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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0680**

Patti Amanda's Inc.,
Appellant,

vs.

City of Biwabik, et al.,
Respondents.

**Filed February 7, 2022
Affirmed
Cochran, Judge**

St. Louis County District Court
File No. 69DU-CV-20-1352

John H. Bray, Bray & Reed, Ltd., Duluth, Minnesota (for appellant)

Shelley M. Ryan, Hoff Barry, P.A., Eden Prairie, Minnesota (for respondents)

Considered and decided by Bjorkman, Presiding Judge; Connolly, Judge; and
Cochran, Judge.

NONPRECEDENTIAL OPINION

COCHRAN, Judge

This appeal arises from appellant's challenge to rates charged for water and sewer service provided to appellant's rental property in the city of Biwabik. Appellant argues that the district court erred by granting summary judgment to respondents and against appellant on appellant's claim that respondents' decision to charge a separate flat-fee base

rate for each apartment in appellant's multi-unit building rather than a single flat-fee base rate for the entire building results in rates that are "illegal." We affirm.

FACTS

The following facts are undisputed. Appellant Patti Amanda's Inc. owns a rental property in the city of Biwabik that contains five residential units and one commercial unit. The building receives water and sewer services through a single connection to the main line. Two commercial meters measure the water, sewer, and electrical usage for all six units—the units are not individually metered. In the past, appellant received one utility bill each month that covered all six units. In January 2014, respondent Biwabik Public Utilities Commission (the PUC) changed this practice and began billing appellant separately for each unit. In addition to being separately billed, each unit is now charged a flat-fee base rate along with the metered usage rate for each utility service.

Respondents city of Biwabik and the PUC (collectively, Biwabik) impose these per-unit flat-fee base rates on all residential properties in the city. The per-unit flat-fee base rates are intended to recover fixed costs such as the costs of building maintenance and debt service. The per-unit flat-fee base rates are distinct from metered usage rates, which separately recover the marginal costs of providing water and sewer service, such as the cost of treatment chemicals and electricity. According to the city administrator, the per-unit flat-fee base rates "keep the payment for services in line and in proportion with the service provided."

The per-unit flat-fee base rates imposed by Biwabik for its water and sewer service reflect the rate structure set forth in the City of Biwabik ordinance 122. *See* Biwabik,

Minn., Code of Ordinances (BCO) no. 122, § 2, subds. 2-3 (2015). This ordinance governs Biwabik's water service and provides that when multiple customers receive water from one pipe connected to a service main, they will each "be billed separately by flat rate." *Id.*, subd. 2. In addition to imposing a flat-fee base rate on every residential property, the ordinance also specifies that landlords of apartment buildings will be charged the flat-fee base rate for each apartment. *Id.*, subd. 3. In practice, the utility rates charged by Biwabik are periodically set by the PUC and then imposed according to the rate structure adopted by the city council.

In April 2020, appellant initiated an action in district court, claiming that Biwabik had imposed "illegal utility surcharges" on its property. Appellant also brought two tort claims. Appellant sought an order from the district court "[d]eclaring [the] surcharges to be illegal" and damages in excess of \$50,000.

In December 2020, the parties filed cross-motions for summary judgment. Appellant argued that the flat-fee base rates set by the city council and charged to each unit violated the city charter, city ordinance provisions, and a state law that requires utility charges to be proportionate, fair, and equitable. Appellant asserted that the per-unit flat-fee base rates imposed on multi-unit dwellings were unfair because they "subsidiz[ed] the other residential customers of the [c]ity on the backs of its residential landlords and similarly-situated businesses." Biwabik argued, in turn, that the per-unit flat-fee base rates comply with the terms of the city charter, city ordinances, and state law.

The district court granted summary judgment to Biwabik. The district court denied appellant's summary-judgment motion and found that appellant failed to present evidence

to support any of its claims. With regard to its “illegal surcharges” claim, the district court concluded that appellant failed to provide any evidence that the rates exceeded statutory authority or were unjust, unreasonable, or inequitable. Similarly, the district court also found that appellant failed to provide evidence to support its tort claims.

This appeal follows.

DECISION

Appellant challenges the district court’s grant of summary judgment to Biwabik (and denial of summary judgment to appellant) on appellant’s claim that utility rates charged by Biwabik are “illegal.” Appellant does not challenge the district court’s summary-judgment dismissal of the tort claims.

“We review a grant of summary judgment de novo.” *City of Waconia v. Dock*, 961 N.W.2d 220, 229 (Minn. 2021). A district court must grant summary judgment if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.01; *Hagen v. Steven Scott Mgmt., Inc.*, 963 N.W.2d 164, 172 (Minn. 2021). To survive summary judgment, the nonmoving party must present specific, admissible evidence that demonstrates a genuine issue of material fact. *Doe v. Archdiocese of St. Paul*, 817 N.W.2d 150, 163 (Minn. 2012).

Appellant’s challenge to Biwabik’s utility rates is limited to the per-unit flat-fee base rates and does not extend to any metered usage rates. Even with regard to the per unit flat-fee base rates at issue, appellant does not argue that any one specific rate is too high. Rather, it challenges the adoption of the per-unit flat-fee rate structure and *how* the city adopted the flat-fee base rates.

We generally accord substantial deference to a decision of a government body establishing utility rates where the government body is acting in a legislative capacity. *See City of Moorhead v. Minn. Pub. Utils. Comm’n*, 343 N.W.2d 843, 846 (Minn. 1984) (discussing deference granted to the Minnesota Public Utilities Commission when acting in a legislative capacity). When a government body sets rates by “allocating costs between utility customers and balancing various factors to achieve a fair and reasonable allocation of these costs,” it operates in a legislative capacity. *Id.*; *see also In re Application of Minn. Power for Auth. to Increase Rates for Elec. Serv.*, 838 N.W.2d 747, 760 n.6 (Minn. 2013) (stating that rate-design decisions—“the allocation of rates among various classes of utility customers”—are considered a legislative function (quotation omitted)). We will uphold an established rate system unless it is “shown to be in excess of statutory authority or resulting in unjust, unreasonable, or discriminatory rates.” *Moorhead*, 343 N.W.2d at 846. With the applicable standard of review in mind, we turn to the specific issues raised on appeal.

I. The district court correctly concluded that Biwabik’s adoption of a flat-fee rate structure did not violate the city charter.

Appellant first argues that Biwabik failed to comply with its city charter when it adopted the per-unit flat-fee rate structure and therefore the district court erred when it granted summary judgment to Biwabik and against appellant on its “illegal surcharges” claim. Specifically, appellant contends that the city charter grants the PUC exclusive authority to set utility rates and that the city council impermissibly encroached on that authority when it took “actions to set and increase the sewer and water rates.” Biwabik

responds that the city charter grants shared regulatory authority over utility rates to the city council and the PUC. Biwabik further contends that the city council acted within its legislative authority granted under the city charter when it enacted ordinance 122, which establishes a per-unit flat-fee rate structure. *See* BCO no. 122, § 2, subds. 2-3. The district court agreed with Biwabik, concluding that the city charter “grants [the] PUC the authority to set rates but does not grant it exclusive authority to do so.”

The issue raised by appellant with regard to the city charter presents a question of statutory interpretation. City charters are interpreted according to the rules of statutory construction. *Firefighters Union Loc. 4725 v. City of Brainerd*, 920 N.W.2d 232, 240 (Minn. App. 2018), *aff’d on other grounds*, 934 N.W.2d 101 (Minn. 2019). We review questions of statutory construction de novo. *State by Smart Growth Minneapolis v. City of Minneapolis*, 954 N.W.2d 584, 590 (Minn. 2021).

To interpret a city charter, we must ascertain and give effect to the intent of its framers. *Firefighters Union*, 920 N.W.2d at 241. If the language used in the city charter is unambiguous, we apply its plain and ordinary meaning. *See Governmental Rsch. Bureau v. Borgen*, 28 N.W.2d 760, 763 (Minn. 1947) (stating that if city charter language “is unambiguous and clearly expressive of a definite meaning or intent, there is no room for construction, and the meaning or intent so expressed must govern”). A city charter is unambiguous if its language “convey[s] a certain and specific meaning to the obvious exclusion of other meanings.” *Id.* In determining whether a city charter is clear or ambiguous, we read the document as a whole and “interpret each section in light of the surrounding sections to avoid conflicting interpretations.” *See Am. Fam. Ins.*

Grp. v. Schroedl, 616 N.W.2d 273, 277 (Minn. 2000) (applying this principle to interpret a Minnesota statute).

The City Charter

The city of Biwabik is a home-rule charter city. *See* Minn. Const. art. XII, § 4 (allowing “[a]ny local government unit . . . [to] adopt a home rule charter for its government”). Its home-rule charter grants broad power to the city. *See* Biwabik, Minn., City Charter (BCC) (2021).

The charter provides that the city “shall have all powers which . . . may now or hereafter be possible for a municipal corporation in this state.” *Id.* § 1.02.¹ Included within those powers is the power to legislate. *See id.*; *Bolen v. Glass*, 755 N.W.2d 1, 4-5 (Minn. 2008) (“The general rule is that, in matters of municipal concern, home rule cities have all the legislative power possessed by the legislature of the state, save as such power is expressly or impliedly withheld.”). The city charter further provides that it “shall be construed liberally in favor of the [c]ity” and that “the specific mention of particular municipal powers in other sections of [the] charter does not limit the power of the [c]ity of those thus mentioned.” BCC § 1.02. And, “[u]nless granted to some other officer or body, all powers are vested in the [c]ity [c]ouncil.” *Id.*

¹ We note that an updated city charter took effect on December 7, 2021. None of the updates affect the provisions at issue in this case.

The city charter also includes language specifically addressing the roles of the city and the PUC in providing utility service. Chapter 11 of the charter includes two relevant sections, which provide the following:

Section 11.01 Acquisition and Operation of Utilities
The City *may own and operate* any water, gas, light, power, heat, telephone, transportation or other public utility

Section 11.02 Regulation and Rates
The Biwabik Public Utilities [Commission] *may* fix rates, fares, and prices for any municipal utility, prescribe the time and manner of payment for such service, make other such regulations as may be necessary, and prescribe penalties for violation of such regulations. *The Biwabik Public Utilities [Commission] must report to the City Council and a public hearing held before any rate increase.*

Id. §§ 11.01-.02 (emphasis added). Section 2.07 also addresses utility service. It provides, in relevant part, that the PUC “shall have the power to *manage and operate* such . . . utilities as the [c]ity may own or acquire” and grants the PUC authority to set rates to “meet the cost of production and transmission of such [u]tilities consumed” but only “[a]s allowed in [s]ection 11.02.” *Id.* § 2.07 (emphasis added).

Construing the language of the charter liberally in favor of the city, as we must, and reading it as a whole, we conclude that the plain language of the city charter gives the PUC and the city council shared authority over the city’s utilities, including utility rates. First, section 11.01 of the city charter grants the city the authority to own and operate municipal utilities. The next section, section 11.02, grants the PUC authority to operate and manage those utilities for the city. Taken together, these sections provide for shared operational authority between the city (or city council) and the PUC.

With regard to rates, section 11.02 provides that the PUC “*may* fix rates, fares, and prices” but it also “*must* report to the [c]ity [c]ouncil.” *Id.* § 11.02 (emphasis added). Under the plain language of section 11.02, the PUC is given the discretion to “fix” rates. *Id.* But those rates do not go into effect by action of the PUC alone. Rather, the PUC “must report to the city council” first and “a public hearing [must be] held before any rate increase.” *Id.* This language—that the PUC “must report to the city council”—necessarily reflects shared authority over rates, with the PUC “fix[ing]” the rates and then reporting to the city council for approval of the rates. This is the only reasonable interpretation of the rate-making language contained in section 11.02, given that the charter must be construed liberally in favor of the city and considering that the city owns the utilities and has shared operational authority over the utilities with the PUC under the charter. Therefore, we agree with the district court that the city charter authorizes the PUC to set rates but does not grant it exclusive authority to do so.

Enactment of Ordinance 122

We further note that nothing in the charter precluded the city council from adopting the flat-fee rate structure established in ordinance 122. This ordinance governs water service. *See* BCO no. 122 (1989). In 2015, the city amended the ordinance to establish a separately billed “fixed-rate fee” for water service to individual units within multi-unit buildings. *Id.* § 2, subds. 2-3 (2015). Section 2 of the ordinance now provides, in relevant part:

Subd. 2. Supply from one service. No more than one house or building shall be supplied from one service connection except by special permission of the city

representative and/or city council. Whenever two or more parties are supplied from one pipe connection with a service main, each building or part of a building *shall be billed separately by flat rate or individual meters depending on the plumbing the building will allow.*

Subd. 3. Multi Units. Each residential unit or business unit within a multi-residential or multi-business building will be treated as a single family residential home or single commercial business. If an apartment building or condominium building has only one meter, each apartment or condominium unit therein is considered the same as a single family house. The landlord . . . will be charged for each apartment or condominium unit the fixed-rate fee for single family homes.

Id. (emphasis added). Ordinances are generally presumed valid. *Bolen*, 755 N.W.2d at 5.²

By its terms, ordinance 122 does not fix any specific rates (i.e. dollar amounts). Rather, it establishes a rate structure to be used by the PUC in fixing specific rates. In light of the overlapping operational authority discussed above and the city’s broad retention of legislative authority under the city charter, the city council properly exercised its legislative authority when it adopted the per-unit flat-fee rate structure included in section 2 of ordinance 122.

In sum, the district court did not err when it concluded that the city charter “did not grant sole authority to [the] PUC” to set utility rates. We further conclude that the adoption of the flat-fee rate structure included in ordinance 122 does not violate the city charter.³

² Appellant does not argue that ordinance 122 is itself invalid, and counsel for appellant acknowledged to the district court that the city’s method of charging per-unit flat-fee base rates for utility access is not “per se illegal.”

³ Appellant also argues that section 5 of ordinance 122 conflicts with the city charter and that rates adopted under that authority are therefore unlawful. *See* BCC no. 122, § 5 (stating that “each water user shall pay for water used according to a rate schedule(s)

Accordingly, there is no basis in the summary-judgment record to support appellant's argument that Biwabik failed to comply with its own city charter.

II. Appellant's argument that Biwabik failed to comply with ordinance 122 does not warrant reversal of the district court's grant of summary judgment.

Appellant next argues that this court should reverse the grant of summary judgment to Biwabik because "Biwabik's actions [did] not comply with its own [c]ity [c]ode." Specifically, appellant argues that Biwabik failed to comply with section 9 of ordinance 122. Section 9 provides, in relevant part, that the PUC "has jurisdiction over various areas of this ordinance for the purposes of management and rate setting and as such would be substituted where the city council is now so designated." BCO no. 122, § 9 (2015). Appellant argues that this language means the PUC has exclusive authority over utility rates and the city council violated section 9 when it "set the rates at issue in this case." We are not persuaded for two key reasons.

First, and foremost, appellant has presented no evidence to show that the city council "set" any specific rate. The absence of such evidence from the record is not surprising. As Biwabik notes in its brief, appellant has only challenged Biwabik's rate structure, not any particular flat-fee base rate. Therefore, there is no evidence in the record to support appellant's claim that the city council violated section 9 of ordinance 122 by setting rates instead of the PUC.

established by resolution of the city council"). We decline to address this argument because, as appellant conceded in oral argument before this court, section 5 applies only to *metered* rates, not to the flat-fee base rates at issue here.

Second, to the extent that appellant contends that the city council “set” rates when it adopted the per-unit flat-fee rate structure, that argument fails. The per-unit flat-fee rate structure was adopted by the city council when it enacted ordinance 122 in its legislative capacity. The city council did not “set” any specific rates when it enacted this provision or otherwise infringe on the authority of the PUC under section 9.

For these reasons, we conclude that no genuine issue of material fact precludes summary judgment with regard to any “illegal surcharge” claim based on section 9 of ordinance 122.

III. Appellant’s argument that Biwabik failed to comply with public notice and hearing requirements likewise does not warrant reversal of the district court’s grant of summary judgment.

Appellant also argues that the per-unit flat-fee base rates at issue here are void because Biwabik did not comply with the procedural requirements for increasing rates. Specifically, appellant asserts that Biwabik did not conduct public hearings or publish notice of those hearings. *See* BCC § 11.02 (requiring that “a public hearing [be] held before any rate increase”). Here again, Biwabik counters that appellant does not challenge any specific rate increase and therefore any applicable hearing and notice requirements are not at issue. The district court agreed with Biwabik, stating that the “real crux” of appellant’s argument was its objection to Biwabik’s *method* of charging flat-fee base rates for utility services, not an objection to *actual rates* or any specific increase in existing metered rates. Accordingly, it did not address appellant’s argument regarding the alleged procedural violations in detail.

While appellant accurately points out that section 11.02 of the city charter requires that “a public hearing [be] held before any rate increase,” the district court is correct that appellant’s lawsuit does not challenge any specific rate increases. Nowhere in its complaint or in its summary-judgment pleadings does appellant reference any specific rate increase.⁴ Therefore, the hearing requirement—and, by extension, any notice requirement—is not at issue. Consequently, we decline to address this argument. *See Thiele v. Stich*, 425 N.W.2d 580, 582-83 (Minn. 1988) (explaining that appellate courts “may not consider matters not produced and received in evidence below”).

IV. Biwabik’s per-unit flat-fee utility rates do not violate Minn. Stat. § 444.075 (2020).

Lastly, appellant argues that Biwabik’s imposition of a flat-fee base rate for each apartment unit violates Minn. Stat. § 444.075 and, therefore, the district court erred by granting summary judgment to Biwabik and against appellant. We are not convinced.

Section 444.075 authorizes municipalities to construct, maintain, and operate sewer and water systems. Minn. Stat. § 444.075, subd. 1a. The statute also authorizes municipalities to impose “just and equitable charges” to pay for the construction, maintenance, operation and use of the facilities. *Id.*, subd. 3(a). The statute further permits

⁴ Appellant generally references seven rate increases in its brief but does not identify the specific rate increases that it contends were approved. Nor does it identify when those rate increases were approved. This lack of specificity reinforces the conclusion that appellant is not challenging any specific rate amount but instead is challenging the city’s selected rate structure.

a municipality to impose three different types of charges to cover its costs: use, availability, and connection. *Id.* The statute provides:

To pay for the construction, reconstruction, repair, enlargement, improvement, or other obtainment, the maintenance, operation and use of the facilities, and of obtaining and complying with permits required by law, the governing body of *a municipality or county may impose just and equitable charges for the use and for the availability of the facilities and for connections with them* and make contracts for the charges as provided in this section. The charges may be imposed with respect to facilities made available by agreement with other municipalities, counties or private corporations or individuals, as well as those owned and operated by the municipality or county itself.

Id. (emphasis added). Case law establishes that a municipality may “impose any combination of use, availability and connection charges to finance municipal sewer and water facilities.” *Crown Cork & Seal Co. v. City of Lakeville*, 313 N.W.2d 196, 199 (Minn. 1981).

While charges for directly rendered services must “be as nearly as possible proportionate to the cost of furnishing the service,” those charges need not be exact. Minn. Stat. § 444.075, subd. 3(b); *see also Daryani v. Rich Prairie Sewer & Water Dist.*, No. A05-1200, 2006 WL 619058, at *4 (Minn. App. Mar. 14, 2006) (stating that “perfect equality in establishing a rate system is not expected, nor can quality be measured with mathematical precision”), *rev. denied* (Minn. May 24, 2006).⁵ Rather, such charges must

⁵ We note that *Daryani* is not a precedential opinion and therefore not binding authority, but it is persuasive in this context. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c) (establishing that nonprecedential opinions are not generally binding authority but may be cited as persuasive authority).

be reasonable given “all costs of the establishment, operation, maintenance, depreciation and necessary replacements of the system, and of improvements, enlargements and extensions necessary” to adequately serve the city, including any debt obligations. Minn. Stat. § 444.075, subd. 3g.

Appellant argues that the flat-fee base rates charged by Biwabik for each apartment in its multi-unit building do not meet these statutory requirements because they effectively require multi-unit buildings to “subsidize” other users without linking the flat-fee base rates to the city’s actual costs. In other words, appellant contends that the per-unit flat-fee base rates are not proportionate to the cost of furnishing service and are not just and equitable. The district court rejected this argument, concluding that appellant failed to offer any evidence that the per-unit flat-fee base rates established by Biwabik were inequitable, unjust, or unreasonable. The district court also found that there was no evidence that the per-unit flat-fee base rates violated any law. We agree with the district court’s conclusion that there is no evidence in the record to support appellant’s argument that Biwabik’s per-unit flat-fee base rates violate section 444.075.

First, as is apparent from the plain language of section 444.075, municipalities have broad authority to establish different rate structures for sewer and water services. The statute specifically authorizes a combination of use, availability, and connection fees. *Id.*, subd. 3(a). Biwabik therefore operated within its authority by imposing a flat-fee base rate, as part of its utility-rate structure, to recover costs associated with making sewer and water services available to all users—including those who live in apartments.

Second, appellant’s argument that Biwabik’s rate structure violates the proportionality requirement of section 444.075 misses the mark. The statute does require that charges for sewer and water “service rendered . . . be as nearly as possible proportionate to the cost of furnishing the service.” Minn. Stat. § 444.075, subd. 3(b). The term “proportionate” is a synonym for the term “proportional,” which means “[f]orming a relationship with other parts or quantities” or being “[p]roperly related in size, degree, or other measurable characteristics; corresponding.” *The American Heritage Dictionary of the English Language* 1413 (5th ed. 2018); see *Hagen*, 963 N.W.2d at 173 (stating that when interpreting a statute containing undefined terms, courts “may refer to dictionary definitions to discern its plain meaning”). Applying that definition here, the proportionality requirement necessarily applies only to specific dollar amounts charged, because proportionality to cost can only be determined by reference to a specific dollar amount. But, as discussed above, appellant’s complaint does not challenge the imposition of any specific dollar amount charged for sewer or water service. Likewise, appellant’s summary-judgment filings do not challenge any specific flat-fee base rate.⁶ Rather, appellant’s “illegal surcharges” claim is directed to the city’s per-unit flat-fee rate structure, which imposes flat-fee base rates on each dwelling unit receiving water and sewer service.

⁶ Counsel for appellant asserted at oral argument before this court that the per-unit flat-fee base rates are “excessive” per se because appellant currently pays more than \$500 per month in flat-fee base rates for its six-unit rental property. Because appellant made this argument for the first time at oral argument, we decline to consider it. See *Getz v. Peace*, 934 N.W.2d 347, 353 n.3 (Minn. 2019) (declining to address an argument made for the first time on appeal during oral argument).

Therefore, the proportionality requirement of section 444.075, subdivision 3(b), is not at issue in this case.

Third, appellant has offered no evidence to show that Biwabik's flat-fee rate structure results in charges that are not "just and equitable." Biwabik, on the other hand, has provided evidence of its reasons for implementing the per-unit flat-fee base rates. The city administrator explained that imposing flat-fee base rates on all units ensures that all units with access to the sewer and water systems contribute towards the cost of operating and maintaining the systems. The city administrator further explained in affidavits and through deposition testimony that the per-unit flat-fee base rates imposed were determined by considering "the cost to run the [utility] system as a whole." This included the fixed costs of building maintenance and debt service on financing for infrastructure improvements obtained through a federal loan. The city administrator also testified that the city consulted with utility experts at the Minnesota Rural Water Association to establish the flat-fee base rates. Therefore, the district court did not err when it concluded that appellant "has failed to provide any evidence that the rate[s] . . . [are] unjust, unreasonable or inequitable" or otherwise violate the law.

In sum, we affirm the district court's grant of summary judgment to Biwabik and denial of summary judgment to appellant. Because appellant failed to present any evidence that Biwabik violated its city charter, its own ordinances, or Minn. Stat. § 444.075 by adopting and implementing a per-unit flat-fee rate structure, the district court properly granted summary judgment on appellant's "illegal surcharges" claim.

Affirmed.