

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF OLMTSTED

THIRD JUDICIAL DISTRICT

Tap House Real Estate, LLC, individually
and on behalf of the putative class,

Court File No.
Case Type: Civil Miscellaneous/Other

Plaintiff,

vs.

CLASS ACTION COMPLAINT

City of Rochester,

Defendant.

Plaintiff, individually and on behalf of the putative class, for its complaint against Defendant states and alleges as follows.

PARTIES

1. Plaintiff Tap House Real Estate, LLC is a Minnesota limited liability corporation at 2365 Commerce Drive NW, Rochester, MN 55901. Plaintiff brings this lawsuit individually and on behalf of the putative class described below.

2. Defendant City of Rochester (“the City”) is a municipal corporation organized under the laws of the State of Minnesota and located in Olmsted County.

BACKGROUND

3. On July 7, 2004, the Rochester City Council passed Resolution 350-04, titled “Resolution Establishing Traffic Improvement District Program” (the “Resolution”). The Resolution is attached as **Exhibit A** and incorporated by reference. The Resolution allows the City, by additional resolution, to create a Transportation Improvement District (“TID”) for any area of the City “experiencing or anticipating new growth and substandard

streets.” On information and belief, all if not most of the areas experiencing growth in the City have been put into fourteen TIDs.

4. The purpose of the Resolution is to shift the burden of paying for transportation infrastructure improvements from the public as a whole to developers, regardless of actual infrastructure needs occasioned by development. The Resolution states that each TID receives a “cost allocation” equal to “75% of the costs of all the transportation projects within the TID.” The total costs of transportation projects include design and engineering costs, “acquisition of right-of-way” costs, and construction costs. The cost allocation is broken down into two categories: Substandard Street Reconstruction Costs (“reconstruction costs”) or Substandard Street Capacity Costs (“capacity costs”) (collectively, “TID fees”). Developers in a TID collectively bear 50% of total reconstruction costs and 100% of total capacity costs. Individual developers are allocated TID fees on a per-acre or trip-generated basis, according to an ad hoc formula. The City demands payment of TID fees as a condition of development agreements.

5. The City’s TID fees are contrary to Minnesota law. TID fees: (1) are in the form of a predetermined money payment; (2) are adopted pursuant to local government powers to regulate new growth and purportedly provide adequate public facilities and services; (3) are intended to fund large-scale, off-site public facilities and services purportedly necessary to serve new development; and (4) are in an amount which is purported to be proportionate to the need for the public facilities generated by new development. These qualities of TID fees mirror those of the illegal and unauthorized impact fee in *Country Joe v. City of Eagan*, 560 N.W.2d 681, 685 (Minn. 1997).

6. To remove the appearance of illegality, the Resolution states that payment of TID fees is completely voluntary and no compulsion or coercion is used to obtain developers' agreement to pay them. But TID fees are "voluntary" in name only. The Resolution explains that a developer's alternative to paying TID fees is an indefinite development moratorium—a "very restrictive condition" restricting all development until public facilities are deemed adequate by the City. Put differently, the City holds developers' land hostage until developers agree to fund the City's wish-list of offsite infrastructure projects.

7. The Minnesota Supreme Court recently confirmed municipalities may not use "voluntary" contracts to strongarm developers into paying unauthorized transportation infrastructure fees. "[N]o part of Minn. Stat. § 462.358 [subdivision regulation statute] authorizes a statutory city to impose an infrastructure charge." *Harstad v. City of Woodbury*, 916 N.W.2d 540, 546 (Minn. 2018). "[B]ecause the statute does not authorize a statutory city to condition subdivision approval on an infrastructure charge, such a condition cannot be memorialized in a contract." *Id.* at 549. "[T]he pearl of great price here is approval of the subdivision agreement. A developer who fails to make a 'voluntary' payment in an amount [the City] finds acceptable faces the prospect of denial of the subdivision application. The infrastructure charge is thus a requirement and . . . there is nothing voluntary about it." *Id.*

8. TID fees are particularly coercive because the City sends the TID bill midway through the development process, after developers make significant investments. Moreover, the City keeps calculation of TID fees a secret. The City does not give

developers advance notice of the amount of TID fees or the detailed formula used to calculate them. The City does not publish which construction projects are in a TID, the total costs of these projects, the way these costs are allocated, or whether TID fees are updated to account for changes in costs, revenue projections, or patterns of development. The Resolution gives the City discretion to change the TID cost allocation to whatever it deems “more proportional or equitable.” The net result is that many developers, including Plaintiff, receive a surprise TID bill, in an unassailable total amount, at a time when the only practical option remaining is to pay it.

9. Even opting out is not a real option. The City’s policy is to specially assess TID fees against developers who try to opt out. The City’s website, a true and correct copy of which is attached as **Exhibit B**, reflects the City’s policy by identifying TID fees as one “[t]he most common improvements assessed by the City.”

10. Minnesota caselaw reflects the City’s custom of assessing “voluntary” TID fees. *See, e.g., SJC Props. LLC v. City of Rochester*, No. A08-1536, 2009 WL 1920271, at *1 (Minn. App. July 7, 2009); *DeGeus Props. LLC v. City of Rochester*, No. 55-CV-10-4211, Verified Compl. ¶ 55, (Olmsted Cty. Distr. Ct. filed June 7, 2010).

11. In specially assessing TID fees, the City blatantly disregarded the advice of its city attorney, who wrote in a June 9, 2004 memorandum to City Council:

If the City wishes to involuntarily impose a special assessment on property benefitting from a street improvement, the City can do so. But, the amount of the assessment is limited to the amount of increased market value the property experiences as a result of the improvement. A TID charge is NOT intended to be a special assessment charge.

A copy of the memo is attached as **Exhibit C**.

12. Since the Resolution's inception, TID fees have served their essential purpose of providing the City a lucrative source of cash, which comes free of the political ramifications of increased taxation. The TID fee that Plaintiff involuntarily paid under duress was \$102,500.00, on or about fall of 2019. On information and belief, the City has collected tens of millions of dollars in TID fees since adopting the Resolution from developers similarly situated to Plaintiff.

13. Despite numerous post-*Harstad* protests, the City has continued to impose arbitrary and unlawful TID fees.

CLASS ALLEGATIONS

14. Plaintiff brings this action individually and on behalf of all individuals similarly situated as a class action pursuant to Rules 23.01 and 23.02 of the Minnesota Rules of Civil Procedure.

15. The Minnesota Rule 23 Class is defined as follows: All entities subject to the payment of TID fees.

16. This action is maintainable as a class under Minnesota Rules of Civil Procedure 23.01 because the individuals in the putative class are so numerous that joinder of all members is impracticable—the number of class members exceeds several hundred, there are questions of law of fact common to the class, the claims or defenses of the representative parties are typical of the claims or defenses of the class, and the representative parties will fairly and adequately protect the interest of the class.

17. This action is also properly maintainable as a class action under Minn. R. Civ. P. 23.02 because questions of law or fact common to members of the class predominate over

questions affecting only individual members and because the class action is superior to other available methods for the fair and efficient adjudication of the controversy.

18. The members of the class identified above are so numerous that joinder of all members is impracticable. The exact number of this class is unknown, but it will be comprised of hundreds of class members. The exact number may be determined from records maintained by the City.

19. There are numerous and substantial questions of law and fact common to the putative class that predominate over questions solely affecting individual members, including, but not limited to the following:

- a. Whether TID fees are lawful;
- b. Whether TID fees must be refunded;
- c. Whether the City properly accounted for TID fees; and
- d. The proper measure of damages for class members.

20. Defendant is expected to raise common defenses to this class action, including a denial that its actions violated the law.

21. The claims of the named Plaintiff, set forth herein, are typical of the claims of the class. The named Plaintiff has the same interests and suffer from the same injury as the class members. The named Plaintiff and the class the named Plaintiff seeks to represent all have been subject to forced payment of TID fees.

22. The named Plaintiff has the incentive and is committed to prosecuting this action. Plaintiff will fairly and adequately protect the interests of the putative classes and have retained as counsel a law firm that numerous courts have found sufficiently experienced

and competent in the prosecution of class action and complex litigation. There are no known conflicts between Plaintiff or class counsel and the class that class counsel seek to represent.

23. This action is maintainable as a class action because the prosecution of separate actions by individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the putative class, which would establish incompatible standards of conduct for the City and would be a waste of limited judicial resources.

24. This action is maintainable as a class action because the City has acted on grounds generally applicable to the classes, thus making declaratory relief, equitable relief, and damages appropriate with respect to the classes as a whole.

25. Upon information and belief, no other member of the class has an interest in individually controlling the prosecution of his or her claims, especially in light of the relatively small value of each claim and the difficulties involved in bringing individual litigation against a powerful entity.

26. Plaintiffs are unaware of any other litigation concerning this controversy commenced by or for other class members.

27. Litigation should be concentrated in this forum because the City is headquartered and located within this forum.

28. The Court has the resources and ability to effectively manage this class action.

**COUNT I
DECLARATORY JUDGMENT**

29. All allegations are incorporated and restated.

30. There is a real, immediate, substantial, continuing, and justiciable controversy between the parties requiring the intervention of the Court regarding the legality of the Resolution and the refund rights provided by the Resolution.

31. Plaintiff and the Class seek a declaration that TID fees are illegal, null, void, and unenforceable. TID fees are preempted by law, including Minn. Stat. § 462.358. TID fees violate Minn. Stat. § 462.353, subd. 4(a), which states municipal fees must be “by ordinance” and “must be fair, reasonable, and proportionate and have a nexus to the actual cost of the service for which the fee is imposed.” The City adopted TID fees by resolution, not ordinance. TID fees are not fair, reasonable, or proportionate, nor do they have a nexus to the actual cost of the service for which the City seeks to impose the fee. TID fees unduly burden the rights of Plaintiff and the Class under the Takings Clauses of the Minnesota and United States Constitutions. The City exacted TID fees from Plaintiff and the Class far out of proportion to the needs created by development, to avoid imposing the burden of paying for additional services on all citizens via taxation.

32. Plaintiff and the Class also seek a declaration that TID fees must be refunded. The Resolution states: “Revenue collected in excess of that ultimately needed in the respective TID must be refunded to the property owners in the TID at the time the TID is dissolved.” Substantial uncertainty exists between the parties regarding the question of whether all TIDs in the City are “dissolved” by effect of law if TID fees are declared illegal,

null, and void. Substantial uncertainty also exists because the City has not created a refund procedure and continues to impose TID fees arbitrarily. Substantial uncertainty also exists because, on information and belief, the City collected and retained revenue in excess of that “ultimately needed” in each TID, failed to use “new revenues” to reduce TID cost allocations as contemplated by the Resolution, and impermissibly commingled funds across TIDs, in violation of the Resolution.

33. Pursuant to Minn. Stat. §§ 555.01–.16 and Minn. R. Civ. P. 57, Plaintiff and the Class are entitled to a declaration that TID fees are illegal and must be refunded, plus an award of prejudgment interest, costs, and disbursements.

COUNT II MONEY HAD AND RECEIVED

34. All allegations are incorporated and restated.

35. The City collected \$102,500.00 of TID fees from Plaintiff and, on information and belief, tens of millions of dollars of TID fees from the Class. The City’s exaction of TID fees from Plaintiff and the Class was illegal, and Plaintiff and the Class involuntarily paid these fees under coercion and duress. The City will be unjustly enriched at the expense of Plaintiff and the Class if allowed to keep ill-gotten TID fees. Plaintiff and the Class are entitled to judgment against the City for money had and received in an amount exceeding \$50,000.00, plus prejudgment interest, costs, and disbursements.

36. Plaintiff and the Class are also entitled to an equitable accounting of TID fees. Equity demands, and the Resolution contemplates, that unspent TID fees be returned at the end of the TID program. Calculating TID fee refunds will be extremely complicated for

several reasons: (1) on information and belief, the City commingled TID funds across TIDs, even though the Resolution states: “Revenue collected within a specific TID must be spent only within that TID”; (2) on information and belief, there are hundreds of claimants; (3) on information and belief, the City collected and retained revenue in excess of that “ultimately needed” in each TID; and (4) on information and belief, the City failed to use “new revenues” to reduce TID cost allocations as contemplated by the Resolution.

37. Plaintiff and the Class are entitled to a judgment of the Court compelling the City to perform a full accounting of TID fees, placing all TID fees in constructive trust for the benefit of and refund to the rightful owners, and awarding prejudgment interest, costs, and disbursements.

COUNT III UNJUST ENRICHMENT

38. All allegations are incorporated and restated.

39. The Class conferred a benefit on the City by paying TID fees. The City accepted the TID fees and retained them. It is inequitable for the City to retain TID fees, as the City imposed TID fees illegally and coercively. As direct result of the City’s illegal and coercive imposition of TID fees, Plaintiff and the Class are entitled to judgment against the City in the full amount of TID fees paid in an amount in exceeding \$50,000.00, plus prejudgment interest, costs, and disbursements.

COUNT IV
SECTION 1983—TAKINGS CLAUSE

40. All allegations are incorporated and restated.

41. This count is asserted pursuant to 42 U.S.C. § 1983.

42. “[T]he government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development, but it may not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts.” *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 606 (2013). A government’s decision to exceed these limits is a “constitutionally cognizable injury.” *Id.* at 607.

43. TID fees are unconstitutional exactions that unduly burden the rights of Plaintiff and the Class under the Takings Clause of the United States Constitution, as incorporated by the Fourteenth Amendment. TID fees are imposed under color of law and as official policy of the City, per the Resolution. TID fees are not fair, reasonable, or proportionate and lack a nexus to the actual cost of service for which they are imposed. On information and belief, the City calculated TID fees arbitrarily and without the allocation reductions contemplated by the Resolution, commingled TID fees across TIDs, and spent TID fees on projects far removed from the TID in which they were collected.

44. As a direct result of the City’s violation of the Fifth and Fourteenth Amendment rights of Plaintiff and the Class, Plaintiff and the Class are entitled to damages in an amount exceeding \$50,000.00, prejudgment interest, costs, disbursements, and attorney’s fees pursuant to 42 U.S.C. § 1988(b).

COUNT V
SECTION 1983—DUE PROCESS

45. All allegations are incorporated and restated.

46. This count is asserted pursuant to 42 U.S.C. § 1983.

47. If a state actor places a taxpayer under duress to pay a tax promptly when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any illegal deprivation.

48. TID fees are an illegal tax, which the City imposes as a matter of official policy and under color of law, as set forth in the Resolution. The City fails to provide developers with a meaningful opportunity or process to withhold payment and obtain a pre-deprivation determination of the validity of TID fees. The City does not provide a meaningful disclosure of how TID fees are set. TID fees must be paid promptly, or developers are unable to proceed with development. The City does not give developers a meaningful, post-deprivation remedy. There is no meaningful opportunity to be heard. The total failure of the City to provide a adequate pre- or post-deprivation process to challenge TID fees or seek a refund of TID fees violates Due Process.

49. As a direct result of the City's violation of the Due Process rights of Plaintiff and the Class, Plaintiff and the Class are entitled to damages in an amount exceeding \$50,000.00, prejudgment interest, costs, disbursements, and attorney's fees pursuant to 42 U.S.C. § 1988(b).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff and the Class request that the Court:

1. Certify this case as a class action;
2. Designate Plaintiff as class representative and Plaintiff's counsel as class counsel;
3. Declare that TID fees are illegal, null, void, and unenforceable;
4. Declare that all TID fees must be refunded;
5. Order a full accounting of TID fees;
6. Place all TID fees in constructive trust;
7. Award Plaintiff and the Class damages to compensate them for the injuries they suffered as a result of Defendant's unlawful conduct;
8. Award Plaintiff costs, disbursements, prejudgment interest, and attorney's fees;
9. Enter judgment favor of Plaintiff and the Class on their claims against Defendant in an amount exceeding \$50,000.00, including attorney's fees, the exact amount to be proven at trial;
10. Grant Plaintiff leave to amend if the Court finds the Complaint deficient;
11. Grant leave to join additional plaintiffs; and
12. Award such other and further relief as the Court deems just and equitable.

Dated: February 3, 2022.

MESHBESHER & SPENCE, LTD.

By:

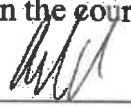


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ACKNOWLEDGMENT

I hereby acknowledge that costs, disbursements, and reasonable attorney fees may be awarded to the opposing party pursuant to Minn. Stat. §549.211, if the Court should find that I acted in bad faith, asserted a claim or defense that is frivolous and that is costly to the other party, asserted an unfounded position solely to delay the ordinary course of the proceedings or to harass, or committed a fraud upon the court.

Dated: February 3, 2022.



Andrew L. Davick

350-04

**RESOLUTION ESTABLISHING
TRAFFIC IMPROVEMENT DISTRICT PROGRAM**

WHEREAS, the United States faces a significant problem in maintaining existing public infrastructure (streets, roads, highways, bridges, pedestrian walkways, bike paths). In September, 2003, the American Society of Civil Engineers estimated that \$1.6 trillion dollars were needed nationwide over a five-year time period to bring public infrastructure up to an acceptable state of repair and maintenance. This figure had increased by \$300 billion since 2001 because of large growth and increased development; and,

WHEREAS, the City of Rochester also faces a significant problem in maintaining its existing public infrastructure. The City has over 300 miles of local streets for which it is responsible for maintenance and repair. This network of local streets has been growing by eight to ten miles per year during the past five years. Currently, the City faces a backlog of unfunded street maintenance needs totaling about \$26,500,000. The City's Public Works Director estimates that \$210,000,000 will be needed to maintain the existing street system and the new streets added by new development over the next 20 years; and,

WHEREAS, the City's Public Works Director projects that over the next 40 years, there could be over \$175,000,000 (or approximately 80 miles) in arterial and collector road construction and reconstruction needed to support new growth; and,

WHEREAS, the City's infrastructure deficit is compounded by new development, its impact upon adjacent public streets and the City's future financial and engineering plans to improve the capacity of the adjacent public streets. The Minnesota Court of Appeals has recognized the fact that subdivision development places a great burden on municipal services including city streets. Middlemist v. City of Plymouth, 387 N.W.2d 190, 193 (Minn. Ct. App. 1986). The City does not have the financial resources to upgrade or improve the available public infrastructure for each and every new development proposed to be located somewhere within the City's boundaries; and;

WHEREAS, the lack of adequate street and road facilities to handle the vehicular traffic generated by new development results in enormous societal costs in the form of environmental pollution, energy consumption, increased energy costs, decreased economic productivity and a general decline in a citizen's quality of life as a person spends more and more time trying to get from here to there. In addition, emergency services suffer as traffic congestion and accessibility problems reduce response times; and,

WHEREAS, Minnesota law addressing a city's ability to regulate development and subdivision activities is found in Minnesota Statutes, Chapter 462; and,

WHEREAS, Minnesota Statutes, Section 462.358, subd. 1a, states that "[t]o protect and

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