

STATE OF MINNESOTA

DISTRICT COURT

ST. LOUIS COUNTY

SIXTH JUDICIAL DISTRICT

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

Case Type: Civil-Other
Court File No.

Plaintiffs,

vs.

City of Duluth,

Defendant.

Summons

THIS SUMMONS IS DIRECTED TO THE ABOVE-NAMED DEFENDANT:

1. **YOU ARE BEING SUED.** The Plaintiff has started a lawsuit against you. The Plaintiff's Complaint against you is attached to this Summons. Do not throw these papers away. They are official papers that affect your rights. You must respond to this lawsuit even though it may not yet be filed with the Court, and there may be no court file number on this Summons.
2. **YOU MUST REPLY WITHIN 21 DAYS TO PROTECT YOUR RIGHTS.** You must give or mail to the person who signed this summons a written response called an Answer within 21 days of the date on which you received this Summons. You must send a copy of your Answer to the person who signed this Summons located at:

Shawn M. Raiter
LARSON · KING, LLP
2800 Wells Fargo Place
30 East Seventh Street
Saint Paul, Minnesota 55101

3. **YOU MUST RESPOND TO EACH CLAIM.** The Answer is your written response to the Plaintiff's Complaint. In your Answer you must state whether you agree or disagree with each paragraph of the Complaint. If you believe the Plaintiff should not be given everything asked for in the Complaint, you must say so in your Answer.

4. YOU WILL LOSE YOUR CASE IF YOU DO NOT SEND A WRITTEN RESPONSE TO THE COMPLAINT TO THE PERSON WHO SIGNED THIS SUMMONS. If you do not Answer within 21 days, you will lose this case. You will not get to tell your side of the story, and the Court may decide against you and award the Plaintiff everything asked for in the Complaint. If you do not want to contest the claims stated in the Complaint, you do not need to respond. A default judgment can then be entered against you for the relief requested in the Complaint.
5. LEGAL ASSISTANCE. You may wish to get legal help from a lawyer. If you do not have a lawyer the Court Administrator may have information about places where you can get legal assistance. Even if you cannot get legal help, you must still provide a written Answer to protect your rights or you may lose the case.
6. ALTERNATIVE DISPUTE RESOLUTION. The parties may agree to or be ordered to participate in an alternative dispute resolution process under Rule 114 of the Minnesota General Rules of Practice. You must still send your written response to this Complaint even if you expect to use alternative means of resolving this dispute.

Dated: September 8, 2021

Larson • King, LLP

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Attorneys for Plaintiffs

STATE OF MINNESOTA**DISTRICT COURT****ST. LOUIS COUNTY****SIXTH JUDICIAL DISTRICT**

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

Case Type: Civil-Other
Court File No.

Plaintiffs,

vs.

City of Duluth,

Defendant.

Class Action Complaint and Demand for Jury Trial

1. Plaintiffs Moline Machinery, LLC and Glass Merchant, Inc., d/b/a Walsh Windows bring this case on behalf of themselves and a class of similarly situated persons and entities who have been damaged by the City of Duluth's unfair, inequitable, unjust, and unprincipled assessment of stormwater system fees.

2. Moline Machinery, LLC, Glass Merchant, Inc., d/b/a Walsh Windows, and the putative class members seek damages arising from the City of Duluth's failure to follow Minnesota law and its own City Code to properly calculate fees charged to owners of nonresidential properties, and for arbitrarily failing to assess the required fees to certain nonresidential properties. Plaintiffs and putative class members also seek declaratory and injunctive relief, as described below.

3. Since 1997, the City of Duluth has overcharged the owners of nonresidential properties millions of dollars. Moline Machinery, LLC and Glass Merchant, Inc., d/b/a

Walsh Windows have themselves been overcharged tens of thousands of dollars by the City of Duluth for stormwater system fees.

4. The City of Duluth has greatly increased the stormwater system fees it has charged Moline Machinery, LLC and Glass Merchant, Inc., d/b/a Walsh Windows. For example, in 2020, Moline paid \$544.06 per month and the City has increased that fee to \$776.54 per month currently. In 2020, Glass Merchant, Inc., d/b/a Walsh Windows paid \$346.28 per month and the City has increased that fee to \$509.18 month currently.

5. The City of Duluth has also arbitrarily undercharged certain nonresidential properties—currently totaling more than \$1 million per year—by failing to assess those properties the actual fees required by City Code. The City of Duluth has instead unjustly and unfairly forced other owners of nonresidential property to pay the fees that should have been charged to the underpaying properties.

6. Because the City of Duluth refuses to refund the overcharges and refuses to fix its errors going forward, Moline Machinery, LLC and Glass Merchant, Inc., d/b/a Walsh Windows were forced to bring this lawsuit to compel the City of Duluth to comply with Minnesota law and its own City Code.

Parties

7. Plaintiff and proposed class representative Moline Machinery, LLC (“Moline”) is a Minnesota limited liability corporation organized and existing under the laws of Minnesota with its headquarters and principal place of business in Duluth, Minnesota.

8. Moline is a family-owned business that has operated in Duluth since 1945. Since its founding in 1945, Moline has grown into an international leader in the design and

manufacture of machines used in in baking applications like donuts, pastries, flat breads, and specialty snacks.

9. Moline owns and operates 150,000 square feet of commercial property in Duluth and is in its fourth generation of family ownership led by company President Gary Moline. Moline currently employs 76 people in well-paying jobs in Duluth.

10. Plaintiff and proposed class representative Glass Merchant, Inc., d/b/a Walsh Windows (“Walsh Windows”) is a Minnesota corporation organized and existing under the laws of Minnesota with its headquarters and principal place of business in Duluth, Minnesota.

11. Walsh Windows is a family-owned business that has operated in Duluth for more than 75 years. Since its founding in 1945, Walsh Windows has manufactured and sold windows, doors, and other building products in Minnesota, Wisconsin, Illinois, Iowa, Michigan, Nebraska, North Dakota, and South Dakota.

12. Walsh Windows owns and operates more than 40,000 square feet of commercial property in Duluth and is in its third generation of family ownership. Walsh Windows employs more than 35 people in well-paying jobs.

13. The City of Duluth (“City”) is a municipal corporation organized and existing under the laws of the State of Minnesota.

Jurisdiction and Venue

14. This Court has jurisdiction over the parties, the proposed class, and the causes of action asserted herein because the proposed class representatives are citizens of St. Louis

County, the causes of action for the class representatives arose in St. Louis County, and the City is located in St. Louis County.

15. Pursuant to Minn. Stat. § 542.09, venue is proper in St. Louis County because the City is in the county and the transactions and property giving rise to the causes of action described below occurred and are located in St. Louis County.

Factual Background

16. Plaintiffs on behalf of themselves and all other persons and entities similarly situated bring this action for and on behalf of the owners of nonresidential properties located in the City from 1998 to the present.

17. Plaintiffs and putative class members have been damaged as a result of the City's failure to charge just, equitable, and proportionate fees for stormwater system services. The City has overcharged the owners of nonresidential properties millions of dollars and, correspondingly, undercharged the owners of a residential properties.

18. The City has also granted unlawful preferential treatment to some property owners by charging them lower fees than are required by City Code and state law. In doing so, the City has overcharged the owners of nonresidential properties that did not receive the arbitrary and illegal discounts.

19. The City has knowingly refused to calculate and apply fees in the manner required by its own City Code and refuses to remedy its errors to prevent future overcharges.

A. Minnesota Stormwater Systems.

20. Pursuant to the Minnesota law, the City is authorized to own and operate a

waterworks utility, including stormwater systems. Minn. Stat. § 444.075, subd. 1a.

21. The City is engaging in a proprietary function when it supplies stormwater system services to property owners.

22. The City is authorized, under Minn. Stat. § 444.075, to impose “just and equitable” fees for the use and availability of stormwater systems.

23. The City must ensure that fees made for service rendered shall be as nearly as possible proportionate to the cost of furnishing the service.

24. Fees issued by a municipality for stormwater systems must be fair, reasonable, just, uniform, and non-discriminatory.

25. Unlawful discrimination draws an unfair line or strikes an unfair balance between those in life’s circumstances having equal rights and privileges. An arbitrary or unreasonable classification or charge amounts to unjust discrimination.

B. The City’s Code.

26. Pursuant to City Code § 43-63, the City established a stormwater utility in 1998.

27. City Code § 43-63, requires that the City impose only “just and reasonable” fees for the use and availability of stormwater services.

28. Since 1998, the City has issued stormwater system fees to the owners of properties within the City using a formula required by City Code § 43-66.

29. City Code § 43-66 states that: “Subject to the limitations in this Section, this Article shall apply to all property in the city of Duluth.”

30. The City's Code includes a definition of the term Equivalent Residential Unit ("ERU), which is defined as: "The average impervious area of residential property per dwelling unit located within the city." *See* City Code § 43-65.

31. Impervious surfaces are materials that do not allow water to infiltrate into the ground. Asphalt parking lots and streets, concrete sidewalks, rooftops, and compacted gravel areas are examples of impervious surfaces. Impervious surfaces create runoff that must be captured and carried by the City's storm sewer system.

32. City Code § 43-66(b) states: "Utility fees shall be based upon the amount of impervious area on the benefitting property and **shall be computed as provided in this Article**. Each parcel of property within the city shall be categorized as residential, nonresidential, or undisturbed property." (emphasis added).

33. City Code § 43-66(b)(1) states: "The utility fees for each type of property **shall be** as follows:

(1) The utility fee for residential property **shall be** the ERU rate multiplied by the number of dwelling units existing on the property;

(2) The utility fee for nonresidential property **shall be the ERU rate multiplied by the numerical factor obtained by dividing the total impervious area for a nonresidential property by one ERU**. The minimum utility fee for any nonresidential property shall be equal to one ERU rate . . .

(emphasis added).

34. The City's Code requires it to regularly gather data to calculate the ERU, which is a critical factor used to calculate the stormwater utility fees charged to property owners. City Code § 43-66(d) states:

(d) **The director shall gather impervious area data on residential property within the city and calculate an ERU value. The utility fees shall be based on this ERU value. In determining the ERU value, the director shall not be required to measure and consider all residential property in the city, but shall consider a reasonable sample representing areas throughout the city.** The director shall further investigate nonresidential properties within the city to determine the impervious area on each property. The determination of impervious area made by the director shall be conclusive unless modified by the adjustment procedure set forth in this Article. **The director shall endeavor to investigate and reestablish an ERU value for the city every five years after the effective date of this ordinance. . .**

(emphasis added).

C. The City's 1997 Calculation of ERU.

35. In 1997, the city performed an analysis to calculate the ERU by randomly selecting 300 residential properties in the City.

36. When making this calculation in 1997, the City did not follow industry standards for making ERU calculations and instead included multi-family, townhomes, condominiums, and mobile homes in the sample of properties used to calculate the average impervious area square footage per dwelling.

37. The City's 1997 study established an average impervious area of 1,708 square feet per dwelling.

38. Since 1997, the City has used 1,708 square feet for the ERU value used to calculate stormwater system fees it has charged to owners of nonresidential properties.

39. The 1,708 square feet total the City has used for the ERU value is far lower than the ERU value used by comparable cities in Minnesota and other states.

D. The City Fails to Follow its Code and Has Not Properly Calculated Stormwater Fees for Decades.

40. For more than 20 years, the City has not followed its Code provisions that require it to calculate and use an ERU value reached through consideration of unbiased data about the residential properties within the City.

41. Despite City Code § 43-66(d)'s directive that the City investigate and reestablish an ERU value for the City every five years, the City has not calculated a new ERU since 1997.

42. By failing to gather data about the actual impervious area of residential properties and by failing to apply industry standard methodology for gathering such data, the City grossly understated the ERU value used to calculate stormwater system fees charged to Moline, Walsh Windows, and members of the class.

43. Understating the ERU value resulted in significantly **higher** stormwater system fees for owners of nonresidential properties in the City. As a result, the City has significantly overcharged Moline, Walsh Windows, and members of the class for more than 20 years.

E. The City's Own Consultants Confirm that it has Significantly Overcharged Owners of Nonresidential Properties for Decades.

44. In 2021, and in response to complaints from Moline and others about the ever-increasing fees the City was charging for its stormwater system, the City commissioned the consulting firm Short Elliott Hendrickson ("SEH") to study the ERU and impervious area data in the City.

45. SEH's report noted that in 1997 the City had calculated the ERU by including multi-family, townhomes, condominiums, and mobile homes in the sample of properties and further noted that the industry standard excluded such properties from an ERU calculation. (*See* Ex. A, attached hereto).

46. Because multi-family properties have significantly less average impervious area per dwelling, the SEH report noted that the City's 1997 calculation resulted in a lower ERU. Had the City used only single-family residences to calculate the ERU in 1997, the average impervious surface area per dwelling in the City would have been 2,145 square feet.

47. The City instead used 1,708 square feet as the ERU and, as a result, imposed fees that were 21% higher than they should have been on owners of nonresidential property.

48. Changes that occur over time within the housing stock in a city also affect the ERU.

49. The ERU for most cities has consistently increased since 1997.

50. The City's Code recognizes that the ERU will change over time, which is why it dictates that new data and ERU calculations be made every five years. The City, however, intentionally failed to carry out this reevaluation and has not changed the already impermissibly low ERU it has used since 1997.

51. The ERU value does not affect owners of residential properties in the City because City Code requires that each dwelling be charged one ERU times the current stormwater system rate. All residential buildings in the City are billed one ERU per living unit.

52. Lower ERU values, however, result in increased fees to owners of nonresidential properties under the fee calculation required by the City's Code.

53. Nonresidential properties are billed based on the total square footage of impervious surface on the property. The total impervious square footage of a non-residential property is then converted to ERUs by dividing the impervious square footage by the ERU number. For example, a medium-sized business that has a total impervious surface of 11,000 square feet is assigned 6.4 ERUs (11,000 sq. feet/1,708 sq. feet = 6.4 ERUs).

54. The 2021 study done by SEH found that the actual average impervious surface area of a single-family residential property in the City was 3,099 square feet.

55. The 2021 study done by SEH found that the ERU the City has used since 1997 resulted in a 45% overcharge to owners of nonresidential properties when compared to the actual average impervious surface area of a single-family residential property.

56. The 2021 SEH study the City commissioned also contained a table that summarized the effect the ERU undercalculation had on nonresidential property owners:

Table 2: Fee Charged per Acre of Impervious Surface – Non-residential Properties

ERU (sq ft)	Fee/ERU	Fee/acre
1,708	\$6.75	\$172.15
3,099	\$6.75	\$94.88

57. By failing to follow City Code to properly calculate the ERU since 1997, the City has overcharged owners of nonresidential properties by 45% and has charged and received millions of dollars from Duluth businesses and owners of nonresidential property for stormwater system fees not allowed under the City Code.

58. By overcharging the owners of nonresidential properties, the City has charged nonresidential property owners for stormwater services in an unjust, inequitable, discriminatory, and disproportionate manner that violated Minn. Stat. § 444.075 and City Code § 43-63.

F. The City Arbitrarily Undercharges Numerous Properties, Which Causes Members of the Proposed Class to Pay More Than Their Share of Stormwater Fees.

59. Although the City's Code requires that "all properties" in the City pay stormwater fees pursuant to the calculations set out in the City Code, the City has arbitrarily decided to grossly undercharge certain properties by reducing the ERUs for which they are charged.

60. As shown in Exhibit A, attached hereto, the City is undercharging certain properties a total of more than \$1.25 million each year.

61. Because the City has failed to follow its City Code and has arbitrarily reduced the fees assessed to certain properties, Moline, Walsh Windows, and the other members of the proposed class have been forced to pay more than their fair share of stormwater system expenses.

62. The City's undercharging of certain properties results in unjust, inequitable, unreasonable, and discriminatory fees being charged to and paid by the other owners of nonresidential properties in the City.

G. Moline, Walsh Windows, and Other Nonresidential Property Owners Have Been Assessed Inequitable, Unjust, and Unreasonable Fees.

63. For years, Moline, Walsh Windows, and putative class members own nonresidential properties in the City and have paid the stormwater fees the City charged them without the ability to know that the City had not fairly calculated their fees.

64. Moline and Walsh Windows, like all proposed class members, have already suffered out-of-pocket damages because of the City's failure to comply with Minnesota law and to follow its own City Code.

65. Moline and Walsh Windows, and the putative class members were charged inequitable, unjust, and unreasonable stormwater system fees because of the City's failure to comply with Minnesota law and to follow its own City Code.

H. The City's Refusal to Consider Requests for Refunds of Overcharges.

66. In numerous written and in person communications, Moline has demanded that the City follow its City Code, properly calculate the City's ERU, and properly assess fees to owners of nonresidential property in the City.

67. Despite these requests and requests made by others, the City has refused to issue refunds, has refused to change its ERU calculation methodology to comply with City Code, and has refused to take any action to remedy its decades long history of overcharging businesses, individuals, and others who own nonresidential properties in the City.

68. The City's failure to refund unauthorized, inequitable, disproportionate, unreasonable, excessive and discriminatory overcharges was a decision bearing on an open class of persons and properties.

69. The City has not taken any action to refund the inequitable overcharges and disproportionately excessive fees that it assessed to nonresidential properties in the City. The City has received and retains the inequitably overcharged and disproportionately excessive fees that it received from nonresidential property owners from 1998 through the present.

70. The City has known, since 1997, that the methodology it used for its ERU calculation was inconsistent with the customary methodology for this type of calculation and knew that its methodology resulted in a lower ERU. The City knew that maintaining an artificially low ERU resulted in increased stormwater system fees being charged to and paid by businesses and owners of nonresidential properties and it proceeded to do so to unjustly benefit the owners of other types of property within the City.

71. The City has refused to recalculate the ERU value since 1997 because it knew that doing so would decrease the ERU, which would correspondingly decrease the stormwater system fees being charged to and paid by businesses and owners of nonresidential properties. The City has instead required that owners of nonresidential properties pay more than their fair share for the City's stormwater system.

72. This City also continues to undercharge the properties contained on Exhibit A to this Complaint by approximately \$1.25 million each year, which increases the stormwater system fees being charged to and paid by businesses and owners of nonresidential properties that do not receive this arbitrary and unlawful reduction.

I. There is No Right to Appeal and No Administrative Remedy Available to Plaintiffs and Members of the Class.

73. Despite being asked to refund overcharges and to fix the problem going forward, the City has refused to follow its City Code and refuses to provide procedural due process to nonresidential property owners.

74. The City has refused to provide an administrative review process for disputing the unauthorized, inequitable, disproportionate, unreasonable, excessive and discriminatory fees that it has failed to refund to the affected persons and properties.

75. The City's Code only allows a property owner to challenge the calculation of the ERU square footage for its **own** property. *See* City Code § 43.67. The City's Code does not provide a right to challenge or appeal the City's refusal to properly calculate: "The average impervious area of residential property per dwelling unit located within the city" as the City is required to do under City Code § 43-65.

76. The City's Code does not provide property owners with a right to appeal the methodology the City uses to calculate the ERU, the City's use of stale and unrepresentative data for such calculations, or the City's failure to follow its City Code and fairly charge all nonresidential properties.

77. The City's refusal to act and the lack of a right to appeal or challenge the unjust, unauthorized, inequitable, disproportionate, unreasonable, excessive and discriminatory stormwater system fees makes this Court the appropriate venue for challenging and remedying the City's conduct.

78. Plaintiffs do not challenge the rate the City has set and used for stormwater system fees. They instead challenge the methodology used to calculate the ERU and the

failure to apply proper charges to all nonresidential properties which has resulted in unjust and inequitable overcharges to owners of nonresidential properties in the City who are members of the proposed class.

Definition of Proposed Class

79. Plaintiffs bring this class action on behalf of themselves and all others similarly situated, for all claims alleged herein, pursuant to Rule 23 of the Minnesota Rules of Civil Procedure. The proposed class is defined as:

All persons and entities who owned a nonresidential structure located within the City of Duluth from 1997 to the present and from whom the City of Duluth received stormwater service fees.

80. Plaintiffs exclude the City of Duluth from the proposed class. Plaintiffs also exclude from the proposed class 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.

81. Plaintiffs also exclude from the proposed class the persons and entities listed on Exhibit A to this Complaint.

82. Plaintiffs also exclude from the proposed class the judge assigned to this case and any member of the judge's immediate family.

Satisfaction of Class Prerequisites

83. This class action satisfies numerosity, commonality, typicality, adequacy, and superiority requirements for maintaining a class.

84. **Numerosity.** Pursuant to Rule 23.01(a) of the Minnesota Rules of Civil Procedure, the proposed class "is so numerous that joinder of all members is impracticable."

The number of members of the proposed class is believed to be thousands of people or businesses who the City charged improper stormwater system fees.

85. **Commonality.** Pursuant to Rule 23.01(b) of the Minnesota Rules of Civil Procedure, the proposed classes share common “questions of law or fact” that predominate over individualized issues. The common questions include, but are not limited to, the following:

- Whether the City charged an inequitable and disproportionate amount to nonresidential property owners for stormwater services?
- Whether the City followed its own City Code when calculating and assessing fees for stormwater services?
- Whether the City used accurate and representative data to calculate the ERU?
- Whether the City must refund the unjust, inequitable, and disproportionate fees it made to nonresidential property owners for stormwater services?
- Can the Plaintiffs obtain a declaration concerning the types and categories of damages and remedies available to putative class members?
- Are Plaintiffs’ claims barred in whole or in part by any of the City’s affirmative defenses?

86. **Typicality.** Pursuant to Rule 23.01(c) of the Minnesota Rules of Civil Procedure, the claims of the Plaintiffs and proposed class representatives “are typical of the claims . . . of the class.” Plaintiffs and all members of the proposed class who were charged for stormwater services have suffered damages because of the City’s wrongful acts and misconduct.

87. **Adequacy.** Pursuant to Rule 23.01(d) of the Minnesota Rules of Civil Procedure, the proposed class representatives “will fairly and adequately protect the interests of the class.” Plaintiffs have no adverse interests to the proposed class members. Plaintiffs

have paid the overcharges at issue. Plaintiffs have retained litigation firms, Larson · King, LLP, and Trial Group North, PLLP, whose attorneys have substantial resources, experience, and success in class action, mass tort, and complex litigation.

88. **Superiority.** Pursuant to Rule 23.02(c) of the Minnesota Rules of Civil Procedure, a class action is a superior method of resolving this action for the following reasons: A class action in this instance conserves the resources of the proposed class, the City, and the Court. The damages of most putative class members are not, in isolation, significant enough to hire an attorney on a contingency basis, and the burden and expense of hiring an attorney on a per-diem basis for Plaintiffs and most putative class members, makes it difficult, if not impossible, for the class members to seek redress.

89. Because the City refuses to remedy its past overcharges and has not changed its practice going forward, the class members need swift and uniform resolution of their claims before additional damage is caused. Further, there may other cases asserted against the City in the future. Serial adjudications in numerous venues are not efficient, timely, or proper. Judicial resources throughout Minnesota will be unnecessarily depleted by resolution of individual claims. Joinder on an individual basis of hundreds or thousands of claimants in any one suit would be impractical or impossible. Individualized judgments and rulings could result in inconsistent relief for similarly situated people and businesses.

Count I
Unjust Enrichment/Quasi Contract

90. Plaintiffs and proposed class members reallege the foregoing paragraphs, inclusive, as though fully set forth herein.

91. The City is not entitled to impose or retain stormwater fees that are inequitable or disproportionate, or fees that are discriminatory, unreasonable, unjust, or unlawful.

92. The fees the City charged and continues to charge to nonresidential property owners for stormwater services are inequitable, discriminatory, and disproportionate and therefore violate Minn. Stat. § 444.075 and its City Code.

93. Minnesota law only allows the City to charge fees for stormwater service that are just, equitable, reasonable, and non-discriminatory. The City failed to do so for owners of nonresidential properties and refuses to refund the money it should not have charged to those property owners.

94. Because Plaintiffs and all members of the proposed class were required to pay the City's stormwater fees to avoid having various City services terminated or face legal action, their relationship with the City was under duress and Plaintiffs necessarily conferred a benefit to the City by paying the fees issued by the City. Plaintiffs could not have known that the City was inequitably, disproportionately, and unreasonably charging them for stormwater services until 2021 when the City's failure to follow its own City Code came to light.

95. The City has received and knowingly accepted the benefits of the fees paid by Plaintiffs and all owners of nonresidential property in the City. Despite knowing that it was unfairly charging the owners of nonresidential property, the City has continued to accept the improper fees and refuses to refund the overcharges that it has received since 1998.

96. The City has acknowledged that it has charged owners of nonresidential properties stormwater service fees that are more than what the City's own City Code allows.

By doing so, the City has charged inequitable, disproportionate, and unreasonable fees to businesses and other entities while charging disproportionately low fees to residential property owners.

97. It is unfair and illegal for the City to refuse to follow its own City Code and to require nonresidential property owners to underwrite the fair share of stormwater service fees owed by residential property owners. There is no justifiable basis for the City's conduct.

98. The City currently knows that it has charged inequitable, disproportionate, and discriminatory fees to nonresidential property owners but refuses to refund those fees and refuses to stop assessing those fees. In so doing, the City holds money which it has no right in equity or good conscience to retain.

99. The City's retention of the inequitable and disproportionately overcharged stormwater service fees is unjust and inequitable and violates Minn. Stat. § 444.075 and its City Code.

100. The City in equity and good conscience should refund the inequitable and disproportionate overcharged fees.

101. Plaintiffs and all members of the proposed class suffered damage as a direct result of the City's failure to follow Minnesota law and its failure to properly apply its own fee schedule.

102. Every member of the proposed class has suffered damage and will continue to suffer damage without Court intervention.

103. That as a direct, proximate, and foreseeable cause of the City's violation of Minnesota law and its failure to correctly apply its own City Code, Plaintiffs and proposed class members sustained damages in excess of \$50,000.00.

Count II
Violation of Due Process

104. Plaintiffs and proposed class members reallege the foregoing paragraphs, inclusive, as though fully set forth herein.

105. The ERU and stormwater system fee methodology and calculations used by the City violate the right to due process under the Minnesota Constitution, Article I, Sections 2 and 7.

106. As set forth herein, the City has intentionally and knowingly collected millions of dollars of stormwater system fee revenue in violation of its City Code and Minnesota law, including, but not limited to, Minn. Stat. § 444.075.

107. The City has no authority to charge stormwater system fees that are not based on the actual "average impervious area of residential property per dwelling unit located within the city" but are instead based on stale and manipulated data. *See* City Code § 43-65.

108. The City has in place no process to refund excess stormwater system fee revenues.

109. There is a real, immediate, substantial, and continuing controversy between Moline, Walsh Windows, members of the proposed class, and the City requiring the intervention of the Court with respect to whether the City's ERU methodology violates due process.

110. Moline, Walsh Windows, members of the proposed class will prove that the City's ERU and stormwater system fee methodology violates the right to due process under the Minnesota Constitution, Article I, Sections 2 and 7.

111. As a result of the City's violation of state law, Moline, Walsh Windows, members of the proposed class have been damaged in excess of \$50,000.00.

Count III Unlawful Taking

112. Plaintiffs and proposed class members reallege the foregoing paragraphs, inclusive, as though fully set forth herein.

113. The City's ERU and stormwater system fee methodology and calculations violate the takings clause of the Minnesota Constitution, Article I, Section 13.

114. As set forth herein, the City has intentionally and knowingly collected millions of dollars of stormwater system fee revenue in violation of its City Code and Minnesota law, including, but not limited to, Minn. Stat. § 444.075.

115. The City has no authority to charge stormwater system fees that are not based on the actual "average impervious area of residential property per dwelling unit located within the city" but are instead based on stale and manipulated data. *See* City Code § 43-65.

116. The City has in place no process to refund excess stormwater system fee revenues.

117. There is a real, immediate, substantial and continuing controversy between Moline, Walsh Windows, members of the proposed class, and the City requiring the intervention of the Court with respect to whether the City's ERU methodology constitutes an unlawful taking.

118. Moline, Walsh Windows, members of the proposed class will prove that the City's ERU and stormwater system fee methodology and fees violate the takings clause of the Minnesota Constitution, Article I, Section 13.

119. As a result of the City's violation of state law, Moline, Walsh Windows, members of the proposed class have been damaged in excess of \$50,000.00.

Count IV
Declaratory and Injunctive Relief

120. Plaintiffs and proposed class members reallege the foregoing paragraphs, inclusive, as though fully set forth herein.

121. Pursuant to Minn. Stat. §§ 555.01 and 555.02, et seq., this Court has jurisdiction to declare rights, status, and other legal relations as affected by a statute, municipal ordinance, or contract, regardless of whether further relief is or could be claimed.

122. A justiciable controversy exists as to whether the City has charged and continues to charge fees that violate Minn. Stat. § 444.075 and other legal authority authorizing municipalities to only charge just, equitable, reasonable, and non-discriminatory fees and whether the City has violated its City Code.

123. Plaintiffs and members of the putative class have been and continue to be charged fees that are not just, equitable, reasonable, and non-discriminatory. The City has and will continue to charge owners of nonresidential properties stormwater service fees for which there is no legitimate or non-arbitrary basis.

124. Plaintiffs and members of the putative class are entitled to a declaration that the City's stormwater service fees collected from owners of nonresidential properties have been unjust, inequitable, unreasonable, and discriminatory.

125. Plaintiffs and members of the putative class are entitled to a declaration that the City's stormwater service fees collected from owners of nonresidential properties violate Minnesota law.

126. To prevent irreparable and continuing harm caused by being forced to pay unjust, inequitable, unreasonable, and discriminatory fees, Plaintiffs are entitled to an injunction prohibiting the City from continuing to charge such fees to the extent they differ from what is required by the City's Code and Minnesota law.

127. Pursuant to Rule 23.02(b) of the Minnesota Rules of Civil Procedure and any applicable statute or rule providing for declaratory and / or injunctive relief, Plaintiffs and putative class members seek a declaratory judgment as follows:

- a. That the City's current calculation of ERU (1,708 sf) has been and is unlawful and unenforceable;
- b. That the stormwater systems fees charged by the City to owners of nonresidential properties have been unjust, inequitable, unreasonable, and discriminatory;
- c. That the City must, going forward, apply the ERU calculated by the 2021 SEH report until the City updates the ERU calculation as required by City Code;
- d. That the City must refund the overcharges for the stormwater systems fees charged by the City to owners of nonresidential properties;
- e. That the City's method for calculating ERU and assessing stormwater system fees to owners of nonresidential properties violated Minn. Stat. § 444.075 and its City Code; and
- f. Such other and further declarations that are needed to remedy the problems placed at issue in this lawsuit.

Prayer for Relief

WHEREFORE, Plaintiffs, on behalf of themselves and all others similarly situated, pray for relief against the City of Duluth as follows:

1. Certification of this class and appointing Plaintiffs and their undersigned counsel to represent the class;
2. Compensation for damages suffered by Plaintiffs and the proposed class members;
3. Awarding any applicable fees and costs and disbursements incurred herein;
4. Declaring the rights and obligations of the parties as prayed for; and
5. Such other and further relief the Court deems just and equitable.

Jury Demand

Plaintiffs hereby request a trial by jury on all claims and issues available under the law.

Dated: September 8, 2021

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Attorneys for Plaintiffs

Acknowledgement

The undersigned hereby acknowledges that pursuant to Minn. Stat. § 549.211, Subd. 2, costs, disbursements and reasonable attorney and witness fees may be awarded to the opposing party or parties in this litigation if the Court should find that the undersigned acted in bad faith, asserting 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.

s/ Shawn M. Raiter
Shawn M. Raiter (#240424)

EXHIBIT A

WATERFRONT BILLING 12-15-2020	CURRENT			ACTUAL			WATERFRONT CREDITS.	
	BUSINESS NAME	ERU Currently Billed	\$6.75/ERU/month	Annual	Actual ERU	\$6.75/ERU/month	Annual	Annual w/80% fee Reduction
Great Lakes Aquarium	30.6	\$ 206.55	\$ 2,478.60	77.9	\$ 525.96	\$ 6,311.52	\$ 1,262.30	\$ 2,393.70
Bayfront Park	1	\$ 6.75	\$ 81.00	171.0	\$ 1,154.18	\$ 13,850.19	\$ 2,770.04	\$ 5,252.81
DECC & Marcus Theaters	1	\$ 6.75	\$ 81.00	558.2	\$ 3,767.51	\$ 45,210.15	\$ 9,042.03	\$ 17,146.37
DEDA	0	\$ -	\$ -	227.3	\$ 1,534.01	\$ 18,408.06	\$ 3,681.61	\$ 6,981.43
Hallett Dock Co	12.9	\$ 87.08	\$ 1,044.90	1,056.2	\$ 7,129.62	\$ 85,555.44	\$ 17,111.09	\$ 32,447.69
Hallett Dock 7 LLC	0	\$ -	\$ -	1,480.0	\$ 9,989.73	\$ 119,876.76	\$ 23,975.35	\$ 45,464.37
Harbor Cove Marina	22.1	\$ 149.18	\$ 1,790.10	123.6	\$ 834.03	\$ 10,008.36	\$ 2,001.67	\$ 3,795.76
Lakehead Boat Basin	4.1	\$ 27.68	\$ 332.10	51.0	\$ 343.91	\$ 4,126.95	\$ 825.39	\$ 1,565.18
North American Salt Co	18	\$ 121.50	\$ 1,458.00	394.0	\$ 2,659.23	\$ 31,910.76	\$ 6,382.15	\$ 12,102.45
Park Point Marina Inn	1	\$ 6.75	\$ 81.00	43.9	\$ 296.06	\$ 3,552.66	\$ 710.53	\$ 1,347.38
Pier B	12.3	\$ 83.03	\$ 996.30	122.6	\$ 827.55	\$ 9,930.60	\$ 1,986.12	\$ 3,766.27
111 & 1200 Port Terminal Dr.	12.7	\$ 85.73	\$ 1,028.70	129.9	\$ 876.62	\$ 10,519.47	\$ 2,103.89	\$ 3,989.61
Riverland AG	5	\$ 33.75	\$ 405.00	1,302.8	\$ 8,793.97	\$ 105,527.61	\$ 21,105.52	\$ 40,022.32
Theodore Smith - 600 Garfield Ave	0	\$ -	\$ -	200.4	\$ 1,352.50	\$ 16,229.97	\$ 3,245.99	\$ 6,155.37
AZCON Inc	4.4	\$ 29.70	\$ 356.40	488.6	\$ 3,297.71	\$ 39,572.55	\$ 7,914.51	\$ 15,008.26
900 Garfield Ave - Port Terminal	1	\$ 6.75	\$ 81.00	664.1	\$ 4,482.61	\$ 53,791.29	\$ 10,758.26	\$ 20,400.84
901 Helberg & 1210 Port Terminal Dr	1	\$ 6.75	\$ 81.00	379.7	\$ 2,562.84	\$ 30,754.08	\$ 6,150.82	\$ 11,663.77
1100 Port Terminal Dr	0	\$ -	\$ -	115.2	\$ 777.60	\$ 9,331.20	\$ 1,866.24	\$ 3,538.94
1102 & 1125 Port Terminal Dr	2	\$ 13.50	\$ 162.00	255.2	\$ 1,722.74	\$ 20,672.82	\$ 4,134.56	\$ 7,840.36
1108 & 1130 Port Terminal Dr	1	\$ 6.75	\$ 81.00	433.0	\$ 2,923.02	\$ 35,076.24	\$ 7,015.25	\$ 13,302.99
1200,1255,1222 & 1325 Port Terminal Dr	1	\$ 6.75	\$ 81.00	766.3	\$ 5,172.80	\$ 62,073.54	\$ 12,414.71	\$ 23,541.96
North Shore Track Services	1	\$ 6.75	\$ 81.00	127.5	\$ 860.69	\$ 10,328.31	\$ 2,065.66	\$ 3,917.11
North Star Steel Co	2	\$ 13.50	\$ 162.00	277.5	\$ 1,873.13	\$ 22,477.50	\$ 4,495.50	\$ 8,524.80
Fairfield Inn & Suites	3.5	\$ 23.63	\$ 283.50	28.0	\$ 188.66	\$ 2,263.95	\$ 452.79	\$ 858.62
Duluth Ready Mix	1	\$ 6.75	\$ 81.00	189.0	\$ 1,275.75	\$ 15,309.00	\$ 3,061.80	\$ 5,806.08
Spirit lake Marina	4.9	\$ 33.08	\$ 396.90	96.2	\$ 649.62	\$ 7,795.44	\$ 1,559.09	\$ 2,956.49
Calumet Superior LLC	1	\$ 6.75	\$ 81.00	91.1	\$ 614.93	\$ 7,379.10	\$ 1,475.82	\$ 2,798.59
US Army Corps of Engineers	41.9	\$ 282.83	\$ 3,393.90	41.3	\$ 278.84	\$ 3,346.11	\$ 669.22	\$ 1,269.04
US Coast Guard	54.3	\$ 366.53	\$ 4,398.30	80.6	\$ 543.85	\$ 6,526.17	\$ 1,305.23	\$ 2,475.11
US Army Reserve	68.5	\$ 462.38	\$ 5,548.50	63.5	\$ 428.29	\$ 5,139.45	\$ 1,027.89	\$ 1,949.18
Sand Point Yacht Club	1	\$ 6.75	\$ 81.00	13.6	\$ 91.80	\$ 1,101.60	\$ 220.32	\$ 417.79
Park Point Park	24.6	\$ 166.05	\$ 1,992.60	145.3	\$ 980.98	\$ 11,771.73	\$ 2,354.35	\$ 4,464.54
Duluth Rowing Club	1	\$ 6.75	\$ 81.00	11.3	\$ 76.28	\$ 915.30	\$ 183.06	\$ 347.14
Sky Harbor Airport	1	\$ 6.75	\$ 81.00	154.3	\$ 1,041.46	\$ 12,497.49	\$ 2,499.50	\$ 4,739.79
C. Reiss Coal Co.	6.7	\$ 45.23	\$ 542.70	797.8	\$ 5,385.02	\$ 64,620.18	\$ 12,924.04	\$ 24,507.80
Allete/MN Power	1	\$ 6.75	\$ 81.00	351.0	\$ 2,369.39	\$ 28,432.62	\$ 5,686.52	\$ 10,783.33
Lavarock Property	61.4	\$ 414.45	\$ 4,973.40	63.3	\$ 427.01	\$ 5,124.06	\$ 1,024.81	\$ 1,943.35
Railroad St. Properties	1	\$ 6.75	\$ 81.00	486.5	\$ 3,283.88	\$ 39,406.50	\$ 7,881.30	\$ 14,945.28
WLSSD	110	\$ 742.50	\$ 8,910.00	592.5	\$ 3,999.38	\$ 47,992.50	\$ 9,598.50	\$ 18,201.60
Terry Lucia	0	\$ -	\$ -	272.7	\$ 1,840.79	\$ 22,089.51	\$ 4,417.90	\$ 8,377.65
James Holgren	0	\$ -	\$ -	731.2	\$ 4,935.80	\$ 59,229.63	\$ 11,845.93	\$ 22,463.39
Burlington No/Santa Fe RR	0	\$ -	\$ -	1,199.3	\$ 8,095.07	\$ 97,140.87	\$ 19,428.17	\$ 36,841.57
7000 Pulaski St.	0	\$ -	\$ -	47.4	\$ 320.02	\$ 3,840.21	\$ 768.04	\$ 1,456.44
VERSO	462.1	\$ 3,119.18	\$ 37,430.10	1,212.6	\$ 8,185.19	\$ 98,222.22	\$ 19,644.44	\$ 37,251.69
Tate & Lyle	10.5	\$ 70.88	\$ 850.50	103.9	\$ 701.60	\$ 8,419.14	\$ 1,683.83	\$ 3,193.04
Total	989.5	\$ 6,679.13	\$ 80,149.50	16,218.0	\$ 109,471.57	\$ 1,313,658.81	\$ 262,731.76	\$ 498,217.27

Some water front properties have been determined to drain away from the harbor and connect to the City storm sewer system. These will be verified again.