STATE OF MINNESOTA
IN SUPREME COURT
A25-1220
A25-1221

Housing First Minnesota,

Appellant,

v.

City of Corcoran,

Respondent.

Housing First Minnesota,

Appellant,

v.

City of Dayton,

Respondent.

APPELLANT'S BRIEF IN CONSOLIDATED CASES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE 3

STATEMENT OF FACTS 5

A. Membership and Purpose of Housing First 5

B. State Law Governing Municipal Building Permit Fee Collection. 6

C. At All Relevant Times, the Cities Have Used Third-Party Consultants to Administer Building Permits. 8

D. Documented Overcollection of Building Permit Fees. 9

1. *The City of Dayton.* 9

2. *The City of Corcoran.* 12

E. The Cities Have Reported Zoning Expenses and General City Overhead as Building Permit Expenses. 14

1. *The Abdo "indirect cost" methodology.* 14

2. *The Corcoran and Dayton Baker Tilly studies.* 14

F. The Expert Report of Dr. Elliot Eisenberg, Ph. D. 15

G. Procedural Posture. 16

1. *The district court dismissed the declaratory judgment claim on standing grounds and the court of appeals reversed.* 16

2. *On remand, the district court dismissed the declaratory judgment claim for lack of a cause of action and the court of appeals affirmed.* 18

ARGUMENT 19

I. STANDARD OF REVIEW. 19

II. THE COURT OF APPEALS CORRECTLY RULED THAT HOUSING FIRST HAS STANDING. 20

III. HOUSING FIRST MAY USE THE DECLARATORY JUDGMENTS ACT TO CHALLENGE THE VALIDITY OF THE CITIES' BUILDING PERMIT FEE ORDINANCES. 23

A. Even Before Passage of the Act, Minnesota Law Recognized a Cause of Action to Challenge a Municipal Fee as an Unlawful Revenue Raising Device. 23

B. The Act Explicitly Creates a Cause of Action to Challenge a Municipal Ordinance. 25

C. The Court Has Consistently Ruled That The Prerequisite to Relief Under the Act is a Justiciable Controversy. 28

D. The Court Specifically Affirmed Use of the Act to Challenge Municipal Fees in *Barron*. 30

E. The Court Has Already Rejected the Argument the Lower Courts Accepted Regarding Needing an Additional Cause of Action to Invoke the Act. 31

F. The Minnesota Supreme Court Affirmed in *McCaughtry* That The Act is Properly Used to Test The Validity of a Municipal Ordinance Regardless of Whether Another Remedy Exists. 33

IV. THE LOWER COURTS ERRED IN HOLDING HOUSING FIRST MAY NOT CHALLENGE THE CITIES' BUILDING PERMIT FEES UNDER THE ACT. 35

A. The Lower Courts Erred by Relying On The Decisions in *Alliance* and *Weavewood*. 35

B. The Court of Appeals Erred by Attempting to Limit the Categories of Legal Questions That May be Adjudicated Under the Act. 40

C. There is a Justiciable Controversy Supporting Housing First's Request for Declaratory Relief. 44

D. Housing First has a Common Law Right to Challenge the Cities' Fees as Being in Excess of the City's Lawful Authority. 44

E. The Finding of the Court of Appeals Regarding Forfeiture is Erroneous. 45

V. THE CITIES' SEPARATION OF POWERS AND POLITICAL QUESTION DEFENSES ARE INVALID AS A MATTER OF LAW. 48

A. The Political Question Doctrine is Inapplicable. 49

B. The Separation of Powers Doctrine is Inapplicable. 53

CONCLUSION 56

TABLE OF AUTHORITIES

Page(s)

Cases

Adams v. Mills,
286 U.S. 397, 52 S. Ct. 589, 76 L. Ed. 1184 (1932) 21
All. for Metro. Stability v. Metro Council,
671 N.W.2d 905 (Minn. Ct. App. 2003) 35
Baker v. Carr,
369 U.S. 186 (1962) 51
Barron v. City of Minneapolis,
212 Minn. 566 (1942) ..... passim
Brown v. State,
617 N.W.2d 421 (Minn. Ct. App. 2000) 35
Builders Ass'n of Minnesota v. City of St. Paul,
819 N.W.2d 172 (Minn. Ct. App. 2012) 46, 47
Centra Homes, LLC v. City of Norwood Young America,
834 N.W.2d 581 (Minn. Ct. App. 2013) 43
City of Morris v. Sax Investments, Inc.,
749 N.W.2d 1 (Minn. 2008) 19, 47, 48
Country Joe, Inc. v. City of Eagan,
560 N.W.2d 681 (Minn. 1997) 1, 40, 45
Crescent Oil Co. of Minnesota v. City of Minneapolis,
177 Minn. 539 (1929) ..... passim
Cruz-Guzman v. State,
916 N.W.2d 1 (Minn. 2018) ..... passim
Equity Residential Holdings, LLC v. City of Minneapolis,
No. A26-0021, 2026 WL 2469818 (Minn. Ct. App. Aug. 24, 2026) 41
Glaze v. State,
909 N.W.2d 322 (Minn. 2018) 20
Harstad v. City of Woodbury,
916 N.W.2d 540 (Minn. 2018) 42
Hassler v. Engberg,
233 Minn. 487, 48 N.W.2d 343 (1951) 29
Honn v. City of Coon Rapids,
313 N.W.2d 409 (Minn. 1981) 26
Housing First Minnesota v. City of Corcoran, Minnesota,
145 S. Ct. 381 (2024) 18

In re McConaughy,
106 Minn. 392 (Minn. 1909) 2, 49, 50, 52
Jennissen v. City of Bloomington,
913 N.W.2d 456 (Minn. 2018) 42
Jennissen v. City of Bloomington,
938 N.W.2d 808 (Minn. 2020) 42
Johnson v. Ervin,
205 Minn. 84 (1939) 41
Limmer v. Swanson,
806 N.W.2d 838 (Minn. 2011) 50
Mangold Midwest Co. v. Vill. of Richfield,
274 Minn. 347 (1966) 42
McCaughtry v. City of Red Wing,
808 N.W.2d 331 (2011) 1, 33, 34, 41
Minneapolis Fed'n of Men Teachers, Local 238 v. Bd. of Educ. of City of Minneapolis,
238 Minn. 154 (1952) ..... passim
Minnesota Chamber of Commerce v. City of Minneapolis,
944 N.W.2d 441 (Minn. 2020) 19
Montgomery v. Minneapolis Fire Dep't Relief Ass'n,
218 Minn. 27 (1944) 25, 29
Ninetieth Minnesota State Senate v. Dayton,
903 N.W.2d 609 (Minn. 2017) 50
No Power Line, Inc. (NPL) v. Minnesota Environmental Quality Council,
311 Minn. 330 (1976) 22
Reed v. Bjornson,
191 Minn. 254 (1934) 28
Rice Lake Contract. Corp. v. Rust Env't and Infra.,
549 N.W.2d 96 (Minn. Ct. App. 1996) 29
Rochester City Lines, Co. v. City of Rochester,
868 N.W.2d 655 (Minn. 2015) 20
Rust Env't and,
Infra., 549 N.W.2d 96 (Minn. Ct. App. 1996) 29
Sheehy Lee v. Kalis,
19 N.W.3d 186 (Minn. 2025) 38
Simon v. Demuth,
17 N.W.3d 753 (Minn. 2025) 53
State Bd. of Med. Examiners v. Olson,
295 Minn. 379, 206 N.W.2d 12 (1973) 29
State by Cooper v. French,
460 N.W.2d 2 (Minn. 1990) 19

State by Humphrey v. Philip Morris Inc.,
551 N.W.2d 490 (Minn. 1996) 16, 21, 22
State ex rel. Smith v. Haveland,
223 Minn. 89 (1946) ..... passim
State Farm Mut. Auto. Ins. Co. v. Skluzacek,
208 Minn. 443 (1940) 26
State v. Joseph,
622 N.W.2d 358 (Minn. Ct. App. 2001) 37
State v. Labo's Direct Serv.,
232 Minn. 175 (1950) 2, 41, 45, 52
State v. Loveless,
987 N.W.2d 224 (Minn. 2023) 46
Vrieze v. New Century Homes, Inc.,
542 N.W.2d 62 (Minn. Ct. App. 1996) 35, 36
Wandersee v. Brellenthin Chev. Co.,
258 Minn. 19 (1960) 38
Weavewood, Inc. v. S & P Home Investment, LLC,
821 N.W.2d 576 (Minn. 2012) 36, 37, 38
Weavewood, Inc. v. S & P Home Invs., LLC,
No. A10-1762, 2013 WL 599125 (Minn. Ct. App. Feb. 19, 2013) 39, 40
Wilson v. Kelley,
224 Conn. 110, 617 A.2d 433 (1992) 37

Statutes

Minn. Const. art. III. § 1 48
Minn. Const. art. XIII, § 1 ..... 50, 52
Minn. Stat. § 326B.082 51
Minn. Stat. § 326B.121 Subd. 2(c) 46
Minn. Stat. § 326B.121, Subd. 2(g) 46
Minn. Stat. § 326B.145 10
Minn. Stat. § 462.353, Subd. 4(a) 6
Minn. Stat. § 555.01 25
Minn. Stat. § 555.02 ..... passim
Minn. Stat. § 555.05 25
Minn. Stat. § 555.11 26
Minn. Stat. §§ 580.28 and 582.25 ..... 39, 40

Regulations

Minn. R. 1300.0160 ..... passim

Other Authorities

Borchard, *The Uniform Declaratory Judgments Act*, 18 Minn. L. Rev. 239 (1934) 27, 40
1 Walter H. Anderson, *Actions for Declaratory Judgments* (2d ed. 1951) 27
Borchard Declaratory Judgments (2d ed. 1941) 27, 28

STATEMENT OF ISSUES

I. **Issue**: Whether Housing First may use the Minnesota Declaratory Judgments Act (the "Act") to challenge the validity of the Cities' building permit fee ordinances.

The court of appeals: Concluded that "a party seeking a declaratory judgment must present an independent, underlying cause of action based on a common-law or statutory right." The court of appeals ruled that the Act could not be used to challenge the Cities' building permit fee ordinances without an additional, independent cause of action, and that there is no common law right to challenge the ordinances.

Apposite Authority

Minnesota Statute § 555.02

Barron v. City of Minneapolis, 212 Minn. 566 (1942)

Crescent Oil Co. of Minnesota v. City of Minneapolis, 177 Minn. 539 (1929)

McCaughtry v. City of Red Wing, 808 N.W.2d 331 (2011)

Minneapolis Fed'n of Men Teachers, Local 238 v. Bd. of Educ. of City of Minneapolis, 238 Minn. 154 (1952)

II. **Issue**: Whether Housing First's claims challenging the Cities' building permit fee ordinances as contrary to state law are barred by the separation of powers or political question doctrine.

The court of appeals: Did not address these questions, upholding the district court's grant of summary judgment on other grounds.

Apposite Authority

Minn. R. 1300.0160

Country Joe, Inc. v. City of Eagan, 560 N.W.2d 681 (Minn. 1997)

Cruz-Guzman v. State, 916 N.W.2d 1 (Minn. 2018)

In re McConaughy, 106 Minn. 392 (Minn. 1909)

State v. Labo's Direct Serv., 232 Minn. 175 (1950)

STATEMENT OF THE CASE

These cases concern the building permit fees charged by the Cities of Corcoran and Dayton. Housing First's declaratory judgment claim alleges that the Cities have failed to comply with Minn. R. 1300.0160 Subp. 2 and have imposed building permit fees in excess of their authority under Minnesota law. Minnesota Rule 1300.0160 Subp. 2 requires that: "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*." (Emphasis added). As interpreted by the Department of Labor & Industry ("DLI") Code Adoption Guide, building permit fees are a "'fee for service,' and as such, they must be commensurate with the services being provided." Housing First presented unrebutted evidence that the Cities have improperly and illegally used building permit fees as profit generating centers to shore up general city finances and fund infrastructure projects unrelated to state building code enforcement.

On March 25, 2024, the Minnesota Court of Appeals ruled that Appellant Housing First "has standing to seek declaratory and injunctive relief" in these cases. The Court "reverse[d] the district court's determination that Housing First lacks standing to assert claims for declaratory and injunctive relief[.]" These matters were then remanded to the district court.

On remand, the parties again moved for summary judgment.[1] The Cities again relied entirely on various technical defenses. With the standing issue decided in favor of Housing First, the Cities' remaining technical defenses were that: (1) the Court may not consider the legality of the building permit fee ordinances under the Minnesota Declaratory Judgments Act (the "Act"); (2) the Court may not adjudicate this case under the separation of powers doctrine; (3) these cases present a non-justiciable political question; and (4) that these actions are precluded by the "filed-rate doctrine."

After supplemental briefing and oral argument, the district court accepted the Cities' arguments that Housing First lacked a cause of action under the Act. Further, the district court ruled that Housing First's claims were not justiciable under the separation of powers and political question doctrines. The district court did not address the Cities' arguments under the filed-rate doctrine or address the merits of Housing First's claims. The district court dismissed the remaining claims with prejudice and entered judgment. In a ruling filed on April 13, 2026, the Minnesota Court of Appeals affirmed, holding that Housing First could not use the Act to challenge the Cities' building permit fee ordinances.

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[1] The Honorable Francis Magill of the Hennepin County District Court rotated out of the civil division and the Honorable Michelle Hatcher became the presiding judge in these cases.

The Court granted Housing First's petition raising the following two issues:

1. Whether Housing First may use the Minnesota Declaratory Judgments Act (the "Act") to challenge the validity of the Cities' building permit fee ordinances; and

2. Whether Housing First's claims challenging the Cities' building permit fee ordinances as contrary to state law are barred by the separation of powers or political question doctrine.

STATEMENT OF FACTS

A. Membership and Purpose of Housing First.

Housing First is a trade association representing the interest of more than 900 businesses throughout the State of Minnesota that are engaged in the development, construction and remodeling of homes and supplying materials and services to the housing industry. ADD115 (Verified Complaint ("*Dayton V. Compl.*")) ¶ 7; *Dayton* Doc. Index 56 ("*3/10/2023 Dayton Swenson Decl.*") Ex. 8 (Transcript of Nicholas Erickson Deposition Testimony on behalf of Appellant Housing First ("*Erickson Dep. Tr.*")) p. 27:24-28:2; ADD101 (Verified Complaint ("*Corcoran V. Compl.*") ¶ 7.[2] Among Housing First's organizational mission and purpose is, through advocacy, to oppose unlawful municipal regulations and fees which adversely impact the housing industry,

[2] All citations to the docket in the *Dayton* litigation, Ct. File No. 27-CV-21-9070, will appear as follows: "*Dayton* Doc. Index __." All citations to the docket in the Corcoran litigation, Ct. File No. 27-CV-21-9069, will appear as follows: "*Corcoran* Doc. Index __."

including the Cities' building permit fees at issue, which increase the cost of housing and thereby reduce housing affordability. *Dayton V. Compl.* ¶ 8; *Corcoran V. Compl.* ¶ 8.

Housing First members currently have, previously have had, and will in the future have, numerous developments and homebuilding activities in the Cities subject to the Cities' development fees, including the building permit fees at issue in this case. *Dayton V. Compl.* ¶ 10; *Corcoran V. Compl.* ¶ 10. To illustrate that the overwhelming amount of homebuilding activity in the Cities is carried out by its members, Housing First presented evidence that in calendar year 2020, its members pulled 99.12% of the permits in the City of Dayton. *Dayton* Doc. Index 111 (3/31/2023 Declaration of Nick Erickson) ¶ 5. For Corcoran, in 2021, Housing First's members pulled 97% of the permits in the City. *Corcoran* Doc. Index 76 ¶ 5. Housing First's members constructed nearly all homes recently built in the Cities.

B. State 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." (Emphasis added.) DLI has an administrative rule imposing similar requirements on building permit fees. 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." Minn. R. 1300.0160 Subp. 2 (emphasis added).

DLI has expounded on this rule in its Code Adoption Guide, providing:

> 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.

See Dayton Doc. Index 50 Ex. 36 p. 11.

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. . . . 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.

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.

Id. p. 17 (emphasis added).

C. At All Relevant Times, the Cities Have Used Third-Party Consultants to Administer Building Permits.

The Cities have 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. *See Dayton* Doc. Index 47

("*3/10/2023 Dayton Huntington Decl.*") Ex. 1 (hereafter, "*Dayton Baker Tilly Report*") p. 8; *Corcoran* Doc. Index 44 ("*3/10/2023 Corcoran Huntington Decl.*") Ex. 1 (hereafter, "*Martens Depo. Tr.*") p. 43:12–21. For Dayton, Metro West bills an hourly rate for the time of its inspection professionals. For Corcoran, Metro West receives a fixed thirty-five percent (35%) of the permit and plan check fees, as well as various hourly fees based upon work performed. *3/10/2023 Corcoran Huntington Decl.* Ex. 2, p. 2-2.

The Cities contracted with an engineering firm, Stantec (previously known as Wenck) to perform plan review on an hourly basis. *See 3/10/2023 Dayton Huntington Decl.* Ex. 3 (hereafter, "*Stantec letter to Goodroad*"); *see also 3/10/2023 Corcoran Huntington Decl.* Ex. 4 (hereafter, "*Wenck letter to Martens*") pp. 1–2. The Cities are only responsible for services actually provided. *See Stantec letter to Goodroad* p. 5 ("Only time actually spent on services rendered will be charged.").

D. Documented Overcollection of Building Permit Fees.

1. *The City of Dayton.*

Between 2015 and 2022, all building permit revenues and plan check revenues went into Dayton's General Fund. *See 3/10/2023 Dayton Huntington Decl.* Ex. 7 (hereafter, "*Goodroad Depo. Tr. excerpts*") pp. 12:24–13:3. The General Fund is used for "staffing costs, operational costs, those kinds of things

. . . the general operations of the city." *Id.* p. 13:10-12. "It's not a specialized fund." *Id.* p. 13:12-13.

In late 2016, Dayton adopted an "Interfund Loan Policy" that allowed the City to use surplus funds from one account—including building permit profits—to finance shortfalls in other funds, i.e., to be a "temporary internal financing mechanism[.]" *3/10/2023 Dayton Huntington Decl.* Ex. 9 (Interfund Loan Policy).

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. During the four-year period between 2018 and 2021, Dayton reported excess building permit revenue of approximately $3 million.[3] *See* ADD146; *3/10/2023 Dayton Huntington Decl.* Exs. 12–15. During this time, the City used $919,996 of excess building permit revenue to balance its budget when other funds were underperforming. ADD147; *compare 3/10/2023 Dayton Huntington Decl.* Exs. 12–15 *with 3/10/2023 Dayton Huntington Decl.* Exs. 52–56.

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[3] In the proceeding below, Appellant offered a detail table that identified reported revenues, expenditures, excess revenues, the amount the City's General Fund actual revenues exceeded actual expenditures, Fund 409 transfers, and the amount of building permit revenues used to subsidize losses in other City funds. *See* ADD146–147. The table understates the sum of building permit profits Dayton reported for years 2018–2021. The total of excess revenue reported for those years was $3,020,907, not $2,889,633, as was stated in the chart.

Also, between 2018 and 2021, Dayton transferred some $2.7 million—the vast majority of which was excess building permit revenue—into a fund known as "Fund 409." *See* ADD147; *see also 3/10/2023 Dayton Huntington Decl.* Ex. 10 (hereafter, "*Doud Depo. Tr. excerpts*") pp. 72:13–73:2. Fund 409 is the City's temporary financing fund. *See 3/10/2023 Dayton Huntington Decl.* Ex. 11 (Long Term Plan dated December 13, 2016) p. 7.

In years 2018, 2019, and 2020, Dayton 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. *Compare 3/10/2023 Dayton Huntington Decl.* Ex. 21 (claiming $569,297.50 in out-of-pocket expenditures to Metro West and Wenck for this three-year period) *with* ADD146 (claiming total inspection-related expenses of $2,292,654 for this same three-year period).

Dayton's valuation-based building permit fee schedule remains the same today as it was in 2021.[4] Dayton's current 65% plan review fee is the same plan review fee as was in place before 2021. *See Doud Depo. Tr. excerpts* p. 84:5–10.

[4] *Compare* Doc. Index 115 (*3/31/2023 Dayton Swenson Decl.*) Ex. 26, Ex. G to Additional Statement (Dayton 2021 fee schedule) § 10 *with* https://www.daytonmn.gov/Documents/I%20Want%20To/View/2026%20Fee%20Schedule.pdf ("*Dayton 2026 fee schedule*") § 10.

2. *The City of Corcoran.*

Similarly, the City of Corcoran had substantial building permit excess revenues and used those building permit revenues to balance its budget and fund special City projects. *See* ADD143–144. Corcoran has also deposited building permit fees directly into its General Fund. *Martens Depo. Tr.* p. 17:15–20.

Between 2018 and 2021, Corcoran had excess building permit revenue of nearly $2.5 million and exceeded the budgeted building permit fee revenues by nearly $2.2 million. ADD143; *3/10/2023 Corcoran Huntington Decl.* Exs. 25–36.[5] If not for excess building permit fees collected by Corcoran, the General Fund would not have enjoyed a surplus for that period but would have instead suffered a deficit.[6] Building permit excess revenues accounted for 85% of the City's total excess revenues over budget during this period. ADD144. Of the City's budget surplus, $707,000 was diverted into Fund 400, also known as the "City Hall Remodel fund." *Id.*; *3/10/2023 Corcoran Huntington Decl.* Ex. 10

[5] The amount of excess building permit revenue that Corcoran reported to DLI was roughly $800,000 less than the excess the City actually received during that period, as is demonstrated by comparing the City's DLI reports with the City's annual financial reports.

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

p. 58, Ex. 11 p. 58.[7] The remaining funds were commingled in the General Fund with other revenues collected by Corcoran and used for whatever purpose the City saw fit. *See* ADD143–144; *Martens Depo. Tr.* p. 17:15–20.

Despite the consistent, year-after-year building permit fee excesses, at no time until 2023 (long after this litigation was in place) did Corcoran amend its valuation-based charges for building permit fees. *Beise Depo. Tr.* pp. 25:16–24, 55:9–23. Corcoran did not modify its plan review fee. Even after the amendment, Corcoran would still profit (fees exceeding costs) over $2,000.00 on a $400,000.00 home. Corcoran has had the same valuation-based fee schedule since 2023.[8]

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[7] Between 2018 and late summer/early fall 2019, Corcoran intended to fund a $1+ million city hall remodel primarily using building permit excess revenues. *See, e.g., 3/10/2023 Corcoran Huntington Decl.* Exs. 13–18. Corcoran abruptly changed course when Housing First issued a public report detailing the City's plan. *See, e.g., 3/10/2023 Corcoran Huntington Decl.* Exs. 19–21. A comprehensive account of the City's plan to use building permit funds to pay for the City hall remodel is included in Housing First's March 10, 2023 summary judgment memorandum in the *Corcoran* matter, Doc. Index 43, pp. 8–14.

[8] *Compare* https://cdnsm5-hosted.civiclive.com/UserFiles/Servers/Server_15543680/File/2023%20Building%20Permit%20Fee%20Schedule%20Final.pdf (Corcoran 2023 fee schedule) *with* https://www.corcoranmn.gov/government/fees_and_financials.php#doc_center_0_panel_0 (Corcoran 2026 fee schedule).

E. The Cities Have Reported Zoning Expenses and General City Overhead as Building Permit Expenses.

1. *The Abdo "indirect cost" methodology.*

Both Cities have used an "indirect cost methodology" to prepare their DLI reports. *See, e.g., 3/10/2023 Corcoran Huntington Decl.* Exs. 24–25; *3/10/2023 Dayton Huntington Decl.*") Ex. 30 p. 4.[9] The indirect cost methodology is not a fee for service method. *See Holthaus Depo. Tr.* p. 48:7-21; *see also OMB Circular* p. 5. Under an indirect cost method, costs relating to items such as elections, assessing, legal, and emergency management may be attributed to the Cities' building departments. *3/10/2023 Dayton Huntington Decl.* Ex. 30 p. 5.

2. *The Corcoran and Dayton Baker Tilly studies.*

The City of Corcoran hired the Baker Tilly firm to study its building permit fee activity for 2021. *See Corcoran* Doc. Index 55 Ex. 6. Baker Tilly concluded that: "For projects valued between $100,000 and $500,000 (the bulk of the City's new home construction), the average permit fees were approximately $2,300 more than calculated costs." *Id.* p. 7. "This difference grew to over $3,850 for new homes over $500,000 in valuation." *Id.*

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[9] The source of the indirect cost methodology and Abdo's use thereof was discussed on pages 14–18 of Housing First's opening summary judgment memorandum in the *Corcoran* case (Doc. Index 43) and pages 18–22 of Housing First's opening summary judgment memorandum in the *Dayton* case (Doc. Index 44).

The City of Dayton likewise retained Baker Tilly to study its building permit fees. Baker Tilly concluded that the Dayton was profiting approximately $1,500 for each detached single-family home building permit. *Dayton Baker Tilly Report* p. 38.

F. The Expert Report of Dr. Elliot Eisenberg, Ph. D.

In the district court, Housing First produced an expert report prepared by economist Dr. Elliot Eisenberg, Ph. D. *3/10/2023 Corcoran Huntington Decl.* Ex. 31 ("*Eisenberg Report*"); *3/10/2023 Dayton Huntington Decl.* Ex. 35. Eisenberg discussed the causal relationship between higher home prices and declining consumer demand. Eisenberg discussed data showing that a $1,000 increase in the cost of a home may have a significant impact on the number of new homes purchased. *See Eisenberg Report* p. 7. 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." *Eisenberg Report* p. 10.

G. Procedural Posture.

1. *The district court dismissed the declaratory judgment claim on standing grounds and the court of appeals reversed.*

Housing First's Verified Complaints allege four legal Counts: Count One: Declaratory Judgment (Permit Fee Schedule Invalid); Count Two: Declaratory Judgment (Violation of Due Process); Count Three: Declaratory Judgment (Violation of Takings Clause); and Count IV (Injunctive Relief). *Corcoran V. Compl.*; *Dayton V. Compl.* Housing First and the Cities moved for summary judgment on all claims. The Cities briefed a variety of technical defenses, including the separation of powers and political question defenses at issue in this appeal. *See Corcoran* Doc. Index 9 pp. 9–10; *Dayton* Doc. Index 11 pp. 11–12. The Cities' principal argument was that Housing First lacked standing because its members passed through building permit fees to homebuyers, also known as the "pass through" defense. The Cities made no defense on the merits of the claim they have been overcharging in violation of the law.

The district court dismissed the declaratory judgment and injunctive relief claims based upon its application of the pass through defense. ADD88–92, 94–95. Housing First appealed and argued that this Court had rejected the pass through defense in *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490 (Minn. 1996) (hereafter, "*The Tobacco Case*"). The court of appeals observed that: "[T]he cities have not been able to identify a single case in which

the pass-through defense has been applied and upheld by the courts of our state." ADD57–58.

The court of appeals determined that Housing First had standing, citing to three facts: (1) "members of Housing First were the ones who directly paid the fees to the cities"; (2) "Housing First provided evidence that its members are responsible for an overwhelming majority of the building permits issued by the cities for the construction of new, single-family homes in recent years"; and (3) "the members are required to obtain building permits and continue paying the fees if they desire to keep building in the cities." ADD58. The court of appeals concluded that "Housing First's members have a sufficient economic stake in challenging the allegedly excessive fee schedule to satisfy the requirements of the standing doctrine." *Id.* The court of appeals reversed dismissal of the declaratory judgment and injunctive relief claims and remanded those claims. ADD65.

The court of appeals affirmed the district court's dismissal of the procedural due process and takings claims. ADD59–63. When Housing First sought further review of dismissal of the takings claim, this Court and the

United States Supreme Court denied review. *See, e.g.,* 145 S.Ct. 381 (2024).[10] The Cities did not appeal the standing determination of the court of appeals.

2. *On remand, the district court dismissed the declaratory judgment claim for lack of a cause of action and the court of appeals affirmed.*

The district court filed its order granting summary judgment to the Cities on June 23, 2025. *See* ADD24, 37.[11] The district court held that "[t]he Declaratory Judgments Act does not establish an independent claim for Housing First to assert and without an independent cause of action its claim must fail." ADD32. The district court also found that Housing First's claims presented separation of powers and political question problems: "This court declines to usurp the powers of the Department of Labor and Industry where there is a nonjusticiable political question." ADD36. The district court therefore dismissed Housing First's remaining claims with prejudice.

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[10] While that appeal process was ongoing, Housing First requested that the district court proceed with adjudication of the declaratory judgment and injunctive relief claims. The Cities, however, argued that until the appeals process concluded district court proceedings were "premature". The district court effectively paused proceedings between the Court's ruling in March 2024 and January 2025. *See, e.g., Dayton* Doc. Index 139, 140, 146.

[11] The parties filed a stipulation on January 27, 2025 that was approved by order dated February 7, 2025. *See, e.g., Dayton* Doc. Index 146 and 148. The stipulation observed that the district court had requested additional briefing. The parties stipulated that: "No brief shall raise any new issues, claims, or defenses." *1/27/2025 Stipulation* ¶ 6. Further, the parties stipulated that the "parties' prior briefing and all filings related thereto remain part of the summary-judgment record for purposes of appeal." *Id.* ¶ 7.

The court of appeals affirmed, holding that Housing First could not use the Act to challenge the Cities' building permit fee ordinances. *See* ADD 1–23. The court of appeals did not address the district court's justiciability conclusions.

ARGUMENT

I. STANDARD OF REVIEW.

When reviewing the grant of summary judgment, this Court applies the following standard of review:

> On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the lower courts erred in their application of the law.

State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). The Court reviews questions of law *de novo*. *Minnesota Chamber of Commerce v. City of Minneapolis*, 944 N.W.2d 441, 446-447 (Minn. 2020); *see also City of Morris v. Sax Investments, Inc.*, 749 N.W.2d 1, 5 (Minn. 2008) ("The application of statutes, administrative regulations, and local ordinances to undisputed facts is a legal conclusion and is reviewed de novo"). Whether a statute creates a cause of action is reviewed *de novo*. *See, e.g., Barron v. City of Minneapolis*, 212 Minn. 566, 568–569 (Minn. 1942). Whether a case presents a justiciable controversy is a question of law reviewed *de novo*. *Cruz-Guzman v. State*, 916 N.W.2d 1, 7 (Minn. 2018). The Court must view the evidence in the light most

favorable to Housing First, the party against which summary judgment was granted. *See Rochester City Lines, Co. v. City of Rochester*, 868 N.W.2d 655, 661 (Minn. 2015).

II. THE COURT OF APPEALS CORRECTLY RULED THAT HOUSING FIRST HAS STANDING.

The Court's Order granting review directed that: "The parties are directed to address the issue of Housing First Minnesota's standing in their briefs." Standing must be maintained at each stage of the proceeding and is reviewed by this Court *de novo*. *Glaze v. State*, 909 N.W.2d 322, 325 (Minn. 2018). Housing First's standing was the crux of the first appeal to the court of appeals. The court of appeals correctly concluded that Housing First has standing. The Cities could have appealed that adverse determination to this Court, but did not. There has been no change in the law or the facts that warrant a different conclusion from this Court.

The record amply sustains Housing First's associational standing in this case. As found by the court of appeals, Housing First's members are the ones who pay the City's fees. ADD58. Housing First's members "are responsible for an overwhelming majority of the building permits issued by the cities for the construction of new, single-family homes in recent years[.]" *Id.* To build in the Cities, Housing First's members must obtain the permits. *Id.*

Moreover, the only question that the Cities raised to Housing First's standing was the pass through defense, which this Court observed in *The Tobacco Case* 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." 551 N.W.2d at 496. The Court further remarked: "That the pass through defense is untenable appears equally evident outside of the context of antitrust and laws relating to regulated industry." *Id.* at 497. The Court cited and discussed *Adams v. Mills*, where the United States Supreme Court ruled in a tort case that "'neither the fact of subsequent reimbursement nor the disposition which may hereafter be made of the damages recovered, is of any concern to the wrongdoers.'" *Id.* at 497 (internal ellipses omitted) (quoting 286 U.S. 397 (1932)).

The court in *The Tobacco Case* did not reject the pass through defense only for the statutory claims. The court rejected the pass through defense for the equitable claims as well: "We also find that Blue Cross has standing to seek the equitable relief pled in its complaint in the form of claims of performance of another's duty to the public and unjust enrichment." *The Tobacco Case,* 551 N.W.2d at 497. The Court relied upon associational standing principles. *See id.*

at 498. Standing requirements are relaxed where the remedy sought is equitable relief. *Id.*[12]

Housing First has standing here for the same reason Blue Cross had standing in *The Tobacco Case*. "[A]n organization may sue to redress injuries to itself or injuries to its members." *The Tobacco Case,* 551 N.W.2d at 498; *see also No Power Line, Inc. (NPL) v. Minnesota Environmental Quality Council*, 311 Minn. 330, 334 (1976). Housing First presented expert evidence of the economic injury caused by excessive permit fees, including the report of Dr. Elliot Eisenberg. *See* ADD130–141. Dr. Eisenberg discussed evidence that a $1,000 increase in the average cost of a home will impact consumer behavior. ADD136. Builders such as Housing First's members are "[m]ost immediately impacted" by higher prices because they "will necessarily build fewer homes." ADD139. "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." *Id.* Housing First has associational standing in this matter.

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[12] The only claim in *The Tobacco Case* that the Court did not sustain was a tort claim. That claim was dismissed because the tobacco companies owed Blue Cross no legal duty. *Id.* at 495 ("While, as Blue Cross notes, duty arising from the same facts may in some instances be owed to more than one entity, here the injury to Blue Cross appears to derive from injuries to its consumers, the smokers.").

III. HOUSING FIRST MAY USE THE DECLARATORY JUDGMENTS ACT TO CHALLENGE THE VALIDITY OF THE CITIES' BUILDING PERMIT FEE ORDINANCES.

The Court has repeatedly held, over the course of nearly one hundred years, that the only thing necessary to bring a claim under the Declaratory Judgments Act is a justiciable controversy. This section analyzes the Court's precedents, the relevant text of the Act, and persuasive authorities construing the Act. Below, Section IV of the Argument addresses the analysis of the court of appeals and explains why the court of appeals erred when it concluded that a court may not reach the merits of a claim under the Act unless the claimant has an additional cause of action separate and apart from the Act.

A. Even Before Passage of the Act, Minnesota Law Recognized a Cause of Action to Challenge a Municipal Fee as an Unlawful Revenue Raising Device.

The Act was approved by the Minnesota legislature in 1933.[13] Before the Act became law, the Minnesota Supreme Court decided *Crescent Oil Co. of Minnesota v. City of Minneapolis*, 177 Minn. 539 (1929). *Crescent Oil* had first come before this Court in 1928, when the Court affirmed the district court's denial of a temporary injunction. *See generally* 175 Minn. 276. In the 1928 opinion, the court framed the second question at bar as "[w]hether the ordinance is valid as a proper regulation in the exercise of the police power or

[13] *See https://www.revisor.mn.gov/statutes/2007/cite/555.02.*

in effect imposes a tax and is therefore invalid." 175 Minn. at 277. The plaintiff's claim was that the city's gasoline filling station license fee was a "disguised tax." *Id.* at 278. The court did not reach the issue in the 1928 opinion, remarking that "whether the imposition is a license or a tax is better determined upon a hearing in the regular course of legal procedure than upon affidavits upon an application for a temporary injunction." 175 Minn. at 279.

The district court agreed with Crescent Oil Company on the merits that the city's fee was illegal and entered judgment in favor of the plaintiff. 177 Minn. at 540. On appeal, the Court observed that "[t]he power to license is not . . . a power to tax. A reasonable license fee is not a tax; an unreasonable one is. To be unreasonable . . . it need not necessarily be confiscatory." *Id.* at 542. The Court ruled that the city could not attempt to justify the fee based upon municipal policing expenditures that were general in nature and properly paid for by general tax revenues. *Id.* at 541–542. The Court agreed that the license fees imposed by the City of Minneapolis were "manifestly unreasonable and excessive, and that the ordinance is invalid." *Id.* at 543.

Thus, even before the Act became law in Minnesota, Minnesota already recognized a common law action to challenge a municipal fee as an unlawful revenue raising device. Housing First invoked this common law when it alleged that the Cities "intentionally and knowingly collected millions of dollars in excess building permit fee revenue in violation of Minnesota law and

regulation, including, but not limited to, Minn. R. 1300.0160." *See Dayton V. Compl.* ¶ 52; *see also Corcoran V. Compl.* ¶ 36. Below, the court of appeals denied that *Crescent Oil* recognized a cause of action to challenge a municipal fee, but provided no alternative explanation for the Court's holding in that decision.

B. The Act Explicitly Creates a Cause of Action to Challenge a Municipal Ordinance.

Under the Act, courts have the "power to declare rights, status, and other legal relations whether or not further relief is *or could be* claimed." Minn. Stat. § 555.01 (emphasis added). "The court is not limited or restricted in the exercise of the broad general powers conferred by § 555.01, since it is provided by § 555.05 that, 'in any proceeding where declaratory relief is sought, in which judgment or decree will terminate the controversy or remove an uncertainty,' the court's authority comes into play." *Montgomery v. Minneapolis Fire Dep't Relief Ass'n*, 218 Minn. 27, 30 (1944).

"No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for." *Id.* The Act is remedial legislation that is intended to afford relief from uncertainty. Minn. Stat. § 555.01 ("This chapter is declared to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered.").

The Act reads:

> Any person . . . whose rights, status or other legal relations are affected by a . . . municipal ordinance . . . may have determined any question of construction or validity arising under the . . . ordinance . . . and obtain a declaration of rights, status, or other legal relations thereunder.

Minn. Stat. § 555.02.

Minn. Stat. § 555.11 requires that where a challenge to an ordinance is brought under the Act, the municipality "shall be made a party." By its plain terms, the Act expressly and unambiguously creates a cause of action to challenge the validity of a municipal ordinance.

The Court has recognized that the Act is "broad and comprehensive in its terms." *Barron*, 212 Minn. at 568. The "broad and flexible reach accorded the declaratory remedy is such that it has become, in many ways, 'an all-purpose writ.'" *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416, 419 n. 5 (Minn. 1981).

The Court has repeatedly referenced the writings of Edwin Borchard, a co-draftsman of the Act, as being authoritative on the meaning and significance of the Act. *See Minneapolis Fed'n of Men Teachers, Local 238 v. Bd. of Educ. of City of Minneapolis*, 238 Minn. 154, 160 n. 1 (1952); *State Farm Mut. Auto. Ins. Co. v. Skluzacek*, 208 Minn. 443, 447 (1940). In his 1934 law review article titled "*The Uniform Declaratory Judgments Act*," Professor

Borchard wrote that: "There is no legal question which cannot become the subject of a declaration, and section 1 of the act indicates the breadth of its scope." Borchard, *The Uniform Declaratory Judgments Act*, 18 Minn. L. Rev. 239, 249 (1934).[14]

In his 1941 second edition of the book titled "Declaratory Judgments," Borchard wrote as follows:

> The term 'cause of action' has become so involved in description and definition that it may be more helpful to adopt, instead, a different criterion to determine when the petitioner may be given judicial relief. . . . [W]hile it will be necessary to bear in mind the factual conditions of a petition for relief, perhaps attention should be concentrated on the interest that a petitioner has in judicial protection—that is to say, whether his rights have been denied, challenged or jeopardized by person or event in such manner as to justify him in invoking judicial protection for their vindication. If that interest, economic or social in character, can and should be thus protected, we denominate it a 'legal interest.' The expansion of the declaratory action through the years is coincident with and marked by this wider scope and perception of the interest of a petitioner in a declaration of rights (a) in cases where theretofore he had only a drastic coercive remedy and (b) in cases where theretofore he had no remedy at all.

Borchard, Declaratory Judgments (2d ed. 1941) p. 18.[15]

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[14] The article can be accessed here: https://doi.org/10.24926/265535.2133.

[15] *See also* 1 Walter H. Anderson, *Actions for Declaratory Judgments* § 9, at 47 (2d ed. 1951) ("The law seems to be well settled that so long as there is a substantial justiciable controversy present in a declaratory judgment action ***that is all that is required***[.]") (emphasis added).

Borchard noted that "[s]ince the middle of the nineteenth century, the construction of statutes and ordinances has been the subject of declaratory action." *Id.* p. 764. It is a "regular practice" to use this "simple device to attack the constitutionality or validity . . . of a statute or municipal ordinance." *Id.* "The power to exact fees and charges . . . ha[s] . . . been tested by placing in issue by declaratory action the construction or interpretation of a governing statute." *Id.* pp. 797–798. Borchard includes in his chapter of form pleadings for declaratory judgment a form challenging the validity of a municipal ordinance. *See id.* p. 468.

Borchard explains that in the context of an "attack . . . upon a statute, the plaintiff must show not only the existence of the statute, but the fact that he is personally affected by it to an extent warranting judicial relief." *Id.* p. 50. "[A] plaintiff contesting the applicability or validity of restrictive regulations under the police power need do no more than show that they in some way affect him deleteriously." Borchard, Declaratory Judgments (2d ed. 1941) p. 62–63.

C. The Court Has Consistently Ruled That The Prerequisite to Relief Under the Act is a Justiciable Controversy.

Only one year after passage of the Act, the Court, in *Reed v. Bjornson*, determined that the Act "authorizes a proceeding which amounts to a justiciable controversy." *Reed v. Bjornson*, 191 Minn. 254, 256 (1934). For almost one hundred years, the Court has repeated that the jurisdiction of the

courts to grant relief under the Act hinges upon justiciability.[16] The Court has taken up numerous legal questions regarding legal rights and liabilities created by Minnesota law.

In *Montgomery v. Minneapolis Fire Department Relief Association*, the Court decided there was an "important justiciable issue" whether the plaintiff had a right to a pension under state law. 218 Minn. at 31.

In *Hassler v. Engberg*, the Court concluded there was a live controversy "proper for adjudication" where the plaintiff landowner alleged that an order of the state commissioner of insurance and a corresponding state statute unconstitutionally imposed a surcharge on the plaintiff's insurance policy. 233 Minn. 487, 495 (1951).

And in *State Board of Medical Examiners v. Olson*, the Court ruled that there was a justiciable controversy permitting a judicial determination regarding whether the defendant chiropractor was unlawfully engaged in the practice of medicine as defined by Minnesota statute. *See* 295 Minn. 379, 386 (1973).

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[16] The court of appeals had itself previously recognized this principle. *Rice Lake Contract. Corp. v. Rust Env't and Infra.,* 549 N.W.2d 96, 99 (Minn. Ct. App. 1996) ("The only prerequisite for a court's exercise of jurisdiction in declaratory judgment actions is the presence of a 'justiciable controversy.'") (citations omitted).

D. The Court Specifically Affirmed Use of the Act to Challenge Municipal Fees in *Barron*.

In *Barron v. City of Minneapolis*, the plaintiff brought a claim under the Act seeking a judicial determination of the validity of a municipal ordinance. 212 Minn. at 567. Of relevance to the supreme court opinion in *Barron*, the plaintiff alleged that the city licensing fee was in "purpose and effect a revenue measure masquerading under the guise of a fee for the issuance of licenses." *Id.* at 568. After citing what is now Minn. Stat. § 555.02, the court found that the case was "plainly . . . a good . . . use of the act." *Id.* at 569. The court remarked that the Act was "'another established remedy.'" *Id.* Having found that the plaintiff could challenge the fee under the Act, the court then determined that "'it is quite obvious that the amount of the license fee was fixed with reference to revenue purposes, which it was the main object of the ordinance to promote by means of a tax imposed upon the particular employment or pursuit, through the exercise of its power over the subject of granting licenses.'" *Id.* at 570–571 (citation omitted). Accordingly, the court ruled that the ordinance adopting the fee could not be sustained. *Id.* at 571.

Housing First is making the same type of challenge here as the plaintiff in *Barron*. Housing First has consistently asserted that the City's building permit fees were adopted for the purpose of raising revenue in violation of Minnesota law. *See Dayton V. Compl.* ¶¶ 52, 54, 55; *Corcoran V. Compl.* ¶ 36,

38. Housing First asserted in its Verified Complaints that the Cities have "intentionally and knowingly collected millions of dollars in excess building permit fee revenue in violation of Minnesota law and regulation, including, but not limited to, Minn. R. 1300.0160." *See Dayton V. Compl.* ¶ 52; *see also Corcoran V. Compl.* ¶ 36. And indeed, Housing First has asserted that the Cities' building permit fees are in excess of their authority. *Dayton V. Compl.* ¶ 53; *Corcoran V. Compl.* ¶ 47. Housing First's claims here are materially similar to the ordinance challenge in *Barron*.

E. The Court Has Already Rejected the Argument the Lower Courts Accepted Regarding Needing an Additional Cause of Action to Invoke the Act.

Four years after *Barron*, the Minnesota Supreme Court observed in *State ex rel. Smith v. Haveland* that a claimant under the Act:

> [N]eed not necessarily possess a cause of action (as that term is ordinarily used) as a basis for obtaining declaratory relief, nevertheless he must, as a minimum requirement, possess a bona fide legal interest which has been, or with respect to the ripening seeds of a controversy is about to be, affected in a prejudicial manner."

State ex rel. Smith v. Haveland, 223 Minn. 89, 92 (1946). Whether a party has a protectible legal interest hinges upon whether it has faced a "prejudicial

burden" from the challenged conduct at issue. *See id.* at 94.[17] A protectible legal interest would include, for example, where one party denies that it owes money to another party. *See id.* at 93. Personal or financial prejudice may establish a protectible interest. *See id.* Protectible interest is not synonymous with asserting a constitutional challenge. *See id.* at 94 (finding that the plaintiff did not have a protectible interest even though the plaintiff was asserting a constitutional challenge to a statute). Rather, what matters under the Act is whether "a direct personal interest of [the] complainant [is] placed in jeopardy." *Id.*

The Court reaffirmed that no cause of action is necessary to bring a claim under the Act in *Minneapolis Federation of Men Teachers, Local 238 v. Board of Education of City of Minneapolis*. 238 Minn. 154 (1952). The legal issue presented by the plaintiffs in that case was whether the school board had the power to compel tenured teachers to sign a contract. *See id.* at 158–160. The sole claim discussed in that opinion was under the Act. The Court ruled that the Act could properly be used to litigate that legal issue, and ruled on the

[17] The Court in *Haveland* referenced the second edition of Borchard's work on Declaratory Judgments *three* times. *See generally* 223 Minn. 89. The *Haveland* Court states that a claimant need not possess a cause of action, but must have a "legal interest," which is the same phrase that Borchard uses to describe the prerequisite to obtaining relief under the Act. *Compare Haveland*, 223 Minn. at 92 *with* Borchard, Declaratory Judgments (2d ed. 1941) p. 18.

merits in favor of the school board. The Court specifically rejected the school board's "erroneous theory that in order to have a justiciable controversy the complaint must necessarily state a [l]egal cause of action in the same sense as that term is ordinarily used in actions falling outside the uniform declaratory judgments act." 238 Minn. at 157. Instead, "[c]learly, in order to constitute a justiciable controversy, there need **not** be such an actual right of action in one party against the other as would justify a granting of consequential relief but only a right on the part of the complainant to be relieved of an uncertainty and insecurity arising out of an actual controversy with respect to his rights, status, and other legal relations with an adversary party." *Id.* (emphasis added).

F. The Minnesota Supreme Court Affirmed in *McCaughtry* That The Act is Properly Used to Test The Validity of a Municipal Ordinance Regardless of Whether Another Remedy Exists.

In *McCaughtry v. City of Red Wing*, landlords and tenants challenged a rental inspection ordinance under the Act. 808 N.W.2d 331, 333 (Minn. 2011). The district court dismissed the plaintiffs' claims for lack of standing and the court of appeals affirmed. *Id.* The supreme court observed that: "The Declaratory Judgments Act specifically provides for challenges to the validity of a municipal ordinance that 'affect[s]' the rights of a person." *Id.* at 337. After quoting Minn. Stat. § 555.02, the supreme court said, "[a]ccordingly, we have long held that a declaratory judgment action is proper to test the validity of a

municipal ordinance, regardless of whether another remedy exists." *Id.* (emphasis added) (citing *Barron*, among other authorities). The court then approvingly quoted the language from *Haveland* stating that a "complainant need not necessarily possess a cause of action . . . as a basis for obtaining declaratory relief[.]" *Id.* (quoting *Haveland*, 223 Minn. at 92).

The *McCaughtry* court then considered whether the plaintiffs had standing, which the court spoke of as being interchangeable with having a legally cognizable interest. *See id.* at 338. The supreme court found that the plaintiffs were subject to the challenged ordinance and that the city had used the ordinance to inspect the plaintiffs' properties. *McCaughtry*, 808 N.W.2d at 338. These facts gave the appellants "'legally cognizable interests' that are 'distinguished from the general public.'" *Id.* (citations omitted). The court went on to consider ripeness, and ultimately determined that there was a justiciable controversy under the Act. *Id.* at 338–339. Having found a justiciable controversy, the court remanded to the court of appeals for a determination on the merits. *Id.* at 341.

IV. THE LOWER COURTS ERRED IN HOLDING HOUSING FIRST MAY NOT CHALLENGE THE CITIES' BUILDING PERMIT FEES UNDER THE ACT.

A. The Lower Courts Erred by Relying On The Decisions in *Alliance* and *Weavewood*.

The fundamental error of the court of appeals is its conclusion that, in the context of the Act, something more than a justiciable controversy is necessary. *See* ADD12. The court of appeals relied heavily upon its own precedent in *Alliance for Metropolitan Stability v. Metropolitan Council*, which concluded that: "A party seeking a declaratory judgment must have an independent, underlying cause of action based on a common-law or statutory right." 671 N.W.2d 905, 916 (Minn. Ct. App. 2003). For this proposition, *Alliance* cited no Minnesota Supreme Court precedent. Rather, *Alliance* cited two decisions, *Brown v. State*, 617 N.W.2d 421 (Minn. Ct. App. 2000) and *Vrieze v. New Century Homes, Inc.*, 542 N.W.2d 62 (Minn. Ct. App. 1996). *Brown* in relevant part quotes *Vrieze* for the proposition "some recovery theory must underlie a declaratory judgment demand." *Brown*, 617 N.W.2d at 425 (internal brackets omitted) (quoting *Vrieze*, 542 N.W.2d at 67).

Vrieze cites no authority for the proposition quoted above. *Vrieze* was not about whether something beyond a justiciable controversy is necessary to bring suit under the Act. The plaintiffs in *Vrieze* claimed that the City of Plymouth was obliged to enforce conditions contained in a grading plan the city originally

imposed as a condition of granting a building permit. *See Vrieze*, 542 N.W.2d at 64. The court in *Vrieze* stated the issue it was considering: "Is the City of Plymouth entitled to discretionary immunity from appellants' action alleging that the city negligently failed to enforce its issued building permit and approved grading plan?" *Vrieze*, 542 N.W.2d at 64. The court of appeals ruled that because discretionary immunity barred a tort claim, the plaintiffs could not use the Act to compel a contrary result. *See id.* at 67 ("If the city cannot be liable to appellants in tort, it cannot be forced either to pay appellants' damages or to take action to correct the 'negligence' appellants allege."). *Vrieze* did not decide the question at issue here. *Vrieze* did not discuss, much less grapple with or attempt to distinguish, any of the Minnesota Supreme Court decisions applying the Act discussed herein. The statement in *Alliance* regarding needing an independent, underlying cause of action rests upon a rickety foundation.

The courts below also relied upon this Court's decision in *Weavewood, Inc. v. S & P Home Investment, LLC*, 821 N.W.2d 576 (Minn. 2012). There, the plaintiff, Weavewood, Inc. had asserted claims for slander of title, fraud, conversion, breach of contract and unjust enrichment. 821 N.W.2d at 578. The court of appeals ruled that all of these claims, insofar as they sought money damages, were barred by the statute of limitations. *See id.* Yet the court of appeals construed the plaintiff's complaint as seeking declaratory relief with

respect to these same claims, and also requesting a declaration regarding the defendant's alleged violation of certain statutes. *See id.*; *see also* 2011 WL 4345904, at **5–6. The court of appeals had held, consistent with its own precedent in *State v. Joseph*, 622 N.W.2d 358 (Minn. Ct. App. 2001), that statutes of limitations did not apply to actions for declaratory judgment. Nos. A10-1762, A10-2113, A10-2221, 2011 WL 4345904, at *5 (Minn. Ct. App. Sept. 19, 2011). The *Weavewood* Court granted review of a single "narrow" issue: "whether statutes of limitations apply to actions for declaratory judgment." 821 N.W.2d at 577, 579, 581.

The Court ruled that "statutes of limitations apply to a declaratory judgment action 'to the same extent' as a nondeclaratory proceeding based on the same cause of action." *Weavewood*, 821 N.W.2d at 579 (citation omitted). It is in this context that the *Weavewood* court remarked that: "a complaint requesting declaratory relief must present a substantive cause of action 'that would be cognizable in a nondeclaratory suit.'" *Id.* (citations omitted). *Weavewood* cited two decisions for this proposition, an opinion of the Supreme Court of Connecticut, *Wilson v. Kelley*, 224 Conn. 110, 617 A.2d 433 (1992), and *Minneapolis Fed'n of Men Teachers, Local 238*.[18] The very next sentence in the

[18] In *Wilson*, the Supreme Court of Connecticut ruled that statutes of limitations apply to claims for declaratory relief. 224 Conn. at 116–117, 617 A.2d at 436–437.

Weavewood opinion reads: "Put differently, the underlying substantive law, *including any applicable defenses*, forms the foundation for a declaratory judgment action." 821 N.W.2d at 579 (emphasis added). Thus, both *Weavewood* and *Vrieze* were concerned with when claims under the Act are barred by a defense. These decisions were not concerned with when claims under the Act are actionable in the first place.

As observed above, *Minneapolis Federation of Men Teachers, Local 238* directly rejects the argument that a separate cause of action is necessary to seek a declaration under the Act. 238 Minn. at 157. *Weavewood* plainly did not intend to overrule or disagree with *Minneapolis Federation of Men Teachers* when *Weavewood cited that very decision for support*. *Weavewood's* reference to needing a "substantive cause of action" was imprecise and not necessary to the Court's determination that statutes of limitations apply when requests for declaratory relief under the Act mirror legal claims. Accordingly, the statement regarding a "substantive cause of action" constitutes obiter dictum. *See Sheehy Lee v. Kalis*, 19 N.W.3d 186, 193 (Minn. 2025) (observing that dicta is that which is "not essential to the court's holding."); *Wandersee v. Brellenthin Chev. Co.*, 258 Minn. 19, 28 (1960) ("Where . . . the expression of an opinion by court or judge is on a collateral question, not directly involved, or mere argument or illustrations originating with the writer of the opinion, then that expression

constitutes obiter dictum."). As shown, *Haveland* says the opposite—a claimant under the Act need *not* have a cause of action. 223 Minn. at 92.

Weavewood did not overrule the well-established principle that the only thing required to seek relief under the Act is a justiciable controversy. This is underscored by the *Weavewood* Court's remand for consideration of whether the plaintiff's claims were barred by the statute of limitations. Again, the plaintiff's legal claims had already been dismissed as being untimely. And in fact, the court of appeals had ruled that the statutes invoked by the plaintiff, Minnesota Statutes Sections 580.28 and 582.25, did *not* create a cause of action. 2011 WL 4345904, at *7 ("We therefore agree with S & P that Minn. Stat. §§ 580.28, 582.25, do not create independent causes of action."). The plaintiff's requests for declaratory relief were the mirror image of legal claims that had already been dismissed. If the Court understood that an independent cause of action was necessary to seek declaratory relief under the Act, Weavewood, Inc.'s requests for declaratory relief would be barred because the corresponding legal claims were barred; there would have been no reason to remand to the court of appeals for consideration whether the requests for declaratory relief were timely. Yet the Court did remand all of the declaratory relief requests, including the request for declaratory relief relating to Sections §§ 580.28 and 582.25. *See* 821 N.W.2d at 581.

On remand, the court of appeals ruled that Weavewood, Inc.'s requests for declaratory relief, including the requests relating to Sections 580.28 and 582.25, were timely, and remanded those requests for declaratory relief to the district court. *See* 2013 WL 599125, at **5–6 (Minn. Ct. App. Feb. 19, 2013). The court of appeals in *Weavewood* did not understand that the plaintiff could not obtain declaratory relief relating to Sections 580.28 and 582.25, even though those statutes did not create a cause of action.

B. The Court of Appeals Erred by Attempting to Limit the Categories of Legal Questions That May be Adjudicated Under the Act.

Below, the court of appeals distinguished *Barron* and other decisions cited by Housing First as involving constitutional claims. ADD21–22. The court of appeals has employed an unduly narrow understanding of challenges that may be brought under the Act. By its plain terms, the Act allows "**any** question of . . . validity" to be brought under the Act. Minn. Stat. § 555.02 (emphasis added). As Borchard wrote: "There is no legal question which cannot become the subject of a declaration[.]" Borchard, *The Uniform Declaratory Judgments Act*, 18 Minn. L. Rev. 239, 249 (1934).

The precise issue the Court considered in *Barron* was whether the city's fee was a legitimate/lawful license fee or an unlawful tax. Stated differently, the question was whether the fee was *ultra vires*. More recent decisions of the Minnesota Supreme Court have engaged in the same analysis. *See Country*

Joe, Inc. v. City of Eagan, 560 N.W.2d 681, 686 (Minn. 1997) ("When it has been apparent that a city's true motivation was to raise revenue—and not merely to recover the costs of regulation—we have disregarded the fee label attached by a municipality and held that the charge in question was in fact a tax.") (citing *State v. Labo's Direct Serv.*, 232 Minn. 175 (1950) and *Barron*).

The insistence of the court of appeals that a claim under the Act must be supported by a separate cause of action conflicts with its attempt to distinguish *Barron*, *McCaughtry v. City of Red Wing*, 808 N.W.2d 331 (Minn. 2011), and other cases raising constitutional issues. Indeed, in a published opinion issued by the court of appeals following its opinion in the case at bar, it held that the Due Process Clause of the Minnesota Constitution does *not* create a cause of action. *See Equity Residential Holdings, LLC v. City of Minneapolis*, No. A26-0021, 2026 WL 2469818 (Minn. Ct. App. Aug. 24, 2026) (published citation not yet available). The Act *is* the mechanism used to vindicate rights created by the Minnesota Constitution. *See Johnson v. Ervin*, 205 Minn. 84, 89 (1939) (observing that the Act provides courts the power to declare statutes unconstitutional).

If the rationale of the lower courts was followed, a court could not grant declaratory relief in a case alleging violation of the Minnesota Constitution, because there would be no additional cause of action supporting the claim under the Act. That the Court determined the claims in *Barron* and

McCaughtry should be heard on their merits underscores that an additional cause of action is *not* required to bring a claim under the Act.

As demonstrated by *Montgomery*, *Hassler*, and *State Board of Medical Examiners*, the Act is the mechanism used to seek adjudication of a wide variety of legal questions. None of these decisions indicate that the plaintiff must present an additional cause of action before the Court will reach the legal question.

The Act is properly used to challenge the validity of municipal action on any ground, be it preemption, unconstitutionality, or being in excess of municipal authority. *See, e.g., Mangold Midwest Co. v. Vill. of Richfield*, 274 Minn. 347 (1966) (holding, in context of "declaratory judgment action", that city Sunday closing ordinance was not invalid under state law); *Harstad v. City of Woodbury*, 916 N.W.2d 540 (Minn. 2018) (affirming declaratory judgment that city lacked statutory authority to impose infrastructure charge); *Jennissen v. City of Bloomington*, 913 N.W.2d 456 (Minn. 2018) (concluding that proposed city charter amendment was not preempted by state law); 938 N.W.2d 808 (Minn. 2020) (concluding that proposed charter amendment was not an improper exercise of the charter amendment power and was not unconstitutional).

The ruling of the court of appeals will shield unlawful municipal action from judicial review. The court of appeals overtly acknowledged its ruling was

likely to close the courthouse doors with respect to challenges to building permit fee ordinances. ADD23 ("we acknowledge that our decision may leave Housing First without an appropriate avenue for judicial review of the cities' building-permit fees."). Previously, the court of appeals ruled that building permit fees are user fees not subject to takings analysis. ADD60. The district court determined that under the court of appeals opinion in *Centra Homes, LLC v. City of Norwood Young America*, 834 N.W.2d 581 (Minn. Ct. App. 2013), the Cities' building permit fees were not subject to review under the Municipal Planning Act because such fees are not adopted pursuant to that act and thus are outside the reach of its appeal provision. *See* ADD93. And prior to bringing this litigation, Housing First had also attempted to seek review before the Department of Labor & Industry Appeals Board, and was rebuffed. *See Corcoran* Doc. Index 4 Ex. E ("*Corcoran DLI App. Bd. Decision*"); *Dayton* Doc. Index 4 Ex. A ("*Dayton DLI App. Bd. Decision*"). But for reversal, there may be no mechanism to stop municipalities from using their building permit fee ordinances as profit generation devices.

Yet the lower court's rationale extends much further than just fee challenges; it would foreclose judicial review over many other important questions. For examples: the plaintiff in *Montgomery* could not have had adjudicated whether he had a right to a pension; the plaintiff in *Hassler* could not have had the legality of the surcharge determined; and the medical board

in *Olson* could not have had determined whether the challenged chiropractic practices were illegal because they qualified as the practice of medicine. The lower courts' rationale largely nullifies the Declaratory Judgments Act.

C. There is a Justiciable Controversy Supporting Housing First's Request for Declaratory Relief.

For the reasons argued above, Housing First has standing to maintain this challenge. Housing First's members have experienced the type of prejudicial burden that gives Housing First a legally protectible interest. *Compare* ADD58 *with Haveland*, 223 Minn. at 92–94. Housing First has stated a justiciable controversy and under *Barron*, *Haveland*, and *McCaughtry*, that is all that is necessary to challenge the Cities' building permit fees under the Act. Whether the Cities' building permit fees are in excess of the Cities' authority is a question of validity that arises under the Cities' ordinances adopting the fees, and there is no good faith argument that Housing First's members are not affected by the ordinance. That was the whole point of the first appeal to the Minnesota Court of Appeals in these cases.

D. Housing First has a Common Law Right to Challenge the Cities' Fees as Being in Excess of the City's Lawful Authority.

Housing First's claims of illegality under state law includes case law holding municipal fees unlawful because they were in purpose and effect revenue raising devices, a recognized form of illegality under *Crescent Oil Co.*

of Minnesota v. City of Minneapolis, 177 Minn. 539 (1929), *Barron*, *Labo's Direct Service*, 232 Minn. at 182, and *Country Joe*, 560 N.W.2d at 685–686.[19] As shown by *Crescent Oil*, when the Act was adopted, Minnesota law already recognized an action challenging municipal fees as being in excess of municipal authority. The ability to bring that same challenge under the Act was then recognized in *Barron*. The Act did not need to create a new cause of action to challenge the validity of an ordinance as an unlawful revenue raising device. It already existed. The Act certainly should not be interpreted to limit or do away with a cause of action already recognized. By alleging that the Cities' fees were invalid under Minnesota law and emphasizing that the Cities acted for the *purpose* of raising revenue, Housing First invoked that form of review. The court of appeals erred by refusing to acknowledge that Minnesota recognizes a common law right to challenge a fee as being *ultra vires*.

E. The Finding of the Court of Appeals Regarding Forfeiture is Erroneous.

The court of appeals determined that: "Housing First has forfeited any argument that its declaratory-judgment claim is supported by an independent

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[19] Housing First has consistently argued that there is such a common law challenge. *See, e.g., Dayton* Doc. Index 150 p. 8 (Dayton observing that: "At the court of appeals, Plaintiff cited a variety of cases for" the proposition there is a common law right to challenge a municipal fee ordinance); *see also Corcoran* Doc. Index 68, *Pls.' Mem. in O'ppn to Summ. J.* pp. 13, 25–26. Housing First again asserted that right on remand. *See, e.g., Corcoran* Doc. Index 125, *Transcript of March 25, 2025 Hearing* p. 15:16–20.

cause of action for preemption by failing to raise it in the district court[.]" ADD20."[20] The court of appeals determined that:

> Housing First did not allege in Count I of each complaint that the code preempts the cities' building-permit fee ordinances, and the district court therefore did not analyze the application of the three-part *City of Morris* preemption test in deciding whether an independent cause of action for preemption supports Housing First's declaratory-judgment claim.

Id. The foregoing analysis of the court of appeals appears to equate the preemption provision of the SBC, Minn. Stat. § 326B.121 Subd. 2(c),[21] with an express cause of action. The logic of the court of appeals required this result—otherwise, the court of appeals could not explain how earlier decisions holding ordinances preempted by the SBC were consistent with its rule requiring an additional, independent cause of action to bring a claim under the Act. *See, e.g., Builders Ass'n of Minnesota v. City of St. Paul*, 819 N.W.2d 172 (Minn. Ct. App. 2012).

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[20] Whether an argument has been forfeited is a question of appellate procedure reviewed *de novo*. *State v. Loveless*, 987 N.W.2d 224, 236 (Minn. 2023).

[21] This statute reads: "A municipality must not by ordinance . . . require building code provisions . . . that are different from any provision of the State Building Code." Likewise, Minn. Stat. § 326B.121, Subd. 2(g) provides that "[n]othing in this subdivision prohibits a municipality from adopting ordinances relating to zoning, subdivision, or planning unless the ordinance conflicts with a provision of the State Building Code[.]" (emphasis added).

But a statute holding local ordinance preempted does not automatically create an independent cause of action. The correct way to interpret earlier decisions such as *Builders Association of Minnesota v. City of St. Paul* is that the Act gives the courts power to determine whether the SBC preempts an ordinance.

To the extent that the court of appeals held that Housing First had not pled or argued that the Cities' ordinances should be set aside because they were contrary to the requirements of the SBC, that ruling is erroneous and contradicted by the record. The pleadings directly alleged that the Cities "ha[d] no authority" to collect building permit fees in excess of what is "fair, reasonable, and proportionate to the actual cost of the service for which the fee is imposed," the standard under Minn. R. 1300.0160. *See Corcoran V. Compl.* ¶ 36 (ADD107); *Dayton V. Compl.* ¶ 52 (ADD123). Housing First argued to the district court on remand that: "The cities have no authority to charge building permit fees in excess of the amounts allowed by the state building code." *Transcript of March 25, 2025 Hearing* p. 5; *see also id.* pp. 9, 14–15. Housing First has consistently argued that the Cities may not charge fees in excess of the limits imposed by the SBC. *See City of Morris*, 749 N.W.2d at 7 ("When a statute contains specific language as to the extent of permissible municipal regulation, our focus is on the language of the statute."). The SBC's limit on municipal fees is a type of express preemption.

Housing First further argued to the district court that:

> There is no meaningful difference between the preemption claim asserted by *Builders Association of Minnesota* and a St. Paul case [sic] and the claim that Housing First is making here. In both cases, a builders association is bringing an action to enforce the state building code. [In] neither case can the cities' [sic] act contrary to the restrictions of the state building code.

Id. p. 15. Indeed, the district court itself cited *Builders Association of Minnesota* and ruled it did "not create any new common law causes of action that Plaintiff can rely upon." *See* ADD35. The lower court's finding of forfeiture is contrary to law and should be reversed.

V. THE CITIES' SEPARATION OF POWERS AND POLITICAL QUESTION DEFENSES ARE INVALID AS A MATTER OF LAW.

In one paragraph of analysis, the district court found that Housing First's claims were barred by both separation of powers and under the political question doctrine. ADD35–36. The full extent of the district court's analysis reads as follows:

> Plaintiff seeks to have this court violate the principles of separation of powers by seeking to have it change a policy created by, and delegated to, the legislative and executive branches. This creates a request for relief of a nonjusticiable political question. The Minnesota State Constitution specifically prohibits the judicial branch from exercising powers delegated to the executive or legislative branch except where explicitly permitted. Minn. Const. art. III. § 1. These principles prevent the judicial branch from resolving political questions which involve issues 'to be exercised by the people in their primary political capacity' or those

> matters which 'ha[ve] been specifically delegated to some other department or particular officer of the government, with discretionary power to act.' *In re McConaughy*, 119 N.W. 408, 417 (Minn. 1909). This court declines to usurp the powers of the Department of Labor and Industry where there is a nonjusticiable political question

The district court's conclusions on these issues are unsupported in law or fact and should be reversed.

A. The Political Question Doctrine is Inapplicable.

The very decision cited by the district court, *In re McConaughy*, demonstrates the inapplicability of the political question doctrine. That decision observes the breadth of the judicial power:

> Every officer under a constitutional government must act according to law and subject to its restrictions, and every departure therefrom or disregard thereof must subject him to the restraining and controlling power of the people, acting through the agency of the judiciary; for it must be remembered that the people act through the courts, as well as through the executive or the Legislature. One department is just as representative as the other, and the judiciary is the department which is charged with the special duty of determining the limitations which the law places upon all official action.

106 Minn. 392, 416 (1909). For a question to evade judicial review under the political question doctrine, it must be something the Constitution squarely vests in the domain of the legislative or executive branch. *Id.* at 417 ("[W]hat the existing law is, is necessarily a judicial question for the courts . . . unless

the Constitution itself provides to the contrary by imposing the duty in the particular instance on some other special tribunal."). Questions properly falling under the political question doctrine are those such as recognition of a foreign sovereign, the adjustment of boundaries, the existence of a state of war, and whether a proposed new Constitution has been adopted. *Id.* at 415.

Other Minnesota case law demonstrates that courts have confined the political question doctrine to instances *where the Constitution* has given a coordinate branch of government authority over a particular question. *See Cruz-Guzman*, 916 N.W.2d at 9–10 (holding that the political question doctrine did not preclude the judiciary from deciding whether the state legislature was satisfying its duty under the Minnesota Constitution "to establish a general and uniform system of public schools.") (quoting Minn. Const. art. XIII, § 1); *see also Ninetieth Minnesota State Senate v. Dayton*, 903 N.W.2d 609, 624-625 (Minn. 2017) (analyzing political question doctrine in case implicating constitutional provisions, i.e., appropriations and line-item veto clauses); *Limmer v. Swanson*, 806 N.W.2d 838, 839 (Minn. 2011) ("the petition asks us to resolve fundamental constitutional questions about the relative powers of the three branches of our government.").

The Cities have conceded that their authority to collect building permit fees stems from statute.[22] Likewise, DLI's enforcement of the SBC was created by statute. Minn. Stat. § 326B.082. Put simply, nothing in this case implicates grants of discretion created by the Minnesota Constitution in favor of either the Cities or of DLI, rendering the political question doctrine wholly inapplicable.

Furthermore, cases applying the political question doctrine do not simply end the analysis when they find that the Constitution grants another branch of government authority over an issue. Rather, courts analyze whether there are judicially enforceable standards that permit the fashioning of a suitable remedy. *Baker v. Carr*, 369 U.S. 186, 217 (1962) ("Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it . . . ."); *see also Cruz-Guzman*, 916 N.W.2d at 10 ("although the constitution assigns to the Legislature the duty of establishing 'a general and uniform

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[22] *See Corcoran* Doc. Index 51 (*Corcoran City Mem. in Supp. of Summ. J.*) p. 26 (stating that "the SBC [State Building Code]—not the MPA [Municipal Planning Act]—is the statutory source of authority for Corcoran's building permit process."); *Dayton* Docket No. 54 (*Dayton City Mem. in Supp. of Summ. J.*) p. 26 (stating that the SBC is the "statutory source of authority for Dayton's building permit process.").

system of public schools,' Minn. Const. art. XIII, § 1, the interpretation of the constitution's language 'is a judicial, not a legislative, question[.]'") (citation omitted); *In re McConaughy*, 106 Minn. at 421-422 (holding that courts may decide whether constitutional amendment was validly adopted). Where such standards exist, the judiciary will enforce them and hold the other branches of government to the requirements of the law. *See generally Cruz-Guzman*, 916 N.W.2d 1 (reversing and remanding for consideration whether legislature had met its obligations under the Education Clause).

In the case at bar, there are judicially enforceable standards: Minn. R. 1300.0160 and the Code Adoption Guide interpreting it. The law does not allow cities to use building permit fees as a revenue-generating device. Determining whether fees are for the purpose of raising revenue is a task that courts are competent to perform. *See Crescent Oil Co. of Minnesota*, 177 Minn. at 542–543 (holding city license fee on gas stations to be manifestly unreasonable and excessive, and therefore invalidating the city ordinance); *Barron*, 212 Minn. at 570 (holding that municipal ordinance setting license fee for vending machines was an improper revenue raising device); *Labo's Direct Service*, 232 Minn. at 181–182 (holding that municipal fee on gas pumps was an invalid tax).

Housing First is not seeking the courts to order the City to adopt any particular building permit fee schedule. Nor is Housing First seeking any adjudication that would impair the discretion of DLI. The remedies sought by

Housing First herein are proper judicial remedies supported by precedent. The Court should reverse the district court's determination these actions are nonjusticiable.

B. The Separation of Powers Doctrine is Inapplicable.

DLI neither approves municipal building permit fees nor audits municipal fee collection reports. Housing First seeks judicial acknowledgment that the Cities' building permit fee schedules violate the law. Housing First seeks to enforce DLI's promulgated regulation and interpretive Code Adoption Guide. Deciding whether municipal fees are permitted by law is something this Court has consistently proved willing to do. Asking whether the Cities' building permit fees violate the SBC in no way violates separation of powers. "It is emphatically the province and duty of the judicial department to say what the law is." *Simon v. Demuth*, 17 N.W.3d 753, 758 (Minn. 2025) (citation omitted). Housing First further seeks to enforce established Minnesota law that municipal fees may not in fact be unlawful revenue raising devices. Whether the Cities' ordinances are *ultra vires* is beyond the purview of DLI.

The district court's statement that Housing First seeks to change DLI's established policy (ADD12) is false. Housing First is seeking to *enforce* DLI's regulation and policy. The Cities have been operating in defiance of that law and policy.

Here, Housing First tried to raise the Cities' overcharging with DLI before initiating litigation. *See Corcoran DLI App. Bd. Decision*; *Dayton DLI App. Bd. Decision*. The Cities argued that DLI was powerless to grant relief because:

> Housing First's 'appeal' does not challenge an order, decision, or determination made by the City of Corcoran's building official. Instead, Housing First seeks to challenge the fee schedule itself, which the City Council adopted by ordinance. The State Board of Appeals simply does not have jurisdiction over challenges to legislation.

Corcoran Doc. Index 69 Ex. 33 pp. 1–2; *Dayton* Doc. Index 105 Ex. 37 pp. 1–2. The DLI Board of Appeals agreed with the Cities, concluding that "the [Cities' fee schedules are] official control[s] legally adopted by ordinance to defray the costs incurred by [them] in reviewing, investigating, and administering applications for building permits within [their] municipal boundaries." *Corcoran DLI App. Bd. Decision* p. 1; *Dayton DLI App. Bd. Decision* p. 1. Furthermore, the Board of Appeals concluded that "[w]hile municipal fee schedules must also be commensurate with actual costs of services to be rendered, those fee schedules are neither set by the municipal official nor are they reviewable by the State Building Code Board of Appeals." *Id.* Accordingly, DLI, through its Board of Appeals, made clear that it would not hear claims challenging the validity of the Cities' ordinances.

Representatives of DLI have spoken publicly about the department's oversight of municipal building fee collection. Scott McLellan, DLI's former director of construction codes and licensing, stated as follows:

> McLellan said his department isn't the watchdog for how cities disperse their fees, but the reports have been used to challenge the way fees are spent. It wouldn't be practical for the department to audit every city's report, he said.
>
> 'It would be an enormous undertaking to substantiate the accuracy of each report and you would need to hire auditors," he said. "I just don't know a better process to report and track building permit fees and expenses.'[23]

Further, Housing First offered a letter from the former DLI Commissioner addressed to the former Executive Director of Housing First that begins with, "[t]hank you for your letter expressing your concerns regarding the completion and accuracy of the Municipal Fee and Expense Report that is annually required to be submitted by certain municipalities that enforce the Minnesota Building Code." *See Corcoran* Doc. Index 69 Ex. 35; *Dayton* Doc. Index 105 Ex. 38. The same letter later states: "Regarding the accuracy of the information submitted in the reports, the agency's role is limited to educating, communicating, and enhancing access to the data." *Id.* There is no legitimate separation of powers question raised by these cases.

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[23] https://www.startribune.com/minnesota-housing-trade-group-questions-some-cities-building-permit-fees/600045156.

CONCLUSION

The lower courts imposed an additional burden on maintaining an action under the Uniform Declaratory Judgments Act that is in conflict with the plain language of the Act, in conflict with nearly one hundred years of precedent of this Court applying the Act, and that would deprive the Act of independent significance. The district court applied the separation of powers doctrine and the political question doctrine to bar Housing First's requested relief even though the prerequisites to the applicability of those doctrines are not present, and despite this Court's consistent willingness to strike down municipal fees that exceed a city's authority under state law. The court should reverse and order the court of appeals to consider the remaining legal issues on the cross motions for summary judgment, including whether Housing First's motion for summary judgment should be granted.

Dated: September 24, 2026

/s/Bryan J. Huntington

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CERTIFICATE OF COMPLIANCE

I hereby certify that Appellant's brief conforms to the requirements of Minn. R. App. P. 132.01 subd. 1. I further certify that Appellant's brief complies with the word limitations of Minn. R. App. P. 132.01 subd. 3(a). The brief was prepared using Microsoft Word 365, which reports the total word count to be 12,991 words, exclusive of the captions, tables of contents, table of authorities, and the signature block. The font used is Century Schoolbook 13 point.

Dated: September 24, 2026 */s/Bryan J. Huntington*

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