STATE OF MINNESOTA	DISTRICT COURT
COUNTY OF HENNEPIN	FOURTH JUDICIAL DISTRICT
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Housing First Minnesota, a non-profit trade association, Plaintiff, v. City of Corcoran, a Minnesota municipal corporation, Defendant.	CASE TYPE: Declaratory Judgment/Injunction The Honorable Francis J. Magill **PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

INTRODUCTION

The law requires that municipal building permit fees must be "must be fair, reasonable, and proportionate to the actual cost of the service for which the fee is imposed." Building permit fees must be a "fee for service." Cities may not charge "additional or extra fees to support a municipality's general fund or other special interest projects undertaken by the municipality." Between 2018 and 2021, the City collected approximately $2.5 million in excess building permit revenue. Despite underreporting building permit revenues and overreporting the related expenses, the City's reports to the Minnesota Department of Labor and Industry still show excess building permit revenues of over $1.6 million. The record in this matter irrefutably reflects that the City's fee schedule was not proportionate to the cost of the services being provided and indeed generated millions of dollars in excess building permit revenues. The City then used these excess revenues, which were deposited into its general fund, to balance the City's budget generally and self-finance municipal development projects. Until the City's practices were brought to light by Plaintiff, the City was fully prepared to finance a $1.1 million remodel of its

city hall using primarily building permit revenues. Although Plaintiff's public report caused the City to change its funding mechanism midstream, the City nevertheless continued to transfer monies from the general fund surplus (containing building permit excess revenue) into the remodel fund. This use of building permit revenues to shore up City finances and fund projects which are unrelated to the City's administration of the state building code, is plainly contrary to law.

Housing First is entitled to summary judgment on its request for declaratory relief that the City's building permit fees violate the law. The City should be ordered to stop its practice of reporting expenses unrelated to the state building code. All excess building permit revenue collected by the City between 2018 and 2021, and in violation of Minnesota law, should be ordered disgorged.

STATEMENT OF THE RECORD

1. *Verified* Complaint ("*V. Compl*.");
2. Declaration of Bryan J. Huntington filed March 10, 2023 ("*Huntington Decl*."), with exhibits:

    1. Excerpts from the deposition of Brad Martens
    2. Metro West "Independent Contractor Agreement"
    3. Excerpts from the deposition of Jessica Beise
    4. Letter from Wenck Associates to Brad Martens dated January 6, 2021
    5. City's 2018 DLI report
    6. City's 2019 DLI report
    7. City's 2020 DLI report
    8. City's 2021 DLI report
    9. City's 2018 Annual Financial Report
    10. City's 2019 Annual Financial Report
    11. City's 2020 Annual Financial Report
    12. City's 2021 Annual Financial Report
    13. Email from Brad Martens dated June 29, 2018.
    14. Memorandum prepared by Brad Martens dated July 12, 2018
    15. Memorandum prepared by Brad Martens dated September 13, 2018
    16. Email from Brad Martens dated October 22, 2018
    17. City Staff Report dated November 8, 2018
    18. Minutes of the November 8, 2018 City Council meeting

19. Housing Affordability Institute's report on building permit fees dated August 2019
20. Email from Brad Martens to reporter Thomas Hauser dated August 20, 2019
21. Email from Brad Martens to reporter Susan Van Cleaf dated August 22, 2019
22. Email from Brad Martens to the Mayor and City Council of Corcoran dated September 13, 2019
23. Transcript from the deposition of Vicki Holthaus as 30.02(f) representative for Abdo
24. Abdo Governmental Fee Analysis dated November 23, 2021
25. Abdo instructions for calculating indirect costs
26. Excerpts from the deposition of Margaret Ung
27. Spreadsheet used by the Margaret Ung to prepare the City's 2020 DLI Report
28. Email from Brad Martens to Jessica Beise dated September 3, 2021
29. OMB Circular A-87 as revised on May 10, 2004
30. Excerpts from the deposition of Andrew Berg
31. Rebuttal report of expert Elliot Eisenberg, Ph.D. dated November 30, 2022
32. Minnesota State Building Code – Code Adoption Guide, 2021 Edition

FACTS

A. Housing First's Mission and Purpose.

Housing First is a trade association representing the interest of approximately 900 businesses throughout the State of Minnesota that are engaged in the development, construction and remodeling of homes and the supply of materials and services to the housing industry.[1] Among Housing First's organizational mission and purpose is, through advocacy, to oppose unlawful municipal regulations and fees which adversely impact the housing industry, including the City's building permit fees at issue, which increase the cost of housing and thereby reduce housing affordability.[2]

Housing First includes a diverse group of builders and developers.[3] Both builders and developers suffer injury from unlawful building permit fees, as do all homebuyers, as it increases costs for all of these parties.[4] Housing First members currently have, have had in the past, and

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1 *See V. Compl.* ¶ 7.
2 *Id.* ¶ 8.
3 *Id.* ¶ 9.
4 *Id.*

will have in the future, numerous developments and homebuilding activities in the City (which have been and will be subject to the City's building permit fees) and have an interest in the outcome of this matter.[5]

By failing to fulfill its legal obligation to follow and comply with the laws and regulations governing imposition of permit fees, the City has collected building permit fees well in excess of the amount(s) allowed by law.[6] The City has required Housing First's members to pay fees in excess of the amount allowed by law.[7] Housing First has an ongoing interest in protecting its membership from the imposition of illegal fees.[8]

B. At All Times Relevant Herein, the City Has Used Third Party Consultants to Administer Building Permits.

State law requires that a municipality use a licensed building official to administer the State Building Code ("SBC").[9] The SBC is the "minimum construction standard throughout all of Minnesota including all cities, townships, and counties."[10] The SBC consists of many rule chapters.[11] The Department of Labor and Industry ("DLI") website details the various chapters comprising the SBC.[12] A City may only have one official responsible for building code administration.[13] There is an entire chapter of regulations governing certification of building officials.[14]

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5 *Id.* ¶ 10.
6 *Id.* ¶ 11.
7 *V. Compl.* ¶ 11.
8 *Id.*
9 Minn. Stat. § 326B.133, Subd. 2.
10 *https://www.dli.mn.gov/business/codes-and-laws/overview-minnesota-state-building-code*.
11 *https://www.dli.mn.gov/business/codes-and-laws/makeup-minnesota-state-building-code*.
12 *Id.*
13 Minn. Stat. § 326B.133, Subd. 1 ("Each municipality shall designate a building official to administer the code. A municipality may designate no more than one building official responsible for code administration defined by each certification category created by statute or rule.").
14 *See generally* Minnesota Administrative Rules Chapter 1301.

At all times relevant herein the City has contracted with Metro West to perform building permit code review and inspections.[15] Metro West reviews all building plan applications for building code compliance, among other things.[16] Ostensibly the terms of the original contract between the City and Metro West still govern the parties' relationship (with the exception of current rates).[17] The agreement states that "[a]ll necessary equipment of any nature, whatsoever necessary, to fulfill the terms of the Contract, shall be provided by the [contractor]"[18] Moreover, "[Contractor] agrees that it will seek no reimbursement for out-of-pocket expenses incurred in the performance of the Contract."[19] In exchange for its services, Metro West received a fixed 35 percent of the City's permit and plan check fees as well as various hourly fees based upon work performed.[20]

Likewise, the City contracts with an engineering firm, Stantec (previously known as Wenck) to perform plan review.[21] Stantec's services include: "performing development plan review, construction management, trunk system planning, managing State mandated wetland and stormwater programs and financial projections among other services."[22] Stantec bills for its services hourly.[23]

C. The City's Excess Building Permit Revenues Between 2018 and 2021.

Pursuant to Minn. Stat. § 326B.145, municipalities are legally required to file with DLI an annual report detailing, among other things, the amount of building permit fee revenue and

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15 *Huntington Decl.* Ex. 1 (hereafter, "*Martens Depo. Tr.*") p. 43:12-21.
16 *Id*.
17 *See Huntington Decl.* Ex. 2 (Metro West Independent Contractor Agreement); *Huntington Decl.* Ex. 3 (hereafter, "*Beise Depo. Tr.*") pp. 87:22-88:4.
18 Metro West Independent Contractor Agreement p. 2.
19 *Id.*
20 *Id.* pp. 2-3.
21 *See Huntington Decl.* Ex. 4 (Wenck letter to Martens) p. 1.
22 *Id*.
23 *Id.* p. 2.

related permit administration expenses. The following chart shows how the City has for years had massive building permit excess revenues and how the City has used those building permit revenues to balance its budget and fund special City projects. Notably, at all times relevant to this action, the City has deposited building permit fees directly into its general fund.[24]

	2018	2019	2020	2021	**Totals**
BP revenues (reported)	$634,592[25]	$880,195[26]	$1,187,692[27]	$1,187,692[28]	**$3,890,171**
Actual BP revenues	$532,115[29]	$912,609[30]	$1,234,182[31]	$1,472,323[32]	**$4,151,229**
BP expenditures (reported)	$161,864	$470,947	$805,896	$758,111	**$2,196,818**
Actual BP expenditures	$161,864[33]	$366,741[34]	$438,138[35]	$701,239[36]	**$1,667,982**
Excess BP revenue (reported)	$472,728	$409,248	$381,796	$429,581	**$1,693,353**
Actual Excess BP revenue	$370,251	$545,868	$796,044	$771,084	**$2,483,247**

[24] *Martens Depo. Tr.* p. 17:15-20.
[25] *Huntington Decl.* Ex. 5 (hereinafter *"2018 DLI report"*).
[26] *Huntington Decl.* Ex. 6 (hereinafter *"2019 DLI report"*).
[27] *Huntington Decl.* Ex. 7 (hereinafter *"2020 DLI report"*).
[28] *Huntington Decl.* Ex. 8 (hereinafter *"2021 DLI report"*).
[29] *Huntington Decl.* Ex. 9 (hereinafter "2018 Annual Financial Report") pp. 92, 95.
[30] *Huntington Decl.* Ex. 10 (hereinafter *"2019 Annual Financial Report")* pp. 90, 93.
[31] *Huntington Decl.* Ex. 11 (hereinafter *"2020 Annual Financial Report"*) pp. 92, 95.
[32] *Huntington Decl.* Ex. 12 (hereinafter *"2021 Annual Financial Report"*) pp. 94, 97.
[33] *2018 Annual Financial Report* p. 94
[34] *2019 Annual Financial Report* p. 92
[35] *2020 Annual Financial Report* p. 94
[36] *2021 Annual Financial Report* p. 96

BP revenue over budget	$207,115[37]	$487,609[38]	$784,182[39]	$657,323[40]	**$2,136,229**
Total City revenues over budget	$455,561	$558,833	$1,224,184	$753,878	**$2,992,456**
Percentage of excess revenues over budget attributable to BP excess revenue	81%	97%	65%	100%[41]	**85.75%**
Amount that General Fund actual revenues exceeded actual expenditures	$370,414	$272,926	$968,598	$434,785	**$2,046,723**
Transfers from general fund	$265,000	$695,000	$537,000	$235,000	**$1,732,000**
Transfers to Fund 400 ("City Hall Remodel fund")	N/A	$520,000[42]	$187,000[43]	N/A	**$707,000**

As shown by the chart above, between 2018 and 2021, the City transferred approximately $707,000 into Fund 400, also known as the "City Hall Remodel fund." In that same time period,

[37] *2018 Annual Financial Report* pp. 92, 95.
[38] *2019 Annual Financial Report* pp. 90, 93.
[39] *2020 Annual Financial Report* pp. 92, 95.
[40] *2021 Annual Financial Report* pp. 94, 97.
[41] In 2021, the amount of excess building permit revenue collected by the City ($771,084) exceeded its general fund surplus ($753,878).
[42] *2019 Annual Financial Report* p. 58.
[43] *2020 Annual Financial Report* p. 58.

if not for excess building permit fees collected by the City, the general fund would not have enjoyed the surplus it has run for the last 4 years—but would have instead suffered a deficit.[44] In the four-year period, the City had excess building permit revenue of nearly $2.5 million and exceeded the budgeted building permit fee revenues by nearly $2.2 million. In that same period, the City had $2m in excess revenue over budget. Of that budget surplus, $707,000 was diverted into a fund for the remodel of city hall, while the remaining funds were comingled in the general fund with other revenues collected by the City and used for whatever purpose the City saw fit.

Despite the consistent, year-after-year building permit fee excesses, at no time has the City amended its valuation-based charges for building permit fees.[45]

D. The City Intended to Use Building Permit Revenues to Fund a City Hall Renovation Until That Plan Was Exposed by Housing First.

From 2018 until late summer/early fall 2019, the City intended to fund a $1+ million city hall remodel primarily using building permit excess revenues. On June 29, 2018, Brad Martens, then City Administrator, wrote an email to the mayor and several members of the city council regarding, among other topics, the remodel of city hall.[46] In that email, Martens estimated the cost of the remodel to be approximately $850,000.00 and proposed for the remodel to be funded as follows (direct quotation below):

- $125,000 from 2018-2019 CIP
- $300,000 from long-range planning fund
- $50,000 from 2018 building permit revenue
- $100,000 from 2019 building permit revenue

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[44] Amount that General Fund actual revenues exceeded actual expenditures ($2,046,693) less building permit revenue over budget ($2,124,467).

[45] *Beise Depo. Tr.* pp. 25:16-24, 55:9-23.

[46] *Huntington Decl.* Ex. 13 (Martens' June 29, 2018 email).

- $275,000 loan from internal fund (probably park dedication) with annual payments of $70,000 for four years back to fund (with interest) from future building permit revenue.

- **This plan would use almost entirely new growth money (building permits) to pay for a City Hall remodel** . . .[47]

On July 12, 2018, Martens provided the city council with a memorandum pertaining to the overall 2019 City budget.[48] In that memorandum, Martens acknowledged that the City was averaging "about $3,000.00 in net revenue" on each new home permit.[49] In projecting for 2019, Martens estimated 65 new home permits would be issued by the City.[50] Martens further stated that, despite the anticipated increase in the number of new home permits issued in 2019, the impact on the budget would be "zero."[51] Martens explained that this was because those revenues had been, and would continue to be, used to offset other gaps in the City's finances, stating:

> For the past several years the City has kept the building permit revenue from new home permits at 21 homes. **The remainder has been used to build up reserves and other funds that are not sufficient**.[52]

On September 13, 2018, Martens provided the city council with a memorandum which also detailed the plans for financing the city hall remodel.[53] This memorandum estimated the total cost for phase one of the city hall remodel at between $1,001,000 and $1,168,000.[54] Consistent with his June 29 email, this memorandum called for significant portions of those costs

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47 *Id.* (emphasis added).
48 *Huntington Decl.* Ex. 14 (Martens' July 12, 2018 memorandum).
49 *Id.* p. 4.
50 *Id.* p. 3.
51 *Id.* p. 4.
52 *Id.*
53 *Huntington Decl.* Ex. 15 (Martens' September 13, 2018 memorandum).
54 *Id.* p. 3.

to come from excess permit revenue including $50,000 from the "2018 Building Permit Surplus" and a six-year inter-fund loan of $405,000 to "be funded through building permit revenues."[55]

On October 22, 2018, Martens sent an email to Tammy Omdal, Senior Vice President and Manager of Northland Strategies, seeking assistance in establishing a financing plan for the city hall remodel.[56] In this email, Martens again confirmed the City's intention to fund the remodel through excess building permit revenue, stating "

> **I need a plan to use new building permit revenue to pay back the gap** [in city hall remodel financing] over a short term (ideally 5-6 years) as I intended to borrow from a fund (probably sewer but need to chat with you).[57]

A November 8, 2018 Staff Report prepared by Martens again indicated that a large portion of the funds necessary for the city hall remodel would come from building permit revenues.[58] Further, the staff report further called for the allocation of revenues from the City's 2019 budget and the City's "2018 budget surplus."[59] As provided in the table above reflecting the City's building permit revenue from 2018 to 2021, the excess building permit revenue taken in by the City was a major contributor toward the surplus enjoyed by the City.[60]

At a November 8, 2018 city council meeting, Martens spoke publicly about the city hall remodel as well as the City's plan to finance the project with building permit revenues. In his comments to the council, Martens confirmed that his references to new growth referred to building permit revenue, stating that "[n]ew demand costs would be paid by new growth

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55 *Id.* p. 4.
56 *Huntington Decl.* Ex. 16 (Martens' October 22, 2018 email).
57 *Id.* (emphasis added).
58 *Huntington Decl.* Ex. 17 (November 8, 2018 Staff Report) ("The remainder is recommended to come from an internal loan from the water fund and be paid back from building permit revenues.").
59 *Id.* p. 3.
60 *Supra* Section C.

revenue—building permit revenue essentially—which we have thrown into the long range planning fund."[61] Martens further confirmed that the 2019 budget transfer referred to in his November 8 staff report also referred to building permit revenue, stating "2019 budget transfer for $120,000, which is generated from building permit revenue."[62] Lastly, Martens again stated that the inter-fund loan being contemplated to finance the city hall remodel would be paid back by building permits revenues, explaining to the council that the inter-loan payment plan was a "$60,000 a year program . . . it could be paid back faster or slower with building permit revenue allocated towards that fund."[63] The city council inquired about the number of building permits needed to fund the project.[64] City administrator Martens noted 20 building permits were allocated to the project."[65]

Throughout 2018, Martens consistently communicated his plan to fund the city hall remodel with revenues from building permits issued by the City. However, at his deposition, Martens admitted that it was not legitimate for the city council to use excess building permit revenues to finance the remodel of city hall.[66]

The City's annual financial reports show that the City acted in conformity with the city administrator's plan for funding the city hall remodel using building permit revenue. In 2019 and 2020, the City collected hundreds of thousands of dollars in excess building permit revenues in those years and transferred significant sums into the city hall remodel fund.[67] In 2019, the city

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61 City of Corcoran Council Meeting of November 8, 2018 (hereinafter "*Nov. 8 Council Meeting"*), available online at https://www.youtube.com/watch?v=yEFzTInYJrs.
62 *Id.*
63 *Id.*
64 *Id.*; *Huntington Decl.* Ex. 18 (Minutes of November 8, 2018 city council Meeting).
65 *Id*.
66 *Martens Depo. Tr.* p. 144:15-20.
67 *2019 Annual Financial Report* pp. 90, 93; 2020 Annual Financial Report pp. 92, 95.

collected $545,868 in excess building permit revenue and transferred $520,000 from the general fund, which held those revenues, to the city hall remodel fund.[68] In 2020, the city collected $798,044 in excess building permit revenue and transferred $187,000 from the general fund to the city hall remodel fund.[69]

In August 2019, Plaintiff published an open report detailing how cities—including Corcoran—use building permit revenue to boost their bottom line (the "Report").[70] Corcoran's plan to use building permit revenues to fund its city hall remodel, as evidenced in the previously cited emails, memoranda, and public comments, was discussed in the Housing First report.[71] Immediately after this report was published, Martens began a misinformation campaign in the media. Martens told multiple members of the media that, in fact, property taxes—not building permit revenue—would be funding the remodel.

Martens told one reporter that "[t]he funds to be paid back by the water fund will be paid by the tax levy supported by the growing tax base" and specifically stated that the Report's statement that the repayment of that interfund loan would come from excess building permit revenue was false.[72] Similarly, Martens told another reporter that the Report included "false and misleading statements" regarding how the City uses building permit revenue and stated that "the vast majority of the proposed City Hall remodel" would be paid by a tax levy supported by the additional tax capacity generated by housing growth.[73] In that same communication, Martens asserted that building permit revenues were instead used to cover "costs of the staff that are

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68 *2019 Annual Financial Report* pp. 58, 90, 92.
69 *2020 Annual Financial Report* pp. 58, 92, 94.
70 *Huntington Decl.* Ex. 19 (Housing Affordability Institute's report).
71 *Id*.
72 *Huntington Decl.* Ex. 20 (August 20, 2019 email from Martens to reporter Thomas Hauser).
73 *Huntington Decl.* Ex. 21 (August 22, 2019 email from Martens to reporter Susan Van Cleaf).

responsible for managing that process . . ."[74] However, Martens had publicly and in internal communications previous explicitly recognized that excess building permit revenue would be primarily responsible for funding the city hall remodel, including paying back any inter-fund loan.[75] Martens acknowledged at his deposition that his claim about property levy funding being used to fund the project was directly inconsistent with his prior statements to the city council the project would be funded by building permits.[76]

After the attention generated by the Report, the City abruptly changed course on the funding mechanism for the city hall remodel. On September 13, 2019, Martens sent an email to the mayor and members of city council containing, among other items, an updated overview of the financing for the city hall remodel.[77] Unlike previous proposals which uniformly identified building permit revenue as the source of a majority of the funding for the city hall remodel, this financial overview provided that the vast majority of the funding would be "funded by the tax levy."[78] At his deposition, Martens agreed that the plan to use tax levies to fund the remodel was fundamentally different than the plan as it previously existed.[79] When asked at his deposition about Martens could not recall when that change was made, or who was involved in the decision to change the source of funding.[80]

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74 *Id.*
75 *Huntington Decl.* Exs. 13-18.
76 *Martens Depo. Tr.* p. 97:20-98:1.
77 *Huntington Decl.* Ex. 22 (September 13, 2019 email from Martens to Mayor and city council).
78 *Id.*
79 *Martens Depo. Tr.* p. 112:13-113:22.
80 *Id.* at p. 109:6-24.

As of the end of 2021, the City Hall Remodel fund contained a negative balance.[81] In that year, $545,163 of "general government" expenditures had been paid out of that fund.[82] As detailed above, the general fund surplus which allowed for transfers to the City Hall Remodel fund was overwhelmingly the result of excess building permit revenue deposited into the general fund.

E. Abdo's Cost Allocation Methodology.

Plaintiff deposed Abdo through its appointed representative Vicki Holthaus, a partner in Abdo's financial solutions team.[83] Abdo helped the City of Corcoran report building permit revenues to DLI in 2020.[84] Abdo also assisted in preparing a report for the City using the indirect cost methodology.[85] The purpose of the report was so that the City could use the indirect cost method going forward.[86] Abdo has provided instruction to the City on how to use the indirect cost methodology.[87]

Margaret Ung, the City's finance manager, signed off on the 2020 DLI report.[88] When she was deposed, she did not know how Abdo performed the indirect cost analysis.[89] Ung repeatedly testified that she did not use an indirect cost methodology to fill out the 2020 DLI report.[90] However, the spreadsheet containing her analysis references an "AEM" (Abdo) time study and repeatedly references the "IDCAR" (indirect cost allocation rate).[91] Clearly, the City

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81 *2020 Annual Financial Report* p. 92.
82 *Id.*
83 *Huntington Decl.* Ex. 23 (hereafter, "*Holthaus Depo. Tr.*") p. 7:22-23.
84 *Id.* p. 11:10-17.
85 *Huntington Decl.* Ex. 24 (hereinafter "*Abdo fee analysis*").
86 *Holthaus Depo. Tr.* p. 12:3-7.
87 *Id.* p. 12:3-14; *see also Huntington Decl.* Ex. 25 (hereafter, "*Abdo Instructions for Calculating Indirect Costs*").
88 *See* 2020 DLI report.
89 *See generally Huntington Decl.* Ex. 26 (hereafter, "*Margaret Ung Depo. Tr.*") p. 33-39.
90 *Margaret Ung Depo. Tr.* pp. 40-42.
91 *See Huntington Decl.* Ex. 27 (Ung Spreadsheet used to prepare the City's 2020 DLI Report).

used Abdo's analysis to prepare the report.[92] The City presumably used Abdo's analysis to prepare the 2021 DLI report.

It was not within Abdo's scope of work to provide a legal opinion concerning whether Corcoran complied with state law governing building permit fees.[93] Abdo reached no conclusions regarding whether the City's fees complied with state law.[94] Holthaus acknowledged that building permit fees are supposed to be a fee for service.[95]

Abdo's indirect cost methodology was drawn from federal regulation, more specifically, Office of Management and Budget ("OMB") Circular A-87.[96] Abdo used this methodology without any basis for doing so under Minnesota law.[97] Abdo never performed a legal analysis concerning which costs could properly be claimed on the DLI form.[98] Holthaus had never read the full OMB circular.[99]

The indirect cost methodology does the following:

> The City's governmental fees were grouped by department and the indirect costs were allocated across the various City fee types based on the direct salary cost for providing the service. Due to the nature of the services performed by the City's administrative employees, any costs not considered direct costs to the Administrative Department (indirect costs) were allocated to the governmental departments in our analysis.[100]

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92 *Huntington Decl.* Ex. 28 (Martens September 3, 2021 email) ("AEM will take care of lines 11, 12, 13, 14.").
93 *Holthaus Depo. Tr.* p. 21:4-8.
94 *Id.* p. 21:9-17.
95 *Id.* p. 20:5-7.
96 *See* p. 20:5-7; *see also Abdo fee analysis* p. 4 (referencing OMB Circular A-87 and stating its allocation method was used to apportion "indirect salary" costs).
97 *Holthaus Depo. Tr.* p. 24:13-18.
98 *Id.* p. 59:16-19.
99 *See Holthaus Depo. Tr.* p. 24:1-3.
100 *Abdo fee analysis* p. 5.

Stated differently, Abdo took all of the City's costs that could not be apportioned to specific departments, and then allocated those costs based upon direct expenditures that could be allocated to a specific department.[101] The indirect cost methodology is not a fee for service methodology. Instead, it is a cost recovery method which attempts to ensure the City does not run a deficit.[102]

The categories of "indirect costs" that were apportioned to inspections services was not specifically identified in either the Abdo report for Corcoran or the Ung spreadsheet. However, the Ung spreadsheet states that $162,947 in overhead was "allocated based on IDCAR."[103] A report authored by Abdo for the City of Dayton did explicitly identify the indirect cost categories. They included items such as "Elections", "Assessing", "Legal", and "Emergency Management."[104]

The OMB Circular states as its purpose that it "establishes principles and standards for determining costs for Federal awards carried out through grants, cost reimbursement contracts, and other agreements with State and local governments[.]"[105] In other words, the purpose of the Circular is for the States to develop an accounting method for federal funds for specific federal projects.[106]

The OMB Circular refers to "fee for service" as an "alternative" model to the cost allocation method. It reads:

> [OMB] encourages Federal agencies to test fee for service alternatives as a replacement for current cost reimbursement payment methods in response to the

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101 *See Holthaus Depo. Tr.* pp. 32:19-33:3.
102 *See id.* p. 48:7-21.
103 *Huntington Decl.* Ex. 27.
104 *See* Abdo fee analysis report for City of Dayton dated December 16, 2020, filed as an exhibit in support of summary judgment in the *Dayton* litigation.
105 *Huntington Decl.* Ex. 29 (hereafter, "*OMB Circular*").
106 *Holthaus Depo. Tr.* p. 24:4-7.

> National Performance Review's (NPR) recommendation. The NPR recommends the fee for service approach to reduce the burden associated with maintaining systems for charging administrative costs to Federal programs and preparing and approving cost allocation plans. This approach should also increase incentives for administrative efficiencies and improve outcomes.[107]

The OMB Circular defines "cost" to explicitly exclude "transfers to a general or similar fund."[108] The OMB Circular provides examples of "indirect costs" to include: "general administration of the grantee department or agency, accounting and personnel services performed within the grantee department or agency, depreciation or use allowances on buildings and equipment, the costs of operating and maintaining facilities, etc."[109] The OMB Circular is explicit that funds "are not [to] be used for general expenses required to carry out other responsibilities of a State or its subrecipients."[110]

The following exchange took place during the Holthaus deposition:

> Q. [I]f the OMB Circular places limitations on a state's use of funds for a federal program, would Abdo apply the same limitations on how a city can use building permit fee funds?
>
> A. You'll have to restate this because I'm just struggling to understand the correlation between a state and federal program and a municipal cost accounting system for building inspections.
>
> Q. Well, I struggle with that, too, and yet you're the ones using the federal program. So let's—do you know—are you aware that both [Cities] put all building permit fee revenues into the general fund?
>
> A. Yes, I am.
>
> Q. . . . Under the OMB Circular, do you know whether there are restrictions on a state commingling federal funds with other state funds.

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[107] *OMB Circular* p. 3.
[108] *Id.* p. 5.
[109] *Id.* p. 32.
[110] *Id.* p. 4.

A. I do not work with state or federal government so I'm not privy to the regulations that they utilize.[111]

Holthaus had never seen the contracts the City had with third-party contractors for building inspections and plan review services.[112]

Plaintiff also deposed Andy Berg, another partner with Abdo.[113] Berg testified regarding the legal compliance audit guide that is produced by the Minnesota Secretary of State.[114] No part of that standard form compliance document addresses building permit fees.[115]

F. <u>Expert Report of Dr. Elliot Eisenberg, Ph. D.</u>

Plaintiff produced an expert report prepared by economist Dr. Elliot Eisenberg, Ph. D.[116] Eisenberg earned a Bachelor of Arts in economics with first class honors from McGill University in Montreal, and also a Master and PH.D. in public administration from Syracuse University.[117] Eisenberg was an economist for the National Association of Home Builders for over a decade.[118] Eisenberg's report specifically focused upon and responded to the LOCI expert report served by Defendant.[119] Eisenberg's conclusions are as follows:

1. Any building permit fee will always have a negative impact on homebuilding and home prices,
2. The size of the fee and the behavioral response of the buyers is the key determinant of the magnitude of the loss, and
3. In the totality of cases, even a modest increase of $1,000 will inevitably negatively impact demand, therefore
4. The excessive and disproportionate fees in the Cities have indisputably harmed homebuilders.

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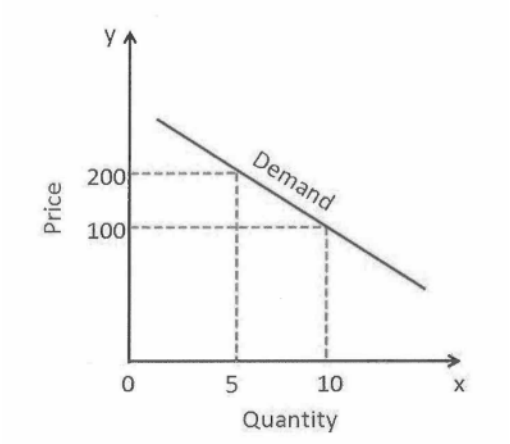
[111] *Holthaus Depo. Tr.* pp. 29:9-30:1.
[112] *Id.* p. 30:
[113] *Huntington Decl.* Ex. 30 (hereafter, "*Berg Depo. Tr.*") p. 8:22-23.
[114] *Id.* p. 16:2-21.
[115] *Id.* p. 18:5-10.
[116] *Huntington Decl.* Ex. 31 (hereafter, "*Eisenberg Report*").
[117] *Id.* p. 1.
[118] *Eisenberg Report* (resume).
[119] *Id.* p. 1.

5. In addition to the negative impacts on homebuilders, there are negative impacts throughout the housing supply chain as a result of excessive and disproportionate building permit fees.
6. Finally, the analysis leads to the conclusion that the rental market is also negatively affected by excessive permit fees.[120]

Eisenberg provided several examples illustrating the economic principle of elasticity of demand.[121] First, he provides the example of a municipal "banana inspection tax."[122] He provided the following chart which generally demonstrates how price increases impact demand[123]:



As the price increases, demand drops. Eisenberg explained how a hypothetical banana tax would impact the behavior of numerous parties, from the grocery store selling the bananas, to the trucks that haul the bananas, to the international shipper of the bananas, to the banana farmer.[124]

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[120] *Id.* pp. 1-2.

[121] "The elasticity of demand refers to the degree to which demand responds to a change in an economic factor." *https://www.investopedia.com/ask/answers/012915/what-difference-between-inelasticity-and-elasticity-demand.asp#:~:text=The%20elasticity%20of%20demand%20refers,shifts%20when%20economic%20factors%20change.*

[122] *Eisenberg Report* p. 2.

[123] *Id.* p. 3.

[124] *Id.* pp. 3-4.

Eisenberg then provided a discussion regarding how interest rates impact homebuying behavior. Eisenberg observed that in 2022, interest rates for a 30-year mortgage rose from 3% to more than 6% and higher.[125] He noted that "[a]s the cost of a new monthly mortgage payment rose dramatically, new home sales plummeted, a measure of demand. The housing market went from one of the strongest sectors in the economy to one of the weakest[.]"[126] Eisenberg noted that there are alternatives to buying a home, such as renting, moving in with roommates, or moving back with one's parents.[127] Indeed, housing demand is "highly elastic" because federal regulations put a hard ceiling on a potential homebuyer's debt-to-income ratio.[128] "The credit environment places a hard limit on new housing demand."[129]

Eisenberg reproduced the following chart originally produced by the National Association of Homebuilders[130]:

Table 1. US Households Priced Out of the Market by Increases in House Prices, 2022

Area	Mortgage Rate	House Price	Monthly Mortgage Payment	Taxes and Insurance	Minimum Income Needed	Households Unable to Afford the Median Price	
						Number	Percent
United States	3.50%	$412,506	$1,822	$493	$99,205	87,527,382	69.1%
United States	3.50%	$413,506	$1,826	$494	$99,445	87,645,314	69.2%
Difference		$1,000	$4	$1	$240	117,932	0.1%

Calculations assume a 10% down payment and a 73-basis point fee for private mortgage insurance.
A Household Qualifies for a Mortgage if Mortgage Payments, Taxes, and Insurance are 28% of Income

Thus, "a $1,000 increase in the price of a new home will prevent an additional 117,932 households across the United States from qualifying for a mortgage, and thus buying a home."[131]

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[125] *Id.* p. 5.
[126] *Id.*
[127] *Id.* p. 6.
[128] *Eisenberg Report* p. 6.
[129] *Id.*
[130] *Id.* p. 7.
[131] *Id.*

Potential homebuyers may either choose not to seek a mortgage, or find themselves unable to qualify for one because of credit limitations.[132] Either way, demand for housing declines as prices rise.[133]

Turning specifically to the issue of excessive building permit fees, Eisenberg observed the following with respect to the parties impacted by higher home prices: "Most immediately impacted, of course, are the builders and developers, who will necessarily build fewer homes. They will hire fewer workers, buy fewer supplies and building materials, and have less need for the services of architects and other professionals during the development and construction process."[134] Also impacted is the priced-out buyer, who suddenly must find an alternative to buying a new home. Eisenberg provided the following additional conclusions and findings:

1. The core principles of microeconomics establish that price increases almost always change behavior, and the degree of behavioral change is reflective of the elasticity of demand.
2. Housing demand is relatively elastic, and as such, increased costs, such as permit fees, regardless of the amount, always have some negative impact on the housing market.
3. The excessive and disproportionate building permit fees assessed by the Cities [Dayton and Corcoran] have inevitably harmed homebuilders and the housing market in the area.
4. Statements or representations that building permit fees have no impact on the local housing market are not reasonable given underlying microeconomic principles.
5. The strength of the City's housing market over the past years mirrors that of the national housing market in that low interest rates and pandemic related factors have been key drivers of the housing market.
6. The argument in the LOCI reports that since housing permits exceeded forecast levels there was no harm to the housing market from the excessive and disproportionate permit fees ignored larger market factors such as changes in interest rates and pandemic behavioral responses.[135]

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[132] *Id.*
[133] *Id.*
[134] *Id.* p. 10.
[135] *Id.* p. 11.

G. Claims at Issue in This Litigation.

The Verified Complaint in this case has four counts: (1) declaratory judgment (permit fee schedule invalid); (2) declaratory judgment (violation of due process); (3) declaratory judgment (violations of takings clause); and (4) injunctive relief. Housing First seeks, among other things, a declaration that the City's building permit fee schedule is illegal and unenforceable; disgorgement of all building permit fee revenue collected in violation of the law; and injunctive relief enjoining enforcement of the building permit schedule.

ARGUMENT

I. BLACK LETTER LAW APPLICABLE TO DISPUTE.

A. Summary Judgment Standard.

Under Rule 56.01 of the Minnesota Rules of Civil Procedure, summary judgment "shall [be] grant[ed] . . . if the movant shows that there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." The purpose of summary judgment is to pierce the pleadings and to assess whether there is a genuine need for trial. Summary judgment is not a "disfavored procedural shortcut, but rather . . . an integral part of the [Rules of Civil Procedure] as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action."[136]

Once the moving party has supported its motion as required by Rule 56.03, the non-moving party has the burden of producing evidence as to all material facts for which it bears the burden of proof at trial.[137] Summary judgment is appropriate against a party who fails to make a showing sufficient to establish the existence of any essential element needed to satisfy that

[136] *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).
[137] *Id*. at 322; *Doward v. City of Minneapolis,* 456 N.W.2d 460, 464 (Minn. Ct. App. 1990).

party's burden.[138] The non-moving party must go beyond the pleadings and set forth affirmative evidence and specific facts showing that there is a genuine dispute on that issue for trial.[139] "To resist summary judgment, the evidence must be significantly probative, not merely colorable."[140] If the non-moving party fails to carry that burden, summary judgment should be granted.[141]

B. The Minnesota Declaratory Judgments Act.

Under the Declaratory Judgments Act, courts have the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed."[142] The Act is remedial legislation that is intended to afford relief from uncertainty.[143] The Act has a preventative purpose.[144] The Minnesota Supreme Court has instructed that:

> Jurisdiction exists to declare the rights, status, and other legal relations of the parties if the complainant is possessed of a judicially protectable right or status which is placed in jeopardy by the ripe or ripening seeds of an actual controversy with an adversary party, and such jurisdiction exists although the status quo between the parties has not yet been destroyed or impaired and even though no relief is or can be claimed or afforded beyond that of merely declaring the complainant's rights so as to relieve him from a present uncertainty and insecurity.[145]

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138 *Celotex*, 477 U.S. at 322–23; *Davis v. Midwest Discount SECS, Inc.*, 439 N.W.2d 383, 386 (Minn. Ct. App. 1989).

139 *Celotex,* 477 U.S. at 324; *Pourmehdi v. Northwest National Bank*, 849 F.2d 1145, 1146 (8th Cir. 1988).

140 *Albert v. Paper Calmenson & Co.*, 515 N.W.2d 59, 64 (Minn. Ct. App. 1994) (citations omitted).

141 *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

142 *McCaughtry v. City of Red Wing*, 808 N.W.2d 331, 337 (Minn. 2011) (quoting Minn. Stat. § 555.01)).

143 *Id*.

144 *Id*. at 339; *cf. City of Eveleth v. Town of Fayal*, No. C2-00-1882, 2001 WL 605049, at **3-4 (Minn. Ct. App. June 5, 2001) (reinstating the City of Eveleth's claim for declaratory judgment challenging a water control ordinance adopted by the Town of Fayal, even though the town had not sought to enforce the ordinance against the city).

145 *Minn. Fed. of Men Teachers, Local 238, A.F.L. v. Bd. of Edu. of City of Mpls.,* 238 Minn. 154, 157-158 (1952) (citations omitted).

C. Standing to Challenge Municipal Ordinances.

Minnesota Statute § 462.361 provides that "*any person aggrieved* by an ordinance, rule, regulation, decision or order of a governing body . . . may have such ordinance, rule, regulation, decision or order reviewed . . . in the district court . . . ."[146] Case law defines "any person aggrieved" as a party upon whom "an action by the municipality adversely operates on his rights of property or bears upon his personal interest."[147]

To establish standing, case law merely requires that a plaintiff identify a particularized injury to its personal interest.[148] "Any particularized injury, regardless if it is shared by the community as a whole, satisfies the standard set in *Citizens* for a party to qualify as 'person aggrieved.'"[149]

With respect to when an injury occurs, the following was observed by our Minnesota Supreme Court in *State by Humphrey v. Philip Morris Inc.*:

> The argument that no injury has been suffered because costs were passed through one entity to customers, consumers, or other entities usually arises in antitrust cases. ***It has been uniformly rejected in the courts***, primarily on the theory that the injury is sustained as soon as the price, artificially raised for whatever reason, has been paid.[150]

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[146] Minn. Stat. § 462.361, subd. 1 (emphasis added)

[147] *Stansell v. City of Northfield*, 618 N.W.2d 814, 819 (Minn. Ct. App. 2000).

[148] *Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 18 (Minn. App. 2003).

[149] *See Friends of Twin Lakes v. City of Roseville*, No. A05-1770, 2006 WL 234879 (Minn. Ct. App.) at *3-4.

[150] 551 N.W.2d 490, 496 (Minn. 1996) (emphasis added); *see also County of Oakland v. City of Detroit*, 866 F.2d 839, 845 (6th Cir. 1989) ("Does the injury suffered by such a person vanish if he is able to recoup the illegal overcharge by passing it on to his own customers? The answer is not difficult, at least insofar as the constitutional aspect of the question is concerned."); *Bacchus Imports, Ld. v. Dias*, 468 U.S. 263, 267 (1984) (holding that plaintiff wholesalers "plainly have standing" to challenge a tax alleged to be discriminatory, even if the tax was passed on to customers of the wholesaler) *cf. Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 490 (1968) ("We hold that the buyer is equally entitled to damages if he raises the price for his own product. As long as the seller continues to charge

D. Associational Standing.

Associational or organizational standing is a "well-established notion" that "recognizes that an organization may sue to redress injuries on its own behalf or on behalf of its members."[151] "The Minnesota Supreme Court has adopted a liberal standard for organizational standing."[152] As indicated above, "Minnesota courts recognize impediments to an organization's activities and mission as an injury sufficient for standing."[153]

"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.'"[154] Numerous decisions of the Minnesota appellate courts have approved of building associations bringing suit on behalf of their members.[155]

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the illegal price, he takes from the buyer more than the law allows."); *Bridgeport and Port Jefferson Steamboat Co. v. Bridgeport Port Authority*, 567 F.3d 79, 85-86 (2d Cir. 2009) (holding that steamboat had standing to challenge passenger fees steamboat collected from its passengers and paid to port authority).

151 *Id.* at 914-15.

152 *Id.* at 913.

153 *Id.* at 914.

154 *Builders Association of the Twin Cities d/b/a Housing First Minnesota v. City of Dayton*, Hennepin County Court File No. 27-CV-19-13521, Docket Index No. 23 (*Findings of Fact, Conclusions of Law, and Order*) p. 3 (quoting *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

155 *See generally Builders Ass'n of the Twin Cities v. Minnesota Department of Labor & Indust.*, 872 N.W.2d 263 (Minn. Ct. App. 2015) (holding that sprinkler rule was invalid in constitutional pre-enforcement challenge brought by plaintiff herein); *see also Builders Ass'n of Minn. v. City of St. Paul*, 819 N.W.2d 172, 176-177 (Minn. Ct. App. 2012) (holding that builders association had standing to challenge city ordinance because its members suffered economic injuries and because its members' interests were at stake); *cf. BATC v. Dayton*, Docket Index No. 23 p. 4 (holding that BATC had standing to challenge Dayton transportation charge).

E. Law Governing Municipal Building Permit Fee Collection.

Pursuant to Minn. Stat. § 462.353, Subd. 4(a): "fees must be fair, reasonable, and proportionate and have a nexus to the actual cost of the service for which the fee is imposed." DLI has an administrative rule imposing similar requirements on building permit fees.[156] The rule reads: "Fees established by the municipality must be by legal means and must be fair, reasonable, and proportionate to the actual cost of the service for which the fee is imposed."[157]

DLI has expounded on this rule in its Code Adoption Guide. The Code Adoption guide reads:

> Minnesota Rule requires building permit fees to be established at a rate that is commensurate with the services being provided by the local building department. The rule also states that the fees are to be reasonable, fair, and proportionate to the actual costs of the services being provided. It is for this reason that the building code does not specifically identify or provide for a fee schedule to be used by a jurisdiction. Each municipality is to evaluate local costs associated with the enforcement of the code. From this local evaluation, a fee structure can be established to cover associated and related building code administration and enforcement responsibilities. Again, by Minnesota Rule, the fees are to be commensurate with the services required or provided; building permit fees may not be used as a tool to raise additional monies for the municipalities' general fund.[158]

The Code Adoption guide contains a question-and-answer section with responses of relevance to this case:

> **8. If we adopt the State Building Code, how much should we charge for a building permit fee?**
>
> **Answer:** Permit fees are to be determined and established by the local municipality. Permit fees must be established so that they cover all costs associated with administration and enforcement [of] the State Building Code – to run a functioning building department. Permit fees can be

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156 *See* Minn. R. 1300.0160 Subp. 2.
157 *Id.*
158 *Huntington Decl.* Ex. 32 (hereafter, "*Code Adoption Guide*") p. 11.

developed on a 'fixed fee' basis and on a construction 'value' type of sliding fee schedule, or a combination of both. It is important to remember that the fees are being collected as a 'fee for service,' and as such, they must be commensurate with the services being provided.[159]

9. If we adopt the State Building Code, can 'extra' permit fee revenue be used to offset other general fund expenditures or balances in the local budget?

Answer: The State Building Code specifically requires that building permit fees be fair, reasonable, and proportionate to the actual costs of the services for which the fee is being imposed (1300.0160 – MN Rules Part). Although exactness is not required, ***it is essential that there be a conscious effort to balance the fees and expenses generated by a program. When fees or expenses consistently and/or excessively vary from one another, adjustments in fees or expenses should be made to more closely align the two***. Because these amounts can fluctuate considerably from year to year, it is important to base decisions on any changes only after establishing rationale and trends. Building permit applicants should not be charged additional or extra fees to support a municipality's general fund or other special interest projects undertaken by the municipality.[160]

The Code Adoption book follows from the plain meaning of the regulation and, therefore, has the force and effect of law.[161]

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[159] *Id.* p. 17.

[160] *Id.* p. 17 (emphasis added).

[161] *See generally Matter of Valet Living*, No. A20-0817, 2021 WL 772622 (Minn. Ct. App. March 1, 2021) (holding that fire marshal's interpretive document followed from plain meaning of fire code); *see also Swenson v. Emerson Elec. Co.*, 374 N.W.2d 690, 702 (Minn. 1985) (observing that "an interpretive rule will be given authoritative effect if it is a permissible gloss on the statute in light of the statute's language, structure, and legislative history."

II. PLAINTIFF HAS STANDING TO MAINTAIN THIS ACTION.

A. The Elements of Associational Standing are Satisfied.

Time and again the courts have affirmed that builder associations have standing to pursue claims on behalf of their members analogous to the claims at issue here. In fact, in another dispute between Plaintiff and the City of Dayton ("Dayton") involving an illegal transportation fee imposed by Dayton (the "Transportation Fee Case"), the district court, the Honorable Susan M. Robiner, ruled that Plaintiff had standing to contest the fee.[162] The decision of Judge Robiner is instructive here.

Housing First's suit in the Transportation Fee Case challenged Dayton's Off Site Transportation Charge.[163] Dayton asserted that Housing First lacked standing to challenge the fee.[164] With respect to standing, the court observed record evidence that members of Housing First had homebuilding activity in the City of Dayton.[165] The court observed that Housing First was "seeking to protect its mission by keeping the costs associated with buying a new home low."[166] The court ruled that Housing First had standing to contest the fee even though "[t]he costs imposed by the City ordinance would . . . eventually . . . be passed on to the new home buyer."[167] For the same reasons as in the Transportation Fee Case, Housing First has standing to maintain its claims against the City here.

The City has made apparent that it will contest standing because the building permit fees are ultimately passed on to homebuyers. Housing First does not dispute, for purposes of this

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[162] *Builders Association of the Twin Cities d/b/a Housing First Minnesota v. City of Dayton* (Hennepin County Ct. File No. 27-CV-19-13521), Docket Index No. 23.
[163] *Id.* p. 1.
[164] *Id.* p. 3.
[165] *Id.* p. 4.
[166] *Id.*
[167] *Id.*

action, that building permit fees are eventually passed on to the homeowner. As was true in the Transportation Fee Case, the fact that the illegal fee is passed on to the homeowner is of no consequence. As has been observed by our Supreme Court:

> The argument that no injury has been suffered because costs were passed through one entity to customers, consumers, or other entities usually arises in antitrust cases. ***It has been uniformly rejected in the courts***, primarily on the theory that the injury is sustained as soon as the price, artificially raised for whatever reason, has been paid.[168]

Cognizable injury for standing purposes occurs the moment the City conditions development on payment of an illegal fee.[169] That is why the builders, who actually pay the fee, have standing to bring the claim. A homeowner likely lacks standing to challenge a municipal fee paid by a builder.[170] The City's position is legally unsupported and would, if accepted, make its fees immune from challenge.

As a factual matter, the City's position conflicts with fundamental economic principles. The Eisenberg expert report explains how excessive fees harm builders: "Most immediately impacted, of course, are the builders and developers, who will necessarily build fewer homes.

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[168] *State by Humphrey v. Philip Morris Inc.,* 551 N.W.2d 490, 496 (Minn. 1996) (emphasis added).

[169] *See County of Oakland*, 866 F.2d at 845 ("Does the injury suffered by such a person vanish if he is able to recoup the illegal overcharge by passing it on to his own customers? The answer is not difficult, at least insofar as the constitutional aspect of the question is concerned."); *Bacchus Imports*, 468 U.S. at 267 (holding that plaintiff wholesalers "plainly have standing" to challenge a tax alleged to be discriminatory, even if the tax was passed on to customers of the wholesaler); *cf. Hanover Shoe*, 392 U.S. at 490 ("We hold that the buyer is equally entitled to damages if he raises the price for his own product. As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows."); *Bridgeport and Port Jefferson Steamboat*, 567 F.3d at 85-86 (holding that steamboat had standing to challenge passenger fees steamboat collected from its passengers and paid to port authority).

[170] *Cf. Kansas v. Utilicorp United, Inc.*, 110 S.Ct. 2807 (1990) (holding that ultimate consumers of natural gas could not assert claim against natural gas producers; reaffirming that only direct purchaser utility companies could maintain suit).

They will hire fewer workers, buy fewer supplies and building materials, and have less need for the services of architects and other professionals during the development and construction process."[171]

Furthermore, neither "injury" nor "harm" is an element of a claim under the Declaratory Judgments Act. All that need be shown to bring a claim under the Act is (1) "definite and concrete assertions of right that emanate from a legal source"; (2) "a genuine conflict in tangible interests between parties with adverse interests"; and (3) the matter is "capable of specific resolution by judgment rather than presenting hypothetical facts[.]"[172] In *Harstad v. City of Woodbury*, the Minnesota appellate courts affirmed that there was a justiciable controversy permitting the developer to contest the city's transportation fee.[173] Justiciability did not depend upon who ultimately bore the cost. So here. Minnesota law does not allow municipalities to charge exorbitant and unreasonable building permit fees. A genuine controversy exists because a builder cannot legally build in the City without paying the illegal fee. The Court can grant a specific resolution—in the form of setting aside the City's fee schedule. All of the elements for justiciability under the Declaratory Judgments Act are satisfied.

III. THE COURT SHOULD GRANT SUMMARY JUDGMENT AND DECLARE THE CITY'S BUILDING PERMIT FEE SCHEDULE INVALID.

There is no genuine issue of material fact that the City has collected over $2.4 million in excess building permit fee revenue and used that excess revenue to build up the City's reserves and fill gaps in the City's finances.[174] Until the City's usage of building permit fee revenue was brought to light by Plaintiff, the City had intended to use a major portion of those excess revenue

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171 *Eisenberg Report* p. 10.
172 *Harstad v. City of Woodbury*, 902 N.W.2d 64, 70 (Minn. Ct. App. 2017) (citation omitted) *aff'd by* 916 N.W.2d 540 (Minn. 2018).
173 *Id.*
174 *See Supra* Section C; *see also* Martens' July 12, 2018 memorandum.

to remodel its city hall. And even after that report, the City still put hundreds of thousands of dollars of commingled general fund surplus (largely comprised of excess building permit revenues) into the city hall remodel fund. Furthermore, there is no genuine issue of material fact that the City's methods of reporting inspection expenses have inappropriately included a wide variety of costs unrelated to administration of the SBC. The record manifestly demonstrates that the City's building permit fees are not "proportionate to the actual cost of the service for which the fee is imposed."[175] The Court should grant summary judgment and declare the City's building permit fee schedule illegal, unenforceable, and void.

A. The City Has Violated the Law by Using Its Building Permit Fees to Fund City Services and Improvements Unrelated to Administration of the State Building Code.

Building permit fees are supposed to be a "fee for service" and not used for purposes of raising revenue.[176] In the words of the DLI Code Adoption Guide: "[I]t is essential that there be a conscious effort to balance the fees and expenses generated by a program."[177] There may be cases where it is debatable whether the City has made a sincere effort to comply with the law. This is not one of those cases.

The record in this matter shows that the City has had disproportionate fees going back as early as 2018. At all times building permit fee revenue has been deposited into the City's general fund.[178] According to the City's annual financial reports, the City collected excess building permit fee revenue totaling hundreds of thousands of dollars per year.[179] Between 2018 and 2021, the last year for which data is currently available, the City collected $2,483,247 in

[175] Minn. R. 1300.0160 Subp. 2.
[176] *Code Adoption Guide* pp. 11, 17.
[177] *Id.* at p. 17.
[178] *Martens Depo. Tr.* p. 17:15-20.
[179] *See Supra* Section C.

excess building permit revenues.[180] Largely as a result of excess building permit revenue, the City enjoyed a surplus in its general fund year after year.[181] It is undisputed that these excess revenues were impermissibly used for City expenses and gaps in City finances unrelated to costs associated with administering and enforcing the SBC.[182]

Beginning in 2019, the City established Fund 400 for the purpose of financing a remodel of city hall.[183] Despite his central role in the decision to finance the city hall remodel using building permit fee revenue, City Administrator Brad Martens agreed at his deposition that it was not legitimate for the City to use those revenues for the remodel of city hall.[184] Between 2019 and 2020, the City transferred $707,000 from the general fund to Fund 400.[185] In both 2019 and 2020, if not for excess building permit fee revenue, the City would not have had a surplus in its general fund sufficient to cover these transfers.[186] Therefore, those transfers necessarily included building permit excess revenues.

As things stand today, the City has collected nearly $2.5 million in excess building permit revenue.[187] However, these revenues have not been used solely to pay costs associated with administering and enforcing the SBC, but have instead been used to benefit the finances of the City generally.[188] Despite collecting significant, excess building permit fees year after year, the City failed to do anything to modify its permit fee schedule to bring its fees in line with its

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[180] *Id.*
[181] *Id*.
[182] Martens' July 12, 2018 memorandum ("For the past several years the City has kept the building permit revenue from new home permits at 21 homes. The remainder has been used to build up reserves and other funds that are not sufficient").
[183] 2019 Annual Financial Report p. 58.
[184] *Martens Depo. Tr.* p. 144:15-20.
[185] *See Supra* Section C.
[186] *Id*.
[187] *Id.*
[188] *See Supra* Section C; *see also* Martens' July 12, 2018 memorandum.

expenses.[189] The City's revenues have "consistently" and "excessively" varied from its costs, yet there has been no "conscious effort" to balance them.[190]

To the contrary, the record evidences the City's effort to minimize and conceal its excess revenues. Despite reporting excess building permit revenues in its annual DLI reports, a comparison of those reports to the City's annual financial reports reflects the City's consistent practice of underreporting revenues while overreporting expenditures. Between 2018 and 2021, the City reported excess building permit revenue totaling $1,693,353 while its annual financial report reflects excess building permit revenues of $2,483,247.[191] This discrepancy is the result of the City underreporting building permit revenue by $261,058 during that same time period while also overreporting building permit expenses by $528,836.[192] These are not rounding errors, but rather reflect a consistent pattern of inaccurate reporting to downplay the extent to which the City was collecting excess building permit revenue from 2018 to present.

The City's building permit fees fail to meet the requirement that "fair, reasonable, and proportionate to the actual cost of the service for which the fee is imposed."[193] Accordingly, the City's building permit fees should be declared invalid, null and void.

B. The City Has Unlawfully Reported as Building Inspection Expenses Amounts Unrelated to Administration of the State Building Code.

The City building inspection expenses that must be reported to DLI must relate to administration and enforcement of the SBC.[194] Rather than comply with this requirement, the

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[189] *Beise Depo. Tr.* pp. 25:16-24, 55:9-23
[190] *Code Adoption Guide* p. 17.
[191] *See Supra* Section C.
[192] *Id.*
[193] Minn. R. 1300.0160 Subd. 2.
[194] *Code Adoption Guide* p. 11 ("Each municipality is to evaluate local costs associated with the enforcement of the code. From this local evaluation, a fee structure can be established to cover associated and related building code administration and enforcement responsibilities.").

City's use of the Abdo method has resulted in all manner of inaccurate and misleading expense reporting.

Beginning in 2020, the City used the Abdo indirect cost methodology.[195] The indirect cost method is drawn from federal regulation. Abdo's representative had never read the regulation in full; she was unaware of restrictions the regulation placed on using the indirect method.[196] No one ever analyzed whether this methodology complied with Minnesota law.[197]

The indirect cost method resulted in costs from numerous departments having nothing to do with building permit administration being deemed inspection-related expenses.[198] While the categories of "indirect costs" that were apportioned to inspections services was not specifically identified in either the Abdo report for Corcoran or the Ung spreadsheet, the Ung spreadsheet reflects that $162,947 in overhead was "allocated based on IDCAR."[199] A report authored by Abdo for the City of Dayton did explicitly identify the indirect cost categories. They included items such as "Elections", "Assessing", "Legal", and "Emergency Management."[200] Abdo's representative acknowledged that the indirect cost methodology is a cost recovery method designed to ensure the City does not run a deficit.[201]

Absent declaratory relief from this Court, the City will continue reporting all manner of irrelevant expenditures as relating to building permit administration. The Court should declare

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[195] *Holthaus Depo. Tr.* pp. 11:10-12:7.
[196] *See Holthaus Depo. Tr.* pp. 24:1-3, 29:9-30:1.
[197] *Id.* p. 59:16-19.
[198] *See id.* pp. 32:19-33:3.
[199] *See Huntington Decl.* Ex. 27.
[200] *See* Abdo fee analysis report for City of Dayton dated December 16, 2020, filed as an exhibit in support of summary judgment in the *Dayton* litigation.
[201] *See Holthaus Depo. Tr.* p. 48:7-21.

that the City has claimed amounts in excess of what is allowed by law and order the City to cease this practice going forward.

IV. THE COURT SHOULD ORDER DISGORGEMENT OF ALL EXCESS BUILDING PERMIT FEE REVENUES COLLECTED BETWEEN 2018 AND 2021.

Housing First prayed in its Complaint for disgorgement of all monies collected in violation of state and federal law.[202] Courts around the country have ordered disgorgement of fees collected by municipalities in violation of the law.[203] The respected treatise, "*Rathkopf's The Law of Zoning and Planning*", in the section titled "Reasonable Fees", observes that: "Where excessive fees have been charged, they may be recovered in an action claiming money damages in the amount claimed to have been illegally exacted."[204] It matters not whether fees were paid under formal protest.[205] Requiring a builder to pay excessive and unreasonable fees to obtain a building permit constitutes a taking and a violation of due process.[206]

The City has collected nearly $2.5 million in excess building permit fee revenues and has for years used those revenues to build its financial reserves and fill gaps in City finances in violation of Minn. Stat. § 462.353, Subd. 4(a). The City has no legitimate claim to these monies; its building inspection services certainly will not be harmed if ordered to disgorge the funds.

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[202] *V. Compl*. ¶¶ 41, 50, 58, 62.

[203] *See generally Beachlawn Bldg. Corp. v. City of St. Clair Shores*, 136 N.W.2d 926 (Mich. 1965) (affirming order requiring city to reimburse fees charged under illegal building permit ordinance); *Raintree Homes, Inc. v. Village of Long Grove*, 906 N.E.2d 751 (Ill. Ct. App. 2009) (affirming trial court's order requiring refund of illegal building permit fees).

[204] *Rathkopf's The Law of Zoning and Planning* § 69:26 (4th ed.)

[205] *Beachlawn Bldg.*, 136 N.W.2d at 262-263 ("Since plaintiff could not have proceeded safely to build houses without permits from defendant . . . we concluded that plaintiff's payments were involuntary because plaintiff had to pay what defendant demanded or give up its business.").

[206] *Cf. Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 614 (2013) ("The fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property.").

The City's contracts with third party consultants are hourly or based upon a set percentage of the fees collected by the City, and are based upon services actually provided.[207] Housing First will distribute all monies disgorged to homeowners who had to pay more for their homes because of the City's illegal conduct.

V. THE COURT SHOULD AWARD HOUSING FIRST ITS ATTORNEY FEES IN THIS ACTION FROM THE DISGORGED FUNDS.

Plaintiff Housing First has expended significant effort, cost and expense related to the recovery of unlawful building permit fees on behalf of Corcoran homeowners. Plaintiff alone has borne the heavy monetary cost and burden of this litigation. Those costs have been substantial. As part of this litigation, Plaintiff was forced to serve subpoenas, take depositions, and conduct significant discovery to conclusively demonstrate that the City's building permit fee schedule is unlawful and that the City should be required to disgorge the excess building permit revenue it collected in violation of the law. As argued above, the homeowners themselves would have no ability to seek recovery of the excessive fees. In fairness and equity, Plaintiff is entitled to reimbursement of its costs and expenses incurred in this litigation.

There are two doctrines that support the award of equitable reimbursement for Plaintiffs' fees and expenses. The first is known as the "common fund" doctrine. The second is known as the "substantial benefit" doctrine. These are discussed in turn.

The common fund doctrine is based upon the principle:

> [T]hat where one of many parties, having a common interest in a trust fund, at his own expense takes proper proceedings to save it from destruction, and to restore it to the purposes of the trust, he is entitled to reimbursement, either out of the fund itself, or by proportionate contribution from those who accept the benefit of his efforts."[208]

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[207] Metro West Independent Contractor Agreement p. 2; Wenck letter to Martens p. 1.
[208] *Internal Imp. Fund Trustees v. Greenough*, 105 U.S. 527 (1881).

Stated differently, the common fund doctrine "provides that a private plaintiff, or plaintiff's attorney, whose efforts create, discover, increase or preserve a fund to which others also have a claim, is entitled to recover from the fund the costs of his litigation."[209]

Minnesota courts have recognized the common fund doctrine for over one-hundred years. As early as 1898, in the matter of *In re Skoll*, the Minnesota Supreme Court affirmed that the common fund doctrine was the law in this state.[210] Likewise, in the 1936 decision of *Regan v. Babcock*, the supreme court observed that it "cannot be seriously doubted" that a court, "in a suit in equity . . . may allow to the plaintiffs compensation for their expenditures, including attorney's fees, out of the funds recovered or saved, where the suit is brought in a representative capacity for the benefit of an estate, municipality, or other beneficiary[.]"[211] Here, where Plaintiff alone has enforced, protected, and preserved the rights of the affected homeowners, equitable reimbursement is justified and appropriate.

The second doctrine supporting Plaintiff's recovery of attorneys' fees is the substantial benefit rule. This rule is based on the equitable principle that nonparties benefiting from litigation should share in the legal expenses of the party bringing the action.[212] The principle avoids unjust enrichment to the absent beneficiaries.

To date, Plaintiff has incurred significant attorneys' fees in the prosecution of this action. If allowed to recover its attorneys' fees and costs, Plaintiff will timely file an affidavit in conformity with Minn. Gen. R. Prac. 119 attesting to its reasonable attorneys' fees and costs in

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209 *See Zilhaver v. UnitedHealth Group, Inc.*, 646 F.Supp.2d 1075, 1084 (D. Minn. 2009) (awarding over $200,000 in reimbursement under the common fund doctrine).

210 71 Minn. 508, 510-511 (Minn. 1898) (quoting approvingly from the *Greenough* decision).

211 196 Minn. 243, 250 (Minn. 1936) (collecting authorities).

212 *See Bosch v. Meeker Co-op. Light and Power Ass'n*, 257 Minn. 362, 363-367 (Minn. 1960) (recognizing and applying the substantial benefit rule).

this action. The affected Corcoran homeowners, who will ultimately receive the excess revenues disgorged by the City, would be inequitably enriched to the extent they benefit from Plaintiff's efforts without having to bear any of that cost and expense. Plaintiffs request that the Court grant summary judgment in favor of Plaintiff on this issue, and direct that, following the City's disgorgement of excess building permit revenues between 2018 and 2021, Plaintiff's reasonable attorneys' fees and costs will be paid from the disgorged funds.

CONCLUSION

Housing First is entitled to summary judgment. The Court should declare the City's building permit fee schedule invalid. Relief should be granted directing the City to comply with the law when it annually reports building permit expenses to DLI. Disgorgement should be ordered for all monies in Fund 409. Housing First should be awarded its attorneys' fees.

Dated: March 10, 2013

/s/ Bryan J. Huntington

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