IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

REUVEN WEIZERG, **DAVID PETER VENG-PEDERSON,** **JACOB PATRICK DAGEL,** **Plaintiff,** **vs.** **CITY OF DES MOINES, IOWA,** **Defendant.**	**Case No. CVCV050995** **ORDER RE: MOTIONS FOR SUMMARY JUDGMENT**

On June 2, 2017, the court held a hearing on the parties' motions for summary judgment. Plaintiffs were represented by attorney James Larew. Defendant City of Des Moines was represented by attorney Michelle Mackel-Wiederanders. After considering the parties' briefs, the record, and the arguments of counsel the court finds and orders as follows.

PROCEDURAL POSTURE

This class action arises out of the City of Des Moines' ("City") use of an unmanned speeding camera or automated traffic enforcement (hereinafter referred to as "ATE") located at mile marker 4.9 on Interstate 235, and its implementation of the city ordinance that allows for this camera's use. Though the original petition involved a number of claims against the City and the third-party company that manages the cameras and the citation process, Gatso USA, Inc. ("Gatso"), the court dismissed a number of the plaintiffs' claims based upon the City's motion to dismiss and Gatso's motion for summary judgment.[1] In the only remaining claim against the City, plaintiffs assert that the City's administrative hearing process which was not codified in the

[1] Order Re: Denying in Part and Granting in Part the City of Des Moines' Motion to Dismiss and Granting Gatso's Motion for Summary Judgment, July 25, 2016.

City's Municipal Code violated their procedural due process rights. Following discovery in the case, plaintiffs and the City moved for summary judgment.

STANDARD OF REVIEW FOR SUMMARY JUDGMENT

The Iowa Rules of Civil Procedure explain that summary judgment is appropriate only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."[2] An issue of fact is one in which reasonable minds might look to the available information and reach different conclusions[3]; such an issue is material if its resolution would affect the outcome of the suit.[4]

The party seeking summary judgment has the burden of establishing that there is no genuine question of material fact.[5] When considering a motion for summary judgment, the court views the evidence in the light most favorable to the non-moving party, drawing every legitimate inference in that party's favor.[6] However, mere speculation on the part of the nonmoving party is not sufficient to create a genuine issue of material fact.[7]

APPLICABLE LAW AND ANALYSIS

The Iowa legislature grants cities and municipalities the right to proscribe and prosecute minor criminal violations and civil infractions under the "home rule" statute which provides:

> A city may, except as expressly limited by the Constitution of the State of Iowa, and if not inconsistent with the laws of the general assembly, exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the city or of its residents, and to preserve and improve

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[2] Iowa R. Civ. P. 1.981(3)
[3] *Murtha v. Cahalan*, 745 N.W.2d 711, 713 (Iowa 2008).
[4] *Nelson v. Lindaman*, 867 N.W.2d 1, 1 (Iowa 2015).
[5] *Id.*
[6] *Id.*
[7] *Id.*, quoting *Hlubeck v. Plecky*, 701 N.W.2d 93, 96 (Iowa 2005).

the peace, safety, health, welfare, comfort, and convenience of its residents.[8]

According to the City of Des Moines' Municipal Code and pursuant to Iowa law, home rule authority is vested in the Des Moines City Council.[9] The city council exercised this authority by enacting provisions in the Des Moines Municipal Code which created rules and procedures for the citation and adjudication of misdemeanors and civil infractions.[10] Misdemeanors are criminal infractions subject to prosecution under the Iowa Rules of Criminal Procedure.[11] Municipal infractions, on the other hand, are subject to civil penalties and may be brought initially upon simple notice.[12]

The "simple notice" process allows the City to alert an individual that they are accused of a violation and the penalties associated with that violation. If the individual pays the fine the individual has "admitted" the violation, and no additional action is needed by either party.[13] However, if the person does not admit the violation, either by actively choosing to contest it or simply by failing to pay any penalties, the City may choose to prosecute the violation by filing a municipal infraction against the individual in state district court.[14] The City provided for the issuance of a municipal infraction in its ordinance regulating ATE's.[15]

If a municipal infraction is issued the state statute delineates the rules and procedures for prosecuting the infraction. The statute provides that:

> a. The matter shall be tried before a magistrate, a district associate judge, or a district judge in the same manner as a small claim. The matter shall only be

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[8] Iowa Code § 364.1 (2016).
[9] Iowa Code § 364.2(1); DES MOINES, IOWA MUN. CODE §§ 2-33 & 2-61 (2016) (Hereinafter "DES MOINES MUN. CODE".
[10] DES MOINES MUN. CODE § 1-15(a)-(c) .
[11] *See generally* Iowa R. Crim. 2.1(1), 2.51.
[12] DES MOINES MUN. CODE § 1-15(e).
[13] *Id.*
[14] *Id.*
[15] *Id.* § 114-243(d)(2-3)

> tried before a judge in district court if the total amount of civil penalties assessed exceeds the jurisdictional amount for small claims set forth in section 631.1.
>
> b. The city has the burden of proof that the municipal infraction occurred and that the defendant committed the infraction. The proof shall be by clear, satisfactory, and convincing evidence.
>
> c. The court shall ensure that the defendant has received a copy of the charges and that the defendant understands the charges. The defendant may question all witnesses who appear for the city and produce evidence or witnesses on the defendant's behalf.
>
> d. The defendant may be represented by counsel of the defendant's own selection and at the defendant's own expense.
>
> e. The defendant may answer by admitting or denying the infraction.
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> f. If a municipal infraction is proven the court shall enter a judgment against the defendant. If the infraction is not proven, the court shall dismiss it.[16]

Section 114-243[17] of the Des Moines Municipal Code identifies the traffic offenses related to the ATE system that could result in the issuance of municipal infractions.[18] Specific to this case, the plaintiffs received notices of violation because they were traveling above the posted speed limit.[19] The particular section of the ordinance which is the subject of the plaintiffs' complaint outlines the following process for issuing and contesting violations:

> (d) Penalty and appeal.
>
> (1) Any violation of subsection (c)(1) or subsection (c)(2) above shall be considered for a notice of violation for which a civil penalty in the amount specified in the schedule of administrative penalties adopted by city council by resolution shall be imposed, payable to the City of Des Moines at the city's finance department or a designee.
>
> (2) A recipient of an automated traffic citation may dispute the citation by requesting an issuance of a municipal infraction citation by the police department. Such request will result in a required court appearance by the recipient and in the scheduling of a trial before a judge or magistrate at the Polk County Courthouse. The issuance of a municipal infraction citation will cause the imposition of state mandated court costs to be added to the amount of the violation in the event of a guilty finding by the court.

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[16] Iowa Code § 364.22(6)

[17] Unless otherwise stated, the court's reference to this section refers to the prior language of the ordinance, not the amended ordinance enacted in July 2017 during the pendency of this motion. *See* Def. Ex. B

[18] DES MOINES MUN. CODE § 1-15(c)(1-2)

[19] *Id.* § 114-243(c)(2).

> (3) If a recipient of an automated traffic citation does not pay the civil penalty by the stated due date or request a trial before a judge or magistrate, a municipal infraction citation will be issued to the recipient by certified mail from the police department. Said municipal infraction citation will result in a mandatory court appearance by the recipient as well as imposition of state mandated court costs if a finding of guilty is made by the court.[20]

Read together, these provisions of the Iowa Code and the Municipal Code paint a clear picture of how the City may prosecute those who are detected by an ATE camera to be in violation of section 114-243. The undisputed facts demonstrate that the City issued a notice of violation to the plaintiffs as owners of the cars depicted in the camera's photo—which the City apparently considers a simple notice[21]—which included payment information.[22]

The City argues that the plaintiffs had two options to contest the NOV. Either proceed to an administrative hearing or request a civil infraction be filed in state court. Plaintiffs argue that they were only given one option—proceed through the administrative process.

The City's position is that the NOV provided the plaintiffs with options once they received the NOV which included "paying the penalty, attempting resolution through an administrative hearing, and having the City file the municipal infractions case with the district court."[23] In support of its position the City relies on the following paragraph in the NOV.

> To Contest This Violation: You have the right to contest this violation at an administrative hearing or by mail. Before contesting your violation it is recommended that you review the local ordinance, images and the actual recorded video of the infraction to determine if you have a valid defense supporting dismissal of this citation.
>
> Note: If the administrative hearing does not resolve the issue, a civil infraction (lawsuit) may be requested to be filed in state district court and a court hearing date will be scheduled. Additional costs including an $85.00 filing fee, and other

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[20] § 144-243(d).
[21] Def.'s Brief in Support of Motion for Summary Judgment at 6 (City quotes section 1-15(e) of the Municipal Code)
[22] Def.'s Ex. C at 1, Ex. D at 1 & Ex. E at 1
[23] Def.s Brief at 6

> court costs will be assessed if you are found liable or you pay the civil penalty before the court hearing date. If you fail to appear for the court hearing, you will be responsible for paying the fine and court costs. If you are found not liable, the fees will be paid by the city. Alternatively, you may request a civil infraction (lawsuit) in lieu of an administrative hearing.[24]

The City argues that this is consistent with its Municipal Code when section 114-243 is read in conjunction with section 1-15(e). The process provided by the City allows a person who is not satisfied with the outcome of the administrative process to still seek review in the district court and the aggrieved person is notified that they can seek this review.[25] The City argues that "[o]ne or more written notices detailing one's right to go to district court and one's options is ample to satisfy due process."[26]

Plaintiffs assert that while the City argues that the administrative process was optional the handling of these matters was not. In their affidavits and supplemental statement of undisputed facts, plaintiffs asserted they were directed that they could only use the administrative hearing process, or they could only utilize the form sent to them.[27] The plaintiffs further asserted that the NOV and its accompanying forms provided by the City did not give the plaintiffs the option to check a box indicating they wished to proceed with the issuance of a municipal infraction.[28] Plaintiffs further asserted that when they called the only phone number provided on the NOV, they were routed to a call center staffed by Gatso employees, who were never provided instructions or advised to inform the recipients of the NOVs that they could request the issuance of a municipal infraction in lieu of an administrative hearing.[29] These factual assertions regarding

[24] Def.s Ex. C at 2, 8 & 14; Ex. D at 2 & Ex. E at 2
[25] Def.'s Brief at 7. *See also* Def.s' Statement of Undisputed Facts ¶ 11
[26] Def.'s Brief at 7 (citing *City of Cedar Rapids v. Behm,* No. 16-1031 at 5-7 (Iowa Ct. App. Feb. 22, 2017))
[27] Plaintiffs' Supplemental Statement of Undisputed Facts ¶¶ 17, 26, 38
[28] *Id.* at ¶ 42
[29] *Id.* at ¶¶ 43-45

the administrative hearing process were not disputed by the City in the form of an affidavit. It is likewise undisputed that the ordinance did not codify the administrative hearing process.[30]

I. THE CITY VIOLATED PLAINTIFFS' DUE PROCESS RIGHTS BY NOT PROVIDING THE PROCESS GUARANTEED BY CITY AND STATE LAW.

The Iowa Constitution provides that "no person shall be deprived of life, liberty, or property, without due process of law."[31] Generally, the Due Process clauses of the Iowa Constitution and the U.S. Constitution are interpreted to provide the same protection.[32] An individual is "entitled to procedural due process when state action threatens to deprive the person of a protected liberty or property interest."[33] Before an individual can be deprived of such a protected interest, "there must be notice and opportunity to be heard in a proceeding that is 'adequate to safeguard the right for which the constitutional protection is invoked.'"[34]

It is undisputed that the plaintiffs have a protected property interest.[35] The Iowa Supreme Court recognized that an individual has a protected property interest against the imposition of "irrational monetary fines."[36] Additionally, the City admits "the Plaintiffs have a property interest in the $65.00 citation issued."[37]

Having established the plaintiffs' protected property interest at issue, the court must decide whether the plaintiffs have been given the due process to which they are entitled under the

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[30] Def.'s Statement of Undisputed Facts ¶ 6 ("The administrative hearing referred to in the citation is . . . not codified in the ordinance. . . .")
[31] Iowa Const. art 1, § 9.
[32] *Bowers v. Polk County Bd. of Supervisors*, 638 N.W.2d 682, 690 (Iowa 2002) ("We usually deem the federal and state due process clauses to be identical in scope, import, and purpose.")
[33] *Bowers*, 638 N.W.2d at 690–91.
[34] *Id.* (quoting *City of Cedar Rapids v. Mun. Fire & Police Ret. Sys. of Iowa*, 526 N.W.2d 284, 291 (Iowa 1995)).
[35] *See Callender v. Skiles*, 591 N.W.2d 182, 189 (Iowa 1999).
[36] *City of Sioux City v. Jacobsma*, 862 N.W.2d 335, 345 (Iowa 2015).
[37] Def.'s Br. at 7

City's Municipal Code. For the purpose of this order, the court accepts that all plaintiffs and class members received their NOVs, thus satisfying the notice requirement. The plaintiffs' concern, instead, rests with the second prong—whether they received the due process provided under the City's Municipal Code.

Typically, determining whether a given process provides constitutionally satisfactory procedural safeguards is a matter of balancing the interests of the parties involved, as well as the risk of erroneous deprivation.[38] However, in this instance, it is unnecessary to engage in this balancing test, because the administrative hearing process failed to conform to the process enacted by the city council in its Municipal Code and outlined by the legislature under the municipal infraction statute.

The City's administrative hearing is significantly different than a municipal infraction trial. The hearing is not heard by a judge or magistrate, but by a city employee referred to as a hearing officer.[39] The individual may bring documentation they have available, but there is no mention whether they may call their own witnesses unlike the municipal infraction statute which allows the defendant to call witnesses.[40] Their available defenses are strictly curtailed.[41] At the

[38] The factors are explained in *Bowers*, 638 N.W.2d, at 691 (quoting *Mathews v. Eldridge*, 424 U.W.319, 335 (1976)) ("First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail")

[39] Briefing suggests the City has now changed the hearing process so that they are overseen by administrative judges, but at the time the plaintiffs were involved in the process, this was not the case. *See* Pl.'s Ex. 13 (providing previous job posting for hearing officer). This issue is not a material fact since the court's concerns are the use of an administrative hearing process not authorized by the ordinance, the use of a lesser standard of proof than a municipal infraction, and the enforcement of a the judgment without utilizing the municipal infraction process.

[40] Def.'s Ex. C at 4, Ex. D at 5 & Ex. E at 5

[41] Def.'s. Ex. C at 2, Ex. D at 2 & Ex. E at 2 (The only defense provided under section 114-243 was if the car was stolen.).

end of the hearing, if the hearing officer finds they are liable, they issue a "ruling" that briefly states the violation was proven by a *preponderance of the evidence*.[42] Under the municipal infraction statute the City's burden of proof is by clear, convincing and satisfactory evidence.[43] This standard requires the City to prove there is "no serious or substantial doubt about the correctness of a particular conclusion drawn from the evidence."[44]

If an individual is determined to be liable after the administrative hearing process, they may request the City file a municipal infraction against them.[45] However, if they do not request the issuance of a municipal infraction, the determination of the hearing officer is considered a final judgment and eligible to be entered into the State of Iowa's tax offset program or subject to other collection actions if the individual does not pay the fine.[46] More importantly, if an individual does not pay the fine after the administrative hearing, the City *does not* file a civil infraction, despite the Municipal Code's clear statement that "[i]f a recipient of an automatic traffic citation does not pay the civil penalty by the stated due date or request a trial . . . a municipal infraction citation will be issued to the recipient."[47]

In its second and final notice to Plaintiff Weizberg, the city explains "as you have failed to pay or contest the Notice of Violation previously issued, the fine is now due. Failure to pay the civil fine may subject you to formal collection procedures and to the Iowa Income Tax Offset Program."[48] The undisputed facts show the City treats the decisions of these administrative

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[42] *Compare* Def.'s. Ex. C at 4, Ex. D at 7 & Ex. E at 6 *with* Iowa Code § 364.22(6)(c)
[43] Iowa Code § 364.22(6)(b)
[44] *In re M.S.*, 889 N.W.2d 675, 679 (Iowa Ct. App. 2016).
[45] Def.'s Ex. C at 6, 12, & 20, Ex, D at 8 & Ex. E at 7
[46] Def.'s Ex. C, at 5, 11 & 19, Ex. D at 7 & Ex. E at 6 (Refers to "JUDGMENT TOTAL" and states "[f]ailure to pay the total amount specified . . . will result in the possible imposition of the Iowa Income Tax Offset Program, collection efforts and legal action.").
[47] DES MOINES MUN. CODE § 114-243(d)(3)
[48] Def.'s Ex. C at 13.

hearing officers as final judgments of liability, and if an individual does not pay the fine after the hearing, the City did not issue a municipal infraction in district court. Thus, individuals who choose to contest a citation via the administrative hearing and fail are subject to collection actions not on a finding of "clear, satisfactory, and convincing evidence" by a magistrate,[49] but based on a lower standard of proof, preponderance of the evidence, and a hearing with fewer procedural safeguards.

The home rule authority granted to cities under the Iowa Code is broad, empowering cities to "exercise any power and perform any function it deems appropriate to protect and preserve the rights, privileges, and property of the city or of its residents, and to preserve and improve the peace, safety, health, welfare, comfort, and convenience of its residents." [50] However, the manner in which the city may exercise this broad power is directly limited by the city's enacting charter and its municipal code.[51]

Since the earliest decades of its statehood, the Iowa Supreme Court has held that cities are bound by both state law and their own charters and codes. For instance, in the 1876 case of *Logan & Sons v. Pyne*, the Court explained that the broad grant of authority in Dubuque's charter to "license, tax, and regulate omnibuses and other vehicles" should be strictly construed, and therefore could not be interpreted to grant the city the "authority to create monopolies in a particular vehicle's use."[52]

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[49] Iowa Code § 364.22(6)(b).
[50] Iowa Code § 364.1
[51] *See, e.g.*, *McManus v. Hornaday*, 99 Iowa 507, ___, 68 N.W. 812, 813 (Iowa 1896) (explaining that a city created by charter's "powers are derived from that charter and the statutes" and therefore "can only be exercised in that mode [provided by the charter and statutes].") *See* DES MOINES MUN. CODE § 2-31 ("This article may be cited as Charter of the City of Des Moines, Iowa.")
[52] *Logan & Sons v. Pyne*, 43 Iowa 524, 526, 18 WL 596, *1-2 (Iowa 1876).

In that same year, the Court made it clear that cities are not only restricted by their charters, but by their own ordinances. In *Starr v. City of Burlington*, though the city had the power "by ordinance to prescribe the steps to be taken in order to acquire jurisdiction over particular [parcels of property],"[53] the Court held, that once the city prescribed those steps via a city ordinance, the city was bound by the process it had outlined.[54] "The city cannot be exempted from the duty of obeying its own laws," and failure to follow the steps set out in the ordinances would render the city's action void.[55]

Two decades later, in *McManus v. Hornaday*, the Court reaffirmed that the city was bound by its enacted ordinances, and further held the city could not override or modify those ordinances via resolution; only an ordinance could override, amend, or substitute an ordinance already in place.[56] Though *McManus* turned on the language of that specific city's charter,[57] later courts broadly affirmed that ordinances properly enacted may only be amended or repealed via ordinance.[58]

More recent cases make clear that not only does a city's failure to abide by its own ordinances render the city's action improper, but failure to follow procedures outlined in its ordinances can violate due process when the action deprives a citizen of a protected liberty or property interest. For instance, in *Hancock v. City Council of Davenport*, the city council

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[53] 45 Iowa 87, 89, 1876 WL 849, *2 (Iowa 1876)
[54] 45 Iowa at 88-89, 1876 WL 849, at *1
[55] 45 Iowa at 88–89, 1876 WL, 849, at *1.
[56] 99 Iowa at ___, 68 N.W. at 813. *See also Ryce v. City of Osage,* 88 Iowa 558, ___, 55 N.W. 532, 533 (1893) ("Nor can an ordinance be repealed or superseded by the passage of a resolution.").
[57] *Id.*
[58] *See G.W. Mart & Son v. City of Grinnell*, 194 Iowa 499,___, 187 N.W. 471, 473 (1922) ("An ordinance is amended, repealed, or suspended by an ordinance only.); *Cascaden v. City of Waterloo*, 106 Iowa 673, ___, 77 N.W. 333, 336 (1898) ("We conclude that ordinances of a general or permanent nature cannot be amended, repealed, or suspended by resolution, but by ordinance only.").

exercised its police powers regarding an old downtown apartment building that had long been poorly maintained.[59] The record was clear that the owners of the building had reason to know the city was considering declaring the building a nuisance since the owners had previously requested additional time and leniency from the city to secure funding to renovate the site.[60] Indeed, the owners were present at the public hearing where the council debated whether or not to condemn the building.[61] However, the record demonstrated that prior to the public hearing; the city did not follow the notice requirements in its own ordinances, which specifically required that "written notice to the property owner must contain a detailed statement of the findings of building inspectors as to the deficiencies which might lead to demolition."[62] The owner received notice of the hearing, but that notice did not include the required detailed description of the property's problems.[63] Because the notice was deficient, the owner of the building did not have a chance to fix the property or address the inspector's concerns at the hearing. Therefore the city's failure to follow its own notice requirement resulted in the city not providing "a meaningful opportunity to be heard which its ordinances contemplated and constitutional due process requires."[64]

This holding finds additional support in the Nebraska case of *Blanchard v. City of Ralston*.[65] In that case, the city knew the identity of an out-of-town owner of a house it intended to demolish, but instead of directly providing notice to the owner about the home's impending demolition, the city merely posted a notice of demolition on the door of the home and waited

[59] 392 N.W.2d 472, 474–75 (Iowa 1986).
[60] *Id.* at 474.
[61] *Id.*
[62] *Id.* at 476
[63] *Id.* at 477–78
[64] *Id.* at 479
[65] 559 N.W.2d 735 (Neb. 1997)

three days.[66] The owner became aware of the notice one day before the final hearing and the date the demolition were scheduled. The owner attempted to intervene; seeking two weeks to clean up the property, but the city denied her request and demolished the home.[67] The Nebraska Supreme Court ruled that the city failed to abide by its own ordinances outlining the process for emergency condemnations.[68] Because the owner was not made "remotely aware of what the concerns might be" with the property and was not given a reasonable time to correct those concerns, the city failed to provide both notice and a meaningful opportunity to be heard, violating the owner's right to due process.[69]

While the underlying factual issues in these cases are different than the case before this court, the court nevertheless finds them instructive. The rule of law from these cases is that cities must obey the laws they enact.

Iowa law allows cities to define and punish municipal infractions, outlining specific steps the city can use to serve a citation on an individual and seek a judgment for the violation in court.[70] Here, the City's Municipal Code provided a process for an individual if they wished to dispute a NOV. That process was a request for the issuance of a municipal infraction. In addition, if the individual did not admit the offense or did not pay the civil penalty the Municipal Code required the City to seek a judgment in the courts.[71] This required a trial before a magistrate. Additionally, in order to obtain a judgment, the City had to prove its case by "clear, satisfactory, and convincing evidence."[72] A finding of liability provided the City with an

[66] *Id.* at 708–09
[67] *Id.* at 709–710
[68] *Id.* at 712
[69] *Id.* at 712–713.
[70] *See* Iowa Code § 364.22 (4), (6) (2016).
[71] *Id.*
[72] Iowa Code § 364.22(6)(b).

enforceable judgment. This is the procedure that the City, working within the parameters of state law, promised in its ordinance. It promised this procedure explicitly in section 114-243 of the Municipal Code.

Nothing prevents the City from instituting informal resolution mechanisms such as an administrative hearing if it wishes to do so, but the Municipal Code did not provide for an administrative hearing for that purpose, and the City may not substitute it for the process guaranteed by the Municipal Code without amending its ordinance. As a result the City did not provide due process to the plaintiffs by establishing an administrative hearing process and the City may not *enforce* the administrative hearing officers' determinations of liability. To subject the plaintiffs to deprivation of property without providing the process enacted in the Municipal Code is a violation of the plaintiffs' rights to due process.

The key difference in this case from other ATE decisions involving other Iowa cities is that the other cities' ordinances provided for an administrative process to determine liability.[73] The City's ordinance here failed to provide such a process.

The City also relies on two decisions where the Court of Appeals for the Eighth Circuit reached a different conclusion than this court.[74] In *Brooks* the court determined that the City of Des Moines did not violate the plaintiffs' procedural due process rights by offering an optional administrative hearing because the City's ordinance offered access to the district court.[75] The ordinance reviewed in *Brooks* is the same one before this court. While this court concedes that

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[73] Cedar Rapids Municipal Code § 61.138(e); Sioux City Municipal Ordinance § 10.12.080(4)(b-d); Muscatine Municipal Code 7-5-5(C) & (D)

[74] *Brooks v. City of Des Moines,* 844 F.3d 978, 980 (8th Cir. 2016). *See also Hughes v. City of Cedar Rapids,* 840 F.3d 987, 994-95 (8th Cir. 2016) (court upheld Cedar Rapids ordinance against procedural due process challenges stating that mere conclusory allegation that administrative hearing process was a rubber stamp or a sham was insufficient to state a claim and state agency's regulations do not set standard for procedural due process)

[75] *Brooks v. City of Des Moines,* 844 F.3d at 980

the ordinance provides that an individual issued a NOV may request the issuance of a municipal infraction, the voluntariness of this process was not reviewed by the federal district court or the federal appellate court since a record on that issue was not generated. Also the federal courts did not examine the ordinance in light of the Iowa Supreme Court's insistence that cities comply with the procedural rights provided in their ordinances as this court has done.

The court in *Brooks* dismissed the plaintiffs' claims on a motion to dismiss because the plaintiffs failed to set forth factual allegations to support their argument that the administrative hearing process was not voluntary or they were not informed about how to request the issuance of a municipal infraction.[76] In this case, because the court is addressing motions for summary judgment, the plaintiffs established a factual basis on these issues which this court found was undisputed. As a result the court finds the posture of this case significantly different from *Brooks*, because the plaintiffs created a record to support their contentions that the administrative hearing process was not voluntary.

Likewise, the City relies on a recent Iowa Court of Appeals decision where the court found that the Cedar Rapids ordinance did not violate the plaintiff's due process rights when it provided for an administrative hearing process.[77] The court noted that the Cedar Rapids ordinance provided for two alternatives for disputing the issuance of the NOV but it was "a bit

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[76] *See Brooks v. City of Des Moines,* 844 F.3d at 980 ("The drivers argue that the ATE system violates their federal rights to due process, equal protection, and privileges and immunities. These claims are dismissed for the reasons stated in Section III.B and Part IV of the *Hughes* opinion."); *Hughes v. City of Cedar Rapids,* 840 F.3d at 994 ("The drivers attack the administrative process as a 'rubber stamp' and a 'sham of a process.' A court need not accept conclusory allegations. *See Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (holding that a pleading is insufficient if it contains mere labels and conclusions or tenders naked assertions devoid of further factual enhancement)").

[77] *Behm v. City of Cedar Rapids,* 2017 WL 706347 (Iowa Ct. App. 2017)

misleading,"[78] Here as stated several times, the City's ordinance did not provide for an administrative hearing process and the undisputed facts demonstrate that the City's representative, Gatso, informed the plaintiffs that their only recourse was to proceed with the administrative hearing process. They did not inform them that the ordinance did not authorize an administrative hearing. For these reasons the court does not find *Behm* controlling.

Finally, the court addresses the City's reliance on *Silvernail v. County of Kent.*[79] In that case the city sought to enforce an ordinance that punished individuals who wrote bad checks to the city. The city employed a private, for-profit business to issue citations to individuals who wrote bad checks; the citations demanded payment both for the amount of the check and an additional $25 civil penalty.[80] The Court of Appeals for the Sixth Circuit affirmed the lower court's dismissal of plaintiffs' due process claims, because, among other reasons, the plaintiffs had willingly paid the $25 fee and "had not alleged that erroneous assessments of the $25 fee were not correctable by the procedures provided."[81] Most importantly as it applies to this case, the court emphasized that the city "could not have deprived Plaintiffs of their property unless they made a determination to file a criminal complaint, in which case the plaintiffs were entitled to a full trial."[82] This is the crucial difference between the process addressed in *Silvernail* and the process used by the City here. The city in *Silvernail* could certainly collect the money owed to it for the amount of the original bad checks, because the city had already established its right to

[78] *Id.* at *3 & n. 5
[79] *Silvernail v. County of Kent*, 385 F.3d 601 (6th Cir. 2004)
[80] *Id.* at 603.
[81] *Id.* at 605.
[82] *Id.* (quoting the district court decision, *Silvernail v. County of Kent*, No. 1:02-CV-559, 2003 WL 1869206, *6 (W.D. Mich. Feb. 24, 2003)

that payment, but the city officials admitted that they could not enforce the fine for the bad check without proceeding to a full trial.[83]

The court finds that the undisputed facts demonstrate that the City did not provide the due process mandated under the Municipal Code. The Municipal Code does not provide for an administrative hearing. The ordinance is equally clear that if the individual does not admit the infraction and pay the fine, the City's next step is to file a municipal infraction against the individual. As to the plaintiffs and class members the City never filed a municipal infraction.

II. REMEDY

The plaintiffs seek reimbursement of any penalties paid by the class members who paid their penalties after the administrative hearing under the theory of unjust enrichment. They also seek the imposition of a permanent injunction to enjoin the City from any collection efforts against class members who have not paid their penalties after the administrative hearing.

The court finds that the plaintiffs established as a matter of law their claim for relief under the theory of unjust enrichment as argued.[84] Having established the elements of unjust enrichment summary judgment is appropriate.

The court finds that the following remedies protect the class members' property rights. For any class member who proceeded through the administrative process, was adjudicated liable, and subsequently paid the penalty, the court orders the City to reimburse in the amount of the penalty paid. For those class members who were adjudicated liable after the administrative hearing but have not paid the penalty imposed, the City is permanently enjoined from any efforts to collect the outstanding penalties. To the extent any monies of the class members are held by

[83] *See* 2008 WL 189206 at *6.
[84] Plaintiffs' Brief at 33-34

the Iowa Tax Offset Program or any other collection agency, the City shall immediately take steps to have those funds released to the affected class members.

IT IS THEREFORE ORDERED that the Plaintiffs' motion for summary judgment is **GRANTED.**

IT IS FURTHER ORDERED that the City's motion for summary judgment is **DENIED.**

IT IS FURTHER ORDERED that the City shall refund to those individuals the amount paid for civil penalties after the administrative hearing subject to any limitation placed on the distribution of those funds pursuant to Iowa Rule of Civil Procedure 1.273, 1.274 and/or 1.275.

IT IS FURTHER ORDERED that the City shall be permanently enjoined from any collection efforts with regard to any outstanding penalties owed by individuals who went through the administrative process and were found liable. If any class members' funds are being held under any collection effort the City shall take immediate steps to have the class members' funds released to the class member.

IT IS FURTHER ORDERED that the plaintiffs shall submit their request for payment of attorney fees and costs to the court for determination under Iowa Rules of Civil Procedure 1.273 and 1.275. The plaintiffs shall submit their requested attorney fees and costs, the reasons supporting their claim for fees and costs, and how those fees and costs are to be paid if awarded within thirty (30) days of the filing of this order. The City shall file their response to the plaintiffs' request thirty (30) days thereafter.

State of Iowa Courts

Type: OTHER ORDER

Case Number	**Case Title**
CVCV050995	REUVEN WEIZBERG ET AL VS CITY OF DES MOINES ET AL

So Ordered

L. P. McLellan

Lawrence P. McLellan, District Court Judge,
Fifth Judicial District of Iowa