STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF MINNEHAHA	)	SECOND JUDICIAL CIRCUIT

GRANT PARK CAPITAL, LLC Plaintiff, vs. CITY OF BALTIC, a South Dakota Municipal Corporation; DEBORAH MCISAAC, TRAVIS SCHREURS, NIKKI OIEN, BRIAN MCGREEVY, AND RYAN SINDING, in their official capacities as members of CITY OF BALTIC CITY COUNCIL; CITY OF BALTIC PLANNING AND ZONING COMMISSION; ED WILSON, DEB MURPHY, NATE VRCHOTA, RYAN SINDING, AND TRAVIS SCHREURS, in their official capacities as members of CITY OF BALTIC PLANNING AND ZONING COMMISSION, Defendants.	49CIV22-002973 **BRIEF IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER WITHOUT NOTICE, PRELIMINARY INJUNCTION, AND PERMANENT INJUNCTION**

Plaintiff Grant Park Capital, LLC ("Plaintiff" or "Grant Park"), by and through its undersigned attorneys of record, submits this brief in support of its motion for a temporary restraining order without notice and preliminary and permanent injunction. Plaintiff respectfully requests that this Court grant its motion and immediately enter the accompanying proposed temporary restraining order because (1) Plaintiff faces irreparable harm unless the conduct of Defendants City of Baltic, a South Dakota Municipal Corporation, Deborah McIsaac, in her capacity as Mayor ("Mayor"), Travis Schreurs, Nikki Oien, Brien McGreevy, and Ryan Sinding, in their official capacities as members of City of Baltic City Council ("City Council"), City of Baltic Planning and Zoning Commission ("Planning and Zoning"), Ed Wilson, Deb Murphy, Nate Vrchota, Ryan Sinding, and Travis Schreurs, in their official capacity as members of the City of Baltic Planning and Zoning Commission

("Defendants" or "the City") are restrained; (2) the harm to Plaintiff outweighs the injury that injunctive relief allegedly would inflict on Defendants; (3) Plaintiff is likely to prevail on the merits of its claims; and (4) the public interest would be served by the issuance of a temporary restraining order. Furthermore, Plaintiff requests that, following a hearing and determination of the issues, a preliminary and/or permanent injunction be entered against Defendants.

Specifically, Grant Park seeks an Order from this Court against the City:

1. Enjoining and restraining the City from defaming Grant Park by publishing to third parties false information in writing which have the propensity to expose Grant Park to hatred, contempt, ridicule, or obloquy, and which may cause it to be shunned or avoided, and which have the tendency to injure its reputation and good will;

2. Compelling the City to publicly retract any statements not true that were published to any third party, including any statement that Grant Park is violating any state laws and local ordinances;

3. Enjoining and restraining the City from making demands upon Grant Park that are not included in the Final Plat;

4. Enjoining and restraining the City from making any resolutions that require Grant Park to do anything outside of the Final Plat; and

5. Enjoining and restraining the City from ignoring its municipal functions with regard to the neighborhoods, including maintenance and addressing any Residents' concerns.

BACKGROUND

Grant Park is the owner of real property in Baltic, South Dakota, that is actively being constructed and developed into two single-family residential neighborhoods. (Aff. of Anna Limoges in Supp. of Motion for T.R.O. Without Notice, Prelim. Inj., and Permanent Inj. ("Limoges Aff.), ¶2 (hereinafter referred to as "Verified Petition")). The two single-family residential neighborhoods are located on the southeast side of Baltic and are known as Grant Park Addition and Phillips Crossing Addition (collectively referred to as the "Development"). (*Id.*, ¶2).

On January 18, 2021, Grant Park brought plans and proposed its Preliminary Plats ("Preliminary Plats") to Planning and Zoning for the Development. (*Id.*, ¶3). Planning and Zoning made some recommendations for changes to the Preliminary Plats and informed Grant Park it needed to present the Preliminary Plats at a future meeting for consideration and recommendation of final plat approval to the City Council. (*Id.*, ¶4). On February 18, 2021, Grant Park again submitted its Preliminary Plats to Planning and Zoning for its residential developments. (*Id.*, ¶5). Planning and Zoning approved the Preliminary Plats, allowing Grant Park to start dirt work for the Development, notwithstanding installation of utilities or roadways. (*Id.*, ¶6).

In 2021, the City began discussing certain paving improvements and sidewalk improvements to 5th Street. The City communicated with Grant Park regarding improvements to the portion of 5th Street that abuts the Grant Park Addition during the annexation process that would include i) paving of that portion of 5th street that abuts the Grant Park Addition ("Paving Improvements"); and ii.) the City submitting an application to obtain a grant for funds to be put towards a sidewalk connecting to the 10' Bike Path along

the southwest portion of the Grant Park and extending north along 5th Street to the northern property boundary of the Grant Park ("Sidewalk Improvements," collectively with Paving Improvements, the "5th Street Improvements"). (Aff. of Tracy Petersen in Supp. of Motion for T.R.O. Without Notice, Prelim. Inj., and Permanent Inj. ("Petersen Aff."), ¶3). The City worked on submitting an application for a grant to obtain funds for the Sidewalk Improvement. (*Id.*, ¶6). The City communicated with Grant Park and Baltic School District that it was working to obtain the grant for the Sidewalk Improvements. (*Id.*, ¶10). The City communicated to Grant Park that Grant Park would not pay for the installation of any portion the 5th Street Improvements, including curb and gutter. (*Id.*, ¶11). Because the City was working on the Sidewalk Improvements, the City did not have the 5th Street Improvements or any other portion of the City's Improvement Approval as part of Grant Park Addition or Phillips Crossing Addition's Final Plat. (*Id.*).

On March 9, 2021, the City Council approved the annexation of the Development under the contingency that City Council would retain legal counsel to review the resolution to annex the Development. (Verified Petition, ¶7). On March 16, 2021, City Council voted unanimously to pass the resolution to annex the Development. (*Id.*, ¶8). On April 8, 2021, Department of Agriculture and Natural Resources ("DANR") conditionally approved the construction plans and specifications for the Development, requiring no further response from Grant Park to DANR. (*Id.*, ¶9). On April 9, 2021, Grant Park initiated grading and dirt work preparation for the Development and the approval of the final plats for the Development. (*Id.*, ¶10). On August 9, 2021, Planning and Zoning recommended to the City Council the rezoning of the parcels of the Development to R-1 residential. (*Id.*, ¶11). Subsequently, on August 10, 2021, the City Council unanimously approved the rezoning of

the Development to R-1. (*Id.*, ¶12). On August 30, 2021, the City Council held a public hearing regarding the rezoning of the Development to R-1 residential.· No public comments were given at the hearing. The City Council passed the first reading of the rezoning amendment. (*Id.*, ¶13).

On July 27, 2021, the City approved a resolution for the City to make the Paving Improvements (the "City's Improvement Approval"). (Petersen Aff., ¶7). This did not include curb and gutter as the City did not know where the new high school was going to be located. (*Id.*). The City wanted to ensure that it included the proper inlets for a new high school if it were to be located within the City's Improvement Approval. (*Id.*). Upon knowing where the new high school would be located, the City intended to fund such improvements at a later time. (*Id.*). The City budgeted to spend up to $95,000 on the project. (*Id.*). Pursuant to the City's Improvement Approval, the City planned to execute the City's Improvement Approval in 2022 when the funds became available. (*Id.*, ¶8).

From January 19th through September 27th, 2021, Grant Park took Planning and Zoning's recommendations under advisement and revised the plans and plats. (Verified Petition, ¶14). From April 9, 2021 through September 27, 2021, Grant Park initiated groundwork per the approved Preliminary Plat. All groundwork was preparation for where the roadways and utilities would be placed upon Planning and Zoning approving the Final Plat. (*Id.*, ¶15). On September 28, 2021, Grant Park presented the updated plans and plats to Planning and Zoning who voted unanimously to recommend final approval to the City Council. (*Id.*, ¶16). That same day the City Council held a special meeting to review the updated plans and plats of the Development and to review the approval recommendation of Planning and Zoning. The City Council unanimously approved the final plans and plats of the

Development without any further modifications or conditions. (*Id.*, ¶17). On October 20, 2021, Grant Park filed the final approved plat for the Phillips Crossing Addition ("Phillips Crossing Final Plat") with the Minnehaha County Register of Deeds. (*Id.*, ¶18). On November 12, 2021, Grant Park filed the final approved plat for the Grant Park Addition ("Grant Park Final Plat") with the Minnehaha County Register of Deeds. (*Id.*, ¶19).

Long before Grant Park purchased the land where the Development is located, the City had been working on water improvements to take place throughout the City and inquiring as to the availability of State funding to ensure the City could accommodate its current and future residents. (*Id.*, ¶20). Discussions between Grant Park and the City regarding water improvements within the Development took place and the City agreed to pay for the water improvements within the Development with any upcoming State funding. (*Id.*, ¶21). These improvements included, but are not limited to, a city-wide water looping project, replacement of the City's main lift station, and replacement of aged watermains. (*Id.*, ¶22).

In reliance on the September 28, 2021 final approval of the Phillips Crossing Final Plat and Grant Park Final Plat (collectively referred to as "Final Plats") for the Development and the correspondence and discussions occurring therein, Grant Park took substantial steps forward in planning and constructing the infrastructure necessary for a neighborhood. (*Id.*, ¶23). Grant Park's steps included but are not limited to:

a. removed the topsoil of the site;

b. finalized the approved site grading;

c. installed the utilities to include the approved watermains;

d. approved sanitary sewer watermain;

e. approved storm sewer;

f. placed the gravel for roadways;

g. finalized grading of the approved roadways;

h. installed the approved curb and gutters;

i. laid asphalt to finalize all approved roadways;

j. installed approved electrical lines;

k. installed approved natural gas lines;

l. installed approved street lighting; and

m. installed approved telecommunication lines.

(*Id.*, ¶24). In reliance on the formal and final approval of the Final Plats, Grant Park incurred approximately $3,555,560.73 in costs related to the construction and completion of the above-referenced infrastructure. (*Id.*, ¶25).

From March 2021 until October 2021, the City worked on and submitted its funding application for the discussed water improvements prior to the January 1, 2022 deadline. (*Id.*, ¶26). The application included engineering plans for water improvements within the Development as discussed with Grant Park. (*Id.*, ¶27). Grant Park relied on the fact the City passed a resolution to improve its Clean Water System to include looping the watermains within the Development as well as the City's actions of applying for the funds. (*Id.*, ¶28). On April 26, 2022, the City was approved for a $1,206,339.00 Drinking Water State Revolving Fund loan and a $622,332.00 American Rescue Plan Act grant for water system improvements. (*Id.*, ¶29).

On May 10, 2022, a change of City officials occurred, and a new Mayor, Authorized Official, and new council members subsequently took office. (*Id.*, ¶30). Since May 10, 2022,

the new City officials have actively, improperly, and illegally attempted to impose conditions and requirements on Grant Park's further construction of the Development. (*Id.*, ¶31).

On information and belief, Planning and Zoning President Ed Wilson contacted Grant Park on May 26, 2022, threatening to "come after you ... you better look out'' if Grant Park did not come to his house and fix his pool that had dirt accumulated in it due to the Derecho. Ed Wilson also stated that he would be calling DANR again. When asked if Ed had called already, he confirmed as well as confirming that he would be calling again. (*Id.*, ¶32).

The following actions of the City transpired from July 2022 through November 2022:

a. On July 27th, Planning and Zoning purported to cease the issuance of building permits until the City's hired engineer, I & S Group, Inc. ("ISG"), could evaluate the development site and generate a report for further discussion with Grant Park. No written notice for this action was given to Grant Park.

b. On August 9, 2022, City Council discussed how the Mayor, Brian Hefty (majority owner of Grant Park), Baltic's City Attorney, and the engineering firms involved would schedule a meeting for further discussions of the Development with Grant Park.

c. On September 13th, Grant Park shared its concerns regarding the City's requests for resolution as nothing was happening. The Mayor replied to Brian Hefty stating " ... the engineers have been communicating via email and ... scheduling a meeting is feasible ...." The parties agreed to meet.

d. ISG and Grant Park had continuous negotiations and dialogue to resolve any issues the City had in order to resume the issuance of building permits.

e. Each set of communications was combined with another set of issues the City

demanded Grant Park to address.

f. As negotiations dragged on through October of 2022, and Grant Park continuously provided solutions to the City's baseless claims and demands.

g. Despite Grant Park's efforts to meet the never-ending laundry list of demands from the City, the City demanded Grant Park address items that had already been previously approved in the Preliminary Plat and Final Plats and added to the laundry list.

h. The City had water flow adequacy concerns and wanted additional sidewalks not considered in the Preliminary Plat and Final Plats.

i. The City failed to cite any ordinance, regulation, or mandate for Grant Park to improve any of the existing water distribution system of the City.

j. Even though the City gave assurances that the existing water system was sufficient prior to the City's approval of the Preliminary Plat and Final Plats, Grant Park paid for and provided numerous water system studies to the City showing ample amount of pressure and water flow to sustain a full build out of the Development.

k. On October 26, 2022, the City and Planning and Zoning passed a Joint Motion to utilize Grant Park as a pawn for its own political gain. ("Joint Motion").

l. The Joint Motion references a letter that the Baltic's School Board ("School Board") had written to the City in September 2022. The letter explained the School Board's displeasure in the City's decision to hold the Development's building permits hostage, as the School had recently passed a bond to build a new addition to the school.

m. On September 27, 2022, Ed Wilson had once again threatened Grant Park indefinitely withhold building permits if Grant Park did not denounce the School Board letter.

n. The Joint Motion mandates Grant Park to:

    a. Clarifying [sic] that it is the state DANR requiring the developer to clean up of both the school and city properties and future sediment downflow needs to cease.

    b. The developer needs to clarify that the city's intent was simply to invoke their fiduciary responsibility to protect our taxpayers, public safety and our city's environment. They must acknowledge that the city is neither anti-development nor do they wish harm on any present or future citizens.

    c. The developer will request the school to publicly retract their uninformed and false statements regarding the city, specifically referencing their letter.

o. Within the Joint Motion, the City gave no ordinance, regulation, or statute as to why it was demanding Grant Park to explain to another entity of the City why such a letter is wrong; to articulate the City's intentions as to holding building permits hostage; and to request a retraction of such a letter.

p. In November of 2022, the City demanded Grant Park to install and improve the existing water distribution system by paying for additional water looping projects, which the City had already garnered State funding for such projects, as illustrated in the November 9th, 2022 memorandum from ISG to Grant Park.

q. As such, instead of utilizing the $1,828,671.00 funds for the project and following through with its promises to Grant Park on paying for water improvements within the Development, the City now demands Grant Park pay for the large water system improvements.

r. The City gave no ordinance, regulation, or statute as to why Grant Park is required to

improve the water system that the City already planned to improve on its own dime. The actions of the City since May 10, 2022, culminating in the Joint Motion and demand for water looping improvements are a jurisdictional overreach, forbidden by law, and not in the regular pursuit of authority conferred upon them. (*Id.*, ¶34). Further, the actions of the City since May 10, 2022, culminating in the Joint Motion and demand to improve the water system are arbitrary, capricious, and in willful disregard of the law and of the rights of Grant Park. (*Id.*, ¶35).

Grant Park is aggrieved by the actions of the City taking place since May 10, 2022, culminating in the Joint Motion. (*Id.*, ¶36). But for the City's inability to follow its own procedures and give Grant Park procedural due process resulting in unlawful, arbitrary and capricious decision-making Grant Park would be able to continue with the approved Development. (*Id.*, ¶37). Such arbitrary and capricious actions have caused Grant Park to suffer significant monetary damages, to include but are not limited to:

a. over $150,000.00 in additional erosion control measures;
b. forcing Grant Park to have its engineers survey and plan a non-mandatory detention pond that the City originally did not require-which would result in an expense of over$ 100,000.00 cost to Grant Park;
c. forcing Grant Park to have its engineers do needless drainage studies costing $7,886.09; and
d. forcing Grant Park to have its engineers do needless water flow analysis that cost over $16,776.74.

Even with Grant Park tirelessly utilizing the vast portion of its resources to meet the demands of the City, the building permit cease order was not lifted. The continuous

withholding of building permits to the Development has started to cause contractual interference to buyers of lots who have yet to close. (*Id.*, ¶39).

Grant Park is further aggrieved by the actions of the City since May 10, 2022, culminating in the Joint Motion in that the City has limited Grant Park's use of its land by arbitrarily demanding:

a. That an additional stormwater detention pond be created in an area that already contains platted and approved residential lots;
b. That Grant Park implement various 12-foot drainage easements not contemplated at the approval of the Development;
c. The installation of additional sidewalks not considered during the final approvals of the Development;
d. That Grant Park mitigate erosion concerns from bare land that landowners want to develop, but are unable to due to the City holding building permits; and
e. That Grant Park contribute financial capital to the further improvement of the City's water system-which the previous administration had planned, applied, and was approved for State funds to do on its own fruition.

(*Id.*, ¶40).

As stated in the Verified Petition, if the City's illegal demands and requests were allowed to stand, in order to complete the already approved work outlined in the Final Plat, Grant Park would experience significant additional damages. (*Id.*, ¶41). Such damages include but are not limited to:

a. In excess of $400,000.00 for the construction of an additional and unnecessary detention pond while also destroying the ability to sell several residential lots;

b. In excess of $1,828,671.00 for general improvements to the City's water distribution system, despite the City agreeing to perform the improvements itself and receiving grant funds to do so; and

c. Significant engineering costs for the unnecessary detention pond and the improper improvement to the water distribution system.

To be clear, Grant Park has relied on the City's decision to approve the Final Plat. (*Id.*, ¶43). No previous approval came with added requirements from any of the public hearings regarding the annexation, plat development, DANR approval of construction of development, or rezoning. (*Id.*, ¶44).

Grant Park sent a Notice of Appeal and Injury to the City on November 10, 2022. (Limoges Aff., ¶3). On November 14, 2022, Grant Park had not heard from the City and Grant Park's counsel asked for a response by November 15, 2022 that would include receipt of the Notice of Appeal and Injury and a date set for a public hearing. (*Id.*). Grant Park's counsel further requested that the proceedings be expedited due to the increasing damages to Grant Park. (*Id.*). The City's Attorney responded that "[t]he City of Baltic has every intention of timely responding to each and every claim made by [Grant Park]." (*Id.*). The City's last mention of a "*possible*" date in a phone call with Grant Park's counsel was followed up with a comment that not all the officials had confirmed that date. (*Id.*, ¶4). There was never any communication that the City officials were available on a certain date. (*Id.*). Grant Park's counsel made it clear to the City Attorney that filing a lawsuit appeared to be the only option for Grant Park but that a hearing was still being requested in an expedited manner. (*Id.*, ¶5). Despite follow-up emails and telephone conversations, the City has *never* set a date or even proposed an actual date for a public hearing. (*Id.*).

The City continues to fail to provide adequate authority to back up its laundry list of demands and continues its dictatorship-like actions against Grant Park. The previous Mayor of the City of Baltic has clarified that during her tenure, the City never went back to any developer and expected them to pay for City street improvements. (Petersen Aff., ¶4). The previous Mayor of the City also makes clear that during her tenure on City Council and as Mayor, the City always maintained the following: i.) City would take care of the work on any City street; and ii.) the City never wanted to assess the citizens to make anyone pay for City street improvements. (Petersen Aff., ¶5). If any improvements were needed, the City took care of the improvements. (*Id.*).

Due to the actions of the current regime in Baltic, Grant Park was forced to file two separate lawsuits to seek different forms of relief in an effort to stop enduring damages. In response, the City increased its arbitrary and capricious actions against Grant Park, and the effect is spreading to the residents that currently live in the Development. The City is now telling its citizens through letters from the Mayor and other City officials that Grant Park is violating the law.

For example, the City took responsibility (without charging Grant Park) to maintain the roads within the Development after the Final Plats were recorded, including snow removal up until December 8, 2022. (Aff. of Brian Hefty in Supp. of Motion for T.R.O. Without Notice, Prelim. Inj., and Permanent Inj. ("Hefty Aff."), ¶5; Aff. of Mike Wendland in Supp. of Motion for T.R.O. Without Notice, Prelim. Inj., and Permanent Inj. ("Wendland Aff."), ¶3). However, on December 7, 2022, the City Attorney emailed Grant Park's attorney with a sudden demand that Grant Park take back the responsibility of snow removal within the Development the day before a snowstorm. (Limoges Aff., ¶7). The first reason the City put

forth was a clause in a *proposed* development agreement that was *never* signed by Grant Park *or* the City.[1] (*Id.*). When the City was asked what had changed since the last time the City had plowed the Development's streets, the City responded that "[t]he parties are in litigation now, a decision your client made." (*Id.*; Hefty Aff., ¶4). The City then appeared to argue that the Final Plat that *was* approved *was no longer* approved and stated the City will not maintain the streets because "City has not accepted any of the improvements [Grant Park] has constructed." (Limoges Aff., ¶7). The City stated there was no agreement between Grant Park and the City that stated the City would maintain the roads within the Development. (*Id.*, ¶8). Curiously, the City taxes each lot within the Development for maintenance of the roads. (*Id.*; Hefty Aff., ¶3). The City then appeared to argue that damage would result to the City's snow plows if the City were to plow the streets within the Development and that it had no documentation of plowing in the Development over the past year. (*Id.*). This was never mentioned when the City plowed the streets previously. Even if it had been mentioned, the streets in the Development are public streets that must be maintained by the City under South Dakota law.

Later in the day on December 8th, Grant Park received notice from a couple residents within the Development that the Mayor sent a letter packet to the residents in the Development. (Hefty Aff., ¶4; Wendland Aff., ¶3). The City told the residents that Grant Park failed to abide by state statutes and city ordinances. (*Id.*). The letter packet further stated the City had not reached an acceptable resolution regarding the snow removal in the Development. (*Id.*). This letter packet gave only one remedy to the Residents—contacting

[1] Under SDCL § 9-4-1.1, municipalities *may* enter into agreements with landowners for the property prior to annexing or development, but it is not required.

Grant Park to address concerns regarding maintenance and care within the Development. (*Id.*). The Mayor also attached a memorandum from the Maintenance Supervisor with concerns which had been addressed during the process of the City approving the Final Plat. (*Id.*). The letter packet sent by the Mayor to the Residents further attached the December 7, 2022 email conversation between Grant Park's attorneys and the City's Attorney that is described in the paragraph above. (*Id.*).

In an effort to assist the residents in the Development, Grant Park sent a letter to the residents of the Development. (Hefty Aff., ¶6, Ex. 3; Wendland Aff., ¶4). Grant Park notified the residents it had not violated any state laws or City ordinances. (*Id.*). Grant Park assured Residents that it would hire a private contractor to ensure the Residents were safe, even though Residents' taxes go towards such services from City and the Final Plat had been approved and recorded. (*Id.*). Although the property within the Development is being taxed by the City for services such as road maintenance, Grant Park wanted to ensure the safety of the Residents because the City had refused. (*Id.*).

On December 12, 2022, Grant Park became aware that a resident emailed the City to ask if the City would be clearing the snow away from the storm drains, as Residents were concerned of the potential flooding and safety hazards that could result from the impending winter storm of December 13, 2022. (Wendland Aff., ¶5). Grant Park was then made aware that the City's response to the resident was "Per the packet you received last week, the developer should be contacted for these requests." (*Id.*, ¶6). Based on the City's behavior, it can be assumed that the City is referring to the letter packet sent by the Mayor to the Residents on December 8th. Despite not having any obligation to clear the storm drains in the public streets in the Development, Grant Park ensured the storm drains were properly

prepared for the storm and further inspected the drains in the Development to ensure the storm drains would provide for the continuous precipitation of the winter storm of December 13, 2022. (*Id.*, ¶8).

On December 14, 2022, Grant Park noticed on the City's website that it posted its agenda for its meeting on December 20, 2022. (Hefty Aff., ¶7). A draft of Resolution 2022-16 proposes that Grant Park, as owner of real property abutting the property where a sidewalk the City wants is to be put, should construct and pay for or be assessed the cost of constructing a new sidewalk and curbs. This is not in accordance with the Final Plats previously approved by the City. (Hefty Aff., ¶8). Instead, it is yet another dictator-type action from the City that will further damage Grant Park. In fact, Grant Park received an estimate that this latest upcoming demand would cost an estimated $240,000 on top of what Grant Park had already spent. (Limoges Aff., ¶9).

The City's actions do not appear to have any stopping point. Without the Court's assistance in granting injunctive relief, Grant Park's damages will continue to grow and its reputation destroyed by the City's defamatory statements. (Hefty Aff., ¶11).

ARGUMENT

The primary function of a preliminary injunction is to preserve the status quo until, upon final hearing, a court might grant full, effective relief. *Sanborn Mfg. v. Campbell Hausfeld/Scott Fetzer Co.*, 997 F.2d 484, 489 (8th Cir. 1993) (quoting *Rathmann Grp. v. Tanenbaum*, 889 F.2d 787, 789-90 (8th Cir. 1989)).

Injunctive relief is warranted when the plaintiff can satisfy four criteria: (1) the threat of irreparable harm to plaintiffs; (2) the state of the balance between this harm and the injury that granting the temporary restraining order will inflict on defendants; (3) the probability

of plaintiff's success on the merits; and (4) the public interest. *Strong v. Atlas Hydraulics, Inc.*, 2014 S.D. 69, ¶ 11, 855 N.W.2d 133, 139 (quoting *Dacy v. Gosr*, 471 N.W.2d 576, 579 (S.D. 1991)). Because these criteria are fulfilled in this case, Plaintiff's motion should be granted, this Court should enter the proposed temporary restraining order, and, following a hearing and determination of the issues, a preliminary and/or permanent injunction should be entered against Defendant.

I. Grant Park faces irreparable harm unless the City's conduct is restrained.

A court should provide injunctive relief when a litigant faces irreparable harm, such as when the litigant is without an adequate remedy at law. *Bienert v. Yankton Sch. Dist.*, 507 N.W.2d 88, 90 (S.D. 1993) (citing *Sorensen v. Rickman*, 486 N.W.2d 259 (S.D. 1992); *Bd. of Regents v. Heege*, 428 N.W.2d 535 (S.D. 1988)); *see also Perfetti Van Melle USA, Inc. v. Midwest Processing, L.L.C.*, 135 F. Supp. 3d 1015, 1019-20 (D. S.D. 2015) ("Irreparable harm occurs when a party has no adequate remedy at law, typically because his injuries cannot be fully compensated through an award of damages.") (quoting *Gen. Motors Corp. v. Harry Brown's, L.L.C.*, 563 F.3d 312, 219 (8th Cir. 2009)). Courts agree that irreparable harm exists when a litigant's future damages would be difficult to measure:

> The legal remedy may be deemed inadequate if any one of a number of factors is present. Accordingly, if plaintiff shows that a monetary award would be speculative because the amount of damage would be difficult or impossible to measure, of if plaintiff demonstrates that effective legal relief can be secured only by a multiplicity of actions, as, for example, when the injury is of a continuing nature, so that plaintiff would be required to pursue damages each time he was injured, equitable relief may be appropriate. Plaintiff also may satisfy the adequacy prerequisite by demonstrating that damages would not adequately compensate him. Illustratively, if defendant's actions pose a threat to some unique property interest, so that the injury will be irreparable and damages will not compensate for loss of that property, the court may issue an injunction inasmuch as there is no adequate legal remedy.

11A Charles A. Wright, et al., FEDERAL PRACTICE AND PROCEDURE, § 2944, at 89-90 (1995); *cf.* SDCL 21-8-14 ("Except where otherwise provided by this chapter, a permanent injunction may be granted to prevent the breach of an obligation existing in favor of the applicant: (1) Where pecuniary compensation would not afford adequate relief; (3) Where the restraint if necessary to prevent a multiplicity of judicial proceedings; or (4) Where the obligation arises from a trust.").

Certain types of injuries have been deemed to satisfy the irreparable harm standard, even if a monetary award can be ascertained. For example, "[a] company's loss of goodwill and reputation among his customers is often not quantifiable and can therefore amount to irreparable harm." *Perfetti Van Melle USA, Inc.*, 135 F. Supp. 3d at 1020; *see Rogers Grp., Inc. v. City of Fayetteville, Ark.*, 629 F.3d 784, 789-90 (8th Cir. 2010) ("We have previously held that a district court did not err when finding that a loss of goodwill among customers was sufficient to establish a threat of irreparable harm."); *Med. Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir. 2003) ("Harm to reputation and goodwill is difficult, if not impossible, to quantify in terms of dollars."); *United Healthcare Ins. Co. v. AdvancePCS*, 316 F.3d 737, 741 (8th Cir. 2002) ("Loss of intangible assets such as reputation and goodwill can constitute irreparable injury."); *Overholt Crop Ins. Co. v. Travis*, 941 F.2d 1361, 1371 (8th Cir. 1991) (holding that the potential future loss of customers constituted irreparable harm warranting injunctive relief); *see also Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co.*, 22 F.3d 546, 552 (4th Cir. 1994) ("[W]hen the failure to grant preliminary relief creates the possibility of permanent loss of customers to a competitor or the loss of goodwill, the irreparable injury prong is satisfied.") (quoting *Merrill Lynch, Pierce, Fenner and Smith v. Bradley*, 765 F.2d 1048, 1055 (4th Cir. 1985)); *Basicomputer Corp. v.*

Scott, 973 F.2d 507, 512 (6th Cir. 1992) ("The loss of customer goodwill often amounts to irreparable injury because the damages flowing from such losses are difficult to compute.") (quoting *Ferrero v. Assoc. Materials, Inc.*, 923 F.2d 1441, 1449 (11th Cir. 1991)); 11A Charles A. Wright, et al., FEDERAL PRACTICE AND PROCEDURE, § 2944, at 159-60 (1995) ("Injury to reputation or goodwill is not easily measured in monetary terms, and so often is viewed as irreparable. Indeed, when the potential economic loss is so great as to threaten the existence of the moving party's business, then a preliminary injunction may be granted, even though the amount of direct financial harm readily is ascertainable.").

Grant Park is suffering irreparable harm that is continuing in nature and difficult to measure. (Hefty Aff., ¶¶10-14). The City, over the past few months, continues to add to its demands and hold any building permits for future residents hostage unless its demands are met. In short, Planning and Zoning Chair Ed Wilson's threat of "com[ing] after [Grant Park] . . ." have come to fruition. (Verified Petition, ¶32).

The continuing, deliberate actions by the City to "come after [Grant Park]" have caused and continue to cause irreparable monetary and reputational harm towards Grant Park that is difficult to measure because it is never-ending. (*Id.*; Hefty Aff., ¶10). The latest threat from the City is that it will pass a resolution to order Grant Park to pay for or construct sidewalks and curb and gutter that were not part of the Final Plat. (Hefty Aff., ¶8). Grant Park may not have even owned the adjacent lots if the City had not held building permits hostage and sent a tidal wave of demands at Grant Park. It should further be noted that this proposed resolution makes no such sidewalk and curb and gutter demand of the opposite side of the street, which further evidences the City's arbitrary singling out of Grant Park.

If the injunctive relief is not granted, the City will truly ruin Grant Park's reputation

by continuing to defame Grant Park, ruin Grant Park's good will and reputation among its current and future residents, interfere with future sales of lots, interfere with the Residents' welfare and peace, and increase Grant Park's damages. (*Id.*, ¶11). Without the Court's assistance, Grant Park fears the City will not stop its arbitrary and capricious demands towards Grant Park and irreparable harm will persist. (*Id.*). Grant Park has no way of measuring damages for future dictator-like actions from the City.

Moreover, injury to Grant Park is both probable and imminent. Residents of the Development, the School, and other residents in the City are well aware of the conflict between Grant Park and the City. (*Id.*, ¶4; Verified Petition, ¶33). The City has repeatedly accused Grant Park at City Council meetings and in letters it has delivered of violating state laws and local ordinances. (Hefty Aff., ¶4). There is no doubt the City's actions will cause further severe and unmeasurable injury to Grant Park because it has already caused the same. (Hefty Aff., ¶10). Grant Park further believes that based on the City's past continuing nature of not knowing when to stop, the City intends to continue to unlawfully defame Grant Park by publishing defamatory statements for public consumption. (*Id.*, ¶¶10, 11, 13). Accordingly, Grant Park has and is suffering irreparable harm, and injunctive relief is necessary to prevent further damage to Grant Park.

The damages that Grant Park will suffer are difficult, if not impossible, to quantify. (*Id.*, ¶12-14). If the City is not immediately restrained, then its efforts will not only pose damage to Grant Park's revenue stream by preventing the sale of lots, but, as discussed above, the City's efforts will also pose a risk of immediate irreparable injury to Grant Park's reputation and goodwill. (*Id.*, ¶¶10-14). Damage to Grant Park in the form of a tarnished reputation and goodwill, and lost revenue from future Residents of the Development would

be difficult to fully assess, and a monetary award cannot adequately compensate Grant Park for that loss. (*Id.*); *see also Perfetti Van Melle USA, Inc.*, 135 F. Supp. 3d at 1019-20 (citations omitted). Further, allowing the City to simply pay damages would reward its wrongful conduct and incentivize future defamation to Grant Park and, possibly, others. As a result, this first factor weighs heavily in favor of granting Grant Park the injunctive relief that it presently seeks.

II. The harm to Grant Park outweighs the injury that injunctive relief allegedly would inflict on the City.

The harm to Grant Park greatly outweighs the injury, if any, that injunctive relief allegedly would inflict on the City. Simply put, the City, its Mayor, and/or any other City Official have no right to defame Grant Park and it is against South Dakota law. As the City's conduct is unlawful, it cannot allege an injury that outweighs the harm that its continued conduct will inflict on Grant Park. *See Perfetti Van Melle USA, Inc.*, 135 F. Supp. 3d at 1020 (recognizing that second factor weighs in plaintiff's favor because granting the preliminary injunction would, among other things, deprive defendants of a profit that they were not entitled to make).

Further, it is unclear and unimaginable how stopping any defamatory statements and continuing demands which lie outside the Final Plat would injure the City at all. Alternatively, even if the City would be injured by such restraint, such alleged injuries would not outweigh any injury that Grant Park had, has, and will have due to the City's actions. Once again, the demands the City is making and will continue to make *lie outside the already-approved Final Plat that Grant Park has and still rightfully relies upon*. If anything, the City will have to foot the bill for the continuous improvements it requests on its own, as would be typical for any municipality. It already has a grant for water improvements and increased

population (such as new Baltic citizens residing in the Development) will provide an increase in tax revenue for the City. (Verified Petition, ¶¶20-22, 29, 33, 40). Accordingly, this second factor also weighs heavily in favor of granting Plaintiff the injunctive relief that it presently seeks.

III. Plaintiff is likely to prevail on the merits of its claims.

The third factor focuses on the probability that the movant will succeed on the merits. *Dacy*, 471 N.W.2d at 579 (citation omitted). "Probability of success on the merits in this context means that the moving party must show that it has 'a "fair chance of prevailing"' on the merits." *Perfetti Van Melle USA, Inc.*, 135 F. Supp. 3d at 1020 (quoting *Kroupa v. Nielsen*, 731 F.3d 813, 818 (8th Cir. 2013) (quoting *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 732 (8th Cir. 2008) (en banc))). "A 'fair chance of prevailing' does not necessarily mean a greater than fifty percent likelihood of prevailing on the merits of the claim." *Id.* (quoting *Planned Parenthood*, 530 F.3d at 731-32). Instead of a rigid measuring stick, a court is to flexibly weigh the particular circumstances of the case to determine "whether the balance of equities so favors the movant that justice requires the court to intervene to preserve the status quo until the merits are determined." *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981).

Grant Park has a fair chance of prevailing on all its claims against the City, including its claims and request for relief in its Verified Petition in 49CIV22-002968.[2] Grant Park's

[2] Based on the City Attorney's special appearance in this action, it is foreseeable that the City will argue this Court has no subject matter jurisdiction. Any arguments pertaining to subject matter jurisdiction will fail and not effect the merits of Grant Park's causes of action. *See Bingham Farms Trust v. City of Belle Fourche*, 2019 SD 50, 932 N.W.2d 916 (holding that South Dakota circuit courts have jurisdiction "to hear and determine . . . claims regarding enforceability . . . [and a] request for declaratory relief is also within a class of cases that may be heard and determined under express statutory authority.").

claims all arise out of the City's defamatory statements and never-ending unlawful demands that lie outside of the Final Plat, culminating in the Joint Motion. The City unlawfully published defamatory statements for some kind of political ploy and to gain public favor for its dictator-like actions against Grant Park. None of these defamatory statements are professional, accurate, or based in any element of truth.

Grant Park's first four causes of action are all for declaratory judgment. SDCL § 21-24-1 provides this Court with the "power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. . . . The declaration may be either affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree." Declaratory judgment's "ultimate goal [is to] allow[] 'the courts (to be) more serviceable to the people." *Kneip v. Herseth*, 214 N.W.2d 93, 96 (citation omitted). "The objective of the [Declaratory Judgment] act is to prevent actual invasions of rights and to establish guidelines for parties' actions so they nay keep within lawful bounds, avoid expense, bitterness of feeling, the disturbance of orderly pursuits and to foster judicial economy." *Id.* (citation omitted). The premise behind declaratory judgment actions is to "afford security and relief against uncertainty, attempting to avoid litigation which results from the destruction of peace, with a view toward declaring rights rather than executing them . . . ." *Id.* Grant Park certainly is faced with a lack of security, an inflammation of uncertainty, and has strived for months to avoid litigation resulting from the City's destruction of the peace in Baltic.

Here, as explained in full above, an actual and justiciable controversy exists as to whether the City can lawfully impose additional conditions and requirements on Grant Park's further construction of the Development despite the approval of the Final Plat and

Grant Park's reliance on the same. Grant Park asks this Court in Counts I and II to declare that pursuant to SDCL § 11-3-6 and under Articles VII and IX of the City's Subdivision Regulations, the approval of the Final Plat by the City by resolution stands for the principal that Grant Park's Final Plat is in compliance with state statutes, City ordinances, and City regulations. Further, Grant Park is asking this Court to declare that once the City approved the Final Plat, its legislative function ends under South Dakota law, leading to the conclusion that the City cannot continue imposing never-ending conditions on Grant Park other than those in the Final Plat. Nothing prevents this Court from declaring the requested relief.

Grant Park Plaintiff seeks a declaratory judgment from the Court declaring that the findings, approvals, and resolutions by the City and Planning and Zoning at the September 28, 2021 meetings, as memorialized in the meeting minutes and in the Final Plat signed by the City, are valid and binding upon the City and that any further attempted to be imposed that culminated with the Joint Motion dated October 26, 2022, and demand for water and drainage improvements dated November 9, 2022, are illegal, null and void, unenforceable, and contrary to South Dakota law. To be specific, SDCL § 11-3-6, Articles VII and IX of the City's Subdivision Regulations, and South Dakota case law prevents the City from veering from its previous decision to approve the Final Plat.

For example, the City continues to put conditions not included in the Final Plat on Grant Park's back, including maintenance of the public areas within the Development. This is directly contrary to South Dakota law. "According to South Dakota law, once the plat is approved, it may be recorded with the register of deeds. Once that occurs, ownership and maintenance responsibility of the public areas within the subdivision passes to the City." *City of Rapid City v. Estes*, 2011 SD 75, ¶23, 805 N.W.2d 714, 720 (citing SDCL §§ 11-3-6, 11-6-26,

11-6-34, 11-3-12; *Hermann v. Bd. Of Comm'rs of City of Aberdeen*, 285 N.W.2d 855, 856 (SD 1979) (Hoffman, Circuit Court Judge, concurring)).

As for its last request for declaratory relief, Grant Park simply asks this Court to find that none of the City's Zoning Regulations provide the City with the authority to impose additional conditions and requirements that are not contained in the approved Final Plat. It is unclear which zoning regulations the City will argue it has the authority to put additional conditions on Grant Park. The City changes its reasoning every time Grant Park asks where the City obtains its authority from. (*See* Limoges Aff., ¶7). The City is outside of its permissible authority, and it will take this Court's declaration for the City to understand.

Grant Park's fifth cause of action is estoppel and is also likely to prevail on the merits. "The doctrine of estoppel or estoppel in pais is bottomed on principals of morality and fair dealing and is intended to subserve the ends of justice." *Even v. City of Parker*, 1999 SD 72, ¶12, 597 N.W.2d 670, 674 (quoting *City of Rapid City v. Hoogterp*, 179 N.W.2d 15, 17 (S.D. 1970)). This case is a prime example of the extreme situations the South Dakota Supreme Court mentioned in *Even*. The City's "conduct . . . induced [Grant Park] to alter [its] position or do that which [it] would not otherwise have done to [its] prejudice." *Id.* (quoting *Smith v. Neville*, 539 N.W.2d 679, 682 (S.D. 1995)).

There, Even applied for a building permit with the City of Parker. *Id.*, 1999 SD 72, ¶13, 597 N.W.2d at 674. "The Zoning Administrator supplied the form . . . authored by the City . . . in which it could have asked any information from the applicant it thought relevant." *Id.* The permit was reviewed and approved by the City. *Id.* Even then purchased materials for his planned build in reliance on the approval of the permit. *Id.* The Zoning Administrator then visited the site of the build and asked for more information that should have been

supplied with the permit but was not requested. *Id.* "The City did not have a duty to call to Even's attention the fact he could not build a garage of pole type construction under the terms of the zoning ordinance." *Id.*, 1999 SD 72, ¶14, 597 N.W.2d at 675 (citation omitted). The Court stated that "the City may not . . . affirmatively create an objectively reasonable impression in an applicant that he has fully complied with all zoning requirements and then proceed to withdraw permission after the applicant has taken steps towards construction which result in a substantial detriment to the applicant." *Id.* (citing *Erickson v. County of Brookings*, 1996 SD 1, ¶15, 541 N.W.2d 734, 737).

We have a similar and *more* extreme situation in this case. If $4,470.00 was the "substantial detriment" in *Even*, it is likely that Grant Park's more than $3,830,223.56 (Verified Petition, ¶¶25, 38; Hefty Aff., ¶¶6, 10-14) spent on the Development in reliance on the approval of the Final Plat along with its ongoing damages would certainly be an extreme case of substantial detriment. The City has further made requests that would require Grant Park to spend in excess of $1,828,671.00 for items *not included in the Final Plat*. (Verified Petition, ¶42; Hefty Aff., ¶¶6, 10-14). For the City, the sky is the limit for any detriment it can make Grant Park endure—a truly exceptional thought.

"[E]stoppel can be applied against public entities in exceptional circumstances to 'prevent manifest injustice.'" *Smith*, 539 N.W.2d at 682 (quoting *City of Rapid City v. Hoogterp*, 179 N.W.2d 15, 17 (S.D. 1970)). Grant Park has clearly been "induced [by the City in such a way that it has] altered [its] position or [done] that which [it] would not have otherwise have done to [its] prejudice." *Id.* (quoting *Hanson v. Brookings Hosp.*, 469 N.W.2d 826, 828-29. (*See also* Hefty Aff., ¶¶14-15 ("Grant Park would not have built any developments within Baltic City Limits had the City not induced it to rely upon the City's

approval of the Final Plat; Grant Park has altered its position and completed various tasks requested by the City as explained in the Verified Petition that it would not have otherwise done had it known the City would continuously attack Grant Park, defame Grant Park, and act as if the Final Plat was never approved")). Grant Park will likely succeed on the merits of its estoppel claim, and, for the same or similar reasons, is likely to succeed on its Petition for Writ of Certiorari filed in 49CIV22-002968.

Grant Park has fairly established that it will likely succeed on all of its claims, including those in the Verified Petition in 49CIV22-002968. As a result, this factor also weighs in Grant Park's favor.

IV. The public interest would be served by the issuance of a temporary restraining order.

The public interest strongly weighs in favor of the entry of a temporary restraining order without notice and preliminary and/or permanent injunction. Defamatory statements that are unprofessional, uncalled for, and causes damage to Grant Park should not be allowed to take place. As explained above in more detail, a municipality should not be allowed to run some kind of dictator-like game with developers who rely on that same municipality's word that its plat was approved. This is truly in the public's interest. As a result, this fourth factor also weighs heavily in favor of granting Grant Park the injunctive relief that it presently seeks.

CONCLUSION

For the foregoing reasons, Grant Park respectfully requests that the Court grant its motion and enter the accompanying temporary restraining order without notice. Furthermore, Grant Park requests that, following a hearing and determination of the issues, a preliminary and/or permanent injunction be entered against Defendants.

Dated: December 16, 2022.

By: /s/ Anna Limoges

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