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 Dayton, 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 $2.9 million in excess building permit revenue. The City's reporting method is overinclusive; the true amount of excess revenue is substantially greater. The City has deposited $2.7 million into "Fund 409", which is designed to self-finance municipal development projects. The overwhelming majority of that money is excess building permit revenue. But for the City using building permit excess revenue to balance its budget and subsidize other City funds, Fund 409 would have a balance of over $3.3 million. 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 monies in Fund 409 should be ordered disgorged.

STATEMENT OF THE RECORD

1. *Verified* Complaint ("*V. Compl*.")
2. City Building Permit Fee Schedule (Section 3: Building, Section 10: Valuation Building Permit Fees, State Surcharge & Plan Check);
3. Declaration of Bryan J. Huntington filed March 10, 2023 ("Huntington Decl."), with exhibits:

    1. Baker Tilly Final Report dated January 10, 2022
    2. Metro West "Independent Contractor Agreement"
    3. Stantec letter dated January 3, 2022 addressed to the attention of Tina Goodroad
    4. Deposition Transcript of Troy Okerlund
    5. Agenda of a Dayton City Council Work Session dated November 10, 2015 and associated documents
    6. City of Dayton Management's Discussion and Analysis
    7. Excerpts from the deposition transcript of Tina Goodroad
    8. Communications Letter dated December 31, 2016 prepared by BerganKDV.
    9. City's Interfund Loan Policy
    10. Excerpts from the deposition of Zachary Doud
    11. AEM Financial Solutions, LLC Long Term Plan dated December 13, 2016
    12. City's 2018 DLI report
    13. City's 2019 DLI report
    14. City's 2020 DLI report
    15. City's 2021 DLI report
    16. Resolution No. 30-2018 (executed)
    17. Resolution No. 23-2019 (not executed)
    18. Resolution No. 24-2020 (not executed)
    19. Resolution No. 16-2021 (not executed)
    20. Resolution No. 31-2022 (not executed)
    21. Spreadsheet produced by the City in this litigation, introduced at the deposition of Troy Okerlund as Exhibit 10
    22. Transaction report for Metro West
    23. E-main chain produced by the City of Dayton between Tina Goodroad and Tim McNeil
    24. E-main chain produced by the City of Dayton between Tina Goodroad, Troy Okerlund, and others
    25. Goodroad deposition Exhibit 6
    26. Excerpts from the deposition of Alec Henderson
    27. Goodroad deposition Exhibit 14
    28. Spreadsheet that was introduced at the Goodroad deposition as Exhibit 21
    29. Deposition Transcript of Vicki Holthaus as 30.02(f) representative for Abdo
    30. Abdo Governmental Fee Analysis dated December 16, 2020
    31. OMB Circular A-87 REVISED
    32. Excerpts from the deposition of Andy Berg
    33. Response to the Baker Tilly City of Dayton time study (marked confidential)
    34. E-main chain produced by Baker Tilly between Matt Stark and others
    35. Expert Report of Dr. Elliot Eisenberg, Ph. D with enclosed resume
    36. Department of Labor & Industry Code Adoption Guide (2021 ed.)

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 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

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1 *See V. Compl.* ¶ 7.
2 *Id.* ¶ 8.
3 *Id.* ¶ 9.
4 *Id.*
5 *Id.* ¶ 10.
6 *Id.* ¶ 11.

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]

At all times relevant herein the City has contracted with Metro West to perform building permit code review and inspections. Metro West reviews all building plan applications for building code compliance, among other things.[15] Ostensibly the terms of the original contract between the City and Metro West still govern the parties' relationship (with the exception of current rates).[16] The agreement states that "Contractor shall be personally liable for all labor and expenses incurred in connection with this Agreement."[17] Moreover, "Contractor shall furnish, at

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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.
15 *See Huntington Decl.* Ex. 1 (hereafter, "*Baker Tilly Report*") p. 8.
16 *See Huntington Decl.* Ex. 2 (Independent Contractor Agreement).
17 *Id.* p. 1 ¶ 1.

Contractor's own cost and expense, all labor, materials, equipment and other items necessary to carry out the terms of this Agreement."[18] Metro West bills the City an hourly rate for the time of its inspection professionals.

Likewise, the City contracts with an engineering firm, Stantec (previously known as Wenck) to perform plan review.[19] Stantec's services include: "[r]eview proposed lot grading (submitted with permits); complete site inspections for compliance with permit application; review record drawing of site improvements; [and] complete erosion control inspections for sites responsible of the builder[.]"[20] Stantec bills for its services hourly. The City is only responsible for services actually provided.[21]

The City does not have, and has never had, internal staff either qualified or capable of performing the services provided by Metro West/Wenck.[22]

C. The City Has Used Building Permit Revenues to Fund Generalized Municipal Debt.

In late 2015 the City held a work session to discuss how the City was paying down substantial debt the City had accrued.[23] A memorandum dated November 6, 2015 prepared by Bob Derus, Interim City Administrator, reads as follows:

> Enclosed is the debt analysis that I did in October 2013, followed by one that was updated to today. Recently, Gary updated information about the amount of unfunded debt; roughly $11.6 million. It forced me to rethink some of my assumptions about our debt since we refunded our debt and saved roughly $12 million dollars in debt, which, since that time, left me with the impression that:

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18 *Id.* p. 4 ¶ 6.
19 *See Huntington Decl.* Ex. 3 (Stantec letter to Goodroad).
20 *Id.* p. 2.
21 *Id.* p. 5 ("Only time actually spent on services rendered will be charged.").
22 *See Huntington Decl.* Ex. 4 (hereafter, "*Okerlund Depo. Tr.*") p. 79:5-16; *Baker Tilly Report* pp. 32-34.
23 *Huntington Decl.* Ex. 5 (November 10, 2015 Work Session Agenda and associated documents).

> 1) Our debt was being managed
> 2) Things got a lot easier, so we are good
>
> However, when I saw that $11.6 million in unfunded debt, along [stet] the message that Gary was advocating, that we need to see the levy go up, I decided to update this analysis.
>
> I will go over this in detail at the meeting, but the main things that it is showing me are the following:
> . . .
> . . .
> 3. Yes, we are managing our debt as was my conclusion back in 2013, but the only reason we are not seeing significant growth of our tax levy, is the fact that <u>all</u> of our trunk, sewer, water and transportation fees from growth are going to fund debt service. In other words, we are robbing from our future to pay the past.[24]

A Debt Analysis from October 2013 included a section titled "Annual Estimated GAP Finance Plan."[25] The Debt Analysis observed that the City had at that time $8.4 million in unfunded debt.[26] The City's "Average Annual P & I [principal and interest] Payments" to service that debt was $740k.[27] The City had what was called a "GAP Finance Plan."[28] The GAP Finance Plan had various contributing elements, one of which was the City's tax levy.[29] Building permit revenue was another element of the GAP Finance Plan.[30] The 2013 plan called for using $65k in building permit revenue in 2014; $104k in 2015; and $130k in 2016.[31]

By October 2015, the City had nearly $12 million in unfunded debt.[32] The City needed $950k annually to service principal and interest on that debt.[33] The City still had a GAP Finance

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24 *Huntington Decl.* Ex. 5 p. 2 (emphasis in original).
25 *Huntington Decl.* Ex. 5 (Debt Analysis, October 2013) p. 4.
26 *Id.*
27 *Id.*
28 *Id.*
29 *Id.*
30 *Id.*
31 *Huntington Decl.* Ex. 5 p. 4.
32 *Id.* (Debt Analysis, October 2015) p. 5.
33 *Id.*

Plan in place, which continued to use building permit revenues to pay the debt.[34] The 2015 plan called for considerably more building permit revenues to fund the debt: $120k in 2015; $260k in 2016; and $390k in 2017.[35]

The City used significant excess permit revenues in 2015 to transfer money into other municipal funds. A summary report prepared by the City's auditors analyzing the fiscal year ended December 31, 2015 reads:

> The 2015 General Fund budget estimated both revenues and transfers in and expenditures and transfers out at $3,194,385. The actual revenues exceeded the estimated revenues by $491,848. Licenses and permits and charges for services were the two main revenue categories exceeding the budget estimates by $401,110, according for over eighty percent of the favorable variance. . . .
>
> The favorable revenue variance allowed the City to transfer an additional $200,000 from the General Fund to Capital Improvement Capital Projects Funds ($200,000 each for equipment and facilities). These transfers were in addition to the $250,000 Pavement Management reserve contribution included in the original expenditure budget estimates.[36]

Between 2015 and 2022, all building permit revenues and plan check revenues went into the City's General Fund.[37] The general fund is used for "staffing costs, operational costs, those kinds of things . . . the general operations of the city."[38] "It's not a specialized fund."[39]

D. <u>The City's Excess Building Permit Revenue for 2016.</u>

The City's auditor, BerganKDV, prepared a "Communications Letter" to the City regarding its audit for 2016.[40] This letter observed that between 2015 and 2016, the City's

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34 *Id.*
35 *Id.*
36 *Huntington Decl.* Ex. 6 (Management's Discussion and Analysis) p. 12.
37 *See Huntington Decl.* Ex. 7 (hereafter, "*Goodroad Depo. Tr. excerpts*") pp. 12:24-13:3.
38 *Id.* p. 13:10-12.
39 *Id.* p. 13:12-13.
40 *Huntington Decl.* Ex. 8 (BerganKDV Communications Letter).

general fund revenues increased from $3,656,233 to $3,863,767, an increase of 5.7%.[41] "[M]uch of this increase was in licenses and permits, which increased $174,200 from 2015. This increase was due to collecting more building permits in 2016 due to an increase in development during the year."[42] Conversely, between 2015 and 2016, the City's general government expenditures increased by only $15,000.[43] Stated differently, the building permit increase was eleven (11) times greater than the increase in general government expenditures.

E. <u>The City's Interfund Loan Policy.</u>

In late 2016 the City adopted an "Interfund Loan Policy." The purpose of the policy was as follows:

> The interfund loan policy provides the parameters by which the City may alleviate cash shortages in the various funds with temporary loans from other funds. Interfund loans are intended to be a temporary internal financing mechanism which may be used to alleviate the need for debt issuance on a project that requires only short-term financing and/or to provide temporary internal financing on a project for which permanent financing will take place at a later date.[44]

As discussed below, between 2017 and 2021, the City transferred some $2.7 million in excess building permit revenue into a fund known as "Fund 409." $2.7 million is roughly the balance of the fund today.[45] This fund was established on the advice of the City's financial consultant, "AEM Financial Solutions, LLC", referred to herein as "Abdo." Abdo recommended that "the City Council consider transferring any future General Fund surpluses to the Temporary

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41 *Id.* p. 10.
42 *Id.*
43 *See id.* p. 11 (chart) (reflecting that general government expenditures were $785,757 in 2015, and $801,115 in 2016).
44 *Huntington Decl.* Ex. 9 (Interfund Loan Policy).
45 *Huntington Decl.* Ex. 10 (hereafter, "*Doud Depo. Tr. excerpts*") pp. 72:13-73:2.

Financing Fund to build a reserve that may be used for future interfund loans (internal financing of projects.").[46]

F. <u>The City's Excess Building Permit Revenues Between 2017 and 2021.</u>

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 related permit administration expenses. The following chart contains the amounts reported by the City to DLI for building permit revenues and expenditures, as well as the amount the City transferred to Fund 409, between 2017 and 2021.

	2017	2018	2019	2020	2021	**Totals**
BP revenues (reported)	No information reported by City of Dayton, in violation of Minn. Stat. § 326B.145[47]	$806,482[48]	$1,504,611[49]	$1,729,376[50]	$2,463,574[51]	**$6,504,043**
BP expenditures (reported)	No information reported by City of Dayton, in violation of Minn. Stat. § 326B.145	$599,541	$686,207	$1,006,906	$1,185,672	**$3,478,326**
Excess BP revenue (reported)	No information reported by City of Dayton, in violation of Minn. Stat. § 326B.145	$206,941	$818,404	$722,470	$1,277,092	**$2,889,633**

[46] *Huntington Decl.* Ex. 11 (Long Term Plan dated December 13, 2016) p. 7.
[47] *See Goodroad Depo. Tr. excerpts* p. 72:7-9.
[48] *Huntington Decl.* Ex. 12 (2018 DLI report).
[49] *Huntington Decl.* Ex. 13 (2019 DLI report).
[50] *Huntington Decl.* Ex. 14 (2020 DLI report).
[51] *Huntington Decl.* Ex. 15 (2021 DLI report).

Amount that General Fund actual revenues exceeded actual expenditures	$765,000[52]	$315,000[53]	$611,000[54]	$814,000[55]	$564,500[56]	**$3,069,500**
409 transfers	$314,673[57]	$315,000[58]	$611,000[59]	$814,000[60]	$564,500[61]	**$2,619,173**
BP funds used to offset/subsidize losses in other city funds	Unknown	N/A	$207,404	N/A	$712,592	**$919,996**
Reconciliation between fund 409 money from other sources and BP revenues subsidizing other funds	Unknown	(206,941 - $315k)= -$108,059 (deficit of BP revenue in fund 409)	($207,404 - $108,059)= +99,345 (surplus of BP revenue subsidizing other funds)	($235,429 - $91,530)= +143,899 (surplus of BP revenue subsidizing other funds)	($712,592 + 143,899) +$856,491 (surplus of BP revenue subsidizing other funds)	**$720,407 (surplus of BP revenue subsidizing other funds)**

As shown by the chart above, between 2017 and 2021, the City transferred approximately $2.7 million into Fund 409, also known as the "temporary financing fund." Some of the money transferred into that fund ($251k) came from other sources. However, during this time, the City used $919,996 of excess building permit revenue to balance its budget when other funds were underperforming. If, rather than use building permit funds to subsidize other, unprofitable funds,

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52 *Huntington Decl.* Ex. 16 (hereafter, "*Resolution No. 30-2018*").
53 *Huntington Decl.* Ex. 17 (hereafter, "*Resolution No. 23-2019*").
54 *Huntington Decl.* Ex. 18 (hereafter, "*Resolution No. 24-2020*").
55 *Huntington Decl.* Ex. 19 (hereafter, "*Resolution No. 16-2021*").
56 *Huntington Decl.* Ex. 20 (hereafter, "*Resolution No. 31-2022*").
57 *Resolution No. 30-2018*.
58 *Resolution No. 23-2019*; *see also Doud Depo. Tr. excerpts* pp. 31:7-13 (admitting that $153,000 of excess building permit revenue from 2018 was put into Fund 409).
59 *Resolution No. 24-2020*; *see also Doud Depo. Tr. excerpts* pp. 30:25-31:5 (admitting that $609,000 of excess building permit revenue from 2019 was put into Fund 409).
60 *Resolution No. 16-2021*.
61 *Resolution No. 31-2022*.

all excess building permit revenues had been put into Fund 409, and if no non-building permit excess revenue had been put into Fund 409, Fund 409 would currently have a balance of $3,339,580. There is no evidence that the City intends to use the money in Fund 409 for any purpose relating to administration of the SBC.[62]

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.[63] The City's building permit fee schedule may be downloaded from the City website.[64]

The City's actual out-of-pocket expenditures to Metro West and Wenck for the three years, 2018, 2019, and 2020 were $569,297.50 ($454,211) + $115,089).[65] As shown by the chart above, during this same 3-year period, the City claimed inspection-related expenses of $2,292,654 ($599,541 + $686,207 + $1,006,906). Therefore, the City has claimed that its internal costs to support its outside consultants (who actually perform the code review, plan review, and building inspections) were three times greater than the direct (i.e., out of pocket) cost of the outside consultants.

In 2021, the City reduced its plan review fee.[66] As shown above, the City still had a nearly $1.3 million surplus relating to building permits for the year. The City has no intention to further modify its fees to reduce future surpluses.[67] "The City anticipates continued significant growth between the present and 2040."[68]

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62 *See Goodroad Depo. Tr. excerpts* p. 110:13-20.
63 *Id.* p. 70:9-14.
64 *https://cityofdayton.wpenginepowered.com/wp-content/uploads/2023/01/2023-Fee-Schedule.pdf* (Section 3: Building, Section 10:Valuation Building Permit Fees, State Surcharge & Plan Check).
65 *Huntington Decl.* Ex. 21.
66 *Doud Depo. Tr. excerpts* p. 84:5-10.
67 *Id.* p. 86:5-12.
68 *Baker Tilly Report* p. 35.

G. The Deposition of Former Dayton Councilmember Troy Okerlund.

In mid-2022, Housing First subpoenaed former Dayton City Councilmember Troy Okerlund.[69] After the subpoena was served, the League of Minnesota Cities (the "League"), which has been paying the attorneys' fees incurred by the City herein, provided Okerlund a lawyer.[70] In the final days leading up to the deposition, this League-appointed lawyer communicated with Okerlund.[71] She told him that he (Okerlund) could be personally liable to the City for a $2.7 million loss—this being roughly the amount that the City had in Fund 409.[72] She told him that he could be sued for defamation by former Dayton administrator Tina Goodroad.[73] She told him that because he had spoken with Housing First, he would receive no indemnification from the League relating to his role as a former member of the City Council.[74] These comments intimidated and frightened Okerlund.[75]

Okerlund previously served as a licensed building official for seven (7) years for the City of Brooklyn Center.[76] Thereafter, Okerlund was a senior investigator for DLI.[77]

The lack of proportionality in the City's building permit and plan review fees was a reason Okerlund ran for office in 2020.[78] After becoming an elected official, Okerlund attempted to raise concerns about building permit fees with City Administrator Goodroad.[79] Okerlund had the impression that Goodroad was trying to conceal the fact that there was a

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69 *Okerlund Depo. Tr.* p. 8:7-13.
70 *Okerlund Depo. Tr.* p. 8:15-18.
71 *Id.* p. 9:14-17.
72 *Id.* p. 9:21-24.
73 *Id.* p. 10:3-5.
74 *Id.* p. 10:6-11.
75 *Id.* p. 10:12-18.
76 *Okerlund Depo. Tr.* p. 15:17-16:8.
77 *Id.* p. 16:22:25.
78 *See id.* p. 20:2-6.
79 *Id.* pp. 29:10-30:7.

surplus of building permit revenues.[80] His concerns were well founded.[81] Goodroad dismissed his concerns, claiming that the City had never been told by its auditors that it was doing anything wrong relating to building permit revenues.[82]

As discussed below, the standard legal compliance form used by auditors does not include a section regarding building permit fees. Thus, no auditor would analyze the legality of building permit fees unless explicitly asked to do so. There is no evidence in the record Dayton ever asked any auditor to perform that analysis.

Okerlund attempted to meet with the mayor but was rebuffed several times.[83] He then sought to raise his concerns with the League of Minnesota Cities (the "League'); the League did nothing.[84] When Okerlund tried to get the City to address the issue, that created an uncomfortable situation for Okerlund.[85] "[T]here was an effort to move on from that issue, and bringing that up created some angst."[86] The uncomfortable situation was a key reason that Okerlund left the Council.[87] The whole time Okerlund was on the Council he was trying to discover what surplus the City had in building permit revenues. He never got the full story:

> As far as the dollar amount and where it was, I – I was certainly under the impression that there was a surplus somewhere. If it had been spent or where it was held, again, I was trying to trace or track that down through my entire time, and I don't feel like I ever got where I felt comfortable with where the numbers were at and where things were located.[88]

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80 *Id.* p. 32:3-7.
81 *See Huntington Decl.* Ex. 23 (Goodroad and McNeil e-mail chain) ("Do you think this will bring too much attention to the 'surplus' as we are admitting to it[.]").
82 *See Huntington Decl.* Ex. 24 (Goodroad and Okerlund e-mail chain).
83 *Okerlund Depo. Tr.* p. 30:1-3.
84 *See Okerlund Depo. Tr.* p. 35:11-23.
85 *See id.* p. 38:19-24.
86 *Id.* p. 39:1-3.
87 *Id.* p. 39:14-19.
88 *Id.* p. 65:16-24.

Okerlund explained that a downturn in homebuilding activity would not harm the City from a standpoint of fixed City expenses:

> Receiving a loss would be – would be a lot less dramatic than other building departments, because we subcontract it out. So we would just – if the work doesn't show up, we don't have to still emplo[y] four different building inspectors, we just have subcontracted people we pay. I think the contract was essentially hourly. . . . I think we were a lot more isolated and insulated from losses than other municipalities.[89]

H. The Deposition of Former City Administrator Tina Goodroad.

Tina Goodroad was the City Administrator for Dayton between January 2019 and May 2022.[90] Previously, she had served as the Planning Director/Development Direction for Dayton for approximately 3.5 years.[91] During the course of this litigation she left Dayton to become the Community Development Director at the City of Lakeville.[92] Goodroad has no specialized knowledge regarding home construction.[93] It was not her role or expertise to opine on whether plans and specifications for a new home met the requirements of the SBC.[94]

Goodroad was asked about a document used by the City to allocate staff time to "inspection services."[95] Goodroad was questioned why she had claimed a portion of her time as relating to inspection services.[96] When asked why she would be reviewing a building permit, her response was "[m]aking sure all the setbacks are being met, making sure all the building material requirements are being met, making sure it's consistent with whatever city approvals the development was given."[97] When asked why she would be looking at building materials, she

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89 *Id.* p. 66:19-67:4.
90 *Goodroad Depo. Tr. excerpts* pp. 9:23-10:10.
91 *See Goodroad Depo. Tr. excerpts* p. 10:2-4.
92 *Id.* p. 10:6-13.
93 *Id.* p. 11:4-6.
94 *Id.* p. 11:7-16.
95 *Huntington Decl.* Ex. 25 (Goodroad Depo. Ex. 6) (Inspection Services Salary and Benefits).
96 *Goodroad Depo. Tr. excerpts* p. 44:11-15.
97 *Id.* p. 45:13-17.

stated she was seeking to comply with existing development approvals.[98] She agreed that none of the activities she performed concerned whether the project complied with the SBC.[99]

Goodroad was asked why it would be that the City had identified 85% of a planner's (Alec Henderson's) time as being dedicated to building permits.[100] Her response was that he had to ensure the building permit was consistent with the City's zoning.[101] (When that planner was deposed, he testified that he had no knowledge, education, or experience relating to the SBC.[102] He denied that he provided any building inspection services.[103])

Similarly, Goodroad was also asked why the City had identified 25% of the public works supervisor (Marty Farrell) as related to building permits.[104] Again, her response was that this employee needed to verify zoning requirements.[105]

Goodroad was asked about a letter written by the City's lawyers in October 2019 advising the City with respect to the law governing building permit fees.[106] The letter, addressed to Goodroad, stated that it was responding to "questions and concerns regarding building permit fees."[107] The letter reads:

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98 *Id.* p. 46:2-5.
99 *Id.* p. 46:6-11.
100 *Id.* p. 46:16-19.
101 *Goodroad Depo. Tr. excerpts* p. 47:21-23 (Q.: "So consistent with the zoning that pertains to the property right?" A.: "Yup, and to the development contract.").
102 *Huntington Decl.* Ex. 26 (hereafter, "*Alec Henderson Tr. excerpts*") p. 12:8-11.
103 *Id.* pp. 14:23-15:4 (Q.: "Are you qualified to perform building inspection services." A.: "I do not provide building inspections.") p. 21:15-23 (Q.: "So I do deserve a straightforward answer to my question. What percentage of your time, while you've been employed by the City, has been related to administration of the State Building Code." A.: "So I do not review building code compliance. So 0 percent would be building code compliance.").
104 *Id.* pp. 48:23-49:2.
105 *Id.* pp. 49:25-50:2 (Q.: "And Marty's role was to ensure consistency with zoning requirements?" A.: "Yes.").
106 *Huntington Decl.* Ex. 25 (Goodroad Depo Exhibit 14) p. 4.
107 *Id.*

> Cities enforcing the SBC must adopt a fee schedule for building permit fees, and the fees must be at a rate commensurate with the cost of services provided by the city. Minn. R. 1300.0160, subps. 1-2. In other words, the fees must be 'fair, reasonable, and proportionate to the actual cost of the service for which the fee is imposed.' *Id.*, *see also Minnesota State Building Code: Code Adoption Guide* at p. 12, MN Dept. of Labor and Industry (Jan. 14, 2016). This means building permit fees are essentially a 'fee for service' and may not be used to raise city revenue. Thus, each city must evaluate its costs associated with administering and enforcing the SBC, which are typically related to running the city department and paying employees that administer and enforce the SBC, and establish fees that cover all of these costs.[108]

The letter recommended:

> [I]f Dayton has not already done so, we recommend adopting a building permit fee schedule that is commensurate to the City's actual costs of the services it provides relating to administration and enforcement of the SBC. . . .[109]

Goodroad was presented with a spreadsheet analyzing expenses that the City could claim on the DLI form as inspection-related expenses.[110] The spreadsheet identifies a variety of City personnel, lists certain tasks, and then attributes direct and indirect costs for those staff. The spreadsheet concluded that on average, for a building permit, the City has $2,170 in "direct cost", $20 in "office space" cost, $600 in "indirect" cost, and $341 in "city overhead" cost, for a total building permit cost of $3,130.[111] The City's outside consultant, Baker Tilly, used this spreadsheet to find the City's costs for single-family detached new home construction.[112]

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[108] *Id.*

[109] *Id.*

[110] *Goodroad Depo. Tr. excerpts* pp. 95:17-96:1 (Q.: "And the purpose of all this is for the city to come up with a number that . . . it can identify on the DLI form as permit and inspection expenses, right?" . . . A.: "Yes."); *see also* Huntington Decl. Ex. 28.

[111] *Goodroad Depo. Ex. 21*.

[112] *Compare id.* (stating that total task cost of single-family building permit is $3,130) *with Baker Tilly Report* p. 38 (stating that total task cost of single-family building permit is $3,129.75).

The questioning and answers regarding this spreadsheet are copied below:

Q. And you would agree that a wide variety of the items listed here have nothing to do with the administration [or] enforcement of the state building code, right?

A. They have everything to do with doing a complete review in issuance of a permit and ensuring that the house is complete and the lot is complete.

Q. You would agree that they do not relate to the administration of the state building code, correct?

A. Some may, some may not.

Q. Yours did not, right?

A. Specifically to the building code?

Q. Right.

A. It may not, but it had everything to do with the developer's obligations –

Q. Right.

A. --and the builder's obligations, so they're just as valid.

Q. Just not according to your lawyers, who said that it had to be related to administration and enforcement of the state building code, right?

Q. You have a more expansive view than the lawyers who were advising you, correct?

Q. You're saying if an expense relates to development, then it's legitimate and can be claimed. That's not what your lawyers said, right?

A. I don't know if I need to answer that again.

Q. I think you need to answer that. We deserve an answer on that. **They said it has to relate to administration o[r] enforcement of the state building code. You're saying that if it relates to development, then it's legitimate. That's a much broader, more expansive view, is it not?**

A. **Yes**.[113]

[113] *Goodroad Depo. Tr. excerpts* pp. 96:23-98:22 (emphasis added).

Goodroad was asked to identify a specific, additional internal expense that the City would have when building permit activity increased. Other than increased expenditures to Metro West and Wenck, she could identify no specific expenses.[114]

I. Abdo's Cost Allocation Methodology.

Plaintiff deposed Abdo through its appointed representative Vicki Holthaus, a partner in Abdo's financial solutions team.[115] Abdo helped the City of Dayton report building permit revenues to DLI in 2018 and 2019.[116] Abdo also assisted in preparing a report for the City using the indirect cost methodology.[117]

It was not within Abdo's scope of work to provide a legal opinion concerning whether Dayton complied with state law governing building permit fees.[118] Abdo reached no conclusions regarding whether the City's fees complied with state law.[119] Holthaus acknowledged that building permit fees are supposed to be a fee for service.[120]

Abdo's indirect cost methodology was drawn from federal regulation, more specifically, Office of Management and Budget ("OMB") Circular A-87.[121] Abdo used this methodology without any basis for doing so under Minnesota law.[122] Abdo never performed a legal analysis concerning which costs could properly be claimed on the DLI form.[123] Holthaus had never read the full OMB circular.[124]

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[114] *Id.* pp. 89:15-90:4.
[115] *Huntington Decl.* Ex. 29 (hereafter, "*Holthaus Depo. Tr.*") p. 7:22-23.
[116] *Id.* p. 10:24-11:1.
[117] *Id.* p. 15:22-16:1.
[118] *Id.* p. 19:6-12; pp. 55:23-56:4.
[119] *Id.* p. 20:14-18.
[120] *Id.* p. 20:5-7.
[121] *See* p. 20:5-7; *see also Huntington Decl.* Ex. 30 (hereafter, "*Abdo fee analysis*") p. 4 (referencing OMB Circular A-87 and stating its allocation method was used to apportion "indirect salary" costs).
[122] *Holthaus Depo. Tr. excerpts* p. 24:13-18.
[123] *Id.* p. 59:16-19.
[124] *See Holthaus Depo. Tr. excerpts* p. 24:1-3.

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.[125]

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.[126] 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.[127]

Categories of "indirect costs", and the actual amounts that were allocated associated with these cost categories, include the following[128]:

Department Name	**Amount**
Council	$37,146
Administration	$21,608
Elections	$8,512
City Clerk	$16,148
Finance	$16,318
Assessing	$85,885
Audit	$35,117
Engineering	$115,623
Legal	$51,595
Financial Services	$70,942
Central Services	$67,188
Information Technology	$39,199
Emergency Management	$4,138
TOTAL	**$569,419**

[125] *Abdo fee analysis* p. 5.
[126] *See Holthaus Depo. Tr. excerpts* pp. 32:19-33:3.
[127] *See id.* p. 48:7-21.
[128] *Abdo fee analysis* p. 5.

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[.]"[129] In other words, the purpose of the Circular is for the States to develop an accounting method for federal funds for specific federal projects.[130]

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 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.[131]

The OMB Circular defines "cost" to explicitly exclude "transfers to a general or similar fund."[132] 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."[133] 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."[134]

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[129] *Huntington Decl.* Ex. 31 (hereafter, "*OMB Circular*') p. 1.
[130] *Holthaus Depo. Tr. excerpts* p. 24:4-7.
[131] *OMB Circular* p. 5.
[132] *Id.* p. 7.
[133] *Id.* p. 51.
[134] *Id.* p. 6.

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.
>
> A. I do not work with state or federal government so I'm not privy to the regulations that they utilize.[135]

Holthaus had never seen the contracts the City had with third-party contractors for building inspections and plan review services.[136]

Plaintiff also deposed Andy Berg, another partner with Abdo.[137] Berg testified regarding the legal compliance audit guide that is produced by the Minnesota Secretary of State.[138] No part of that standard form compliance document addresses building permit fees.[139]

J. <u>The Baker Tilly Study.</u>

In 2021, the City retained another outside consultant, Baker Tilly, to study its building permit fees. The City used a draft report from Baker Tilly to complete its 2020 DLI report.[140] The City's own finance director, Zachary Doud—the same person who certified the DLI report

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[135] *Holthaus Depo. Tr. excerpts* pp. 29:9-30:1.
[136] *Id.* p. 30:
[137] *Huntington Decl.* Ex. 32 (hereafter, "*Berg Depo. Tr.*") p. 8:22-23.
[138] *Id.* p. 16:2-21.
[139] *Id.* p. 18:5-10.
[140] *Doud Depo. Tr. excerpts* p. 57:2-10.

for 2020—testified that he had no independent knowledge regarding whether the amounts claimed on the form were appropriate.[141] Indeed, Doud did not know what the standard was for expenses to be legitimately claimed on the DLI report.[142]

Baker Tilly concluded that the City was profiting approximately $1,500 for each detached single-family home building permit.[143] Baker Tilly's analysis of City costs was premised upon a wide variety of staff services having nothing to do with SBC administration.[144]

Baker Tilly performed a time study asking City personnel to identify time spent performing various tasks. One response reflects the time a City administrative assistant spends processing permits. For "single family detached new construction", it takes an assistant 26 minutes to enter and process the permit.[145]

The same day that Plaintiff served Dayton with the Summons in this action, Matt Stark, a Baker Tilly employee, met with Doud. As summarized by Stark:

> [Doud was] very happy and comfortable with the numbers we've generated for their DOLI report. In regard to this morning's summons from BATC, I suggested that they might want to recalculate previous years' costs using our methodology to see if they can help close the gap between revenues and expenditures that seems to bother the builders so much.[146]

This same individual who was eager to help the City "close the gap" has co-authored an expert report in this litigation supporting the City.

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[141] *Id.* p. 57:11-18 (Q.: "Although you certified this document, you have no independent knowledge regarding whether the amounts identified here are properly claimed as building code enforcement expenditures, correct.?" A.: "That is correct.").

[142] *Id.* p. 45:5-9 (Q.: "Do you know what the standard is for legitimate expenditures to claim on the DLI report." A.: "I do not.").

[143] *Baker Tilly Report* p. 38.

[144] *Goodroad Depo. Ex. 21* (stating that total task cost of single-family building permit is $3,130) *with Baker Tilly Report* p. 38 (stating that total task cost of single-family building permit is $3,129.75).

[145] *Huntington Decl.* Ex. 33 (Baker Tilly time study response) p. 8.

[146] *Huntington Decl.* Ex. 34 (Matt Stark e-mail chain).

K. Expert Report of Dr. Elliot Eisenberg, Ph. D.

Plaintiff produced an expert report prepared by economist Dr. Elliot Eisenberg, Ph. D.[147] 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.[148] Eisenberg was an economist for the National Association of Home Builders for over a decade.[149] Eisenberg's report specifically focused upon and responded to the LOCI expert report served by Defendant.[150] 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.
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.[151]

Eisenberg provided several examples illustrating the economic principle of elasticity of demand.[152] First, he provides the example of a municipal "banana inspection tax."[153] He

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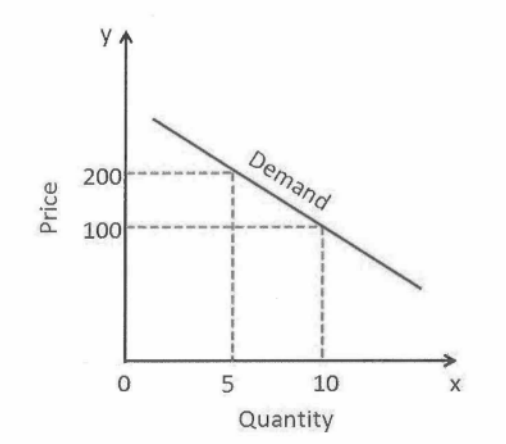
147 *Huntington Decl.* Ex. 35 (hereafter, "*Eisenberg Report*").
148 *Id.* p. 1.
149 *Eisenberg Report* (resume).
150 *Id.* p. 1.
151 *Id.* pp. 1-2.
152 "The elasticity of demand refers to the degree to which demand responds to a change in an economic factor." *https://www.investopedia.com/ask/answers/012915/what-difference-between-inelasticity-and-elasticity-demand.asp#:~:text=The%20elasticity%20of%20demand%20refers,shifts%20when%20economic%20factors%20change*.
153 *Eisenberg Report* p. 2.

provided the following chart which generally demonstrates how price increases impact demand[154]:



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.[155]

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.[156] 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[.]"[157] Eisenberg noted that there are alternatives to buying a home, such as renting, moving in with roommates, or moving back with one's parents.[158] Indeed, housing demand is "highly elastic" because federal

[154] *Id.* p. 3.
[155] *Id.* pp. 3-4.
[156] *Id.* p. 5.
[157] *Id.*
[158] *Id.* p. 6.

regulations put a hard ceiling on a potential homebuyer's debt-to-income ratio.[159] "The credit environment places a hard limit on new housing demand."[160]

Eisenberg reproduced the following chart originally produced by the National Association of Homebuilders[161]:

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."[162] Potential homebuyers may either choose not to seek a mortgage, or find themselves unable to qualify for one because of credit limitations.[163] Either way, demand for housing declines as prices rise.[164]

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

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159 *Eisenberg Report* p. 6.
160 *Id.*
161 *Id.* p. 7.
162 *Id.*
163 *Id.*
164 *Id.*

process."[165] 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.[166]

L. 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.

[165] *Id.* p. 10.
[166] *Id.* p. 11.

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."[167]

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.[168] 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 party's burden.[169] 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.[170] "To resist summary judgment, the evidence must be significantly probative, not merely colorable."[171] If the non-moving party fails to carry that burden, summary judgment should be granted.[172]

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[167] *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).
[168] *Id*. at 322; *Doward v. City of Minneapolis,* 456 N.W.2d 460, 464 (Minn. Ct. App. 1990).
[169] *Celotex*, 477 U.S. at 322–23; *Davis v. Midwest Discount SECS, Inc.*, 439 N.W.2d 383, 386 (Minn. Ct. App. 1989).
[170] *Celotex,* 477 U.S. at 324; *Pourmehdi v. Northwest National Bank*, 849 F.2d 1145, 1146 (8th Cir. 1988).
[171] *Albert v. Paper Calmenson & Co.*, 515 N.W.2d 59, 64 (Minn. Ct. App. 1994) (citations omitted).
[172] *Thiele v. Stich*, 425 N.W.2d 580, 583 (Minn. 1988).

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."[173] The Act is remedial legislation that is intended to afford relief from uncertainty.[174] The Act has a preventative purpose.[175] 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.[176]

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 . . . ."[177] 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."[178]

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

[174] *Id*.

[175] *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).

[176] *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).

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

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

To establish standing, case law merely requires that a plaintiff identify a particularized injury to its personal interest.[179] "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.'"[180]

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.[181]

D. <u>Associational Standing.</u>

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."[182] "The Minnesota Supreme Court has adopted a liberal standard for organizational standing."[183]

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

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

[181] 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 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).

[182] *Id.* at 914-15.

[183] *Id.* at 913.

As indicated above, "Minnesota courts recognize impediments to an organization's activities and mission as an injury sufficient for standing."[184]

"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.'"[185] Numerous decisions of the Minnesota appellate courts have approved of building associations bringing suit on behalf of their members.[186]

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.[187] 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."[188]

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

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184 *Id.* at 914.

185 *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)).

186 *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).

187 *See* Minn. R. 1300.0160 Subp. 2.

188 *Id.*

> 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.[189]

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 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.[190]
>
> **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,***

[189] *Huntington Decl.* Ex. 36 (hereafter, "*Code Adoption Guide*") p. 11.
[190] *Id.* p. 17.

> ***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.[191]

The Code Adoption book follows from the plain meaning of the regulation and, therefore, has the force and effect of law.[192]

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 these same parties involving an illegal transportation fee imposed by the City (the "Transportation Fee Case"), the district court, the Honorable Susan M. Robiner, ruled that Plaintiff had standing to contest the fee.[193] The decision of Judge Robiner is instructive here.

Housing First's suit in the Transportation Fee Case challenged the City's Off Site Transportation Charge.[194] The City asserted that Housing First lacked standing to challenge the fee.[195] With respect to standing, the court observed record evidence that members of Housing First had homebuilding activity in the City of Dayton.[196] The court observed that Housing First

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

[192] *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."

[193] *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.

[194] *Id.* p. 1.

[195] *Id.* p. 3.

[196] *Id.* p. 4.

was "seeking to protect its mission by keeping the costs associated with buying a new home low."[197] 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."[198] 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 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.[199]

Cognizable injury for standing purposes occurs the moment the City conditions development on payment of an illegal fee.[200] That is why the builders, who actually pay the fee,

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[197] *Id.*

[198] *Id.*

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

[200] *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).

have standing to bring the claim. A homeowner likely lacks standing to challenge a municipal fee paid by a builder.[201] 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. 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."[202]

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[.]"[203] 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.[204] 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

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[201] *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).

[202] *Eisenberg Report* p. 10.

[203] *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).

[204] *Id.*

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 $3 million in excess building permit fee revenue and placed much of that excess revenue into a fund intended to finance City improvements. 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."[205] 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, a fact acknowledged by the City Attorney.[206] To quote the City Attorney: "Each city must evaluate its costs associated with administering and enforcing the SBC, which are typically related to running the city department and paying employees that administer and enforce the SBC, and establish fees that cover all of these costs."[207] In the words of the DLI Code Adoption Guide: "[I]t is essential that there be a conscious effort to balance the fees and

[205] Minn. R. 1300.0160 Subp. 2.
[206] *Huntington Decl.* Ex. 27 (Goodroad Depo Ex. 14) p. 4 (Correspondence from Jacob Kimmes).
[207] *Id.*

expenses generated by a program."[208] 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 2013. The 2013 and 2015 GAP finance plans reflect that the City was using building permit excess revenues to fund generalized municipal debt.[209] The City's building permit excess revenue continued to increase in 2016.[210] In late 2016, on the advice of Abdo, the City established Fund 409.[211] Between 2017 and 2021, the City deposited $2.7 million in excess building permit revenue into Fund 409.[212] The City used $919,996 of excess building permit revenue to make its budget even (i.e., building permit revenues subsidizing other municipal services).[213] If, rather than use building permit funds to subsidize other, unprofitable funds, all excess building permit revenues had been put into Fund 409, and if no non-building permit excess revenue had been put into Fund 409, Fund 409 would currently have a balance of $3,339,580.[214] As things stand today, the City has $2.7 million in Fund 409.[215] The City has no intention to use these funds toward administration of the SBC.[216] Nor has the City done anything to modify its valuation-based permit fees.

In October 2019, the City attorney told the City that it should "adop[t] a building permit fee schedule that is commensurate to the City's actual costs of the services it provides relating to administration and enforcement of the SBC.[217] The City failed to do so. In fact, the City has

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[208] *Code Adoption Guide* p. 17.
[209] *Huntington Decl.* Ex. 5 pp. 4-5.
[210] *Huntington Decl.* Ex. 8 (BerganKDV Communications Letter) p. 10.
[211] *Huntington Decl.* Ex. 11 (Long Term Plan dated December 13, 2016) p. 7.
[212] *Resolution Nos. 30-2018*, *23-2019*, *24-2020*, *16-2021*, *31-2022*.
[213] *Resolution Nos. 24-2020*, *31-2022*.
[214] *See* excess building permit revenue chart, *supra*.
[215] *Doud Depo. Tr. excerpts* pp. 72:13-73:2
[216] *See Goodroad Depo. Tr. excerpts* p. 110:13-20.
[217] *Id.*

never modified its valuation-based permit fees.[218] The City's revenues have "consistently" and "excessively" varied from its costs, yet there has been no "conscious effort" to balance them.[219]

To the contrary, the record evidences the City's effort to minimize and conceal its excess revenues. The Councilmember who sought reform, Troy Okerlund, was kept in the dark by the City Administrator and eventually driven from the Council altogether.[220] Mere days before his deposition, Okerlund was told by his League-appointed lawyer that he could be held personally liable for the City's loss of the monies in Fund 409.[221] The warning had its foreseeable effect: Okerlund felt threatened and fearful immediately before being deposed.[222]

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."[223] 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.[224] At deposition, former City Administrator Goodroad acknowledged that her view—viz., that zoning-related expenses should qualify in the proportionality analysis—was "much broader, more expansive" view.[225] Indeed, the City's use

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[218] *Goodroad Depo. Tr. excerpts* p. 70:9-14.
[219] *Code Adoption Guide* p. 17.
[220] *Okerlund Depo. Tr.* pp. 39:14-19, 65:16-24.
[221] *Id.* p. 9:21-24.
[222] *Id.* p. 10:12-18.
[223] Minn. R. 1300.0160 Subp. 2.
[224] *Huntington Decl.* Ex. 27 (Correspondence from Jacob Kimmes); *see also 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.").
[225] *Goodroad Depo. Tr. excerpts* pp. 96:23-98:22.

of the Abdo and Baker Tilly methods have resulted in all manner of inaccurate and misleading expense reporting.

The City failed to file any report with DLI in either 2016 or 2017, in clear violation of the law.[226] In 2018 and 2019, the City used the Abdo indirect cost methodology.[227] 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.[228] No one ever analyzed whether this methodology complied with Minnesota law.[229]

The indirect cost method resulted in costs from numerous departments having nothing to do with building permit administration being deemed inspection-related expenses.[230] This included, among other things, costs for "Elections", "Assessing", "Legal", and "Emergency Management."[231] Abdo's representative acknowledged that the indirect cost methodology is a cost recovery method designed to ensure the City does not run a deficit.[232]

In 2020 the City used a different consultant, Baker Tilly, to assist with its DLI report.[233] Baker Tilly's analysis similarly identified all manner of zoning-related tasks as going into the City's cost for building permit administration.[234] This includes, for example, tasks such as "landscape escrow", "review subdivision", review of devel. approvals", "site review/as-builts", etc.[235] Time was included for staff (e.g., Goodroad, Henderson) who testified they had no role in

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[226] *See id.* p. 72:7-9.
[227] *Holthaus Depo. Tr.* p. 10:24-11:1.
[228] *See Holthaus Depo. Tr. excerpts* pp. 24:1-3, 29:9-30:1.
[229] *Id.* p. 59:16-19.
[230] *See id.* pp. 32:19-33:3.
[231] *Abdo fee analysis* p. 5.
[232] *See Holthaus Depo. Tr. excerpts* p. 48:7-21.
[233] *Doud Depo. Tr. excerpts* p. 57:2-10.
[234] *Goodroad Depo. Ex. 21* (stating that total task cost of single-family building permit is $3,130) *with Baker Tilly Report* p. 38 (stating that total task cost of single-family building permit is $3,129.75)
[235] *Goodroad Depo. Ex. 21*.

administering the SBC.[236] Even taking into account all these zoning-related tasks, Baker Tilly still found the City had excess revenue in the amount of $1,500 per permit.[237]

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 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 MONIES IN FUND 409.

Housing First prayed in its Complaint for disgorgement of all monies collected in violation of state and federal law.[238] Courts around the country have ordered disgorgement of fees collected by municipalities in violation of the law.[239] 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."[240] It matters not whether fees

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[236] *Goodroad Depo. Tr.* p. 46:6-11; *see also Alec Henderson Tr. excerpts* pp. 14:23-15:4 (Q.: "Are you qualified to perform building inspection services." A.: "I do not provide building inspections.") p. 21:15-23 (Q.: "So I do deserve a straightforward answer to my question. What percentage of your time, while you've been employed by the City, has been related to administration of the State Building Code." A.: "So I do not review building code compliance. So 0 percent would be building code compliance.").

[237] *Baker Tilly Report* p. 38.

[238] V. Compl. ¶¶ 57, 66, 74, 78.

[239] *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).

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

were paid under formal protest.[241] Requiring a builder to pay excessive and unreasonable fees to obtain a building permit constitutes a taking and a violation of due process.[242]

The City currently has $2.7 million in Fund 409 (and in fact would have much more if all excess building revenue had done into that fund). The City has no legitimate claim to these monies; its building inspection services certainly will not be harmed if ordered to disgorge the funds.[243] The City's contracts with third party consultants are hourly and based upon services actually provided.[244] 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.

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241 *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.").

242 *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.").

243 *See Okerlund Depo. Tr.* p. 66:19-67:4.

244 *See Huntington Decl.* Ex. 3 (Stantec letter to Goodroad).

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."[245]

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."[246]

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.[247] 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[.]"[248] Here, where Plaintiff alone has enforced, protected, and preserved the rights of the affected homeowners, equitable reimbursement is justified and appropriate.

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[245] *Internal Imp. Fund Trustees v. Greenough*, 105 U.S. 527 (1881).
[246] *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).
[247] 71 Minn. 508, 510-511 (Minn. 1898) (quoting approvingly from the *Greenough* decision).
[248] 196 Minn. 243, 250 (Minn. 1936) (collecting authorities).

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.[249] 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 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 the monies contained in Fund 409, 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.

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[249] *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).

Dated: March 10, 2023

/s/ Bryan J. Huntington

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