

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS**

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).

Filed March 25, 2024
Affirmed in part, reversed in part, and remanded
Segal, Chief Judge

Hennepin County District Court
File Nos. 27-CV-21-9069, 27-CV-21-9070

Bryan J. Huntington, Kyle L. Vick, Larkin Hoffman Daly & Lindgren Ltd., Minneapolis,
Minnesota (for appellant)

Monte A. Mills, Katherine M. Swenson, Anna M. Tobin, Erin R. Emory, Greene Espel
PLLP, Minneapolis, Minnesota (for respondents)

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

NONPRECEDENTIAL OPINION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

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.

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).

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.

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 (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.

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.

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

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.

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. 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 (2013), is the only case cited by Housing First in support of its argument. But this case disclaims the applicability of the takings

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).

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 (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 (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 due-process 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 (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-of-state 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 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.

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.