No. 24-

IN THE

Supreme Court of the United States

HOUSING FIRST MINNESOTA,

Petitioner,

v.

CITIES OF CORCORAN AND DAYTON, MINNESOTA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Cities of Corcoran and Dayton, Minnesota (the "Cities") impose valuation-based permit fees on residential building permit applicants. A valuation-based permit fee schedule, generally speaking, becomes more costly as the construction value increases. Housing First Minnesota ("Housing First" or "Petitioner"), a trade association representing home builders operating in the Cities, brought suit asserting that the Cities' building permit fees violate the Fifth Amendment's Takings Clause. Housing First also alleged that the building permit fees were not proportionate with the actual cost of the services provided and thus violate Minn. R. 1300.0160, Subp. 2. A Minnesota trial court granted the Cities summary judgment on all claims. The Minnesota Court of Appeals affirmed dismissal of the takings claims. The court of appeals first remarked that "[t]he takings clause was applicable in *Koontz* because the governmental authority conditioned the issuance of a land-use permit on a grant by the landowner of an easement—an interest in the landowner's real property." The court then concluded that the Cities' building permit fees were "user fees" not subject to the Takings Clause. The court simultaneously reversed dismissal of Petitioner's claims under state law and remanded those claims to the district court. The Minnesota Supreme Court declined discretionary review regarding the takings claims.

The questions presented are:

1. Whether valuation-based building permit fees are exempt from unconstitutional conditions analysis under *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013).

2. Whether the Cities' building permit fees are "user fees" exempt from the Takings Clause.

3. Whether the lower court properly determined on summary judgment that the Cities' building permit fees are user fees when no court has ruled the Cities' building permit fees valid under Minnesota law requiring proportionality between the fees and the Cities' actual cost of providing services, and when that specific issue was remanded to the trial court for adjudication.

CORPORATE DISCLOSURE STATEMENT

Petitioner has no parent company or publicly held company with a 10% or greater ownership interest in it.

STATEMENT OF RELATED CASES

This case arises from and is related to the following proceedings before the District Court, Hennepin County, Minnesota, the Minnesota Court of Appeals, and the Minnesota Supreme Court:

1. Hennepin County District Court. Case caption: *Housing First Minnesota v. City of Corcoran*. File No. 27-CV-21-9069. Judgment entered on July 3, 2023.

2. Hennepin County District Court. Case caption: *Housing First Minnesota v. City of Dayton*. File No. 27-CV-21-9070. Judgment entered on July 3, 2023.

3. The Minnesota Court of Appeals consolidated the *Corcoran* (Appellate Ct. File No. A23-1049) and *Dayton* (Appellate Ct. File No. A23-1050) cases, both of which had the same caption as at the district court. The court of appeals entered judgment on July 8, 2024.

4. The Minnesota Supreme Court denied discretionary review in the consolidated cases on June 26, 2024. The cases had the same captions as at the district court.

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JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). The Minnesota Court of Appeals filed its opinion on March 25, 2024. The Minnesota Supreme Court denied a petition for review on June 26, 2024. *See* Pet. App. F.

CONSTITUTIONAL PROVISIONS

The Takings Clause of the United States Constitution provides that: "nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution reads in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law[.]"

INTRODUCTION

The Court's precedents recognize the coercive pressure inherent in the building permit process. The Court has repeatedly rejected categorical rules adopted by lower courts which had the effect of shielding building permit fees from review under *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In *Koontz v. St. Johns River Water Management District*, 570 U.S. 595 (2013), the Court rejected a categorical exclusion adopted by lower courts holding that *Nollan* and *Dolan* do not apply to monetary exactions. Earlier this year, in *Sheetz v. County of El Dorado*, 601 U.S. 267 (2024), the Court rejected another categorical exclusion to *Nollan* and *Dolan*; in that case, an exclusion exempting all legislatively adopted exactions from the Fifth Amendment. The case at bar is another instance where Court intervention is necessary to prevent the rule of *Nollan* and *Dolan* from being rendered a nullity by lower court exemptions. Uniquely, in this case, the exclusion applied by the lower court is one the Court already found inapplicable in *Koontz*.

In *Koontz*, the Court ruled that a government's demand for payment in exchange for a building permit is subject to *Nollan/Dolan* review. Such demands are subject to Fifth Amendment review because they "'operate upon . . . an identified property interest' by directing the owner of a particular piece of property to make a monetary payment." *Koontz*, 570 U.S. at 613. Where there is a "direct link between the government's demand and a specific parcel of real property", the "central concern of *Nollan* and *Dolan* [is implicated]: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue[.]" *Id.* at 614. Important to the case at bar, *Koontz* distinguished building permit exactions from taxes and user fees. *See id.* at 615 (rejecting the dissent's argument "that if monetary exactions are made subject to scrutiny under *Nollan* and *Dolan*, then there will be no principled way of distinguishing impermissible land-use exactions from property taxes."). Both the *Koontz* majority, and the *Koontz* dissenters, observed that the unconstitutional conditions doctrine would thenceforth apply to monetary exactions supposedly only reimbursing local government for its direct costs. *See Koontz*, 570 U.S. at 618–619 (referring to the dissent's argument the Takings Clause was inapplicable to sewage charges or the price for a liquor permit as "an argument for overruling *Nollan* and *Dolan*"); *see also id.* at 626 (Kagan, J., dissenting) (observing that fees to "cover the direct costs of providing services like sewage and water to the development" would thereafter be subject to *Nollan/Dolan*).

In the recent decision in *Sheetz*, the Court observed that *Nollan* and *Dolan* apply to all manner of permit

conditions where the government "withholds or conditions a building permit for reasons unrelated to its land-use interests." 601 U.S. 267, 275 (2024). Permit conditions lacking a sufficient connection to legitimate land-use interests amount to "'an out-and-out plan of extortion.'" *Id.* (citation omitted). In *Sheetz*, the Court unanimously rejected the ruling of the California Court of Appeals below exempting the monetary exaction because it was imposed pursuant to a legislatively adopted schedule.

In the case at bar, the Minnesota Court of Appeals unjustifiably narrowed the applicability of *Koontz* to situations where the monetary exaction is in lieu of the government taking a property interest. *See* 2024 WL 1244047, at *5. *Koontz* is unequivocal that it is the direct link between an exaction imposed as a condition of receiving a building permit, and development of a specific parcel of real property, which implicates *Nollan/Dolan*. Exactions imposed as a condition of receiving a building permit are subject to constitutional scrutiny irrespective of the type of fee. The court of appeals below compounded its error by relying upon a portion of *Koontz* where the Court distinguished building permit fees from user fees. The decision below creates a conflict with decisions of other state courts applying the Takings Clause to building permit charges similar to those at issue here. *See*, *e.g.*, *Mira Mar Dev. Corp. v. City of Coppell, Texas*, 421 S.W.3d 74, 97–98 (Tex. App. 2013) (holding there was a genuine issue of material fact whether city construction inspection charges violated the Fifth Amendment).

This appeal presents the important question whether valuation-based building permit fees are exempt from *Nollan/Dolan* scrutiny because they are claimed to be

"user fees." The court of appeals decided the issue without reference to the record. The issue has been preserved and is of national importance. The Court should grant this petition and reverse the court of appeals' decision.

STATEMENT OF THE CASE

A. The Cities Use Building Permit Fees To Fund General Government Operations.

The Cities impose valuation-based building permit fees as a condition of issuing residential building permits. Pet. App. D pp. 2–3.[11] A valuation-based system categorizes projects differently based upon their estimated value; more expensive projects are generally charged higher rates (e.g., Dayton charges projects in the range of $100,001–$500,000 a higher base fee than projects in the range of $50,001–$100,000). The valuation tier is determined by the municipal building official and should correspond to the total value of all construction work. *See* Minn. R. 1300.0160, Subp. 3. Municipalities determine the specific rate to charge at each level of valuation. *See* 2023 WL 9230351 ("*Housing First Brief in Court of Appeals*"), at *5 (discussing the DLI Code Adoption Guide).

The Minnesota Department of Labor and Industry ("DLI") has promulgated a rule pertaining to municipal building permit fee collection, Minn. R. 1300.0160, Subp. 2. DLI observed in its explanatory Code Adoption Guide that building permit fees are "to be established at a rate

1. *See*, *e.g.*, 2024 City of Dayton Fee Schedule pp. 14–15; *see also* 2024 City of Corcoran Fee Schedule p. 12; https://bit.ly/474hwuc; https://bit.ly/4gimibR.

that is commensurate with the services being provided by the local building department." *Housing First Brief in Court of Appeals*, at *5 (quoting the DLI Code Adoption Guide). "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." *Id.* In addition to the permit fee, building permits must pay a plan review fee. Minn. R. 1300.0160, Subp. 1. In both Cities, the plan review fee is a fixed percentage (65%) of the building permit fee.

"Except for certain types of minor projects, builders and contractors are required to obtain building permits before they can commence construction on a project." Pet. App. D p. 3 (citing Minn. R. 1300.0120 (2021)). A city shall not issue a building permit until the permit and plan review fee has been paid. Minn. R. 1300.0120, Subp. 7.

Housing First is a trade association representing businesses engaged in residential development, home construction, and home remodeling. *See* Pet. App. D p. 3. In recent years, Housing First's members applied for and received the overwhelming majority of the building permits issued in the Cities. *Id.* pp. 3, 9. Housing First's members directly pay the fees to the Cities, then pass the fees through to homebuyers. *See id.* pp. 4–5, 9. Housing First's members must pay the permit fees if they desire to keep building new homes in the Cities. *Id.* p. 9.

Between 2018 and 2021, based on the city's own numbers, Corcoran's building permit profits (viz., revenue over costs) were approximately $2.5 million. *See id.* p. 4; *see also Housing First Brief in Court of Appeals*, at

**13–15.[2] A consultant hired by Corcoran found 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."[3] Corcoran used hundreds of thousands of dollars in building permit profits to fund a remodel of its City Hall. *See* Pet. App. A p. 4; 2023 WL 9230351, at **13–15.

Between 2018 and 2021, Dayton had building permit profits of over $2.9 million. *See* Pet. App. D p. 4*; see also* 2023 WL 9230351, at **9–13.[4] A third party report prepared for Dayton found that it was profiting approximately $1,500 for each detached single-family home building permit. 2023 WL 9230351, at *18. The city used over $900,000 of building permit profits to offset/subsidize losses in unrelated city funds. *Housing First Dayton Trial Court Memo.* p. 10. During this same time, the city transferred $2.7 million into a fund designed to self-finance future municipal projects unrelated to building permits. *See* 2023 WL 9230351, at **11–12.

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2. For context, during this same four (4)-year period, Corcoran's entire General Fund had actual revenues over expenditures in the amount of $2,046,723.00. *See* https://publicaccess.courts.state.mn.us/CaseSearch, Ct. File No. 27-CV-21-9069, Doc. Index No. 43 ("*Housing First Corcoran Trial Court Memo.*") pp. 7–8. Accordingly, but for Corcoran's multimillion dollar profits on building permits, the General Fund would have run a deficit rather than a surplus. *Id.*

3. Ct. File No. 27-CV-21-9069, Doc. Index No. 68 ("*Housing First Corcoran Trial Court O'ppn Memo.*") p. 8.

4. For context, during this same four (4)-year period, Dayton's entire General Fund had actual revenues over expenditures in the amount of $3,069,500.00. *See* https://publicaccess.courts.state.mn.us/CaseSearch, Ct. File No. 27-CV-21-9070, Doc. Index No. 46 ("*Housing First Dayton Trial Court Memo.*") p. 10.

Despite the Cities' realizing significant building permit profits year after year, neither city reduced or altered its building permit fees between 2018 and 2022. *See* 2023 WL 9230351, at **12, 14. Long after this litigation was instituted, Corcoran amended its building permit fees in 2023. *Id.* at *14. Even after the amendment, a building permit for a $400,000 construction project resulted in combined building permit and plan review fee of $4,763.96—of that sum, $1,900 (or roughly 40% of the permit cost) is pure profit to the city. *Housing First Corcoran Trial Court O'ppn Memo.* p. 8.

Minnesota state law requires the Cities to annually report building permit revenues and expenses. Minn. Stat. § 326B.145. The Cities have both used an "indirect cost" methodology to report building permit expenses. *See* 2023 WL 9230351, at **15–17. The indirect cost methodology took general city costs that could not be apportioned to specific departments—such as elections, assessing, legal, and emergency management—and then allocated those costs based upon direct expenditures that could be allocated to specific departments. *Id.* As explained by the Cities' third party consultant: "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." *Id.* at *16. The indirect cost methodology is a cost recovery method which attempts to ensure a city does not run a deficit. *Id.* at *17.

B. Housing First Challenges the Cities' Building Permit Fees and the Trial Court Dismisses the Takings Claims on Summary Judgment.

Housing First brought suit against the Cities alleging, among other things, that the Cities' building permit fees violate the Takings Clause of the Fifth Amendment. Pet. App. D p. 4. The takings claims sought declaratory and injunctive relief, as well as disgorgement of fees illegally exacted.[5] Housing First argued to the district court that requiring a builder to pay excessive and unreasonable fees to obtain a building permit constitutes a taking. *Housing First Corcoran Trial Court Memo.* p. 35 (citing *Koontz*); *Housing First Dayton Trial Court Memo.* p. 40 (same). The district court granted summary judgment to the Cities on the takings claims, determining that "Housing First failed to show property was taken without just compensation because, in exchange for the fees paid, Housing First's members were issued the building permits and thus received 'compensation' in exchange for their payments."[6] Pet. App. D pp. 4–5; *see also* Pet. App. A pp. 13–15; Pet. App. B pp. 13–15.

Housing First also alleged that the Cities' building permit fees violate Minn. R. 1300.0160, Subp. 2, which

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5. *See* Ct. File No. 27-CV-21-9069, Doc. Index No. 3 pp. 10–11; Ct. File No. 27-CV-21-9070, Doc. Index No. 3 pp. 12–13.

6. The district court found that Housing First lacked standing to prosecute any of its claims, which would include the takings claims. The court of appeals did not specifically analyze standing for the takings claims, choosing to affirm on other grounds. Insofar as the court of appeals reviewed the district court's standing analysis, it disagreed that Housing First lacked standing. Housing First has standing to pursue the takings claims.

provides 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." *See* Pet. App. D pp. 3–4. On summary judgment, the Cities made no effort to defend this claim on its merits. Rather, the Cities advanced a variety of technical defenses, including standing. The district court dismissed the claims alleging the Cities' fees violated this regulation on the theory Housing First lacked standing. *Id.* pp. 4–5.

C. The Minnesota Court of Appeals Affirms, Holding the Cities' Building Permit Fees Are User Fees; the Minnesota Supreme Court Denies Review.

Housing First appealed dismissal of the takings claims, arguing that the Cities' building permit fees were invalid under *Koontz*. *See* Pet. App. D p. 4. The court of appeals held that the Cities' building permit fees are "user fees" not subject to review under the Takings Clause. *See id.* pp. 10–11. The court of appeals relied upon the statement in *Koontz* that: "taxes and user fees are not takings." *Id.* p. 11 (quoting 570 U.S. at 615) (cleaned up). Furthermore, the court of appeals distinguished *Koontz* on the ground the fee in *Koontz* was in lieu of the owner granting an easement. *See id.* The court of appeals then remarked that "to the extent that the challenged fees may be characterized as an unauthorized tax, such claims are also outside the protections of the takings clause."[7] *Id.* pp. 11–12.

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7. No party to these litigation matters has argued that the Cities' fees were or should be treated as taxes.

The Minnesota Court of Appeals reversed the dismissal of the claims alleging illegality under state regulation and remanded those claims to the district court, where they remain now. *See id.* pp. 6–10. The court of appeals observed that the district court *had not* determined whether the Cities' permit fees complied with Minn. R. 1300.0160, Subp. 2. The court of appeals remanded that issue back to the district court for adjudication. *See* Pet. App. D pp. 15–16.

Housing First timely petitioned the Minnesota Supreme Court for discretionary review regarding the takings claims and the user fee determination of the court of appeals. The Minnesota Supreme Court denied the petition. Pet. App. F.

Housing First now respectfully asks this Court to issue a writ of certiorari and reaffirm what it held in *Koontz* and more recently in *Sheetz*—viz., that *Nollan* and *Dolan* apply to government demands for payment in exchange for receiving a building permit.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW, WHILE PURPORTING TO APPLY *KOONTZ*, IN FACT APPLIES A LINE OF CASES *KOONTZ* ITSELF DISTINGUISHES AS INAPPLICABLE IN THE LAND DEVELOPMENT CONTEXT.

The court of appeals' reliance on language in *Koontz* observing that "user fees" are not subject to the Takings Clause fundamentally misunderstands at least three things: first, the reason why *Koontz* applied *Nollan* and

Dolan to the monetary exaction in that case was because of the connection between development of the real property and the fee; second, *Koontz* distinguished the user fee cases from monetary exactions on land development, the latter of which are covered by *Nollan* and *Dolan*; and third, the user fee cases cited by *Koontz* did not involve paying a fee to build on one's own property and are readily distinguishable because there was no protected property interest at issue in those cases. The court of appeals below adopted an exception to *Nollan/Dolan* analysis in conflict with the fundamental rationale of decision in *Koontz*.

The issue addressed by *Koontz* of relevance here is whether a monetary fee imposed as a condition of a building permit is subject to *Nollan/Dolan* analysis. *See Koontz*, 570 U.S. at 611–619. The Court began its analysis in *Koontz* by observing that *Nollan* and *Dolan* "'involve a special application' of [the unconstitutional conditions] doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits." *Id.* at 604 (citing *Lingle v. Chevron*, 544 U.S. 528, 547 (2005)). The Court observed two realities of the permitting process: first, the special vulnerability applicants face in the development process; and second, the costs that new development can impose on the public. *See id.* at 604–605. The Court determined that *Nollan* and *Dolan* "accommodate[s] both realities." *Id.* at 605. "Our precedents . . . enable permitting authorities to insist that applicants bear the full costs of their proposals while still forbidding the government from engaging in 'out-and-out extortion' that would thwart the Fifth Amendment right to just compensation." *Id.* (citing *Dolan*, 512 U.S. at 391) (internal ellipses removed).

The *Koontz* majority observed that the position of the Florida Supreme Court, as well as the view of the *Koontz* dissenters, was that the takings claim in that case failed "because the subject of the exaction at issue here was money rather than a more tangible interest in real property." *Id.* at 612. The *Koontz* majority rejected that proposition, remarking that acceptance of that rule would make it "very easy" for "land-use permitting officials to evade the limitations of *Nollan* and *Dolan*." *Koontz*, 570 U.S. at 612. The Court distinguished its earlier decision in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), by observing that the water management district's monetary demand on Mr. Koontz "'operate[d] upon an identified property interest' by directing the owner of a particular piece of property to make a monetary payment." *Id.* at 613. The Court was emphatic that the "fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property." *Id.* at 614. The Court elaborated that:

> Because of that direct link, this case implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.

Id. The Court accepted the petitioner's argument that *Nollan*/*Dolan* analysis applies "when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a . . .

parcel of real property." *Id.* at 614. Local government's demand for payment as a condition of development is akin to taking a lien on the real property, which implicates unconstitutional conditions analysis. *See id.* at 614–615. The holding in *Koontz* was that "the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money." *Koontz*, 570 U.S. at 619.

Below, the court of appeals determined that the reason *Nollan/Dolan* analysis applied in *Koontz* was because it was a fee in lieu of the water management district taking an easement. *See* Pet. App. D p. 11. This was *not* the basis of decision in *Koontz*. The "fulcrum" of that decision was that development of specific property was conditioned on a demand for payment. *Koontz*, 570 U.S. at 614. Other state courts have recognized as much and rejected the notion *Koontz* is limited to fees in lieu of property conveyances.[8]

As in *Koontz*, the building permit fees challenged in this case must be paid in order for property to be developed. *See* Pet. App. D p. 3 ("Except for certain types of minor projects, builders and contractors are required to obtain building permits before they can commence construction on a project."); *see also id.* p. 9 (observing that Housing First's members "are required to obtain building permits and continue paying the fees if they

8. *See Anderson Creek Partners, L.P. v. County of Harnett*, 876 S.E.2d 476, 496 (N.C. 2022) ("[W]e conclude that the 'monetary exactions' with which *Koontz* was concerned were not limited to 'in lieu of' fees and, instead, encompassed a broader range of governmental demands for the payment of money as a precondition for the approval of a land-use permit.").

desire to keep building in the cities."); Minn. R. 1300.0120, Subp. 1. There is a direct connection between the Cities' building permit fees and the ability to obtain the building permit necessary to develop land.

The Cities' building permit fees give rise to the same abuse of power concern noted by *Koontz*. Under Minnesota law, municipalities are allowed to determine in the first instance the rates charged at building permit valuation levels. Although state law requires cities to adjust their fees to make revenues commensurate with expenditures, the Cities here flouted that requirement for years. *See Housing First Brief in Court of Appeals*, at *5 ("Each municipality is to evaluate local costs associated with . . . enforcement . . . From this local evaluation, a fee structure can be established to cover associated and related building code administration and enforcement responsibilities."). And indeed, even to this day, more than 3 years after these litigations commenced, the Cities *still* have yet to take action to make their permit fees compliant with the law. So long as the value of the development outweighs the permit fees, the builder (and ultimately, the landowner) is likely to pay the fees. *See Sheetz*, 601 U.S. at 275 ("The landowner is 'likely to accede to the government's demand, no matter how unreasonable,' so long as she values the building permit more."). The fact that Minnesota state law regulates and constrains the Cities' building permit fees does not displace or obviate review under the Takings Clause. *See Koontz*, 570 U.S. at 618 (observing that "state law normally provides an independent check on excessive land use permitting fees").

Furthermore, the record shows that the Cities have in fact used their building permit fees to pursue ends

lacking any nexus or rough proportionality to building permit review. The Cities have for years profited on building permit fees in the range of millions of dollars. *Housing First Brief in Court of Appeals*, at **9–15. The Cities funneled these profits into their respective General Funds and used them for whatever purposes they deemed fit. Corcoran used hundreds of thousands of dollars in building permit profits to remodel its city hall. *See id.* ** 13–15. Dayton transferred $2.7 million into a fund for future municipal projects unrelated to building permits. *See id.* **11–12. Despite year after year profits, the Cities failed to rein in their building permit fees. "Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them." *Koontz*, 570 U.S. at 605.

The dissenters in *Koontz* asserted that the majority opinion made it impractical to distinguish monetary exactions subject to *Nollan/Dolan* from taxes. *Id.* at 626–627 (Kagan, J., dissenting). It is in the context of responding to the dissent that the *Koontz* majority mentioned user fees not being takings. *See id.* at 615–617. The Court's response to arguments of the dissent underscores that monetary requirements to obtain a land use permit do not fall within the user fee exception:

> The dissent criticizes the notion that the Federal Constitution places any meaningful limits on 'whether one town is overcharging for sewage, or another is setting the price to sell liquor too high.' But only two pages later, it identifies three constraints on land use permitting fees that it says the Federal Constitution imposes and suggests that the additional

> protections of *Nollan* and *Dolan* are not needed. [T]he dissent's argument that land use permit applicants need no further protection when the government demands money is really an argument for overruling *Nollan* and *Dolan*.

Id. at 618–619 (cleaned up). The dissenters fully understood that the majority held *Nollan/Dolan* applicable to permitting fees "cover[ing] the direct costs of providing services like sewage or water to the development." *Id.* at 626.

The fact the user fees takings exception has no application in the development context is shown by the cases cited by the *Koontz* majority. None of those cases involved impairment of a private property interest. *See, e.g.*, *Mobile County v. Kimball*, 02 U.S. 691 (1880) ("But neither is taxation for a public purpose, however great, the taking of private property for public use, in the sense of the Constitution."); *see also United States v. Sperry Corp.*, 493 U.S. 52, 59 (1989) (observing that no private property interest was implicated by tribunal user fee). There is a material difference between payment of a fee required by local government as a condition of private property development, and payment of a fee to utilize public facilities. *See Koontz*, 570 U.S. at 614–615; *cf. Horne v. Dep't of Agric.*, 576 U.S. 350, 366–367 (2015) (distinguishing the decision in *Leonard & Leonard v. Earle*, 279 U.S. 392 (1929), by holding that raisins, unlike oysters, are private property, the taking of which requires just compensation).

Unlike the user fee cases, a fee imposed as a condition of a building permit burdens the right to build on one's

own property, a right protected by the Fifth Amendment. *See Nollan*, 483 U.S. at 833 n. 2 (observing that the "right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'"); *see also Tyler v. Hennepin County, Minnesota*, 598 U.S. 631, 639 (2023) ("Minnesota recognizes a homeowner's right to real property, like a house[.]").

With respect to the reference of the court of appeals regarding characterizing the Cities' building permit fees as taxes, if the Cities' building permit fees were considered taxes, that would necessarily lead to the conclusion the Cities have no authority under state law to require them. *See* Minn. Stat. § 412.251 (listing municipal taxing powers); *cf. Koontz*, 570 U.S. at 617 ("If respondent had argued that its demand for money was a tax, it would have effectively conceded that its denial of petitioner's permit was improper under Florida law."). There is a reason the Cities have never argued their building permit fees are taxes: doing so would concede their invalidity under state law.

Certiorari is warranted because the ruling below is in direct conflict with the core rationale of *Koontz* and would, if allowed to stand, lead to significant confusion in Minnesota and elsewhere regarding the circumstances where *Nollan/Dolan* analysis applies. Proliferation of the view of the court below would make it very easy for local governments to use building permits as profit generating centers.

Whether valuation-based building permit fees are exempt from *Nollan/Dolan* is a question of national

importance. The International Residential Code includes a sample valuation-based building permit fee schedule.[9] According to code adoption maps produced by the International Code Council, the IRC is in use or adopted in 49 states.[10] Valuation-based building permit fees are believed to be the most prevalent method of fee in use in the country (as opposed to setting the fee based upon square footage or some other method). The Court should grant review to make clear there is no blanket exception for building permit fees that would create a gaping hole in the protections to landowners provided by *Nollan* and *Dolan*.

II. THE DECISION IN *SHEETZ* FURTHER UNDERSCORES THE ERROR OF THE COURT OF APPEALS.

Within weeks of the decision of the court of appeals below, the Court filed its opinion in *Sheetz v. County of El Dorado*. The monetary exaction challenged in *Sheetz* was a "traffic impact fee." The question addressed in *Sheetz* was "whether the Takings Clause recognizes a distinction between legislative and administrative conditions on land-use permits." 601 U.S. 267, 273 (2024). The Court unanimously ruled that the Takings Clause applies equally to legislative and administrative permit conditions. *Id.* at 279. *Sheetz* confirms that the Takings Clause applies "when the government withholds or conditions a building permit for reasons unrelated to its land-use interests."

9. *See* https://codes.iccsafe.org/s/IRC2021P2/appendix-al-permit-fees/IRC2021P2-AppxAL.

10. https://iccsafe.org/wp-content/uploads/Code_Adoption_Maps.pdf.

Id. at 275. For example, a permit condition requiring that the applicant must pay for a holiday party for a planning commission would amount to extortion. *Id.*

If a permit condition requiring the applicant to pay for a holiday party amounts to a constitutional violation—a condition the Court *unanimously* agreed would be extortionate—so too does a requirement that the applicant pay for a city hall remodel or pay to finance future city projects unrelated to building permits. In substance and effect, that is what the Cities have required in order for landowners to develop.

In light of the fact the court of appeals rendered its decision without the benefit of *Sheetz*, it would be appropriate to reverse and remand for further consideration in light of that decision. *Cf. Mast v. Fillmore County, Minnesota*, 141 S.Ct. 2430 (2021) (reversing and remanding in light of decision of the Court filed after state court of appeals opinion).

III. THE RECORD DEFIES THE FINDING OF THE COURT OF APPEALS ON SUMMARY JUDGMENT THAT THE CITIES' BUILDING PERMIT FEES ARE USER FEES.

The court of appeals determined that the Cities' building permit fees were user fees exempt from the Takings Clause without analyzing how the record evidence applied to that finding. *See* Pet. App. D p. 10–11. The court of appeals ostensibly looked no further than that the Cities' fees were legally required to be commensurate with the actual costs of services provided, to find the fees were in fact user fees. This aspect of the court of appeals

exalts form over substance and overlooks that the Court has itself disregarded mere labels when deciding the applicability of the Takings Clause to exactions.

"[O]ur Constitution deals in substance, not form." *Sheetz*, 601 U.S. at 281 (Gorsuch, J., concurring). The Takings Clause "stands as a shield against the arbitrary use of governmental power." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). "'The Fifth Amendment's guarantee was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Id.* at 163 (citation omitted; cleaned up).

When analyzing the constitutionality of a type of charge, the Court disregards its label and instead focuses upon its substance. *See Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021) (recognizing that government labels do not control whether government action causes a taking); *Dolan*, 512 U.S. at 392 (rejecting assertion that "denominating a governmental measure as a 'business regulation' . . . immunize[s] it from constitutional challenge on the ground that it violates a provision of the Bill of Rights."); *Sperry Corp.*, 493 U.S. at 62 (noting that the Court would look at the reality of the fee imposed, and not just its stated purpose, in deciding whether the fee violated the Takings Clause); *cf. Tyler*, 598 U.S. at 639 ("The County had the power to sell Tyler's home to recover the unpaid property taxes. But it could not use the toehold of the tax debt to confiscate more property than was due."). There is a point at which even an exercise of the taxing power may violate the Fifth Amendment. *Village of Norwood v. Baker*, 172 U.S. 269, 278 (1898) (observing

that even for taxes, there is "a point beyond which the legislative department . . . may not go, consistently with the citizen's right of property.").

As early as 1898, the Court recognized that the "guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvement, could not be questioned by him in the courts of the country." *Village of Norwood*, 172 U.S. at 278. In *Village of Norwood*, the Court ruled that a special assessment—which the Court referred to as an "exaction"—violated the Fifth Amendment because it was substantially in excess of the special benefit to the landowner. 172 U.S. at 279.

In discussing the difference between taxes and takings, *Koontz* approvingly cited *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980). *See* 570 U.S. at 616. The plaintiff in *Webb's Fabulous Pharmacies* challenged as violative of the Fifth Amendment the Seminole County circuit clerk retaining over $100,000.00 in interest earned on interpleaded funds. *See* 449 U.S. at 157–158. In addition to the interest, the clerk of court took a fee of $9,228.74 for services rendered pursuant to Florida Statute § 28.24. *Id.* The Court rejected the clerk's argument that it had the right to keep the interest as a user fee, remarking that it was "obvious that the interest was not a fee for services, for any services obligation to the county was paid for and satisfied by the substantial fee charged pursuant to § 28.24[.]" *Id.* at 162. The Court observed that the county's retention of interest, which

the Court referred to as an "exaction," was "a forced contribution to general governmental revenues, and . . . is not reasonably related to the costs of using the courts." *Id.* at 163. The Court ruled that the clerk's retention of interest was a taking in violation of the Fifth and Fourteenth Amendments. *Id.*

The Cities' building permit fees are forced contributions to general government revenues. Dayton's own consultant found the city was profiting approximately $1,500 on each detached single-family home building permit. 2023 WL 9230351, at *18. At no time has Dayton amended its fees to bring them in line with costs. Rather, Dayton has for years used its building permit profits to build a reserve for future city projects.

Corcoran, which hired the very same consultant to analyze its profit per permit as Dayton, found that the city was on average profiting approximately $2,300 on most new home building permits. *Housing First Corcoran Trial Court O'ppn Memo.* p. 8. Although Corcoran amended its building permit fees in 2023, that amendment did not come close to making the fees proportionate with the city's actual costs: the city will still be profiting $1,900 on average. *Id.*

Even the methodology the Cities have used to report building permit expenses (viz., the indirect cost methodology) attributes general government overhead as building permit expenses. *See* 2023 WL 9230351, at **15–17. The Cities have inflated their building permit expenses to include unrelated costs such as elections, assessing, legal, and emergency management. Adding in such expenses reduces the profit the Cities are required

to report to DLI. The building permit profits discussed throughout this petition would be greater were these irrelevant costs excluded.

The Cities have used building permit profits to fund projects unrelated to building permits, projects which ought to be paid for by the public as a whole. Under the same reasoning as *Webb's Fabulous Pharmacies*, this evidence belies the notion that the Cities' building permit fees are user fees.

The lower court's ruling conflicts with this Court's many precedents holding that the constitutionality of a fee is determined by its substance, not its form. As argued above, even accepting for the sake of argument the logic of the court of appeals regarding the status of user fees under *Koontz*, that would still not categorically excuse the Cities' building permit fees from Fifth Amendment review. In substance, the building permit fees are exactions—not user fees—which fail constitutional scrutiny. The Court should reverse the court of appeals and remand for consideration of whether the Cities' building permit fees are general government revenue raising devices of the type prohibited by *Webb's Fabulous Pharmacies*.

IV. REVIEW SHOULD BE GRANTED TO RESOLVE CONFLICTS CREATED BY THE LOWER COURT'S RULING AND TO CLARIFY THE LAW.

The court of appeals observed that in *Koontz* the exaction there "conditioned the issuance of a land-use permit on a grant by the landowner of an easement—an interest in the landowner's real property." Pet. App. D p. 11 (citation omitted). In *Koontz*, there were two alternatives

presented to the landowner to obtain a permit, either (a) have a 1-acre development and convey a conservation easement for 13.9 acres, or (b) have a 3.7-acre development with a smaller easement area (11.2 acres) and pay the government to make improvements on land several miles away. *See* 570 U.S. at 601–602. Accordingly, payment of the fee was in lieu of the government taking conservation easement over roughly 2.7 acres of land.

By distinguishing *Koontz* on the ground there was no demand for property in the instant case, the lower court's holding conflicts with other lower court decisions observing that *Koontz* is not limited to in-lieu of fee scenarios. *See Anderson Creek Partners, L.P. v. County of Harnett*, 876 S.E.2d 476, 496 (N.C. 2022); *Charter Twp. of Canton v. 44650, Inc.*, No. 354309, 2023 WL 2938991, at *12 (Mich. Ct. App. April 13, 2023). The holding in *Koontz* was clear that *Nollan/Dolan* analysis would thereafter apply to all demands for money imposed on building permits: "the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money." *Koontz*, 570 U.S. at 619. The Court should grant review in this case to correct the lower court's evident misunderstanding that *Koontz* is limited to fee in lieu situations.

The lower court's ruling also creates a conflict with decisions of other state courts holding that building permit fees similar to those at issue here are subject to *Nollan/Dolan* review. For example, in *Mira Mar Development Corporation v. City of Coppell, Texas*, the Texas Court of Appeals applied *Nollan/Dolan* to construction inspection fees charged by the city. 421 S.W.3d at 97–98. The court

determined that for inspection fees, "[t]he impact of the development . . . is the City's costs for the inspections, not the value of the construction." *Id.* at 97. The Texas Court of Appeals determined that the city had failed to offer evidence establishing as a matter of law that its inspection fees were roughly proportionate, and therefore ruled that the district court's grant of summary judgment in favor of the city on this item was inappropriate. *Id.* Review should be granted to resolve this conflict, as well as to address confusion expressed by lower courts regarding the relationship between the user fee and unconstitutional conditions doctrines. *See Anderson Creek Partners, L.P. v. County of Harnett*, 854 S.E.2d 1, 12 (N.C. Ct. App. 2020) (stating that "the *Koontz* Court . . . provided little guidance on how courts should tread the fine line between unconstitutional exactions and constitutional, routine taxes and fees."), *rev'd by* 876 S.E.2d 476 (N.C. 2022).

V. THE LOWER COURT'S RULING SHOULD BE SUMMARILY REVERSED SO THAT STATE LAW VALIDITY IS DETERMINED BEFORE THE TAKINGS ISSUE.

The court of appeals dismissed the takings claims even though there has been no determination that the Cities' building permit fees survive scrutiny under Minn. R. 1300.0160, Subp. 2, the Minnesota regulation requiring that building permit fees be proportionate to the actual services provided. Put another way, the lower court ruled that the Cities' building permit fees are definitively exempt user fees for purposes of federal constitutional law without first having determined whether the permit fees even satisfy the state regulation which supposedly made them user fees in the first place. No court has made

any such determination. State law would guide, but not control, whether the building permit fees are exempt from the Constitution's reach. *See Tyler*, 598 U.S. at 638; *see also Murr v. Wisconsin*, 582 U.S. 383, 396 (U.S. 2017) (observing the Court's reservation with the view that property rights under the Takings Clause are coextensive with state law). To date, there has been no determination under even state law that the building permit fees satisfy proportionality requirements.

The lower court's ruling has created a catch-22 situation. On one hand, the takings claims have been dismissed with prejudice; on the other hand, Petitioner's state law claims challenging lack of proportionality have been remanded to the district court and have yet to be decided on the merits. If the trial court now determines that the Cities' building permit fees fail the test of proportionality required by Minn. R. 1300.0160, Subp. 2, it will be too late for the takings claims to be resurrected. The dismissal of those claims will be final and not subject to reversal. The character of the building permit fees under federal law should not have been determined before the character of the fees under state law has been determined. The lower courts put the cart before the horse with respect to the takings claims. The Court should reverse and remand the premature dismissal of the takings claims.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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September 6, 2024

APPENDIX

TABLE OF APPENDICES

APPENDIX A — ORDER AND MEMORANDUM OF THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MINNESOTA, COUNTY OF HENNEPIN, FILED JULY 6, 2023

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT FOURTH
JUDICIAL DISTRICT

Court File No.
27-CV-21-9069

HOUSING FIRST MINNESOTA,

Plaintiff,

vs.

CITY OF CORCORAN,

Defendant.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Judge: Francis J. Magill

The above-entitled matter came on for hearing before the Honorable Francis J. Magill, Judge of District Court, on April 7, 2023, upon Cross-Motions for Summary Judgment. The Court heard cross-motions for summary judgment in related case, Housing First Minnesota v. City of Dayton (27-CV-21-9070), at the same time. Bryan J. Huntington and Megan C. Rogers, Esqs. represented

Appendix A

Plaintiff. Monte A. Mills and Katherine M. Swenson, Esqs. Represented Defendant.

Based upon the files, records, and proceedings herein, and being fully informed in the premises, the Court makes the following:

ORDER

1. Defendant's Motion for Summary Judgment is GRANTED.

2. Plaintiff's motion for Summary Judgment is DENIED.

3. The attached Memorandum is incorporated as if fully set forth herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

/s/ Frank J. Magill
The Honorable Francis J. Magill
Judge of District Court

I certify the above order constitutes the Judgment of the Court.
Court Administrator

By:
Lund, Deborah
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Appendix A

MEMORANDUM

BACKGROUND

Housing First is a trade organization representing home builders, developers, and remodelers. *Pl.'s Mem. in Supp. of Mot. for Summ. J. at 3*. The City of Corcoran ("City") is a municipality that collects building permit fees and in return issues building permits for the construction of homes. *Def. Mem. in Supp. of Mot. for Summ. J. at 5-6*. The building permits that the City issues are required by law under the State Building Code ("SBC"). *Minn. Stat. § 326B.151*. Department of Labor and Industry ("DOLI") regulations require that building permit fees be "fair, reasonable, and proportionate to the actual cost of the service for which the fee is imposed." *Minn. R. 1300.0160 subp. 2*. The City sets the amount of the fees for the building permits through an ordinance enacted each year by the City Council. *Def. Mem. of Law in Supp. of its Mot. for Summ. J. at 9*. The City has made slight adjustments to the building permit fees, and the current fee schedule is the same as the fee schedule in the 1994 Uniform Building Code. *Def. Mem. of Law in Supp. of its Mot. for Summ. J. at 9-10*.

After the fees are set, the City contracts with Metro West Inspection Services, Inc. ("Metro West") and Stantec to provide services related to building permits. *Pl.'s Mem. in Supp. of Mot. for Summ. J. at 5*. The City pays Metro West on an hourly and percentage basis for the work it performs related to building permits and pays Stantec on an hourly basis. *Pl.'s Mem. in Supp. of Mot. for Summ. J.*

at 5. Metro West serves as the City's designated building official. *Def. Mem. in Supp. of Mot. for Summ. J. at 8*.

The majority of building permits issued by the City were issued to members of Housing First. *Pl.'s Consol. Reply Mem. in Supp. of Summ. J. at 13*. When the Housing First entities pay the fee to the City for the building permit, they pass this cost along to the home buyers. Housing First's members add a 15% overhead fee and a 6% profit margin. *Def. Mem. in Supp. of Mot. for Summ. J. at 7; Emory Decl. Ex. 8 at HFM002158*.

The City has reported a considerable surplus of building permit revenues in recent years. *Pl.'s Mem. in Supp. of Mot. For Summ. J. at 5-7*. Housing First also alleges that the City planned to use excess building permit revenue to fund its planned remodel of City Hall. *Pl.'s Mem. in Supp. of Mot. For Summ. J. at 8-12; Huntington Decl. Ex. 13*. Housing First cites this fact as proof that the City collects building permit fees in excess of what is allowed by law. In other words, Housing First argues that the building permit revenues are not "proportionate" to the costs associated with providing the permits as required by the statute. Housing First seeks a declaration of the invalidity of the City's current building permit fees and an order requiring the City to comply with the law in its reports to DLI and set a fee schedule that is proportional to the cost of issuing the building permits. *Pl.'s Mem. in Supp. of Mot. For Summ. J. at 38*. Housing First also seeks disgorgement of the alleged excess building permit fee revenues and requests that the disgorged amount be returned to the homeowners after paying Housing First's

legal fees. *Pl.'s Mem. in Supp. of Mot. For Summ. J. at 2, 38* The City contends that Housing First lacks standing to challenge the fees, and that even if Plaintiff has standing, its claims fail on their merits. The City also contends that it has followed the law in setting its fees for building permits. *Def. Mem. of Law in Supp. of its Mot. for Summ. J. at 9-10; 16*.

For the reasons below, the Court finds that Plaintiff's claims fail as a matter of law and GRANTS Defendant's Motion for Summary Judgment. For the same reasons, Plaintiff's Motion for Summary Judgment is DENIED.

STANDARD OF REVIEW

Summary judgment is appropriate when "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." *Minn. R. Civ. P. 56.01*. "A material fact is one of such a nature as will affect the result or outcome of the case depending on its resolution." *Zappa v. Fahey*, 245 N.W.2d 258, 259–60 (Minn. 1976). Summary judgment is also appropriate when a "determination of the applicable law will resolve the controversy." *Gaspord v. Washington Cnty. Plan. Comm'n*, 252 N.W.2d 590, 590 (Minn. 1977).

"On a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party." *State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 571 (Minn. 1994) (citing *Hansen v. City of St. Paul*, 214 N.W.2d 346, 347 (Minn. 1974). It is not the province of the court to decide issues of fact; rather,

the court must decide whether any genuine factual issues exist. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). "A material fact is one of such a nature as will affect the result or outcome of the case depending on its resolution." *Zappa*, 245 N.W.2d at 259–60.

A fact is genuinely in dispute when there is evidence in the record that "would permit reasonable persons to draw different conclusions." *Am. Bank of St. Paul v. Coating Specialties, Inc.*, 787 N.W.2d 202, 205 (Minn. Ct. App. 2010) (citing *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002)). "Speculation, general assertions, and promises to produce evidence . . . are not sufficient to create a genuine issue of material fact[.]" *Id.* (internal citations omitted). Summary judgment in all cases "is mandatory against a party who fails to establish an essential element" of its claim. *Lloyd v. In Home Health, Inc.*, 523 N.W.2d 2, 3 (Minn. Ct. App. 1994).

DISCUSSION

I. Housing First Lacks Standing to Challenge the City's Building Permit Fees.

Generally, standing is the "requirement that a party has a sufficient stake in a justiciable controversy to seek relief from a court." *State by Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490, 493 (Minn. 1996) (citing *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972)). Without standing, a party cannot bring the suit. *Humphrey*, 551 N.W.2d at 493. Standing exists when a party has suffered an "injury-in-fact" or when standing is granted to a party through a legislative enactment. *Id.*; *Citizens for a Balanced City*

v. Plymouth Congregational Church, 672 N.W.2d 13, 18 (Minn. Ct. App. 2003).

A. Because Plaintiff's Members Do Not Have Standing, Plaintiff Has No Associational Standing.

Housing First asserts that it has associational standing to bring this action on behalf of its members.[1] *Pl.'s Mem. in Supp. of Mot. for Summ. J. at 28.* The City acknowledges that Housing First can assert standing if its members have standing. *Def. Mem. Of Law in Supp. of its Mot. for Summ. J. at 17.* However, the City argues that Housing First's members have not suffered an injury-in-fact nor are they beneficiaries of statutory standing. *Def. Mem. of Law in Supp. of its Mot. for Summ. J. at 2, 18*.

1. Housing First's Members Have Not Suffered an Injury-In-Fact

Standing arises when a plaintiff has suffered an injury-in-fact. *Humphrey*, 551 N.W.2d at 493. An injury-in-fact "is a concrete and particularized invasion of a legally protected interest." *Enright v. Lehmann*, 735 N.W.2d 326, 329 (Minn. 2007) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The injury required to establish standing may be economic in nature, "so long as it is not

1. Plaintiff does not claim to have standing in its own right. Plaintiff does not apply for, pay for, or receive building permits. Plaintiff has not suffered an injury-in-fact relating to the building permit fees, nor does Plaintiff point to its own basis for statutory standing. Plaintiff can only achieve standing through associational standing.

abstract or speculative." *Builders Ass'n of Minn. v. City of St. Paul*, 819 N.W.2d 172, 176 (Minn. Ct. App. 2012) (citing *State v. Knutson*, 523 N.W.2d 909, 911 (Minn. Ct. App. 1994)). The injury must also be "traceable to the challenged action." *Builders Ass'n of Minn.*, 819 N.W.2d at 177 (citing *In re Crown CoCo, Inc.*, 458 N.W.2d 132, 135 (Minn. Ct. App. 1990)).

Housing First asserts that its members have suffered an "injury-in-fact" because they pay the City for the building permits. However, the building permit fees do not harm the members or cause them an independent injury. The funds used to pay for building permit fees are accounted for in a manner that allows the members to pass the fees on to each individual home buyer. There is no intent for the members to incur the cost of the fees, nor is there evidence that they have not been able to pass the fees on to home buyers. Instead, the record evidence is undisputed that Plaintiff's members pay the building permit fees to the City and are then fully reimbursed by the home buyers, plus an additional amount for overhead and profit. *Emory Decl. Ex. 17.* Thus, higher building permit fees translate into greater profits for Plaintiff's members. There is no economic injury to Plaintiff's members associated with higher building permit fees. The economic injury is passed on and recognized by the home buyers. This is further confirmed by Plaintiff's acknowledgment that any recovery should go to the home buyers (less their attorney's fees on an unjust enrichment theory).[2] *Pl.'s Mem. in Supp. of Mot. for Summ. J. at 36*.

2. Plaintiff has not argued its members suffered an injury based on the time value of money. Plaintiff's members expended funds on behalf of the home buyers that they did not recoup until

Plaintiff argues that Minnesota has rejected the argument that passing a loss through to another party defeats standing. In support of this argument, they erroneously rely on *State by Humphrey v. Philip Morris, Inc.* In that case, the Minnesota Supreme Court dealt with the issue of whether Blue Cross Blue Shield of Minnesota ("Blue Cross") had standing to pursue claims against tobacco companies for increased health costs due to its insureds' smoking habits. *State by Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490, 495-97 (Minn. 1996). The tobacco companies sought to use the pass through defense to defeat Blue Cross's standing to bring statutory antitrust and consumer protection claims. They asserted that because Blue Cross simply passed on any increased costs to its employer subscribers, Blue Cross had not suffered an actual injury. *Id.* The Court rejected this use of the pass through defense because "each of the[] statutes contain[ed] specific authorizations for suit [by Blue Cross] and each create[d] a private cause of action for any party injured directly or indirectly by a violation of the statute." *Id.* at 495. In other words, the Supreme Court held that the pass through defense did not defeat a legislature's grant of statutory standing:

> We . . . conclude that it was the intent of the Minnesota legislature to abolish the availability of the pass through defense by specific grants of standing within statutes designed to protect Minnesota citizens from sharp commercial practices.

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later. However, given that Plaintiff's members added profit to the permit fees, it presumably cannot prove its members suffered any losses from the temporary loss of the use of the money.

Id. at 497. The Court did not hold that the pass through defense was inapplicable to injury in fact standing and any such language otherwise is *dicta*. *See also Group Health Plan, Inc. v. Philip Morris, Inc.,* 621 N.W.2d 2, 7 (Minn. 2004) (Court interpreted *State by Humphrey* to have rejected the pass through defense because the "defense was abolished by the legislature with the broad grants of standing conferred in the statutes at issue." (emphasis added)).

Plaintiff is only pursuing one statutory claim. Plaintiff claims they have standing under the Municipal Planning Act, Minn. Stat. § 462.361 ("MPA"). However, as set forth below, case law makes clear that Section 462.361 does not allow Plaintiff to pursue a claim under the MPA. Given Plaintiff's lack of statutory standing to pursue a MPA claim, the pass through defense is irrelevant. *Humphrey* does not support Plaintiff's standing argument.

Furthermore, the pass through defense was traditionally pursued by defendants in antitrust cases. In one of the seminal cases rejecting the pass through defense in the antitrust context, the United States Supreme Court faced the question whether plaintiff suffered an injury when defendant asserted that the plaintiff was able to pass on the illegally inflated price to the ultimate consumer through higher prices. The Supreme Court rejected this argument because "a wide range of factors influence a company's pricing policies." *Hanover Shoe, Inc. v. United Shoe Mach. Corp.,* 392 U.S. 481, 491-492 (1968). The Court referenced supply and demand, general economic conditions, and a tight labor market as factors that made

it difficult to determine whether the illegally inflated amount had been passed on to the consumer. *Id.* The Court said that given these "virtually unascertainable figures," proving that the cost was passed through to the purchaser would be "insurmountable." *Id.* at 493. The Court noted there might be instances involving a "pre-existing 'cost-plus' contract" where the pass through defense would be viable because it would be clear that the plaintiff had not been damaged due to Plaintiff's ability to fully pass the overcharge on to the consumer. *Id.* at 494.

This analysis by the *Hanover* Court supports the use of the pass through defense in this case. The record evidence shows that the building permit fee was isolated. A profit margin was added to the building permit fee. An overhead figure was added to the building permit fee. The entire amount was then passed on to the home buyer, similar to a cost-plus contract referenced by the *Hanover* Court. Under the unique facts of this case, Housing First's members were not injured because they passed on the building permit fees to the home buyers.

In an effort to prove injury in fact, Plaintiff submitted an expert report that they contend shows the economic effect of higher building permit fees. *Huntington Decl. Ex. 31*. They argue that the report demonstrates that higher building permit fees result in decreased home sales, which results in economic harm to Plaintiff's members. *Pl.'s Mem. in Supp. of Mot. for Summ. J. 18-19.*

In evaluating economic injury and standing with respect to a builder's trade association, the Minnesota

Court of Appeals upheld a district court's finding that the association had standing to challenge a city policy governing the size of egress windows. *Builders Ass'n of Minn. v. City of St. Paul*, 819 N.W.2d 172, 177 (Minn. Ct. App. 2012). In that case, one of the trade association's members provided evidence that customers had decided not to replace egress windows because of the policy and that this caused the member to lose revenue. *Id*. This, the court concluded, constituted a "concrete economic injury" to the association's members, thus giving rise to associational standing. *Id*. at 176-77.

Here, unlike in *Builders Association of Minnesota*, Housing First has not provided evidence of a concrete economic injury. Housing First must provide evidence from a member showing that potential customers chose not to purchase or remodel homes due to building permit fees in the City during the time period alleged. *See also Citizens for a Balanced City,* 618 N.W.2d at 18 (alleging specific harm to area, including evidence that a business moved out of the area and that community had difficulty recruiting patrol walkers, demonstrated necessary injury). An expert opinion based on national data not specific to the City that building permit fees influence the housing market is insufficient to prove a concrete injury to Plaintiff's members. The alleged economic injury detailed in the expert report is too indirect and speculative.[3] Unlike

3. The expert report is replete with equivocal statements and omissions that fail to prove a direct injury to the Plaintiff's members. Although as a general economic proposition higher fees influence demand, there is no direct evidence this happened in the City during the period of time referenced by Plaintiff. The expert

Builders Association, Plaintiff has been unable to allege any specific, direct injury to establish standing.

B. Plaintiff Has No Statutory Standing.

Standing can also arise from a statutory grant. *Humphrey*, 551 N.W.2d at 493. Plaintiff asserts that it has a cause of action for declaratory judgment under the Municipal Planning Act, Minn. Stat. § 462.361 ("MPA"). *Pl.'s Mem. in Supp. of Mot. for Summ. J. 24*. That statute provides for judicial review of "an ordinance, rule, regulation, decision or order of a governing body or board of adjustments and appeals acting pursuant to sections 462.351 to 462.364." Minn. Stat. § 462.361, Subd. 1. However, all of the sections from 462.351 to 462.363 relate to municipal planning and land use, not building permits. Therefore, the MPA does not provide a statutory

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report does not reference or analyze any housing data from the City during the relevant period. The report's conclusion is based on nationwide factors and basic concepts of supply, demand, and elasticity, not the relevant market in the City. As noted by the Supreme Court in *Hanover,* there is a vast difference between "the real economic world" as opposed to an "economist's hypothetical model." *Id.* at 493. Further, if the City charged lower permit fees during the relevant period, the City would have needed to raise funds in another way to balance its budget. Beise Decl. ¶ 12 (it is the City's practice to balance its budget). If, for example, the City raised property taxes to replace the building permit fees, demand for housing may have decreased due to the higher property taxes, irrespective of lower building permit fees. It is speculative to conclude on the current record that the Plaintiff's members were damaged due to lower housing demand because of the allegedly inflated permit fees.

grant of standing for Plaintiff's claims related to building permit fees.

The Minnesota Court of Appeals reached the same conclusion when it decided a case in which a home builder alleged that a city was overcharging for building permit fees and challenged the permit fees under § 462.361 of the MPA. *Centra Homes, LLC v. City of Norwood Young America*, 834 N.W.2d 581 (Minn. Ct. App. 2013). In reviewing the relevant sections of the MPA, the court noted that no provision "authorizes a municipality to establish a building code or a building-permit fee." *Id.* at 586. Rather, the MPA governs land use and "does not govern building construction." *Id.* Therefore, the court held, "a person required to pay a building-permit fee is not aggrieved by a decision of the city acting pursuant to sections 462.351 to 462.34," the sections of the MPA that are covered by the MPA's statutory grant of standing. *Id.* As such, § 462.361 of the MPA did not permit the home builder "to bring an action in district court to obtain review of the city's building-permit fees." *Id.* So too here.

Because the section of the MPA relied upon by Plaintiff relates to land use and municipal planning, and not building construction or building permit fees, the MPA does not provide a statutory grant of standing in this action.

C. Plaintiff's Other Standing Arguments are Meritless.

Housing First also argues that it has standing based on Minnesota's "well-recognized right to sue to enjoin

illegal expenditures of municipal funds." *Pl.'s Mem. in Opp'n to City's Mot. for Summ. J. at 12,* citing *McKee v. Likins*, 261 N.W.2d 566, 570-571 (Minn. 1977); *Arens v. Village of Rogers*, 240 Minn. 386, 392 (1953). However, the cases relied upon by Housing First are not applicable here. *McKee* was a suit by a taxpayer, and the court found that the plaintiff had standing as a taxpayer. *McKee v. Likins*, 261 N.W.2d 566, 568; 571 (Minn. 1977). The same is true of *Arens*. *Arens v. Village of Rogers*, 240 Minn. 386, 388; 392 (1953). The "well-recognized right to sue to enjoin illegal expenditures of municipal funds" referenced by Housing First applies to taxpayers, but Housing First has not demonstrated that it pays taxes to the City. As such, taxpayer standing does not apply to Housing First's claims.

Further, the reason taxpayers have standing to challenge the expenditure of funds is because such expenditures are likely to increase their overall tax burden. *Arens*, 61 N.W.2d at 514; *see also Phillips v. Brandt*, 43 N.W.2d 285, 289 (Minn. 1950) (holding that taxpayer had standing to challenge allegedly illegal payment of salary for city position because taxes were source of funds). Housing First has not demonstrated that they are likely to see their financial burden increased in any way, because the building permit fees its members pay are fully reimbursed. Additionally, Housing First cites no cases establishing a common law right to challenge the expenditure of funds that originate not from taxes, but from permit fees that are paid and then fully reimbursed by home buyers plus an additional profit.

Finally, Housing First asserts that *McCaughtry v. City of Red Wing*, 808 N.W.2d 331 (Minn. 2011) is a source of standing for its declaratory judgment claim. *Pl.'s Mem. in Opp'n to City's Mot. for Summ. J. at 12*. According to Plaintiff, *McCaughtry* grants them a right to challenge a city ordinance. Housing First's reliance on *McCaughtry* is misplaced for two reasons. First, *McCaughtry* is not a case about standing, but a case about ripeness. *Id.* at 338 (" . . . we believe that the relevant issue here is ripeness, not standing."). Second, a "party challenging the constitutionality of a law must show that the law 'is, or is about to be, applied to his disadvantage.'" *Id.*, *quoting Lee v. Delmont*, 36 N.W.2d 530, 537 (1949); *see also Haveland*, 25 N.W.2d at 478 (explaining that litigants must be able to show that they have sustained or are immediately in danger of sustaining some direct injury). Here, Housing First has not established a direct injury, because as discussed above, Housing First's members pass the building permit fees plus profit and overhead on to the home buyers.

For the reasons above, Housing First has not established that it has standing to bring its claims in this matter.

II. Even if Housing First Did Have Standing, It Has Not Established a Takings Clause Violation.

Housing First seeks declaratory judgment for its claim that the City's building permit fees violate the takings clause. *Pl.'s Mem. in Supp. Of Mot. for Summ. J. at 22*. The state and federal constitutions proscribe the government

from taking private property for public use without just compensation. The Takings Clause in the United States Constitution states that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V; *see also Chi., Burlington & Quincy R.R. Co. v. City of Chicago*, 166 U.S. 226, 241 (1897) (concluding that the Takings Clause applies to the states via the Fourteenth Amendment). The Minnesota Constitution, which also provides protection against the taking of property without just compensation, is slightly broader in scope, stating that "[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured." Minn. Const. art. I, § 13 (emphasis added). Thus, in this case establishing such a claim requires a plaintiff to show (1) that plaintiff has a protected property interest, (2) that the government took, destroyed, or damaged the property interest for use by the public, and (3) that just compensation was not paid. *See Hall v. State*, 908 N.W.2d 345, 352 (Minn. 2018) (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000 (1984)).

First, Housing First must show that it has a protected property interest. Although Housing First's members are fully reimbursed for the building permit fees they pay to the City, they do initially pay the fee to the City. While its members do not ultimately suffer an injury in fact, they have a property interest in the money that is used to obtain building permits in the City.[4]

4. Housing First also argues that "the taking occurs the moment the City conditions development of real property upon payment of an illegal fee." Pl.'s Mem. in Opp'n to City's Mot. for Summ. J. at 16. However, this issue is not as simple as presented

Second, Housing First must show that the property was taken for use by the public. Housing First has shown, and the City acknowledges, that the revenues collected from building permit fees are kept for public use. *Pl.'s Mem. in Supp. of Summ. J. at 1; Def.'s Mem. in Supp. of Summ. J. at 9*. Whether the revenues from building permit fees are used to balance the budget, as alleged by Housing First, or whether they are used to maintain the staff and resources needed to administer the building permit process, the revenues are kept for public use. Therefore, Housing First's property interest, the money its members pay for building permit fees, is taken by the government for public use.

Third, Housing First is required to demonstrate that property was taken without just compensation. Here, the City did not take property without just compensation. It is undisputed that the City took money from Housing

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by Housing First. At the time the building permit fees are set as well as paid, neither the City nor the purchaser of the permit can ascertain for certain whether the fee is "fair, reasonable, and proportionate to the actual cost of the service for which the fee is imposed" as required by law. Minn. R. 1300.0160 subp. 2. That is because the City sets the permit fees before the start of the year without knowing how many building permits will be requested, the amount of revenue that will be raised through each permit, or the costs that will be incurred by the City. In other words, at the time the City sets the fee schedule and even when the builder pays the fee, it may not be apparent whether the fee is illegal. Thus, it may not be correct as stated by Plaintiff that a taking occurs when the City "conditions development of real property upon payment of an illegal fee" because it is not apparent until later whether the fee is illegal or not.

First's members, but in return, the members were issued building permits. The members were then able to use the permits to generate a profit, both in terms of the profit earned by passing the permit fees along to home buyers and in terms of the ability to build and then sell homes for a profit. Housing First's members sought to purchase building permits from the City and that is exactly what they got in exchange for payment of the building permit fees. They have failed to establish that they did not receive just compensation.

For these reasons, Housing First's takings claim fails as a matter of law.

III. Even if Housing First Did Have Standing, It Has Not Established a Due Process Clause Violation.

Housing First seeks a declaratory judgment on its claim that the City's building permit fees violate the procedural due process clause. *Pl.'s Mem. in Supp. of Mot. for Summ. J. at 22*. Specifically, Housing First alleges that because the City has not reimbursed excess building permit fee revenues or set up a procedure to allow such reimbursement, its members have been denied procedural due process. *Pl.'s Mem. in Opp'n to City's Mot. for Summ. J. at 17.* Housing First seeks disgorgement of the excess fees. *Id.*

The state and federal constitutions provide procedural due process rights. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. To establish a procedural due process claim, the plaintiff must show (1) that the government

has deprived the plaintiff of a "protected life, liberty, or property interest" and (2) that the government's procedures were constitutionally inadequate. *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 632-33 (Minn. 2012).

Having established that Housing First's members have a property interest in the money they use to obtain building permits from the City, the next step is to analyze whether the City's procedures are constitutionally inadequate. This analysis involves a three-factor balancing test weighing: (1) the private interest affected by the official action, (2) the risk of an erroneous deprivation through the procedures used, and the probable value of additional or substitute procedural safeguards, and (3) the government's interest, along with the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Here, Housing First has not demonstrated that the City's procedures are constitutionally inadequate. The private interest in this case is the money that Housing First members use to obtain building permits. This interest is affected by the official action of setting a rate for the building permit fee and collecting that amount in exchange for issuing a building permit. While the members pay the fee initially, they are fully reimbursed, plus profit, by the home buyers. While there is a risk of charging a fee that does not exactly match the cost to the City to issue the permit, that burden falls on the home buyers, not Housing First's members. Thus, at most the impact on the property interest of the members is indirect. Plaintiff is in essence

seeking to force the City to set up a due process procedure for the home buyers, not its members. Such "indirect and incidental" impacts on a property interest do not give rise to a procedural due process claim. *See O'Bannon v. Town Court Nursing Ctr.,* 447 U.S. 773, 788-89 (1980).

Lastly, procedural safeguards are available to Housing First's members. As noted in *Centra Homes,* the housing permit fees can be challenged by Housing First's members through the administrative process. *Centra Homes,* 834 N.W.2d at 587 ("The rules applicable to the state building code provide that a permit applicant may appeal a municipal building official's decision [regarding building permit fees] to a municipal board of appeals or to the state appeals board.") And, as also noted, district court review would be available after exhaustion of the administrative process. *Id.* at 588.

For these reasons, Housing First's takings and due process claim fails as a matter of law.

CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant's Motion for Summary Judgment and DENIES Plaintiff's Motion for Summary Judgment.

FJM

APPENDIX B — ORDER AND MEMORANDUM OF THE DISTRICT COURT FOR THE FOURTH JUDICIAL DISTRICT OF THE STATE OF MINNESOTA, COUNTY OF HENNEPIN, FILED JULY 6, 2023

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT FOURTH
JUDICIAL DISTRICT

Court File No.
27-CV-21-9070

HOUSING FIRST MINNESOTA,

Plaintiff,

vs.

CITY OF DAYTON,

Defendant.

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT

Judge: Francis J. Magill

The above-entitled matter came on for hearing before the Honorable Francis J. Magill, Judge of District Court, on April 7, 2023, upon Cross-Motions for Summary Judgment. The Court heard cross-motions for summary judgment in related case, Housing First Minnesota v. City

of Corcoran (27-CV-21-9069), at the same time. Bryan J. Huntington and Megan C. Rogers, Esqs. represented Plaintiff. Monte A. Mills and Katherine M. Swenson, Esqs. represented Defendant.

Based upon the files, records, and proceedings herein, and being fully informed in the premises, the Court makes the following:

ORDER

1. Defendant's Motion for Summary Judgment is GRANTED.

2. Plaintiff's motion for Summary Judgment is DENIED.

3. The attached Memorandum is incorporated as if fully set forth herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

BY THE COURT:

/s/ Francis J. Magill
The Honorable Francis J. Magill
Judge of District Court

I certify the above order constitutes the Judgment of the Court.
Court Administrator

By:
Lund, Deborah
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Appendix B

MEMORANDUM BACKGROUND

Housing First is a trade organization representing home builders, developers, and remodelers. *Pl.'s Mem. in Supp. of Mot. for Summ. J. at 3*. The City of Dayton ("City") is a municipality that collects building permit fees and in return issues building permits for the construction of homes. *Def. Mem. in Supp. of Mot. for Summ. J. at 8-9*. The building permits that the City issues are required by law under the State Building Code ("SBC"). *Minn. Stat. § 326B.151*. Department of Labor and Industry ("DOLI") regulations require that building permit fees be "fair, reasonable, and proportionate to the actual cost of the service for which the fee is imposed." *Minn. R. 1300.0160 subp. 2*. The City attempts to accomplish this by having its staff review relevant data and propose changes to the fee schedule to the City Council. *Doud Decl. ¶ 8*. The City then sets the amount of the fees for the building permits through an ordinance enacted each year by the City Council. *Swenson Decl. Ex. 11 23:8-24; Ex. 16*.

After the fees are set, the City contracts with Metro West Inspection Services, Inc. ("Metro West") to serve as the City's building official and provide services related to building permits. *Swenson Decl. Ex. 5 at DAYTON_024335; Ex. 10 at 14:11-21.* The City pays Metro West on an hourly basis for the work it performs related to building permits. *Pl.'s Consol. Reply Mem. in Supp. of Summ. J. at 40.*

The majority of building permits issued by the City were issued to members of Housing First. *Pl.'s Consol.*

Reply Mem. in Supp. of Summ. J. at 13. When the Housing First entities pay the fee to the City for the building permit, they pass this cost along to the home buyers plus a 15% overhead fee and a 6% profit margin. *Pl.'s Mem. in Supp. of Mot. For Summ. J. at 33; Def. Resp. Mem. of Law in Opp'n to Pl.'s Mot. for Summ. J. at 5-6; Swenson Decl. Ex. 7 at HFM002158.*

The City has reported a considerable surplus of building permit revenues in recent years. *Pl.'s Mem. in Supp. of Mot. For Summ. J. at 9-10*. Because of this, Housing First alleges that the City collects building permit fees in excess of what is allowed by law and seeks a declaration of the illegality and unenforceability of the City's current building permit fees, disgorgement of excess building permit fee revenues, and injunctive relief enjoining enforcement of the current building permit fee schedule and requiring the City to set a fee schedule that is proportional to the cost of issuing building permits. *Pl.'s Mem. in Supp. of Mot. For Summ. J. at 3, 26*. The City contends that Housing First lacks standing to challenge the fees, and that even if Plaintiff has standing, its claims fail on their merits. The City also contends that it has followed the law in setting its fees for building permits. *Def. Mem. of Law in Supp. of its Mot. for Summ. J. at 9-10; 17.*

For the reasons below, the Court finds that Plaintiff's claims fail as a matter of law and GRANTS Defendant's Motion for Summary Judgment. For the same reasons, Plaintiff's Motion for Summary Judgment is DENIED.

Appendix B

STANDARD OF REVIEW

Summary judgment is appropriate when "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." *Minn. R. Civ. P. 56.01*. "A material fact is one of such a nature as will affect the result or outcome of the case depending on its resolution." *Zappa v. Fahey*, 245 N.W.2d 258, 259–60 (Minn. 1976). Summary judgment is also appropriate when a "determination of the applicable law will resolve the controversy." *Gaspord v. Washington Cnty. Plan. Comm'n*, 252 N.W.2d 590, 590 (Minn. 1977).

"On a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party." *State by Beaulieu v. City of Mounds View*, 518 N.W.2d 567, 571 (Minn. 1994) (citing *Hansen v. City of St. Paul*, 214 N.W.2d 346, 347 (Minn. 1974). It is not the province of the court to decide issues of fact; rather, the court must decide whether any genuine factual issues exist. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70 (Minn. 1997). "A material fact is one of such a nature as will affect the result or outcome of the case depending on its resolution." *Zappa*, 245 N.W.2d at 259–60.

A fact is genuinely in dispute when there is evidence in the record that "would permit reasonable persons to draw different conclusions." *Am. Bank of St. Paul v. Coating Specialties, Inc.*, 787 N.W.2d 202, 205 (Minn. Ct. App. 2010) (citing *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002)). "Speculation, general assertions, and promises to produce evidence . . . are not sufficient

to create a genuine issue of material fact[.]" *Id.* (internal citations omitted).

Summary judgment in all cases "is mandatory against a party who fails to establish an essential element" of its claim. *Lloyd v. In Home Health, Inc.*, 523 N.W.2d 2, 3 (Minn. Ct. App. 1994).

DISCUSSION

I. Housing First Lacks Standing to Challenge the City's Building Permit Fees.

Generally, standing is the "requirement that a party has a sufficient stake in a justiciable controversy to seek relief from a court." *State by Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490, 493 (Minn. 1996) (citing *Sierra Club v. Morton*, 405 U.S. 727, 731-32 (1972)). Without standing, a party cannot bring the suit. *Humphrey*, 551 N.W.2d at 493. Standing exists when a party has suffered an "injury-in-fact" or when standing is granted to a party through a legislative enactment. *Id.*; *Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 18 (Minn. Ct. App. 2003).

A. Because Plaintiff's Members Do Not Have Standing, Plaintiff Has No Associational Standing.

Housing First asserts that it has associational standing to bring this action on behalf of its members.[1]

1. Plaintiff does not claim to have standing in its own right. Plaintiff does not apply for, pay for, or receive building permits.

Pl.'s Mem. in Supp. of Mot. for Summ. J. at 32. The City acknowledges that Housing First can assert standing if its members have standing. *Def. Mem. Of Law in Supp. of its Mot. for Summ. J. at 17.* However, the City argues that Housing First's members have not suffered an injury-in-fact nor are they beneficiaries of statutory standing. *Def. Mem. of Law in Supp. of its Mot. for Summ. J. at 2, 18*.

1. Housing First's Members Have Not Suffered an Injury-In-Fact

Standing arises when a plaintiff has suffered an injury-in-fact. *Humphrey*, 551 N.W.2d at 493. An injury-in-fact "is a concrete and particularized invasion of a legally protected interest." *Enright v. Lehmann*, 735 N.W.2d 326, 329 (Minn. 2007) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). The injury required to establish standing may be economic in nature, "so long as it is not abstract or speculative." *Builders Ass'n of Minn. v. City of St. Paul*, 819 N.W.2d 172, 176 (Minn. Ct. App. 2012) (citing *State v. Knutson*, 523 N.W.2d 909, 911 (Minn. Ct. App. 1994)). The injury must also be "traceable to the challenged action." *Builders Ass'n of Minn.*, 819 N.W.2d at 177 (citing *In re Crown CoCo, Inc.*, 458 N.W.2d 132, 135 (Minn. Ct. App. 1990)).

Housing First asserts that its members have suffered an "injury-in-fact" because they pay the City for the

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Plaintiff has not suffered an injury-in-fact relating to the building permit fees, nor does Plaintiff point to its own basis for statutory standing. Plaintiff can only achieve standing through associational standing.

building permits. However, the building permit fees do not harm the members or cause them an independent injury. The funds used to pay for building permit fees are accounted for in a manner that allows the members to pass the fees on to each individual home buyer. There is no intent for the members to incur the cost of the fees, nor is there evidence that they have not been able to pass the fees on to home buyers. Instead, the record evidence is undisputed that Plaintiff's members pay the building permit fees to the City and are then fully reimbursed by the home buyer, plus an additional amount for overhead and profit. *Swenson Decl. Ex. 15.* Thus, higher building permit fees translate into greater profits for Plaintiff's members. There is no economic injury to Plaintiff's members associated with higher building permit fees. The economic injury is passed on and recognized by the home buyers. This is further confirmed by Plaintiff's acknowledgment that any recovery should go to the home buyers (less their attorney's fees on an unjust enrichment theory).[2] *Pl.'s Mem. in Supp. of Mot. for Summ. J. at 40.*

Plaintiff argues that Minnesota has rejected the argument that passing a loss through to another party defeats standing. *Pl.'s Mem. in Supp. of Mot. for Summ. J. at 29.* In support of this argument, they erroneously rely on *State by Humphrey v. Philip Morris, Inc.* In that

2. Plaintiff has not argued its members suffered an injury based on the time value of money. Plaintiff's members expended funds on behalf of the home buyers that they did not recoup until later. However, given that Plaintiff's members added profit to the permit fees, it presumably cannot prove its members suffered any losses from the temporary loss of the use of the money.

case, the Minnesota Supreme Court dealt with the issue of whether Blue Cross Blue Shield of Minnesota ("Blue Cross") had standing to pursue claims against tobacco companies for increased health costs due to its insureds' smoking habits. *State by Humphrey v. Philip Morris, Inc.*, 551 N.W.2d 490, 495-97 (Minn. 1996). The tobacco companies sought to use the pass through defense to defeat Blue Cross's standing to bring statutory antitrust and consumer protection claims. They asserted that because Blue Cross simply passed on any increased costs to its employer subscribers, Blue Cross had not suffered an actual injury. *Id.* The Court rejected this use of the pass through defense because "each of the[] statutes contain[ed] specific authorizations for suit [by Blue Cross] and each create[d] a private cause of action for any party injured directly or indirectly by a violation of the statute." *Id.* at 495. In other words, the Supreme Court held that the pass through defense did not defeat a legislature's grant of statutory standing:

> We . . . conclude that it was the intent of the Minnesota legislature to abolish the availability of the pass through defense by specific grants of standing within statutes designed to protect Minnesota citizens from sharp commercial practices.

Id. at 497. The Court did not hold that the pass through defense was inapplicable to injury in fact standing and any such language otherwise is *dicta*. *See also Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2, 7 (Minn. 2004) (Court interpreted *State by Humphrey*

to have rejected the pass through defense because the "defense was abolished by the legislature with the broad grants of standing conferred in the statutes at issue." (emphasis added)).

Plaintiff is only pursuing one statutory claim. Plaintiff claims they have standing under the Municipal Planning Act, Minn. Stat. § 462.361 ("MPA"). However, as set forth below, case law makes clear that Section 462.361 does not allow Plaintiff to pursue a claim under the MPA. Given Plaintiff's lack of statutory standing to pursue a MPA claim, the pass through defense is irrelevant. *Humphrey* does not support Plaintiff's standing argument.

Furthermore, the pass through defense was traditionally pursued by defendants in antitrust cases. In one of the seminal cases rejecting the pass through defense in the antitrust context, the United States Supreme Court faced the question whether plaintiff suffered an injury when defendant asserted that the plaintiff was able to pass on the illegally inflated price to the ultimate consumer through higher prices. The Supreme Court rejected this argument because "a wide range of factors influence a company's pricing policies." *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 491-492 (1968). The Court referenced supply and demand, general economic conditions, and a tight labor market as factors that made it difficult to determine whether the illegally inflated amount had been passed on to the consumer. *Id.* The Court said that given these "virtually unascertainable figures," proving that the cost was passed through to the purchaser would be "insurmountable." *Id.* at 493. The Court noted

there might be instances involving a "pre-existing 'cost-plus' contract" where the pass through defense would be viable because it would be clear that the plaintiff had not been damaged due to plaintiff's ability to fully pass on the overcharge to the consumer. *Id.* at 494.

This analysis by the *Hanover* Court supports the use of the pass through defense in this case. The record evidence shows that the building permit fee was isolated. A profit margin was added to the building permit fee. An overhead figure was added to the building permit fee. The entire amount was then passed on to the home buyer, similar to a cost-plus contract referenced by the *Hanover* Court. Under the unique facts of this case, Housing First's members were not injured because they passed on the building permit fees to the home buyers.

In an effort to prove injury in fact, Plaintiff submitted an expert report that it contends shows the economic effect of higher building permit fees. *Huntington Decl. Ex. 35*. They argue that the report demonstrates that higher building permit fees result in decreased home sales, which results in economic harm to Plaintiff's members. *Pl.'s Mem. in Supp. of Mot. for Summ. J. at 23*.

In evaluating economic injury and standing with respect to a builder's trade association, the Minnesota Court of Appeals upheld a district court's finding that the association had standing to challenge a city policy governing the size of egress windows. *Builders Ass'n of Minn. v. City of St. Paul*, 819 N.W.2d 172, 177 (Minn. Ct. App. 2012). In that case, one of the trade association's

members provided evidence that customers had decided not to replace egress windows because of the policy and that this caused the member to lose revenue. *Id.* This, the court concluded, constituted a "concrete economic injury" to the association's members, thus giving rise to associational standing. *Id.* at 176-77.

Here, unlike in *Builders Association of Minnesota*, Housing First has not provided evidence of a concrete economic injury. Housing First must provide evidence from a member showing that potential customers chose not to purchase or remodel homes due to building permit fees in the City during the time period alleged. *See also Citizens for a Balanced City*, 618 N.W.2d at 18 (alleging specific harm to area, including evidence that a business moved out of the area and that community had difficulty recruiting patrol walkers, demonstrated necessary injury). An expert opinion based on national data not specific to the City that building permit fees influence the housing market is insufficient to prove a concrete injury. The alleged economic injury detailed in the expert report is too indirect and speculative.[3] Unlike *Builders*

3. The expert report is replete with equivocal statements and omissions that fail to prove a direct injury to the Plaintiff's members. Although as a general economic proposition higher fees influence demand, there is no direct evidence this happened in the City during the period of time referenced by Plaintiff. The expert report does not reference or analyze any housing data from the City during the relevant period. The report's conclusion is based on nationwide factors and basic concepts of supply, demand, and elasticity, not the relevant market in the City. As noted by the Supreme Court in *Hanover*, there is a vast difference between "the real economic world" as opposed to an "economist's hypothetical

Association, Plaintiff has been unable to allege any specific, direct injury to establish standing.

B. Plaintiff Has No Statutory Standing.

Standing can also arise from a statutory grant. *Humphrey*, 551 N.W.2d at 493. Plaintiff asserts that it has a cause of action for declaratory judgment under the Municipal Planning Act, Minn. Stat. § 462.361 ("MPA"). *Pl.'s Mem. in Supp. of Mot. for Summ. J. at 28*. That statute provides for judicial review of "an ordinance, rule, regulation, decision or order of a governing body or board of adjustments and appeals acting pursuant to sections 462.351 to 462.364." Minn. Stat. § 462.361, Subd. 1. However, all of the sections from 462.351 to 462.363 relate to municipal planning and land use, not building permits. Therefore, the MPA does not provide a statutory grant of standing for Plaintiff's claims related to building permit fees.

The Minnesota Court of Appeals reached this same conclusion when it decided a case in which a home builder alleged that a city was overcharging for building permit

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model." *Id.* at 493. Further, if the City charged lower permit fees during the relevant period, the City would have needed to raise funds in another way to balance its budget. *Doud Decl.* ¶ *13* (it is the City's practice to balance its budget). If, for example, the City raised property taxes to replace the building permit fees, demand for housing may have decreased due to the higher property taxes, irrespective of the lower building permit fees. It is speculative to conclude on the current record that the Plaintiff's members were damaged due to lower housing demand because of the allegedly inflated permit fees.

fees and challenged the permit fees under § 462.361 of the MPA. *Centra Homes, LLC v. City of Norwood Young America*, 834 N.W.2d 581 (Minn. Ct. App. 2013). In reviewing the relevant sections of the MPA, the court noted that no provision "authorizes a municipality to establish a building code or a building-permit fee." *Id.* at 586. Rather, the MPA governs land use and "does not govern building construction." *Id.* Therefore, the court held, "a person required to pay a building- permit fee is not aggrieved by a decision of the city acting pursuant to sections 462.351 to 462.34," the sections of the MPA that are covered by the MPA's statutory grant of standing. *Id.* As such, § 462.361 of the MPA did not permit the home builder "to bring an action in district court to obtain review of the city's building-permit fees." *Id.* So too here.

Because the section of the MPA relied upon by Plaintiff relates to land use and municipal planning, and not building construction or building permit fees, the MPA does not provide a statutory grant of standing in this action.

C. Plaintiff's Other Standing Arguments are Meritless.

Housing First also argues that it has standing based on Minnesota's "well-recognized right to sue to enjoin illegal expenditures of municipal funds." *Pl.'s Mem. in Opp'n to City's Mot. for Summ. J. at 12*, citing *McKee v. Likins*, 261 N.W.2d 566, 570-571 (Minn. 1977); *Arens v. Village of Rogers*, 240 Minn. 386, 392 (1953). However, the cases relied upon by Housing First are not applicable

here. *McKee* was a suit by a taxpayer, and the court found that the plaintiff had standing as a taxpayer. *McKee v. Likins*, 261 N.W.2d 566, 568; 571 (Minn. 1977). The same is true of *Arens*. *Arens v. Village of Rogers*, 240 Minn. 386, 388; 392 (1953). The "well-recognized right to sue to enjoin illegal expenditures of municipal funds" referenced by Housing First applies to taxpayers, but Housing First has not demonstrated that it pays taxes to the City. As such, taxpayer standing does not apply to Housing First's claims.

Further, the reason taxpayers have standing to challenge the expenditure of funds is because such expenditures are likely to increase their overall tax burden. *Arens*, 61 N.W.2d at 514; *see also Phillips v. Brandt*, 43 N.W.2d 285, 289 (Minn. 1950) (holding that taxpayer had standing to challenge allegedly illegal payment of salary for city position because taxes were source of funds). Housing First has not demonstrated that they are likely to see their financial burden increased in any way, because the building permit fees its members pay are fully reimbursed. Additionally, Housing First cites no cases establishing a common law right to challenge the expenditure of funds that originate not from taxes, but from permit fees that are paid and then fully reimbursed by home buyers plus an additional profit.

Finally, Housing First asserts that *McCaughtry v. City of Red Wing*, 808 N.W.2d 331 (Minn. 2011) is a source of standing for its declaratory judgment claim. *Pl.'s Mem. in Opp'n to City's Mot. for Summ. J. at 12*. According to Plaintiff, *McCaughtry* grants them a right to challenge a

city ordinance. Housing First's reliance on *McCaughtry* is misplaced for two reasons. First, *McCaughtry* is not a case about standing, but a case about ripeness. *Id.* at 338 (" . . . we believe that the relevant issue here is ripeness, not standing."). Second, a "party challenging the constitutionality of a law must show that the law 'is, or is about to be, applied to his disadvantage.'" *Id.*, *quoting Lee v. Delmont*, 36 N.W.2d 530, 537 (1949); *see also Haveland*, 25 N.W.2d at 478 (explaining that litigants must be able to show that they have sustained or are immediately in danger of sustaining some direct injury). Here, Housing First has not established a direct injury, because as discussed above, Housing First's members pass the building permit fees plus profit and overhead on to the home buyers.

For the reasons above, Housing First has not established that it has standing to bring its claims in this matter.

II. Even if Housing First Did Have Standing, It Has Not Established a Takings Clause Violation.

Housing First seeks declaratory judgment for its claim that the City's building permit fees violate the takings clause. *Pl.'s Mem. in Supp. Of Mot. for Summ. J. at 26.* The state and federal constitutions proscribe the government from taking private property for public use without just compensation. The Takings Clause in the United States Constitution states that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V; *see also Chi.*,

Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 241 (1897) (concluding that the Takings Clause applies to the states via the Fourteenth Amendment). The Minnesota Constitution, which also provides protection against the taking of property without just compensation, is slightly broader in scope, stating that "[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured." Minn. Const. art. I, § 13 (emphasis added). Thus, in this case establishing such a claim requires a plaintiff to show (1) that plaintiff has a protected property interest, (2) that the government took, destroyed, or damaged the property interest for use by the public, and (3) that just compensation was not paid. *See Hall v. State*, 908 N.W.2d 345, 352 (Minn. 2018) (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1000 (1984)).

First, Housing First must show that it has a protected property interest. Although Housing First's members are later fully reimbursed for the building permit fees they pay to the City, they do initially pay the fee to the City. While its members do not ultimately suffer an injury in fact, they have a property interest in the money that is used to obtain building permits in the City.[4]

4. Housing First also argues that "the taking occurs the moment the City conditions development of real property upon payment of an illegal fee." Pl.'s Mem. in Opp'n to City's Mot. for Summ. J. at 16. This issue is not as simple as presented by Housing First. At the time the building permit fees are set as well as paid, neither the City nor the purchaser of the permit can ascertain for certain whether the fee is "fair, reasonable, and proportionate to the actual cost of the service for which the fee is

Second, Housing First must show that the property was taken for use by the public. Housing First has shown, and the City acknowledges, that the revenues collected from building permit fees are kept for public use. *Pl.'s Mem. in Supp. of Summ. J. at 1; Def.'s Mem. in Supp. of Summ. J. at 9*. Whether the revenues from building permit fees are used to balance the budget, as alleged by Housing First, or whether they are used to maintain the staff and resources needed to administer the building permit process, the revenues are kept for public use. Therefore, Housing First's property interest, the money its members pay for building permit fees, is taken by the government for public use.

Third, Housing First is required to demonstrate that property was taken without just compensation. Here, the City did not take property without just compensation.

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imposed" as required by law. Minn. R. 1300.0160 subp. 2. That is because the City sets the permit fees before the start of the year without knowing how many building permits will be requested, the amount of revenue that will be raised through each permit, or the costs that will be incurred by the City. In other words, at the time the City sets the fee schedule and even when the builder pays the fee, it may not be apparent whether the fee is illegal. Thus, it may not be correct as stated by Plaintiff that a taking occurs when the City "conditions development of real property upon payment of an illegal fee" because it is not apparent until later whether the fee is illegal or not. While building fee revenue has exceeded expenses in recent years, that has not always been the case. In several earlier years, the City's expenses exceeded revenue (Swenson Decl. Exs. 19-21), and under Plaintiff's theory, in such years there would not have been a taking because the City was not in violation of Minn. R. 1300.0162, subp.2.

It is undisputed that the City took money from Housing First's members, but in return, the members were issued building permits. The members were then able to use the permits to generate a profit, both in terms of the profit earned by passing the permit fees along to home buyers and in terms of the ability to build and then sell homes for a profit. Housing First's members sought to purchase building permits from the City and that is exactly what they got in exchange for payment of the building permit fees. They have failed to establish that they did not receive just compensation.

For these reasons, Housing First's takings claim fails as a matter of law.

III. Even if Housing First Did Have Standing, It Has Not Established a Due Process Clause Violation.

Housing First seeks a declaratory judgment on its claim that the City's building permit fees violate the due process clause. *Pl.'s Mem. in Supp. of Mot. for Summ. J. at 26*. Specifically, Housing First alleges that because the City has not reimbursed excess building permit fee revenues or set up a procedure to allow for such reimbursement, its members have been denied procedural due process. *Pl.'s Mem. in Opp'n to City's Mot. for Summ. J. at 17.* Because of this, Housing First seeks disgorgement of the excess fees. *Id.*

The state and federal constitutions provide procedural due process rights. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. To establish a procedural due process

claim, the plaintiff must show (1) that the government has deprived the plaintiff of a "protected life, liberty, or property interest" and (2) that the government's procedures were constitutionally inadequate. *Sawh v. City of Lino Lakes*, 823 N.W.2d 627, 632-33 (Minn. 2012).

Having established that Housing First's members have a property interest in the money they use to obtain building permits in the City, the next step is to analyze whether the City's procedures are constitutionally inadequate regarding the money. This analysis involves a three- factor balancing test weighing: (1) the private interest affected by the official action, (2) the risk of an erroneous deprivation through the procedures used, and the probable value of additional or substitute procedural safeguards, and (3) the government's interest, along with the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

Here, Housing First has not demonstrated that the City's procedures are constitutionally inadequate. The private interest in this case is the money that Housing First members use to obtain building permits. This interest is affected by the official action of setting a rate for the building permit fee and collecting that amount in exchange for issuing a building permit. While the members pay the fee initially, they are fully reimbursed, plus profit, by the home buyers. While there is a risk of charging a fee that does not exactly match the cost to the City to issue the permit, that burden falls on the home

buyers, not Housing First's members. Thus, at most the impact on the property interest of the members is indirect. Plaintiff is in essence seeking to force the City to set up a due process procedure for the home buyers, not its members. Such "indirect and incidental" impacts on a property interest do not give rise to a procedural due process claim. *See O'Bannon v. Town Court Nursing Ctr.*, 447 U.S. 773, 788-89 (1980).

Lastly, procedural safeguards are available to Housing First's members. As noted in *Centra Homes*, the housing permit fees can be challenged by Housing First's members through the administrative process. *Centra Homes*, 834 N.W.2d at 587 ("The rules applicable to the state building code provide that a permit applicant may appeal a municipal building official's decision [regarding building permit fees] to a municipal board of appeals or to the state appeals board.") And, as also noted, district court review would be available after exhaustion of the administrative process. *Id.* at 588.

For these reasons, Housing First's procedural due process claim fails as a matter of law.

CONCLUSION

For the foregoing reasons, the Court GRANTS Defendant's Motion for Summary Judgment and DENIES Plaintiff's Motion for Summary Judgment.

FJM

APPENDIX C — ORDER OF THE COURT OF APPEALS FOR THE STATE OF MINNESOTA, FILED JULY 20, 2023

STATE OF MINNESOTA
IN COURT OF APPEALS

A23-1049

HOUSING FIRST MINNESOTA,

Appellant,

vs.

CITY OF CORCORAN,

Respondent.

A23-1050

HOUSING FIRST MINNESOTA,

Appellant,

vs.

CITY OF DAYTON,

Respondent.

Appendix C

ORDER

BASED ON THE FILE, RECORD, AND PROCEEDINGS, AND BECAUSE:

1. On July 19, 2023, appellant Housing First Minnesota filed appeal A23-1049. In appeal A23-1049, appellant seeks review of a July 6, 2023 order in district court file number 27-CV-21-9069 granting summary judgment for respondent City of Corcoran and a July 10, 2023 judgment entered on that order. In the July 6, 2023 order, the district court determined that appellant lacked standing to challenge City of Corcoran's building permit fees and determined that appellant's claims failed as a matter of law.

2. On July 19, 2023, appellant filed appeal A23-1050. In appeal A23-1050, appellant seeks review of a July 6, 2023 order in district court file number 27-CV-21-9070 granting summary judgment for respondent City of Dayton and a July 10, 2023 judgment entered on that order. In the July 6, 2023 order, the district court determined that appellant lacked standing to challenge City of Dayton's building permit fees and determined that appellant's claims failed as a matter of law.

3. Related appeals from separate actions may be consolidated by the appellate court's order on its own motion or upon motion of a party. Minn. R. Civ. App. P. 103.02, subd. 3. Because the appeals involve similar issues and the summary-judgment motions in the two cases were heard together, consolidation is warranted in the interests of judicial economy.

Appendix C

IT IS HEREBY ORDERED:

1. Appeals A23-1049 and A23-1050 are consolidated.

2. Appellant shall serve and file a single brief and addendum addressing both appeals within 30 days after delivery of the transcript, in accordance with Minn. R. Civ. App. P. 131.01, subd. 1.

Dated: July 20, 2023

BY THE COURT

/s/ Susan L. Segal
Susan L. Segal
Chief Judge

APPENDIX D — OPINION OF THE COURT OF APPEALS FOR THE STATE OF MINNESOTA, FILED MARCH 25, 2024

COURT OF APPEALS OF MINNESOTA

A23-1049, A23-1050

HOUSING FIRST MINNESOTA,

Appellant,

vs.

CITY OF CORCORAN,

Respondent (A23-1049).

HOUSING FIRST MINNESOTA,

Appellant,

vs.

CITY OF DAYTON,

Respondent (A23-1050).

March 25, 2024, Filed
Affirmed in part, reversed in part, and remanded.

Considered and decided by Johnson, Presiding Judge; Segal, Chief Judge; and Cochran, Judge.

Appendix D

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

Appellant building trade association sued respondent cities in separate suits, alleging that the schedule of building-permit fees adopted in ordinance by respondents resulted in the collection of excessive revenues, beyond what is lawfully allowed. The parties brought cross-motions for summary judgment. The district court granted respondents' motions and denied appellant's motions.

In this consolidated appeal, appellant argues that the district court erred in determining that appellant lacks standing to challenge the validity of respondents' building-permit fee ordinances and in dismissing, as a matter of law, appellant's takings and procedural due-process claims. Appellant further argues that we should reverse the denial of appellant's motions for summary judgment and direct that judgment be entered in favor of appellant in both cases. Because we conclude that appellant has standing to seek declaratory and injunctive relief, but that the district court did not err in dismissing appellant's takings and due-process claims, we affirm in part, reverse in part, and remand. We also decline to review the denial of appellant's motions seeking summary judgment in its favor.

FACTS

By Minnesota statute, municipalities, such as respondents City of Corcoran and City of Dayton, can

enforce the Minnesota State Building Code. *See* Minn. Stat. § 326B.121, subd. 2 (2022). Municipalities may establish a schedule of fees for issuing building permits and are required to collect those fees before a permit is issued. Minn. Stat. §§ 326B.107, .151-.153 (2022); Minn. R. 1300.0160 (2021). Except for certain types of minor projects, builders and contractors are required to obtain building permits before they can commence construction on a project. Minn. R. 1300.0120 (2021).

The Minnesota Department of Labor and Industry—the agency responsible for establishing and updating the state building code—has promulgated a rule, Minn. R. 1300.0160, regulating the fees that cities can charge for building permits (the rule). Subpart 2 of the rule requires that "[f]ees established by the municipality . . . 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. Subpart 4 of the rule requires that, other than in limited exceptions where a fixed fee can be charged, "[b]uilding permit fees shall be based on valuation" of the project for which the permit is being sought. *Id.*, subp. 4. Corcoran and Dayton both set their schedule of building-permit fees annually by ordinance.

Appellant Housing First Minnesota is a trade association that represents the interests of businesses "engaged in the development, construction and remodeling of homes and the supply of materials and services to the housing industry." In recent years, both cities experienced a significant increase in permits issued for the construction of new, single-family homes. And nearly all of the building

permits issued in the two cities for the construction of those homes were issued to members of Housing First.

Housing First commenced lawsuits against the cities alleging that the building-permit fees charged by the cities were not proportionate to the actual cost of the services provided and that the cities were thus in violation of subpart 2 of the rule. Housing First asserts that the building-permit fees for the two cities are excessive because, in the years between 2018 and 2021, Corcoran had a "surplus" of revenue from building-permit fees in the amount of approximately $2.5 million, and Dayton had a "surplus" of approximately $2.9 million. The complaints, which mirror each other, contain counts for declaratory judgment that the cities' building-permit fee ordinances violate: (1) subpart 2 of the rule; (2) the takings clauses of the Minnesota and United States Constitutions; and (3) the procedural due-process rights of Housing First's members under the Minnesota and United States Constitutions. The complaints also contain a request for an order requiring the cities to "disgorge" all excess revenue from building-permit fees and enjoining the cities from enforcing their building-permit fee ordinances.

After the close of discovery, the parties filed cross-motions for summary judgment in both cases. Housing First maintained that it had established a violation of the rule and was entitled to judgment in its favor, granting the relief sought in its complaints. The cities argued in their summary-judgment motions that the complaints should be dismissed because Housing First lacked standing to challenge the validity of the building-permit fee

ordinances and failed to establish the necessary elements for its constitutional claims, among other arguments.

The cities' standing argument was premised on the fact that, pursuant to a discovery stipulation, Housing First admitted

> that Housing First's Members that have paid building-permit fees to [Corcoran and Dayton] for the construction of new single-family residential houses (since January 1, 2015), passed on those fees to or were otherwise reimbursed for the full amount of those fees by other persons or entities, such as but not limited to the purchasers of those houses.

The cities argued that, because Housing First's members were able to pass on the full cost of the fees, the members lost no money and thus did not suffer an "injury in fact." And, because the members lacked an injury in fact, Housing First could not claim associational standing.

The district court agreed with the cities that Housing First lacked standing based on Housing First's admission that all permit fees paid by its members were passed on to others, and that the members therefore had no economic injury. The district court also rejected as evidence of economic injury an expert opinion provided by Housing First that even small increases in the cost of new homes can depress demand. The court determined that the impact predicted by the expert, which was based on

national data, was too speculative to establish a "concrete economic injury" to Housing First's members due to alleged excessive permit fees in the two cities.[1]

As to the constitutional claims, the district court held that, in addition to the lack of standing, the claims were subject to dismissal because Housing First failed to present evidence sufficient to establish the requisite elements for either a takings or procedural due-process violation. On the takings claims, the district court determined that Housing First failed to show property was taken without just compensation because, in exchange for the fees paid, Housing First's members were issued the building permits and thus received "compensation" in exchange for their payments. As to the due-process claims, the district court concluded that adequate procedural safeguards were available to Housing First's members to challenge the building-permit fees through an administrative appeal process. *See* Minn. R. 1300.0230 (2023).

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1. Housing First asserted that it had statutory standing under the judicial-review provision of the Minnesota municipal planning act, Minn. Stat. § 462.361 (2022). The district court rejected this claim, concluding that "the section of the [act] relied upon by [Housing First] relates to land use and municipal planning, and not building construction or building permit fees." The district court also rejected Housing First's argument that it has standing as a taxpayer because Housing First did "not demonstrate[] that it pays taxes to the [cities]." Housing First did not pursue either argument on appeal.

Appendix D

DECISION

On appeal from the grant of summary judgment, we review de novo whether there are any genuine issues of material fact and whether the district court erred in applying the law. *Ruiz v. 1st Fid. Loan Servicing, LLC*, 829 N.W.2d 53, 56 (Minn. 2013). "We view the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002).

I. The district court erred in determining that Housing First lacks standing.

"Standing is the requirement that a party has a sufficient stake in a justiciable controversy to seek relief from a court." *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996). Generally, "[a] party has standing when (1) the party has suffered an injury-in-fact, or (2) the party is the beneficiary of a legislative enactment granting standing." *Webb Golden Valley, LLC v. State*, 865 N.W.2d 689, 693 (Minn. 2015). Additionally, "[a]n organization can assert [associational] standing [on behalf of its members,] if its members' interests are directly at stake or if its members have suffered an injury-in-fact." *Builders Ass'n of Minn. v. City of St. Paul*, 819 N.W.2d 172, 177 (Minn. App. 2012). Whether a party has standing presents a jurisdictional issue reviewed de novo. *Webb Golden Valley*, 865 N.W.2d at 693.

Appendix D

The cities argue that Housing First lacks standing based on what is called the "pass-through defense." The defense is premised on the logic that when "an injured party 'passes through' its damages to another entity that is obligated to pay, there is no actual injury to the first party" and that this lack of injury deprives the first party of standing. *Philip Morris*, 551 N.W.2d at 496 (citing *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 492, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)). The defense "usually arises in antitrust cases." *Id.* The cities contend that the pass-through defense applies here because Housing First admitted that its members "passed on" all fees they paid to the home buyers or others. The cities argue that Housing First's members thus suffered no injury-in-fact and that Housing First therefore lacks associational standing to challenge the building-permit fee ordinances.

Housing First argues that the district court impermissibly applied the pass-through defense, which it asserts was "firmly rejected" by the Minnesota Supreme Court in *Philip Morris*. In that case, Blue Cross and Blue Shield of Minnesota sued five tobacco companies "on various theories, all relating to the health of Minnesotans who have smoked cigarettes over an extended period of time." *Id.* at 491-92. The tobacco companies moved to dismiss for lack of standing, arguing that Blue Cross had suffered no compensable injury because it passed on its expenditures to its subscriber groups through increased premiums. *Id.* at 492.

Appendix D

In rejecting the application of the pass-through defense in *Philip Morris*, the supreme court observed that the defense "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." *Id.* at 496. The supreme court further stated: "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. Ultimately, the supreme court "conclude[d] that it was the intent of the legislature to abolish the availability of the pass through defense by specific grants of standing within statutes designed to protect Minnesota citizens from sharp commercial practices." *Id.* The supreme court concluded that Blue Cross had a grant of statutory standing to assert consumer-protection claims. *Id.* at 496-97. The court further ruled that Blue Cross had standing to assert equitable claims but cautioned "that such standing is limited to pursuit of injunctive relief."[2] *Id.* at 498.

The cities dispute Housing First's characterization of the supreme court's holding in *Philip Morris*. The cities argue that the supreme court's holding should be read as rejecting the pass-through defense only in cases involving statutory grants of standing. The cities contend that, because there is no statutory grant of standing involved in these cases, the pass-through defense remains a viable defense.

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2. The supreme court also affirmed the dismissal of a tort claim on standing grounds, reasoning that the injury suffered by the health-care organization was too remote. *Id.* at 495.

We are skeptical of the cities' argument. As noted by Housing First, the 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. In addition, the supreme court commented in a footnote in *Philip Morris* that, "[e]ven absent the statutory grant of authority," the court "believe[s] Blue Cross would have standing on the antitrust claim." *Id.* at 497 n.1. This footnote appears to undermine the cities' argument on the continuing viability of a pass-through defense in Minnesota. But whether or not the cities are correct on that point, we are not persuaded that Minnesota's standing doctrine is so narrow as to deprive Housing First of standing in this case, despite Housing First's admission that its members pass on all costs of the fees to others.

The purpose of the standing doctrine is to ensure that a party has "a sufficient stake in the controversy to seek relief from the court so that the issues before the court will be vigorously and adequately presented." *Webb Golden Valley*, 865 N.W.2d at 693 (quotation omitted). We conclude that Housing First's members have such a stake. First, members of Housing First were the ones who directly paid the fees to the cities. Second, 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. Finally, the members are required to obtain building permits and continue paying the fees if they desire to keep building in the cities. While any one of these reasons may not be sufficient, we are persuaded that, when taken together, Housing First's members have

a sufficient economic stake in challenging the allegedly excessive fee schedule to satisfy the requirements of the standing doctrine. We therefore conclude that, as the trade association for its members, Housing First has associational standing.[3] *See Builders Ass'n of Minn.*, 819 N.W.2d at 177.

II. The district court did not err in dismissing Housing First's takings claims.

The constitutions of the United States and Minnesota both prohibit the taking of private property for public use without just compensation. U.S. Const. amend. V; Minn. Const. art. 1, § 13. To establish a takings claim, a party "must show that: (1) they have a property interest protected by the Fifth Amendment; (2) the government took the property interest; (3) the property interest was taken for public use; and (4) just compensation was not paid." *Hall v. State*, 908 N.W.2d 345, 352 (Minn. 2018). This court presumes ordinances are constitutional, and Housing First bears the burden of demonstrating that the ordinance results in an unconstitutional taking. *Minn.*

3. We caution, however, that our conclusion should not be interpreted as meaning that Housing First has a right to seek "disgorgement" as a remedy. Housing First's members admitted that they have been fully reimbursed for all building-permit fees paid. There is even a suggestion in the record that at least some of Housing First's members may have profited from the fees by adding a profit percentage to their invoices. In this opinion, we hold only that Housing First has standing to challenge the building-permit fee ordinances. *Cf. Philip Morris*, 551 N.W.2d at 498 (noting the limitation in the supreme court's holding to the pursuit of injunctive relief on Blue Cross's claim in equity).

Voters All. v. City of Minneapolis, 766 N.W.2d 683, 688 (Minn. 2009).

Housing First argues that the cities took property—money—without just compensation because the permit fees were in excess of the fees that could be lawfully charged. We disagree that the takings clause applies in this context. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013), is the only case cited by Housing First in support of its argument. But this case disclaims the applicability of the takings clause to a challenge to fees set by a governmental unit for a service. In *Koontz*, the Supreme Court stated:

> It is beyond dispute that "[t]axes and user fees . . . are not 'takings.'" We said as much in *County of Mobile v. Kimball*, 102 U.S. 691, 703, 26 L. Ed. 238 (1881), and our cases have been clear on that point ever since.

570 U.S. at 615 (citation omitted). The takings clause was applicable in *Koontz* because the governmental authority conditioned the issuance of a land-use permit on a grant by the landowner of an easement—an interest in the landowner's real property. *Id.* at 601. By contrast, the cases on appeal here involve only the payment of fees for a service, the review of plans and issuance of permits. Under *Koontz*, user fees do not exact a "taking" under the constitution.

Additionally, we note that the Minnesota Supreme Court has explained that "[w]hen it [appears] 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." *Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681, 686 (Minn. 1997) (involving a city's imposition of a road-connection charge, in addition to payment of the permit fee, as a condition of issuance of a building permit). In *First Baptist Church of St. Paul v. City of St. Paul*, the supreme court reiterated that a regulatory fee is properly treated as a tax when its primary purpose is to raise revenue, rather than recover costs associated with regulation. 884 N.W.2d 355, 359 (Minn. 2016). Thus, to the extent that the challenged fees may be characterized as an unauthorized tax, such claims are also outside the protections of the takings clause. We therefore affirm dismissal of Housing First's takings claims.

III. The district court did not err in determining that Housing First's due-process claims fail on the merits.

Housing First next argues that the district court erred in dismissing its due-process claims. In its complaints, Housing First alleged that the cities have failed to satisfy procedural due-process requirements because the cities have provided "no process to refund excess building permit fee revenues."

The United States and Minnesota Constitutions protect the right to procedural due process. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 7. To assert a viable

procedural due-process claim, a party must allege facts sufficient to demonstrate that it (1) has been deprived of a protected life, liberty, or property interest (2) without "constitutionally sufficient" procedural protections. *Hall*, 908 N.W.2d at 358. In evaluating the sufficiency of procedural protections, courts consider (1) the private interest affected, (2) the risk of erroneous deprivation of that interest through the procedures used, and (3) the government's interest. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

The first step in analyzing a procedural due-process claim is to assess whether the challenged governmental action is legislative or judicial in nature. *Barton Contracting Co. v. City of Afton*, 268 N.W.2d 712, 715 (Minn. 1978). The permit fee schedules challenged here are set out in the ordinances of the cities and affect an "open class." *Id.* As such, the cities were acting in a legislative capacity as opposed to a quasi-judicial capacity. *Id.* at 716. When a governmental authority is acting in a legislative capacity, "[a]ny rights of procedural due process in such proceedings are minimal." *Id.*

With this framework in mind, we fail to discern any error in the dismissal of Housing First's due-process claims. In its brief to this court on its procedural dueprocess claims, Housing First makes a very limited argument and cites to only a single case, *McKesson Corporation v. Division of Alcoholic Beverages & Tobacco*. 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990). That case involved the rights of a wholesale distributor of alcoholic beverages to obtain a refund of liquor excise taxes paid when the tax

was declared unconstitutional. *Id.* at 22. The Supreme Court held that the distributor was entitled under the due-process clause to a postdeprivation remedy of being able to sue to obtain a refund. *Id.* at 36-41. Housing First relies on *McKesson* to argue that the due-process clause requires that it must be allowed to seek a refund of any excessive fees paid by its members.

The tax at issue in *McKesson* was declared unconstitutional because it provided preferences for certain distributors of in-state products in violation of the Commerce Clause. *Id.* at 22-23, 47. The distributors of out-of-state products were required to pay higher excise taxes. *Id.* at 22-23. The Supreme Court rejected the state's arguments that a refund should not be available because the distributors of out-of-state products were likely able to pass on the extra cost to their customers. *Id.* at 46-49. The Supreme Court reasoned, first, that this argument was based on nothing more than "sheer speculation," not evidence in the record. *Id.* at 46. Second, the Court explained that, even if the affected distributors were able to pass on the extra cost, the distributors were placed at a competitive disadvantage because their products would cost more compared to the distributors of local products. *Id.* at 48-49.

By contrast here, there is not just evidence, but an admission by Housing First, that its members passed on the cost of the fees to others and, because the same schedule of fees applies to all building permits issued in the cities, Housing First's members were not placed at any competitive disadvantage in the cities' construction

markets. Simply stated, Housing First's members are not in the same position as the distributors of out-ofstate products in *McKesson*. Accordingly, Housing First's reliance on *McKesson* is misguided and does not support Housing First's as-applied challenge to the fee ordinances on procedural due-process grounds.

Moreover, we conclude that adequate procedures are available to satisfy the requirements of procedural due process. First, as the district court stated, the rule provides an administrative appeal process. *See* Minn. R. 1300.0230; *Centra Homes, LLC v. City of Norwood Young America*, 834 N.W.2d 581, 587 (Minn. App. 2013). Second, a challenge to the building-permit fee ordinances can be brought in court, as Housing First has done here. The fact that Housing First may not be entitled to pursue a refund of any allegedly excessive fees because its members have been fully reimbursed by the home buyers or others does not rise to the level of a constitutional violation. We therefore affirm the district court's dismissal of Housing First's due-process claims.

IV. We decline to review the district court's denial of Housing First's motion for summary judgment.

Housing First asks us to exercise our discretion to reverse and remand with a direction that summary judgment be entered in Housing First's favor because "there is no genuine dispute that the Cities have exacted building permit funds in excess of what is allowed under Minn. R. 1300.0160 Subp. 2." We decline Housing First's request for two reasons.

First, the district court did not address the merits of Housing First's claims for declaratory and injunctive relief, other than its takings and due-process claims. "This court generally does not address issues presented in but not decided by the district court." *Singelman v. St. Francis Med. Ctr.*, 777 N.W.2d 540, 543 (Minn. App. 2010) (quotation omitted).

Second, even if we were to entertain Housing First's request, we disagree with Housing First's apparent suggestion that the cities have conceded the building-permit fees are unlawful. The cities have defended their building-permit fee schedules and the processes by which those schedules were adopted. Housing First emphasizes that the cities' arguments on appeal focus on technical defenses rather than the merits. But we do not take this as a concession that the fees are unlawful but rather the result of the cities' focus on the district court's reasons for granting summary judgment.

As a final matter, we note that the cities dispute whether the Minnesota Declaratory Judgments Act, Minn. Stat. §§ 555.01-.16 (2022), provides an independent cause of action. But again, this issue has not been decided by the district court, and we express no opinion on the merits of that question in this appeal.[4] Accordingly, we

4. For this same reason, we decline to rule on the viability of the defenses asserted by the cities regarding the separation-of-powers and political-question doctrines. Housing First argues that we should reject the cities' arguments because they are unpled affirmative defenses and they lack merit. The district court did not address these matters because it dismissed Housing First's complaints for lack of standing. And, consequently, we decline to address them for the first time on appeal.

reverse the district court's determination that Housing First lacks standing to assert claims for declaratory and injunctive relief, but we affirm the district court's dismissal of Housing First's takings and due-process claims. We therefore remand this matter to the district court for further proceedings not inconsistent with this opinion.

Affirmed in part, reversed in part, and remanded.

APPENDIX E — JUDGMENT OF THE COURT OF APPEALS FOR THE STATE OF MINNESOTA, FILED JULY 8, 2024

COURT OF APPEALS OF MINNESOTA

Appellate Court # A23-1049, A23-1050
Trial Court # 27-CV-21-9069

HOUSING FIRST MINNESOTA,

Appellant,

vs.

CITY OF CORCORAN,

Respondent (A23-1049).

HOUSING FIRST MINNESOTA,

Appellant,

vs.

CITY OF DAYTON,

Respondent (A23-1050).

JUDGMENT

Pursuant to a decision of the Minnesota Court of Appeals duly made and entered, it is determined and

adjudged that the decision of the Hennepin County District Court, Civil Division herein appealed from be and the same hereby is affirmed in part, reversed in part, and remanded. Judgment is entered accordingly.

Dated and signed: July 8, 2024

FOR THE COURT

Attest: Christa Rutherford-Block
Clerk of the Appellate Courts

By: /s/ Christa Rutherford-Block
Clerk of the Appellate Courts

I, Christa Rutherford-Block, Clerk of the Appellate Courts, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my signature at the Minnesota Judicial Center, In the City of St. Paul
July 8, 2024
Dated

Attest: Christa Rutherford-Block
Clerk of the Appellate Courts

By: /s/ Christa Rutherford-Block
Clerk of the Appellate Courts

APPENDIX F — ORDER OF THE SUPREME COURT OF THE STATE OF MINNESOTA, FILED JUNE 26, 2024

SUPREME COURT OF MINNESOTA

June 26, 2024, Decided;
June 26, 2024, Filed

A23-1049,
A23-1050

HOUSING FIRST MINNESOTA,

Petitioner,

vs.

CITY OF CORCORAN,

Respondent (A23-1049).

HOUSING FIRST MINNESOTA,

Petitioner,

vs.

CITY OF DAYTON,

Respondent (A23-1050).

Appendix F

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of Housing First Minnesota for further review is denied.

Dated: June 26, 2024

BY THE COURT:

/s/ Margaret H. Chutich
Margaret H. Chutich
Associate Justice