative defenses asserted or that Section 9 of the Joint Agreement is unconstitutional or void as against public policy. Finally, the Court denies the request by RUSS for attorney's fees. The costs of this action are taxed to the City of Mount Union.

II. BACKGROUND PROCEEDINGS

In early February 2014, the Court issued its Rulings on the parties' competing Motions for Summary Judgment. Of particular import, the Court ruled that RUSS proved all of the elements for breach of contract, except for the precise amount of damages. The Court also held that the City raised substantial fact issues concerning its affirmative defenses but did not prove any affirmative defense as a matter of law.

The parties appeared for trial on February 4, 2014. The Court heard testimony from several witnesses. The parties offered several hundred pages of exhibits into the record. Following trial, the parties submitted cogent written final arguments. Upon this extensive record, the Court now issues the following **FINDINGS** and **CONCLUSIONS**.

III. FINDINGS OF FACT

1. In late 1999, several Southeast Iowa counties formed the Regional Utility Service System known as RUSS. The counties executed an agreement under Iowa Code Chapter 28E to form this alliance for the purpose of "planning, designing, developing, financing, constructing, owning, operating, and maintaining waste water treatment systems and water systems for and on behalf of the signatory counties and the cities and towns located in those counties." Henry County became a signatory county. RUSS is a legal entity under Iowa Code Chapter 28E. RUSS enjoys the powers of a public corporation under Iowa Code Chapter 28F.

The City of Mount Union is a small city of about 107 people located in rural Henry County, Iowa. Mount Union consists of about 43 households and 27 families. Unfortunately, the City has experienced a steady decline in population since the 1970s. Many of the City's residents are retired or persons of modest means. Most of the employed residents work outside the City limits.

In 1996, the Iowa Department of Natural Resources (DNR) conducted water sampling in Mount Union and found evidence of human sewage. As a result, the DNR issued a notice of violation to the City. The City then applied for funding to construct a wastewater collection and treatment system (sewer system). These efforts proved unsuccessful.

Some eight years later, on December 30, 2004, the DNR issued an administrative order to Mount Union mandating that the City take steps to correct the deficiencies that the DNR first observed in 1996. Interestingly, the Order contains the following observation:

> "The City has informed the Department that the City does not intend on complying with Department regulations due to lack of local support at this time. In addition, Mayor Johnson alleged that the Department did not have jurisdiction in mandating the City to install a wastewater system." See Exhibit V, page 322.

In response to the DNR order, the City hired French-Reneker (French), an engineering firm, to provide technical support to comply with the DNR mandate. French provided engineering support, some limited financial information, and outlined the steps necessary to correct the deficiencies noted by the DNR. French recommended, at least preliminarily, that the City install a two-cell, controlled discharge lagoon system. The French report also noted potential funding sources for the sewer system. The report concluded that financing the project without grant assistance would be very difficult. (emphasis in original). Without grant assistance, French projected the per user, per month cost of the sewer service would be $119.

Significantly, the French report also discussed legal aspects of the project. Importantly, the report states:

> "Mount Union has chosen to have their project administered and, in turn, have their system owned by the RUSS organization." (emphasis added). Exhibit W at page 356.

The date of this report is September 28, 2005.

Earlier, in August 2005, the City Council for Mount Union hosted an open forum regarding RUSS and the sewer system project. The minutes from this meeting state:

> "RUSS would maintain all ownership and operation of this project." Exhibit X, page 408.

About six months after hiring French, the City held an open forum to discuss how to pay for the system and other issues. RUSS representatives attended. RUSS

proposed to write one or more grant applications and then manage the construction of the sewer system. The City Council voted to authorize RUSS to do grant writing and project administration. This authorization did not address the ownership of the system.

In early 2007, the City received one or more grants for construction of the system. In addition to these grants, RUSS applied for loans and grants to complete the sewer system. RUSS assumed debt through the United States Department of Agriculture Rural Development Project for construction of the sewer system. The loan security for the project consisted, in part, of revenue bond financing authorized under Chapters 28F and 331 of the Code of Iowa.

2. RUSS prepared the Joint Agreement, which is the subject of this law suit, and submitted it to the City in 2007. City council members voiced several concerns about the Agreement. A major concern centered on ownership of the system. The Agreement provided for RUSS to own the system. The city council asked an engineer from French to talk with RUSS representatives about this provision and others.

Some of the City's concerns about the Agreement – including the ownership issue – continued unabated into July 2008. At that time, the city council voted to have attorney Rande McAllister review the Agreement. Once Mr. McAllister reviewed the Agreement, he contacted Mr. Paul Zingg, the attorney for RUSS. Attorney McAllister expressed concern to Attorney Zingg over three specific provisions of the Joint Agreement, including the provision that RUSS would both own and operate the sewer system. Zingg promptly responded to these concerns. He opined that RUSS must be the owner and operator of the system because it was directly responsible for payments on the revenue bonds issued to fund the project. Zingg also noted that Article 9 of the

Joint Agreement required the City to reimburse RUSS once the sewer user fee account became delinquent for a specified period of time.

McAllister forwarded Zingg's letter to the Mount Union city council through its then mayor, Mr. Dan Johnson. McAllister wrote:

> "I believe he [Zingg] has adequately and correctly addressed all of the issues you raised…."

McAllister further explained that because the USDA provided funding for the project, that entity made the rules for the project. McAllister concluded by stating that the only issue of concern that "is negotiable" is whether the City could have a first right of refusal to acquire the sewer system before sale to a third party.

On August 6, 2008, the mayor of Mount Union and its city clerk signed resolution No. 06-08-08-01, authorizing RUSS to issue sewer revenue bonds in an amount not to exceed $400,000 and to issue project notes in a like amount to finance the Mount Union Wastewater Treatment System Project. Exhibit 20. Significantly, the resolution stated:

> "The issuance of the bonds and project notes will benefit the City…the City is the primary beneficiary of the issuance of the bonds and project notes…."

On August 6, 2008, the city council met with RUSS personnel to discuss the Joint Agreement. Upon motion made and seconded, the council unanimously voted to authorize the mayor to sign the Joint Agreement with RUSS. The motion authorizing the Joint Agreement and the vote approving the motion were recorded in the council minutes. These minutes were approved at the city council meeting on August 17, 2008.

The mayor and city clerk for Mount Union, Iowa, executed the Joint Agreement on August 7, 2008, before a notary public. The attestation clause immediately below their signatures stated they signed the Agreement as their "voluntary act and deed."

RUSS representatives signed the Joint Agreement on September 10, 2008. The Joint Agreement was then recorded in Henry County, Iowa, on September 29, 2008, and with the Secretary of State on November 18, 2008.

On September 10, 2008, the mayor and city clerk executed an administrative services contract between the City of Mount Union and RUSS. The following month, the same two city officials signed the Sub Recipient Agreement for Federally Funded Project. This Agreement designated RUSS as the sub recipient of federal funds for the Mount Union Project. Section 3 states:

> "Any and all improvements or property, real or personal, constructed, installed, or acquired pursuant to this contract shall be and remain the property of the sub recipient."
> Exhibit C, pages 54-56.

Bids for the sewer project were approved and awarded for construction on or about July 1, 2009. Construction was completed approximately 18 months later in about December of 2010. During the construction phase, RUSS placed individual septic tanks in the City's right of way and obtained easements from individual land owners.

3. RUSS passed resolutions establishing monthly user fees for the system as follows:

April 4, 2007	$35.00
August 4, 2010	$43.00
June 13, 2012	$57.63
November 1, 2013	$69.88

4. Several users of the Mount Union sewer system have failed or refused to pay the monthly system user fee. RUSS has given the City Notice of Delinquent User Accounts on October 3, 2011; January 16, 2012; April 2, 2012; July 2, 2012; October 1,

2012; January 2, 2013; April 1, 2013; July 2, 2013; and January 3, 2014. RUSS gave the City these Notices as provided for by Section 9 of the Joint Agreement. Section 9 states in pertinent part:

> "The City shall indemnify RUSS and reimburse RUSS for any customer sewer service, which is sixty (60) days delinquent by payment within thirty (30) days of receiving Notice of the delinquency from RUSS."

The RUSS invoice dated January 3, 2014, shows the amount of fees due and owing is $27,862.10 as of December 31, 2013. RUSS executive director Bruce Hudson testified that the unpaid sewer fees owed as of January 31, 2014, were $29,050.62. Approximately 15 residential accounts were delinquent. The City had not paid any of these charges up to the date of trial.

5. The budget for the City of Mount Union for 2013 was $17,724. The City's constitutional debt limit is about $117,886.50. The City has little savings or surplus funds.

Based upon these **FINDINGS**, the Court now enters the following:

IV. CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the subject matter.

2. The Court must decide this case based solely upon the evidence and law. Evidence is testimony in person, exhibits received by the Court, stipulations of the parties, and any other matter admitted at trial.

As a fact finder, the Court may not consider sympathy, bias, or prejudice toward any party. Here, as is true in many cases, there may have been some facts that were not put on the record. There may be one or more reasons for this. The parties must realize that the Court can decide the issues only on the evidence presented. The Court

cannot go outside the record made in court to find evidence. Where the record is incomplete or evidence is lacking for any reason, the Court is required to fashion its remedy and do justice as best it can with the information, even though imperfect, found in the record.

3. In determining the facts in this case, the Court has considered the evidence using its observations, common sense, and experience. The Court has attempted to reconcile any conflicts in the evidence. To determine the credibility of witnesses, the Court has considered whether the testimony is reasonable and consistent with other evidence; the witnesses' appearance, conduct, age, intelligence, memory, and knowledge of the facts; and the witnesses' interest in the trial, their motive, candor, bias, and prejudice.

4. To prove the claim for breach of contract, RUSS must show these elements:

a. The existence of a contract;

b. The terms and conditions of the contract;

c. That RUSS performed all the terms and conditions required under the contract;

d. A breach by the City of Mount Union;

e. That RUSS has suffered damages as a result of the breach. Molo Oil Company v. River City Ford Truck Sales, 578 N.W.2d 222, 224 (Iowa 1998).

The Court **CONCLUDES** that RUSS proved the terms and conditions of the Joint Agreement; that RUSS performed all the terms and conditions required under the

contract; that the City of Mount Union breached the contract by failing to pay the fees assessed for the sewer service; and that RUSS has been damaged in the amount of $27,862.10 as of the end of 2013. RUSS failed to prove the greater amount of damages claimed because the record did not show at trial both that RUSS gave the City notice of the greater amount and that the City had 30 days to pay it. (Emphasis added).

RUSS is thus entitled to a judgment against the City, unless the City proves the Joint Agreement was void or voidable. The Court now discusses the City's affirmative defenses.

DURESS AND COERCION

5. The City's first affirmative defense is that the City signed the Joint Agreement as the result of duress and coercion applied by officials of RUSS. Duress is an affirmative defense. The City has the burden to establish the defense. Fees v. Mutual Fire Auto Insurance Company, 490 N.W.2d 55, 58 (Iowa 1992). If the City can prove duress, the Court can hold the Joint Agreement to be voidable. For the reasons explained below, the Court concludes that the City failed to prove the affirmative defense of duress.

Duress is generally defined as:

> "…any wrongful act of one person that compels a manifestation of apparent assent by another to a transaction without his volition. It has also been defined as compulsion or restraint by which a person is illegally forced to do, or forbear from doing, some act. Generally speaking, duress may be said to exist whenever one, by the unlawful act of another, is induced to make a contract or to perform some other act under circumstances which deprive him of the exercise of free will. Duress destroys the free assent necessary for entering into a contract and indeed prevents the formation of a binding contract." In the Interest of C.K., 350 N.W.2d 37, 43-44 (Iowa 1982).

There are two essential elements to a claim of duress in the execution of a contract: (1) one party issues a wrongful or unlawful threat; and (2) the other party had no reasonable alternative to entering the contract. In re Marriage of Shanks, 758 N.W.2d 506, 512 (Iowa 2008)(considering an antenuptial contract). Here, the City does not allege RUSS made or issued an unlawful or illegal threat. Rather, Mount Union contends RUSS made a "wrongful" threat.

Threats to do acts that are lawful may be "wrongful" depending on the circumstances. Wrongful acts can include oppression that goes beyond hard bargaining: the use or threatened use of undue influence; or threats to take unfair advantage of the business or financial circumstances of another so as to overcome the other's free will. See *Williston on Contracts*, Section 71: 13 Note 45, for a collection of cases. Further, wrongful acts can include threatened or actual action that is morally, though not legally, wrong.

Generally, the intent of the person allegedly causing the duress is unimportant. Rather, it is the party's actions which determine whether wrongful conduct occurred. The *Restatement (Second) of Contracts* offers substantial guidance on the contours of "wrongful conduct." Under the *Restatement*, a threat is improper if it is a breach of the duty of good faith and fair dealing under a contract with the recipient. A threat is also improper if the resulting exchange is not on fair terms and the threatened act would harm the recipient and would significantly benefit the party making the threat, or the effectiveness of the inducing assent to the agreement is significantly increased by a prior unfair dealing by the party making the threat, or what is threatened is otherwise a

use of power for illegitimate ends. See *Restatement (Second) of Contracts* Section 176.

Here, the City of Mount Union does not dispute that the city council authorized the mayor to sign the Joint Agreement and that the mayor and city clerk signed the Agreement as authorized. Rather, the City asserts RUSS exercised improper leverage such that the City signed the Agreement under duress and as a result of coercion.

The City maintains that Kelly Lewiston and perhaps the RUSS board exerted wrongful coercion resulting in the City signing the Joint Agreement. As evidence, the City argues the following factors:

A. RUSS made all of the decisions on the project and failed to keep the City informed of user fees, issuance of revenue bonds, tax rates, and how delinquent accounts would be managed and collected;

B. RUSS surreptitiously acquired ownership of the system;

C. Counsel for RUSS informed the City's attorney that the two parties were at an "impasse" and that RUSS would not work further on the project until the City approved the Agreement; and

D. RUSS board minutes from August 6, 2008, contain the following notation:

> **"**The RUSS board requested CEO-Director Kelly Lewiston to attend the Mount Union city council meeting this evening and informed the council that if the Joint Agreement is not signed the City will be receiving a certified letter giving the City ten days to sign or RUSS will pull the project and notify the funding agencies and Iowa Department of Natural Resources." See Defendant's Exhibit H, page 249.

The Court carefully considered these arguments and concluded they lacked merit. RUSS officials had several meetings with members of the city council. The city

council hired counsel and an engineering firm to advise and represent the City. Both French and attorney McAllister communicated to and for the City. City officials reviewed and signed several documents explaining various aspects of the project. Under the trial record, the City did not establish that RUSS failed to provide relevant information about any facet of the project. Indeed, the City hired French and RUSS to do consulting and to operate the sewer system because the City lacked the expertise to perform these functions.

The City's argument that RUSS improperly acquired ownership of the system is misguided. The greater weight of the **credible** evidence demonstrated that the City knew well before the Joint Agreement was signed that it would not own the system. Surely, the City vacillated about whether this ownership arrangement was acceptable, but the evidence is clear that the city council authorized the mayor to sign the Joint Agreement knowing that RUSS would be the owner of the system.

When counsel for RUSS advised the City's attorney that the parties were at an impasse and action was needed, counsel for the City gave the council this advice:

> "…I guess you and the Council will have to decide whether you want to proceed or not.
> I don't see anything that is terribly objectionable from a legal standpoint….the Council and the citizens of Mount Union would have to be flexible to make it work." Exh. EE pg 438."

The record, including the exchanges between counsel, does not demonstrate duress or coercion on the part of RUSS.

Finally, the City's reliance on the passage from the RUSS board minutes from August 6, 2008, is misplaced. The City presented virtually no credible evidence that Kelly Lewiston or any other RUSS official ever improperly threatened the city in any way

at any time. Indeed, the City did not prove that Kelly Lewiston attended the meeting at which the "threat" was to be made.

The Iowa Supreme Court has recognized the doctrine of "economic duress." The City must prove three elements to establish economic duress: (1) the City involuntarily accepted RUSS's terms; (2) the City had no alternative; and (3) RUSS acted in a coercive manner. 490 N.W.2d at 59-60.

To satisfy the first element, the City had to prove that the mayor involuntarily signed the Joint Agreement. Here, the evidence demonstrated the mayor signed the Agreement after the city council gave him authority to do so. The Joint Agreement states on its face that the mayor signed the Agreement as his voluntary act and deed. The City hired counsel for legal advice about the Agreement. The City had ample time to consider and discuss the Agreement before accepting it. Under these facts, the City failed to show the mayor executed the Agreement involuntarily. 490 N.W.2d at 59-60.

To satisfy the second requirement for economic duress, the City had to show that it had no reasonable alternative but to sign the Agreement. This element is a practical one under which the Court must examine the "exigencies of the City." Here, the City had adequate time to consult with its attorney and the French firm before signing the Agreement. The City failed to establish that exigencies existed or that practical alternatives to signing the Agreement were nonexistent.

To prove the third element of economic duress, the City had to establish that RUSS acted in a coercive manner. In Turner v. Low Rent Housing Authority, 387 N.W.2d 596 (Iowa 1986), the parties reached and signed a settlement agreement. When one party sued on the agreement, the other raised the defense of economic

duress. This party claimed it signed the agreement as a means to avoid bankruptcy and was therefore coerced. The Supreme Court rejected the claim of economic duress. Significantly, the Court stated an alleged victim of duress may not obtain part of the benefits of an agreement and disavow the remainder. This is precisely what the City of Mt. Union seeks here. 387 N.W.2d at 599.

Next, the Court stated that the party asserting duress failed to show that its only reasonable alternative was to sign the agreement. The Court rejected the notion that a party could prolong the execution of the agreement until the "eleventh hour" then claim a crisis because of its own financial necessities. 387 N.W.2d at 599.

For all of these reasons, the Court concludes that the City failed to prove that it signed the Joint Agreement under economic duress or that RUSS coerced the City into executing the Joint Agreement.

LACHES-ESTOPPEL

6. For its second affirmative defense, the City argues RUSS failed to timely assert a first claim for payment of delinquent user fees. The City asserts RUSS waived the right to collect these fees totaling $8,051.50.

RUSS first notified the City of delinquent user fees in early October 2011, or about a year after the system become operational. RUSS demanded payment from the City of $8,051.50. See Exhibit 6, page 11. The demand for payment stated:

> "I apologize if this is the first notice that you have received; however it has taken me a few months to verify that all payments vs invoices were accurate and posted correctly."

The City asserts this delay prejudiced the City because it had already spent the City's cash reserves on a culvert project; that the City lacked other resources to pay the fees; and that the City missed the opportunity to raise taxes or take other affirmative action to

collect the fees. The City argues RUSS waived the right to collect these delinquent fees because of inaction. The Court concludes the City failed to establish the defense of laches and estoppel or waiver.

Laches is an affirmative defense. The City has the obligation to prove this affirmative defense. The doctrine of laches is an equitable doctrine that is premised on unreasonable delay in asserting a right that causes disadvantage or prejudice to another. Laches alone is generally not a defense to an action on contract. Life Investors, Inc. v. State of Corrado, 838 N.W.2d 640, 645 (Iowa 2013). However, laches coupled with estoppel can constitute an affirmative defense in a contract action. State Savings Bank v. Miller, 124 N.W. 873, 874 (Iowa 1910). Ordinarily, the doctrine of laches does not apply within the statute of limitations unless there is a showing of special detriment to another. 838 N.W.2d at 645. The Court should not infer prejudice from the mere passage of time. 838 N.W.2d at 645. Here, RUSS filed suit within the applicable statute of limitations, and laches is not a defense to breach of contract. Thus, the City of Mount Union's reliance on the defense of laches is misplaced. However, the Court must consider whether laches and estoppel, joined together, constitute an affirmative defense here.

In State Savings Bank v. Miller, the Supreme Court recognized that estoppel is a common defense in a law action. 124 N.W. at 875. Our courts have recognized at least two versions of estoppel, including equitable estoppel and estoppel by acquiescence. Estoppel by acquiescence occurs when a person knows or ought to know of an entitlement to enforce a right and neglects to do so for such time as would imply an intention to waive or abandon the right. Garrett v. Huster, 684 N.W.2d 250, 256 (Iowa

2004). The focus is on the actions of the party who holds the right in order to determine whether that right has been waived. The doctrine advances a policy of stability and conclusiveness. Davidson v. Van Lengen, 266 N.W.2d 436, 439-440 (Iowa 1978).

To prove "equitable estoppel," a party must show: (1) the opposing party misrepresented or concealed material facts; (2) the party relying on estoppel lacked knowledge of the true facts; (3) the party misrepresenting or concealing the true facts intended the deceived party to act on those representations; and (4) detrimental reliance by the party to whom the representations were made. Rubes v. Mega Life and Health Insurance Company, 642 N.W.2d 263, 271 (Iowa 2002). The essence of the doctrine is that "one who has made certain representations should not thereafter be permitted to change his position to the prejudice of one who has relied thereon." Ahrendsen ex rel Ahrendsen v. Iowa Department of Human Services, 613 N.W.2d 674, 678 (Iowa 2000). Ordinarily, equitable estoppel must be proven by clear and convincing evidence. Christy v. Miulli, 692 N.W.2d 694, 702 (Iowa 2005).

In Markey v. Carney, 705 N.W.2d 13 (Iowa 2005), the Iowa Supreme Court distinguished the two estoppel doctrines. The Court noted that even though estoppel by acquiescence bears an estoppel label, it is in reality a "waiver" theory. Westfield Insurance Companies v. Economy Fire and Casualty Company, 623 N.W.2d 871, 880 (Iowa 2001). Estoppel by acquiescence does not require a showing of detrimental reliance or prejudice. According to the Markey court, estoppel by acquiescence applies when a party (1) has full knowledge of his rights and the material facts; (2) remains inactive for a considerable time; and (3) acts in a manner that leads the other party to believe the act now complained of has been approved. 705 N.W.2d at 21-22. Estoppel

by acquiescence is applicable where a person knows or ought to know that he is entitled to enforce his right and neglects to do so for such a length of time as would imply that he intended to waive or abandon his right. Humbleton Livestock Auction, Inc. v. B&C Cattle Company, 155 N.W.2d 478, 487 (Iowa 1967).

The Court must look to the behavior and acts of RUSS to determine whether the entity waived its right to collect delinquent user fees. A RUSS representative explained the reason for the billing delay. The City did not show that this explanation was false or unreasonable. Further, the City did not establish that a single City representative believed that RUSS waived the delinquent fees by waiting to submit the original delinquency notice. Indeed, there is nothing in the trial record that suggests that the City would have paid even a small delinquent account if RUSS had given notice within 90 days of the first delinquency. Instead, the record suggests that the City had no intention to pay the user fees. This Court is unwilling to conclude on the trial record that RUSS acted in a manner that led the City to believe RUSS waived payment of the first installment of delinquent user fees. For these reasons, the Court determines the City's affirmative defense of estoppel and waiver should be rejected.

CONSTITUTIONALITY OF ARTICLE 9

7. A contract which violates the Constitution is void and unenforceable. The City of Mount Union insists that Section 9 of the Joint Agreement requires the City to be liable for the sewer fees of individual users and this is contrary to Article VII, Section 1, of the Iowa Constitution. This constitutional provision states:

> "The credit of the State shall not, in any manner, be given or loaned to, or in aid of, any individual, association, or corporation; and the State shall never assume, or become responsible for, the debts or liabilities of any individual,

> association, or corporation, unless incurred in time of war for the benefit of the State."

Thirty-eight other states have adopted a constitutional provision similar to Iowa's. The Iowa provision is based upon New York's constitution. The New York provision was enacted to prevent the State from acting as surety "for privately owned canals and railroads whose financial collapse saddled prior state governments with heavy financial burdens." Star Equipment Ltd v. Iowa DOT, 843 N.W.2d 446 (Iowa 2014). Article VII, Section 1, is designed to be an "unqualified prohibition" against the State "lending its credit" to another person or entity or assuming the debts of others. Grout v. Kendall, 195 N.W. 467, 472 (Iowa 1923). This constitutional provision withholds from the State all power or function of suretyship. As enacted, the intent of the provision is to prevent a political subdivision from paying for failed projects started by others. 192 N.W. at 531

With this background, the Court must examine the precise contours of Article VII, Section 1, more closely. The term "credit" means a situation where a secondary liability will become primary upon the failure of the primary debtor. Stanfield v. Polk County, 492 N.W.2d 648, 656 (Iowa 1993). The State or political subdivision "loans its credit" when it acts as a **surety** for another. The State may be a primary obligor but not a secondary one. Article VII, Section 1, forbids the "incurring of obligations by the indirect method of secondary liability." Grout v. Kendall, 195 N.W. 467, 472 (Iowa 1923).

Accordingly, the question in this case is whether Article 9 made the City of Mount Union a surety or rather imposed primary liability on the City for the user fees. The liability of the surety is always secondary and not primary. Whether the City of Mount Union's liability for the user fees is primary or secondary depends on the nature of its interest. Star Equipment Ltd v. State of Iowa DOT, 843 N.W.2d 446 (Iowa 2014). The

City is not considered a surety if it has a direct personal relationship in the debt and receives a benefit from the debt. 843 N.W.2d at 450 citing 72 C.J.S. Principal and Surety, Section 12 at 187 (2005). In Ft. Dodge Culverts Steel Co. v. Miller, 206 N.W. 141, 142 (Iowa 1925), the Court explained that "a principal, as distinguished from a surety, … means the person primarily liable under the obligation and who receives the benefit for which the obligation was given."

To determine whether the City is a principal, the Court believes that a review of Chapters 28F and 28E and several funding documents are instructive. Chapter 28F was enacted to provide a means for the joint financing by public agencies of works or facilities useful and necessary for the collection, treatment, and purification, and disposal of sewage. This Chapter applies to the Mount Union sewer system. Revenue bonds to fund the project were issued for the Mount Union sewer system under Chapter 28F.

Section 28F.5 contains the mechanism for payment of the revenue bonds issued to fund the sewer project. First, the statute gave RUSS the power to pledge all or part of the net revenues earned on the Mount Union sewer project to pay for the revenue bonds. Also, the statute allowed RUSS to fix, establish, and maintain such rates, tolls, fees, or other charges and *"collect the same from the public agencies participating in the agreement."* (Emphasis added). The term "public agency" means any political subdivision of the State. The City of Mount Union is a public agency under Section 28F.5. Thus, Chapter 28F authorized RUSS to collect the fees from Mount Union necessary to operate the sewer system.

Section 28F.5 further provides that the rates set by RUSS shall be fixed "as will always provide revenues sufficient to pay the cost of maintaining the system and to pay for the bonds issued for the project." In turn, Section 28F.5 appears to recognize that the public agency responsible to pay the applicable fees levied by RUSS has the right to fix rates or other charges for the use of the services rendered by the sewer project. The statute allows the City to set such rates as "will always provide the City with sufficient revenue to pay the rates or fees levied against it by the entity." Again, Section 28F.5 contemplates that the City will pay RUSS the sewer fees.

Finally, Section 28F.5 states:

> "All such rates or charges to be paid by the owners of real property, if not paid, … when due, shall constitute a lien upon such real property served by such project."

Chapter 28E was enacted in part to allow small cities like Mount Union to provide services and facilities that it could not otherwise afford. Section 28E.1 recognizes this arrangement inures to the City's benefit. See, for example, pg 356 of Exhibit W. Here, the evidence is clear that the City could not build, operate, or finance the wastewater treatment project without substantial assistance from RUSS. Because the DNR mandated that the City correct its hazardous wastewater deficiencies, Mount Union clearly benefitted by the 28E Joint Agreement and the construction of the system. When advising the City, Attorney Rande McAllister opined that the City would benefit from the wastewater treatment system and should sign the Joint Agreement. Furthermore, Section (5) of Article IV of the 28E Agreement creating RUSS specifically contemplates that Mount Union would pay RUSS for providing wastewater treatment for city residents.

On August 6, 2008, the Mayor of Mount Union signed Resolution No. 06-08-08-01. The Resolution approved the issuance of bonds and project notes from the Mount Union wastewater treatment project. Section 2 states, in part:

> "The issuance of the Bonds and Project Notes will benefit the City…the city is the primary beneficiary of the …Bonds and Project Notes…."

This examination of Chapters 28E, 28F, the Joint Agreement, the 28E Agreement, and Resolution 06-08-08-01 establishes that the City held the primary obligation to pay for the sewer system, including the sewer fees. The record presented also demonstrates that the City of Mount Union has a direct personal interest in the debt for the project and receives an ongoing benefit from the debt. Several cases support this conclusion. In Richards v. City of Muscatine, 237 N.W.2d 48, 62 (Iowa 1975), the City pledged to use city funds to pay tax increment bonds. Opponents of the project argued that issuing tax increment bonds lends the credit of the State because City taxes were pledged to the payment of the bonds. The Supreme Court rejected this argument, holding that the City acted as surety for no one because it had a direct interest in the debt and benefitted from the debt.

In John R. Grubb, Inc. v. Iowa Housing Finance Authority, 255 N.W.2d 89, 98 (Iowa 1977) the Court considered a case involving the Iowa Housing Finance Authority. The Housing Authority was a state agency created by the legislature. Like RUSS, the agency exercised its powers through a board and was established to provide adequate housing for low- or moderate-income families. 255 N.W.2d at 91.

The Authority made mortgage loans to housing sponsors to provide long-term financing for the purchase or the rehab of adequate housing for low- to moderate-income persons. The Authority first issued bonds and the bond proceeds were loaned

to mortgage lenders, who in turn made mortgage loans to low-income persons. Taxpayers protested the Authority's issuance of bonds, asserting that the State pledged its credit in violation of Article VII, Section 1. The Court rejected this claim, holding that the State did not act as a surety under the circumstances.

These are only two of the Iowa cases recognizing that State statutes creating financing programs similar to Chapter 28F that allowed private entities to develop projects did not violate Article VII, Section 1. See 843 N.W.2d at 460 n.12.

The evils sought to be avoided under Article VII, Section 1 are not present here. The City has assumed responsibility for its own benefit – improvements to the quality of the community and its public works—and not for a private purpose. For all of these reasons, the scheme for payment of delinquent user fees established by Chapters 28E and 28F, as embodied in the Joint Agreement, does not offend the Iowa Constitution.

Because Article 9 does not require the City to act as a surety, the Court concludes that Section 9 of the Joint Agreement does not offend Article VII, Section I, of the Iowa Constitution. Thus, the Court respectfully rejects this affirmative defense.

PUBLIC POLICY

The City argues next that the Joint Agreement violates public policy for a variety of reasons. The Court respectfully disagrees. Contracts that contravene public policy will not be enforced. Walker v. American Family Mutual Insurance Company, 340 N.W.2d 599, 601 (Iowa 1983). Likewise, courts should not enforce a contract which tends to be injurious to the public or contrary to the public good. Rogers v. Webb, 558 N.W.2d 155, 157 (Iowa 1997) (contingent fee contract in divorce proceeding violated public policy of preserving marital relationship).

This Court should proceed cautiously and should invalidate the Joint Agreement on public policy grounds "only in cases free from doubt." The City bears the burden of proof here. DeVetter v. Principal Mutual Life Insurance Company, 560 N.W.2d 792, 794 (Iowa 1994). Before this Court can invalidate the Joint Agreement for public policy reasons, the City must show that preservation of the general public welfare outweighs the societal interest in the freedom of contract. 558 N.W.2d at 198. Several factors should be considered in balancing the competing interests implicated in the enforcement of a contract that violates public policy. Bergantzel v. Mlynerik, 619 N.W.2d 309, 317 (Iowa 2000). In weighing the interest in the enforcement of the contract, the Court must take account of the parties' justified expectations; any forfeiture that would result if enforcement was denied; and any special public interest in the enforcement of the contract. When weighing the public policy at stake against enforcement of the contract, the Court should consider: (1) the strength of the policy as manifested by legislation or judicial decisions; (2) the likelihood that a refusal to enforce the term will further the policy; (3) the seriousness of any misconduct involved and the extent to which it was deliberate; and (4) the directness of the connection between that misconduct and the term of the contract. The Court now discusses these factors.

First, the Court believes both parties voluntarily and freely signed the Joint Agreement in this case and expected it to be performed. Clearly, RUSS expected to be paid for services rendered. As certain, the City knew of its obligation to pay for services rendered. If this was unclear before the City hired Rande McAllister, correspondence between Zingg and McAllister made the City's obligation clear. These factors reflect generally an interest in the enforcement of the Agreement. Further, our law favors

contracts. The Court should not "arm chair quarterback" the wisdom or folly of any contract. Bjornstad v. Fish, 87 N.W.2d 1, 7 (Iowa 1957). Similarly, parties to contracts should not look to the Court to rescue them from contracts entered voluntarily with assistance of counsel and for the mutual benefit of the parties. Smith v. Harrison, 325 N.W.2d 92, 94 (Iowa 1982). These factors support enforcement of the contract.

The City has the burden to show the factors weighing against enforcement clearly outweigh the factors for enforcement. Here, the City argues draconian measures will be necessary to pay the delinquent fees. The City implies that it may go bankrupt or face the prospect of un-incorporation if the Court enforces the Joint Agreement. The Court respectfully declines to accept these arguments. They are not supported by substantial credible evidence in the trial record. Therefore, the Court concludes that the City has failed to establish that the factors weighing against enforcement clearly outweigh the factors for enforcement. For these reasons, the Court concludes that the City is not entitled to a determination that any part of the Joint Agreement, including Section 9, violates public policy.

V. ATTORNEY FEES

RUSS requests an award of attorney's fees for prosecuting the breach of contract action. The City of Mount Union resists this request. For the reasons discussed below, the Court declines to award fees to RUSS.

Attorney's fees are not a matter of right. Generally, the Court may award fees only when a statute or written agreement between the parties expressly provides for an award of fees. W.B. Barber Lumber Company v. Celania, 674 N.W.2 62, 66 (Iowa

2003). The written contract must contain a clear and express provision for fees in order for the Court to order them. Here, there is a clear and express provision for fees.

The Joint Agreement provides, in relevant part:

> "If either party fails to timely perform any term or condition of this agreement…the defaulting party agrees to assume all outstanding indebtedness and reimburse the other for any expenses incurred in connection with the performance of this agreement, including attorney's fees and cost relating to the enforcement thereof." See Exhibit 19, paragraph 14, page 4.

RUSS presented evidence showing that it incurred attorney's fees and expenses of $28,785.85. See Exhibit 17. The City of Mount Union asserts RUSS has not shown these fees are reasonable because Exhibit 17 lacks any detail about or description of the legal work actually performed in the case. Brief page 39. The Court agrees with this analysis.

> Section 625.22, The Code (2013), provides:
>
> "When judgment is recovered upon a written contract containing an agreement to pay an attorney fee, the Court shall allow and tax as a part of the cost a *reasonable* attorney fee to be determined by the Court."

This statute requires the Court to determine a "reasonable fee." In general, the Court is considered an expert on the issue of attorney's fees. However, the party seeking a fee award bears the burden to prove reasonableness. City of Riverdale v. Diercks, 806 N.W.2d 643, 659 (Iowa 2011). The Court should consider several factors when determining the issue of reasonableness. They are: the time reasonably spent, the nature and extent of the service provided, the amount involved, the difficulty of handling and importance of the issues, the responsibility assumed and results obtained, the customary charges for similar service, and the standing and experience of the

attorney. Great America Leasing Corporation v. Cool Comfort Air Conditioning and Refrigeration Inc., 691 N.W.2d 730, 733 (Iowa 2005).

The City of Mount Union asserts that the Court should also consider factors relevant to those used in discretionary fee shifting statutes. This argument is misplaced because the fee award sought here is based upon a written agreement and Section 625.22. No discretionary fee splitting statute is in issue or relevant.

An attorney should generally submit a detailed affidavit which itemizes the fee claim. Boyle v. Alum-Line Inc., 773 N.W.2d 829, 833 (Iowa 2009). Counsel did not submit a detailed claim here. The claim does not specify the work performed or the nature and extent of the services provided. Without this detail, the Court is unable to look at the "entire picture of the case and use independent judgment to decide on an appropriate and reasonable fee." 773 N.W.2d at 833.

There is no precise rule or formula but the Court can initially determine a reasonable attorney fee by multiplying the number of hours reasonably expended times a reasonable hourly rate. 773 N.W.2d at 833. Here, the Plaintiffs have provided the Court with information about the hourly rate and number of hours worked. The hourly rates are certainly reasonable for attorneys in southeast Iowa. However, the Court is unable to discern the reasonableness of time spent because the affidavit of attorney's fees lacks detail about the specific services performed. This lack of specificity impairs the Court's ability to make detailed findings of fact about fees. Detailed findings of fact are required under Iowa law. See Dutcher v. Randall Foods, 546 N.W. 889, 897 (Iowa 1996).

The Court is generally aware of the time counsel spent at trial and during the extensive summary judgment proceedings. The Court could grant some fee award based upon its personal observations during these proceedings and a review of the court files. However, Section 625.24 appears to preclude the Court from awarding RUSS even a reduced attorney fee.

Section 625.24, The Code (2013), imposes a duty on a party requesting reasonable attorney's fees under Section 625.22 to file an affidavit stating that the party's attorney has not entered an agreement for fee splitting. The Court should not tax fees as costs without this affidavit. Van Sloun v. Agans Bros Inc., 778 N.W.2d 174 (Iowa 2010). So far as the Court can determine, Plaintiff has not filed the affidavit required by Section 625.24. Hence, for the reasons stated, the Court declines to fix reasonable attorney fees and tax them as costs.

VI. COURT COSTS

The Defendant shall pay the costs of this action.

VII. CONCLUSIONS

Judgment is entered against the City of Mount Union, Iowa, for delinquent user fees through December 31, 2013, in the sum of $27,862.10. Interest shall accrue at the rate of 5 percent per annum. See Iowa Code Section 535.2(1)(a). Defendant shall pay the costs of this action.

IT IS SO ORDERED.

JUDGMENT IS ENTERED ACCORDINGLY.

Dated and signed this 16th day of June, 2014.

_____

Michael J. Schilling
District Court Judge
Eighth Judicial District of Iowa

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Certificate of Service: The undersigned certifies that a true copy of this document was served on each person named (and checked) below, including attorneys of record, or the parties where no attorney is of record, by **electronic mail** and/or enclosing this document in an envelope addressed to each named person at the respective addresses disclosed by the pleadings of record herein, with postage fully paid, by depositing the envelope in a United States depository or hand-delivered via courthouse mail on: _____ (date).

Copies distributed via:	**Email**	**Mail**	
	_____	_____	Lucas Helling, For the Plaintiff
	_____	_____	Barbara Edmondson, For the Defendant

By: _____