STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF HENNEPIN | FOURTH JUDICIAL DISTRICT

Builders Association of the Twin Cities
d/b/a Housing First Minnesota,

Plaintiff,

v.

City of Dayton,

Defendant.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Judge Susan M. Robiner
Court File No. 27-CV-19-13521

The above-captioned matter came before the Honorable Susan M. Robiner on November 1, 2019 upon Plaintiff's motion for summary judgment. Rob A. Stefonowicz, Esq., appeared on behalf of Plaintiff. Jason J. Kuboushek, Esq., appeared on behalf of Defendant. Based upon all the files, records, and proceedings herein, the Court makes the following:

STATEMENT OF FACTS

1. The City of Dayton (the "City") adopted its New Policy and Procedure for development review on July 23, 2019. This new policy amended the City's subdivision ordinances.
2. The New Policy and Procedure applies to all new residential, commercial, industrial, and public/semipublic subdivisions, as well as to new phases of previously approved developments.
3. The New Policy and Procedure requires that development applicants agree, upon submission of application, to pay an "Off Site Transportation Charge" in either the form of a "Project-Specific Transportation Charge" or a "General Transportation Fee." For the application to be considered, one of these two payments must be completed.

4. The Project Specific Transportation Charge option requires an applicant to submit a concept plan to the City, request and put monies in escrow for the City Engineer to prepare a project specific feasibility study, and sign an Off-Site Transportation Charge Agreement where the applicant agrees to waive all rights to challenge the City's authority to charge and collect such a fee. The benefit to this option is the applicant will only be paying for the specific impacts the proposed development will have on the City's Off-site transportation network.
5. The General Transportation Fee or General Off-Site Transportation Charge option allows the applicant to forgo the feasibility study, saving money and time. If applicants choose this option, they are required to pay the City's General Off-Site Transportation Charge and sign the Off-Site Transportation Charge Agreement.
6. On August 9, 2019, The Builders Association of the Twin Cities ("BATC") filed and served Defendant with the Summons and Complaint. The BATC claimed that the City had no authority to impose the fees required by the New Policy and Procedure.
7. On October 4, 2019, both parties filed motions for summary judgement and injunctive relief.
8. On November 1, 2019, the Court heard both party's motions for summary judgment and took the matter under advisement.

CONCLUSIONS OF LAW

I. Standard for Summary Judgment

Pursuant to Minn. R. Civ. P. 56, either party may move for summary judgment and provide the Court with evidence that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. A trial court shall not decide any issues of disputed fact in deciding summary judgment, and any party challenging summary

judgment may not rely upon speculation but must present specific facts that would foreclose summary judgment. *Anderson v. Liberty Lobby Inc.*, 477 U.S. 242, 256 (1986).

Summary judgment is not designed to deny a party of its right to a full hearing on the merits of any fact issue. Rather summary judgment is an extraordinary remedy- a "blunt instrument" to be employed "only where it is perfectly clear that no issue of fact is involved." *Poplinski v. Gislason,* 397 N.W.2d 412, 414 (Minn. Ct. App. 1986) *rev. denied* (Minn. Feb. 19, 1987) (*quoting Donnay v. Boulware,* 144 N.W.2d 711, 716 (1966)). Based on the governing standard and established case law, the Court proceeds with caution in deciding summary judgment motions.

II. Standing

The City claims that the BATC does not have standing to challenge the City's development review process and subdivision ordinances.

"Standing is the requirement that a party has a sufficient stake in a justiciable controversy to seek relief from the court" *Alliance for Metro. Stability v. Metro Council*, 671 N.W.2d 905, 913 (Minn. App. 2003) (quoting *State v. Philip Morris, Inc.*, 551 N.W.2d 490, 493 (Minn. 1996)). Under Minnesota law, a party may only acquire standing in two ways. Either the party: (1) is the "beneficiary of some legislative enactment granting standing;" or (2) has suffered some "injury-in-fact." *Id.*

An association has standing to sue on behalf of its members where "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (U.S. 1977); *see also State by Humphrey v. Phillip Morris Inc.*, 551

N.W.2d, 490, 498 (Minn. 1996) (adopting *Hunt* associational standing analysis). On the other hand, merely having "an organizational interest in the problem" does not confer standing on an organization regardless of the depth and sincerity of its interest. *Sierra Club v. Morton,* 405 U.S. 727, 738-39 (1972).

Here, BATC's members include Sharper Homes, Inc., Regency Homes Incorporated, Simmer Brothers Homes, DR Horton, M/I Homes, Jonathan Homes, Lennar, Pulte Homes, Creative Homes and David Weekly Homes. Declaration of David Seigel at ¶10. These members have current development or homebuilding activities in the City of Dayton. *Id.* Thus, these individual members would all have standing in their own right as the ordinance and the charges being imposed are paid by the individual members and they have their own "injury-in-fact" in having to pay these charges.

BATC's mission includes assuring municipal compliance with the rule of law and increasing the availability and affordability of new homes in the Minnesota area. *Id.* at ¶7-8. Plaintiff is seeking to protect its mission by keeping the costs associated with buying a new home low. The costs imposed by the City ordinance would initially be paid by the developer but eventually would be passed on to the new home buyer. BATC's interests are germane to the ordinance at issue.

The claim asserted and the relief requested by the BATC do not require the participation of any of its members. They are claiming the ordinance put in place by the City of Dayton is not authorized and the relief they are seeking is an immediate stoppage of the charge being imposed upon developers. None of this requires individual members of BATC to participate. BATC has fulfilled the three requirements for an association to have standing.

III. Amended Subdivision Ordinance

The City argues its Off-Site Transportation Charge is authorized by Minn. Stat. § 462.358, subd. 2a. Plaintiff claims the Minnesota Supreme Court case *Harstad v. City of Woodbury,* which interprets Minn. Stat.§ 462.358, controls and the City does not have the authority to impose the Off-Site Transportation Charge.

Minn. Stat. § 462.358, subd. 2a gives statutory cities two ways to conditionally approve a subdivision application:

> The regulations may permit the municipality to condition its approval on the construction and installation of sewers, streets, electric, gas, drainage, and water facilities, and similar utilities and improvements or, in lieu thereof, on the receipt by the municipality of a cash deposit, certified check, irrevocable letter of credit, bond, or other financial security in an amount and with surety and conditions sufficient to assure the municipality that the utilities and improvements will be constructed or installed according to the specifications of the municipality.
>
> Minn. Stat. § 462.358, subd. 2a.

The *Harstad* Court described this statute as follows: "A city can condition approval of a subdivision application on the developer (a) constructing or installing the improvements or (b) providing a form of 'financial security' that is sufficient to assure the city that the improvements will be constructed or installed according to the specifications of the city." *Harstad v. City of Woodbury*, 916 N.W.2d 540, 546 (Minn. 2018). A statutory city may not impose an infrastructure charge when "the infrastructure charge does not contemplate a return of funds…to the applicant in the event that the applicant satisfies all the conditions tied to that security." *Id.* at 548. This interpretation is supported by the paragraph four of subdivision 2a which states that municipalities have "30 days to release and return to the applicant any and all financial securities tied to the requirements" once the developer has fulfilled the conditions required by said municipality. *Id.* at 547, citing Minn. Stat. § 462.358, subd. 2a.

In this instance, the City gives two options to developers. The first is to have a Project Specific Feasibility Study conducted, which means the developer must first submit an escrow deposit for the City to conduct a study to determine how much the developer's proportional share of the improvements will be. Then the developer is required to sign the Off-Site Transportation Charge Agreement and the fees found from the study must be included in the developer's agreement at the time of the Final Plat. The second option allows a developer to avoid paying for the Project Specific Feasibility Study by voluntarily agreeing to pay the City's general off-site transportation charge as set forth in the City's fee schedule.

Defendant claims that it differentiates itself from *Harstad* by making the second option "voluntary." Yet, there is no evidence that these payments are optional or voluntary, when a developer must choose one of the two options both of which require some type of payment before obtaining approval. And even though the City may give developers the opportunity to only pay for their proportional share of the improvements, both options make payment mandatory for approval and do not allow for a return of funds for the developers, as is required under Minn. Stat. § 462.358, as interpreted by *Harstad v. City of Woodbury*. The options provided by the City fall under the same category as the options provided by Woodbury in the *Harstad* case. In both instances, developers are required to pay some type of fee to gain approval without the ability to recoup the funds if they complete and install the required improvements.

Defendant, in its Memorandum of Law in Support of Summary Judgment, claims the payments or "charges" are only held until the off-site infrastructure changes are completed. Yet, neither of the Off-Site Transportation Charge Agreement Forms illustrate a path where the payments or "charges" are refunded to the developer upon satisfaction.

The City also contends that the *Harstad* decision did not address the issue of whether Minn. Stat. § 462.358, subd. 2a, applies only to the construction of utilities and improvements that are located *within* the proposed development. Specifically, they focus on footnote 8 in the *Harstad* decision stating, "Because we conclude that Woodbury did not have the authority to condition the approval of a subdivision application on payment of its infrastructure charge, we do not address whether Minn. Stat. § 462.358, subd. 2a, applies only to the 'construction and installation' of 'utilities and improvements' that are located within the proposed development." *Id.,* at n. 8. But here, as in *Harstad,* we need not analyze the effect of the location of improvements since the City conditions approval of subdivision applications on payment under either of its two options,

In sum, Minn. Stat. § 462.358, subd. 2a, and its interpretation in *Harstad*, prohibits the City of Dayton from imposing a charge or fee that is mandatory to approve a subdivision application. While the City of Dayton's plan differs slightly than the City of Woodbury's, they both have the same flaw in making the payments mandatory instead of having developers give the city "financial security" until the improvements are completed and then allowing the security to be returned. Had the legislature intended to authorize a city to accept payments, charges, or cash fees instead of "financial security," it would have used those precise terms as it did in subdivision 2b of Minn. Stat. § 462.358.

Defendant has not raised any genuine issues of material fact, the Court finds that Plaintiff is entitled to summary judgment.

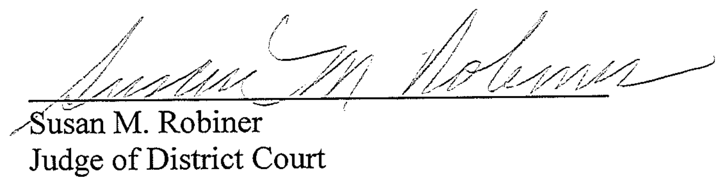
ORDER

1. Defendant's motion for summary judgment is **DENIED**.
2. Plaintiff's motion for summary judgment is **GRANTED**.

3. Defendant's Off-Site Transportation Charge, New Policy and Procedure, and amended Subdivision Ordinances are adjudged and declared to be illegal, null, and void, and unenforceable.
4. The Defendant is permanently enjoined from enforcing its Off-Site Transportation Charge, New Policy and Procedure, and amended Subdivision Ordinances.
5. Plaintiff is entitled to its costs and disbursements incurred herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:



Dated: January 20, 2020

Susan M. Robiner
Judge of District Court