STATE OF MINNESOTA



DISTRICT COURT

COUNTY OF ST. LOUIS

SIXTH JUDICIAL DISTRICT

Moline Machinery LLC, Glass Merchant, Inc., d/b/a Walsh Windows on behalf of themselves and all others similarly situated,

Plaintiffs,

v

City of Duluth,

Defendant.

Court File No.: 69DU-CV-21-1668

**COURT'S ORDER ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

The above-entitled matter came before the undersigned Judge of District Court on May 8, 2023, pursuant to Plaintiffs' motion for class certification. Plaintiffs were represented by Shawn M. Raiter and J. D. Feriancek, and Defendant was represented by Katherine M. Swenson and Assistant Duluth City Attorney Elizabeth Tabor. The Court reviewed the memoranda of law, oral arguments, and all files, records, and proceedings herein. The Court also allowed post-hearing briefing, and the matter was taken under advisement as of May 15, 2023.

Based on all of the foregoing, the Court hereby issues the following:

## ORDERS

1. The Court hereby certifies a class in the above-captioned case defined as:

> "All persons and entities who paid stormwater service fees to the City of Duluth for non-residential structures from September 8, 2015, to the present.

> "This class excludes the owners of 'waterfront' property who received 'waterfront' designation BMP credits, or other discounts related to stormwater service fees before 2021, as identified on the document Bates numbered COD0003682, and any person or entity who paid the stormwater service fees for such properties. This class also excludes the owners of multi-family properties who paid stormwater service fees and any person or entity who paid such fees for multi-family properties. This class further excludes the City of Duluth, as well as the judge assigned to this case, any member of the judge's immediate family, and any person or entity that has previously commenced and concluded a lawsuit against the City of Duluth arising out of the subject matter of this lawsuit."

2. The Court appoints Plaintiffs' Moline Machinery, LLC, and Glass Merchant, Inc., d/b/a Walsh Windows as class representatives, and appoints the law firms Larson•King, LLP, and Trial Group North, PLLP, as class counsel, and authorizes court-facilitated notice of this action to members of the class.

3. Plaintiffs' counsel is directed to set up a conference call with the Court and opposing counsel for scheduling purposes on September 15, 2023, at 8:00 a.m. Judge's telephone number is 218-221-7680.

4. The following memorandum is incorporated as part of this order.

BY THE COURT:

Hylden, Eric
Aug 9 2023 10:30 AM

Honorable Eric L. Hylden
Judge of District Court

**MEMORANDUM OF LAW**

## Factual and Procedural Background.

This lawsuit was commenced in September of 2021. The Complaint asserts four causes of action: (1) unjust enrichment, (2) taking, (3) procedural due process, (4) injunctive/declaratory relief.

At the root of Plaintiffs' complaint is the City of Duluth's stormwater utility, created in 1997. This is allowable under Minn. Stat. § 444.075 (2022). The City of Duluth enacted an ordinance, City Code § 43-63, as authority for the stormwater system. Billing for the system would be based on the equivalent residential unit (ERU), which is defined as the average impervious area of residential property per dwelling unit located within the city. Impervious area includes blacktop, parking areas, concrete walks, rooftops, and even compacted gravel. Billing for the utility would be based on ERU value. Under the City Code, residential properties would be billed on the ERU rate multiplied by the number of dwelling units on the property. Thus, a one-family home would simply be billed the ERU rate times one.

For non-residential property, the calculation is more complicated. Under City Code § 43-66:

> "The utility fee for non-residential property shall be the ERU rate multiplied by the numerical factor obtained by dividing the total impervious area for a non-residential property by one ERU."

In effect, this means that for non-residential property, a lower ERU value will result in higher fees.

The essence of Plaintiffs' claims are that the City set an unreasonably low ERU value at the outset in 1997, thus resulting in overpayment by non-residential properties. (Plaintiffs admitted at the hearing that billings made or fees paid prior to September of 2015 are barred by the statute of limitations, and therefore would not be a part of this lawsuit. Their amended proposed class definition reflects this fact.) Plaintiffs also claim that the City also erred by: (1) failing to update the ERU value for nearly 24 years; (2) when the time came, failing to fairly and equitably change the ERU value when Defendant undertook the effort to accomplish that; (3) by offering unauthorized discounts for waterfront properties, multi-family properties and those non-residential properties who engaged in "best management practices" (BMP) for stormwater runoff. Plaintiffs claim that the City's system for charging stormwater utility fees remains unfair.

The Defendant denies Plaintiffs' claims. A Rule 12 motion to dismiss was brought early in the case but was denied by this Court. Defendant also argues that Plaintiffs have not met the standard for allowing class certification.

## Legal Standard

In Minnesota, Minn. R. Civ. P. 23.01 states as follows:

> "One or more members of a class may sue or be sued as representative parties on behalf of all only if (a) the class is so numerous that joinder of all members is impracticable; (b) there are questions of law or fact common to the class; (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (d) the representative parties will fairly and adequately protect the interests of the class."

These elements are known, in short, as numerosity, commonality, typicality, and adequacy.

If a party requesting class certification can prove all four elements of Rule 23.01, then they must also meet the requirements of Rule 23.02 (a), (b), or (c). The parties here agree that subdivision (a) does not apply here. R. 23.02 (b) allows class certification if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole…"

R. 23.02(c) allows class certification if "the court finds that questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy…" See also *Lewy 1990 Trust ex rel Lewy v Inv. Advisors, Inc.,* 650 N.W.2d 445, 451 (Minn. App. 2002).

The moving party bears the burden of establishing the elements for class certification. *Luiken v Domino's Pizza, LLC*, 705 F.3d 370, 372 (8th Circuit 2013). The district court is allowed considerable discretion to determine whether a class action should be certified. *Streich v American Family Mut. Ins. Co.*, 399 N.W.2d 210, 213, (Minn. App. 1987). The Court will analyze each factor seriatim.

**Numerosity.** The question here is whether joinder of all class members is impracticable. No particular number is necessary, but the court is to do a fact-

specific analysis on the size of the class, the size of the claims, and the practical effect of trying each case individually. *Lewy*, 650 N.W.2d at 452. Here, once the initial dispositive motions were decided, the parties engaged in discovery related to class certification. In that process, the parties agree that Defendant's data identifies just over 1,500 properties billed at a non-residential stormwater rate in 2020. Defendant objects that Plaintiffs have not taken the next step, to identify which of those properties received waterfront, BMP, or other discounts, since Plaintiffs' own definition excludes such properties from the class.

The Court observes that Plaintiffs' burden in a Rule 23 certification motion is a preponderance of the evidence. *Whitaker v 3M Company*, 764 N.W.2d 631, 638 (Minn. App. 2009). Here, the Court is satisfied that Plaintiffs have met that burden. Under the theories presented in Plaintiffs' Complaint, the number of non-residential and non-discounted properties is, more likely than not, going to be impracticable to take to trial separately. This Court's own experience shows that number need not be very high.

**Commonality.** This factor requires the Plaintiffs to show that there will be questions of law or fact common to the class. This does not require common questions affecting all class members – a substantial number is sufficient. *Lewy*, 650 N.W.2d at 453. As stated by the U.S. Supreme Court, "'What matters to class certification is not the raising of common "questions" – even in droves – but rather, the capacity of a class-wide proceeding to generate common *answers* apt to drive

the resolution of the litigation.'" *Walmart Stores v Dukes*, 564 U.S. 338, 350 (2011) (emphasis in original, citation omitted).

Here, the Court finds adequate questions of law and fact. The basic inquiry of the Plaintiffs here will be whether the City's methods for billing non-residential stormwater fees is fair and equitable. The Court finds that Plaintiffs' claim of unjust enrichment goes directly to that underlying question. Under Minnesota law, "[i]n order to establish a claim for unjust enrichment, the claimant must show that another party knowingly received something of value to which he was not entitled, and that the circumstances are such that it would be unjust for that person to retain the benefit." *Schumacher v Schumacher*, 627 N.W.2d 725, 729 (Minn. App. 2001). Likewise, Plaintiffs have a claim for declaratory or injunctive relief, based on the idea that Defendant City of Duluth has still not fixed its stormwater fee system and must be instructed to do so. Whether non-residential non-discounted properties are entitled to injunctive/declaratory relief is a common question of law and fact on that cause of action as well.

**Typicality.** This factor requires the class representative's claims to be compatible with those of the proposed class. "The typicality requirement is met when the claims of the named plaintiffs arise from the same event or are based on the same legal theory as the claims of the class members." *Lewy*, 650 N.W.2d at 453. "The burden of demonstrating typicality is fairly easily met so long as other class members have claims similar to the named plaintiff." *DeBoer v Mellon Mortg. Co.*, 64 F3d 1171, 1174 (8th Circuit 1995). Here, the Court is satisfied the

claims of Moline Machinery and Walsh Windows will be typical of those of other members of the class. Defendant objects that, based on the discovery, there is the potential for Walsh Windows to have been undercharged for stormwater fees and therefore be a poor representative for a class overcharged. The discovery is far from complete, however, so the Court is not in a position to decide the merits of Walsh Windows' individual claim. Even if true, that does not destroy the typicality requirement. The Court finds this factor has been met.

**Adequacy of representation.** With regard to representational adequacy, the Court observes that Moline and Walsh Windows have consistently participated in the case, through responding to discovery and supporting Plaintiffs' motion practice. Indeed, these two businesses have led the charge against the City's stormwater fee regime. When the time came, they hired attorneys, who appear to be qualified to represent the class.

Based on the foregoing, the Court finds that Plaintiffs have satisfied all four factors of Rule 23.01.

The second requirement of Rule 23 is that Plaintiffs demonstrate one of the four factors in Rule 23.02. As previously noted, the parties agree that Rule 23.02(a) is not in play here.

Rule 23.02(b) allows a class action when the claims show that "final injunctive relief or corresponding declaratory relief is appropriate to the class as a whole." Defendant here notes that it appears the Plaintiff class will be seeking money damages. Rule 23.02(c) requires "that the questions of law or fact

common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

With regard to R. 23.02(b), Defendant objects that since class members will be seeking money damages, certification under this subdivision is incorrect. That is certainly true under Defendant's citation to the *Dukes* case. The quotation made by Defendants, however, suggests that "individualized monetary claims belong in Rule 23.02(c). Here, as the Court sees this case, Plaintiffs are asking for two different things in their motion for class certification: First, forward-looking declaratory relief requiring the City to reform even its most current method for calculating non-residential stormwater fees, and second, refunds for class members for any overpayments made from September 2015 through the date of damages calculation by the fact finder. Thus, Plaintiffs may qualify for class certification under Rule 23.02(b), (c), or both.

The Court finds that Plaintiffs have presented sufficient evidence of claims for declaratory relief under R. 23.02(b). Whether Plaintiffs will be able to convince a fact finder that they should have relief going forward remains to be seen. For now, however, they have shown enough to move forward under this subsection of the rule.

In addition, Plaintiffs have also shown that, in their unjust enrichment claim, common questions of law or fact will predominate and are superior to other methods of resolution. While it is certainly true that individual damages for being

overcharged will be present, the legal question of whether the Plaintiff class is entitled to relief at all will predominate the inquiry. If that is determined in Plaintiffs' favor, then the Court agrees with Plaintiffs' counsel that the damages are likely to lend themselves to mathematical calculation. If the legal issues are not decided in Plaintiffs' favor, of course, that will end the inquiry for all members of the class.

## CONCLUSION

The Court finds that Plaintiffs have qualified under Rule 23 for class certification. The parties are set for a telephone scheduling conference in September to discuss discovery and trial. The Court will require the parties to hold a discovery conference under Rule 26.06 and prepare a discovery plan that addresses the issues they are likely to face in this phase of the case.

The Court would also encourage the parties to discuss ways to resolve the case. In the Court's view, this case suggests itself to mediation. Naturally, the Court is happy to do anything it can to assist in that process.

E.L.H.