

STATE OF SOUTH DAKOTA)

IN CIRCUIT COURT

:SS

COUNTY OF MINNEHAHA)

SECOND JUDICIAL CIRCUIT

GRANT PARK CAPITAL, LLC,

49CIV22-002968

49CIV22-002973

Plaintiff/Petitioner,

vs.

**BRIEF IN SUPPORT OF
MOTION FOR ATTORNEYS' FEES AND
APPLICATION FOR TAXATION OF
COSTS AND DISBURSEMENTS**

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 THE 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 THE CITY OF BALTIC PLANNING AND ZONING COMMISSION,

Defendants/Respondents.

Defendants/Respondents (the "Baltic Defendants"), as prevailing parties in the above-captioned actions, have moved the Court pursuant to SDCL §§ 15-6-54(d), 15-17-37, 15-17-44, 15-6-11, 15-17-42, 15-17-51, for an award of their attorneys' fees and costs and disbursements incurred in the defense of these actions, and submit this Brief in Support of Motion for Attorneys' Fees and Application for Taxation of Costs and Disbursements.

This Brief is supported by the Affidavit of William C. Garry ("Garry Affidavit") and the Affidavit of John R. Hughes ("Hughes Affidavit"), and exhibits thereto.

INTRODUCTION

On November 10, 2022, Grant Park filed a Notice of Appeal to the Board of Adjustment seeking to review the Planning and Zoning Commission's decision on July 27, 2022, to suspend the further issuance of building permits to lot owners in the Grant Park/Phillips Crossing Development until such time as Grant Park brought the Development property into compliance with municipal ordinances and state statutes. Grant Park had failed to appeal the Planning and Zoning Commission's suspension of building permits within twenty-one (21) days as required by SDCL § 11-4-19, or at any time thereafter until November 10, 2022.

On Wednesday, November 23, 2022, the day before Thanksgiving, Plaintiff/Petitioner Grant Park Capital, LLC ("Grant Park"), commenced two separate actions against the Baltic Defendants, in 49CIV22-002968 (writ of certiorari) and 49CIV22-002973 (declaratory relief).

On December 2, 2022, counsel for the Baltic Defendants sent a letter to Plaintiff/Petitioner's counsel of record by electronic mail. Hughes Affidavit, Exhibit 4; December 2, 2022, correspondence to Grant Park's Counsel. Grant Park's lawyers were specifically admonished that:

Your client failed to exercise the appeal rights to the Board of Adjustment¹ provided in the Zoning Regulations and SDCL § 11-4-19 within twenty-one (21) days of July 27, 2022, when the issuance of building permits was suspended, or at any time thereafter until months later on November 10, 2022. Your client's decision to initiate these confused and duplicative judicial filings will not cure these procedural failures. *See, e.g., Huber v. Hanson Cty. Planning Comm'n*, 2019 S.D. 64, 936 N.W.2d 565.

¹ At the hearing on February 14, 2023, the following exchange took place between the Court and one of Grant Park's counsel: THE COURT: --well, don't you appeal it to the Board of Adjustment? MR. MASTELLAR: You would --. THE COURT: -- I mean the statutes [are] just dead bang clear on that to me." Hughes Affidavit, Exhibit 5; HT 02-14-2023, p. 38, lines 10-14. Grant Park's counsel also could not identify a South Dakota Supreme Court decision that supported Grant Park's direct appeal to Circuit Court and bypassing of the Board of Adjustment. *Id.*, pp. 35-36. The Court also was unable to locate any supporting authority for Grant Park's position, in South Dakota or "another state that was similar." *Id.* at 35, lines 8-11.

Grant Park's counsel was advised that both actions violated SDCL § 11-4-20, as that statute, "stays all proceedings in the action appealed from" when Grant Park filed its Notice of Appeal on November 10, 2022. Grant Park's lawyers were also specifically advised that, "The Court lacks subject matter jurisdiction over these matters and must dismiss these actions as a matter of law."

On December 19, 2022, the Baltic Defendants filed Respondents' Motion to Dismiss Pursuant to SDCL § 15-6-12(b)(1) and (5) and SDCL §§ 11-4-19 and 11-4-20. On December 21, 2022, the Baltic Defendants filed their Motion to Dismiss Pursuant to SDCL § 15-6-12(b)(1)-(5) and SDCL Ch. 11-4. This Court granted both Motions to Dismiss pursuant to SDCL § 15-6-12(b)(1) for lack of subject matter jurisdiction *and* pursuant to SDCL § 15-6-12(b)(5) for failure to state a claim upon which relief can be granted.

On February 14, 2023, Grant Park's counsel of record during oral argument described the above-captioned civil actions, as follows: "we are appealing what the, what was a decision of the planning and zoning, who is the Board of Adjustment, on a zoning decision that we were agreed[sic][aggrieved] from." Hughes Affidavit, Exhibit 5; HT 02-14-2023, p. 52, lines 5-8. When asked by the Court to provide the statute conferring subject matter jurisdiction over these actions, Grant Park's counsel could not identify² such a statute, but cited a Baltic municipal zoning ordinance instead. *Id.*, Exhibit 5; p. 53, lines 4-8.

² The following exchange took place between the Court and one of Grant Park's counsel: THE COURT: What statute authorized, I mean from your position, what statute authorizes this court to have jurisdiction over this petition and this complaint? MR. MASTELLAR: Our-our-our position --. THE COURT: What SDCL? MR. MASTELLAR: Sure. In 11-4-25 we are appealing what the, what was a decision of the planning and zoning, who is the Board of Adjustment, on a zoning decision that we were agreed[sic] [aggrieved] from. THE COURT: I'm not making that connection then how you would, how I would have jurisdiction if-if you are relying on 11-4-25." Hughes Affidavit, Exhibit 5; HT 02-14-2023, pp. 51-53. (Emphasis added).

On April 19, 2023, Notice of Entry of Order and Judgment of Dismissal was entered in both actions. As prevailing parties, the Baltic Defendants are entitled to an award of their costs and disbursements under SDCL §§ 15-6-54(d), 15-17-37, and 15-17-44. In addition, as recognized by this Court in its ruling on the Baltic Defendants' Motions to Dismiss, both actions were wholly without merit, and thus, were frivolous under well-established South Dakota law. The record further demonstrates that both actions were brought by Grant Park for malicious and improper purposes.

The Baltic Defendants are entitled to an award of attorneys' fees under SDCL §§ 15-17-42, 15-17-51 and/or 15-6-11.

ARGUMENT AND AUTHORITIES

I. The Baltic Defendants, as the prevailing party, are entitled to an award of their costs and disbursements.

SDCL § 15-6-54(d) provides, in pertinent part, "Except as otherwise provided by statute, costs and disbursements, other than attorneys' fees, shall be allowed as of course to the prevailing party unless the court otherwise directs." (Emphasis added). SDCL § 15-17-44 further provides, "If there is no specific statutory authorization allowed for taxation of disbursements in a civil action or special proceeding, taxation of disbursements may be allowed in the discretion of the court." (Emphasis added).

These actions were dismissed for lack of subject matter jurisdiction and failure to state a claim pursuant to SDCL § 15-6-12(b)(1) and (5). As the prevailing parties, the Baltic Defendants are entitled to an award of their costs and disbursements. Accordingly, this Court is required to enter an award of costs and disbursements in favor of the Baltic Defendants in the total amount of \$304.53. *See* Affidavit of William C. Garry and Affidavit of John R. Hughes, Exhibits 1-3.

II. Both of these actions were frivolous and brought for malicious purposes, and therefore, the Baltic Defendants are also entitled to an award of their attorneys' fees.

Both of these actions were frivolous and failed to state a claim upon which relief could be granted under long-standing, well-established South Dakota law. The record further demonstrates that both of these actions were brought by Grant Park for improper and malicious purposes. Consequently, this Court should award the Baltic Defendants their reasonable attorneys' fees incurred in having to defend these matters.

A. Statutory authority for attorneys' fees award.

An award of attorneys' fees in this case is authorized and warranted under SDCL § 15-17-51 and SDCL § 15-6-11. The relevant statutory authority, in pertinent part, is set forth below:

SDCL § 15-17-42 - This chapter applies to any civil action or special proceeding in which the State of South Dakota or any of its divisions, departments or political subdivisions is a party including counties, municipalities, school districts, townships and other governmental entities.

SDCL § 15-17-51 - If a civil action, including an action for appeal of a zoning decision³, or special proceeding is dismissed or requested relief is denied and if the court determines that it was frivolous or brought for malicious purposes, the court shall order the party whose claim, cause of action, or defense was dismissed or denied to pay part or all expenses incurred by the party defending the matter, including reasonable attorneys' fees.

SDCL § 15-6-11(b)(1)-(2)⁴ - By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney

³ As noted above, Grant Park's counsel of record describes the above-captioned actions as the appeal of a zoning decision." Hughes Affidavit, Exhibit 5; HT 02-14-2023, p. 52, lines 5-8. Consequently, the Baltic Defendants' Motion is squarely within the recovery of attorneys' fees provided by the South Dakota Legislature in SDCL § 15-17-51.

⁴ Evidence of bad faith is not required to impose sanctions based upon the filing of pleadings that are filed for an improper purpose. SDCL § 15-6-11 emphasizes the responsibilities of attorneys and reinforces those obligations by the imposition of sanctions. Smizer v. Drey, 2016 S.D. 3, 873 N.W.2d 697.

or unrepresented party **is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:**

- (1) **it is not being presented for any improper purpose**, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;
- (2) **the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law[.]**

SDCL § 15-6-11(c) - **If**, after notice and a reasonable opportunity to respond, the court determines that § 15-6-11(b) has been **violated**, the **court may**, subject to the conditions stated below, **impose an appropriate sanction** upon the **attorneys, law firms, or parties** that have violated § 15-6-11(b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate § 15-6-11(b). It shall be served as provided in § 15-6-5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe) , the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate § 15-6-11(b) and directing an attorney, law firm, or party to show cause why it has not violated § 15-6-11(b) with respect thereto.

(2) Nature of Sanctions; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of § 15-6-11(b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed. (emphasis added).

B. *Both actions are frivolous*

As set forth above, this Court has authority to award attorneys' fees if it finds that lawsuits are frivolous. "To determine whether sanctions are appropriate . . . it is necessary to determine whether there was a reasonable basis to believe that the facts supporting the claim were true *at the time the lawsuit was filed.*' [] 'A frivolous action exists when the proponent can present no rational argument based on the evidence or law in support of the claim. . . ." Healy v. Osborne, 2019 S.D. 56, ¶ 34, 934 N.W.2d 557, 566-67 (citations omitted). *See also* Tri-State Refining & Inv. Co. v. Apaloosa, 431 N.W.2d 311, 315-316 ("pure penalty sanction" upheld where numerous papers were filed with the trial court that were clearly frivolous and intended to harass).

Grant Park filed an 89-page Verified Petition for Writ of Certiorari against the Baltic Defendants at 10:19 a.m. on November 23, 2022. (Verified Petition [49CIV22-2968]) A mere three and one-half hours later, Grant Park filed a separate 194-page Complaint against the Baltic Defendants, premised on the same allegations, this time in a declaratory judgment action. [49CIV22-2973] Both of these actions were completely frivolous under long-standing, well-established South Dakota law.

As set forth in detail in the Baltic Defendants' briefs and reply briefs in support of the motions to dismiss and this Court's ruling granting those motions to dismiss, which are incorporated herein by this reference, this Court lacked subject matter jurisdiction over both actions and the Complaint and Verified Petition failed to state a claim upon which relief could be granted for numerous reasons. In response to the motions to dismiss, Grant Park failed to present any rational argument to support its commencement of these two frivolous actions, and Grant Park did not make any attempt to argue for the extension, modification, or reversal of existing law or the establishment of new law.

These actions were absolutely frivolous for all of the following reasons:

- 1) Under well-established South Dakota case law and statutes, Grant Park's sole and exclusive remedy to challenge Planning and Zoning Commission decisions was to appeal to the Board of Adjustment under SDCL 11-4-19, and if aggrieved by the appeal decision of the Board of Adjustment, to seek review of the Board of Adjustment's decision by filing a petition for writ of certiorari in accordance with the requirements of SDCL 11-4-25. *See* SDCL §§ 11-4-19 -11-4-25; Lamar Advertising of South Dakota, LLC v. City of Rapid City, 2020 S.D. 30, 944 N.W.2d 793; Huber v. Hanson County Planning Commission, 2019 S.D. 64, 936 N.W.2d 565.
- 2) Grant Park failed to exhaust its administrative remedies, which was required before this Court could provide judicial review of a municipal planning and zoning commission decision via a petition for writ of certiorari under SDCL § 11-4-25. *See* SDCL §§ 11-4-19 -11-4-25; Lamar, supra.; Huber, supra.; Elliot v. Bd. of Cty. Comm'rs of Lake Cty. (Elliot II), 2007 S.D. 6, 727 N.W.2d 288; Elliot v. Bd. of Cty. Comm'rs of Lake Cty. (Elliot I), 2005 S.D. 92, 703 N.W.2d 361.
- 3) The December 2, 2022, letter from counsel for the Baltic Defendants to Plaintiff/Petitioner's specifically points out that Grant Park representative, Michael Wendland, former Mayor of Baltic for eighteen years, made the false statement under oath⁵ in the Verified Petition, that, "Grant Park has no other adequate remedy by administrative appeal or otherwise." Verified Petition, ¶ 46. Grant Park never responded. Hughes Affidavit, Exhibit 4; December 2, 2022 Correspondence to Grant Park's Counsel.
- 4) Grant Park filed both actions in direct violation and disregard of the automatic "stay of proceedings" that went into effect under SDCL § 11-4-20 when it filed its Notice of Appeal with the Board of Adjustment on November 10, 2022.
- 5) Grant Park filed its Verified Petition for Writ of Certiorari [49CIV22-2968] in clear violation of the statutory requirements of SDCL § 11-4-25.
- 6) South Dakota law is abundantly clear that judicial review of decisions by municipal boards and commissions is statutory and established by the legislature, and when a request for judicial review is not authorized by statute, the Court lacks subject matter jurisdiction. Huber, supra. Grant Park could not identify any statutory authority that would authorize

⁵ Mr. Wendland also stated under oath in the Verified Petition that, "No previous application for the relief sought by this petition has been made to any court or judge." Verified Petition, ¶ 46. In fact, as noted above, Grant Park filed the Complaint for declaratory relief in 49CIV22-002973 three and one-half hours after filing the Verified Petition for Writ of Certiorari in 49CIV22-002968. The Baltic Defendants consider this to be another false statement. At the very least, the sworn statement is disingenuous and calculated to mislead the Baltic Defendants and the Court.

this Court to exercise subject matter jurisdiction to judicially review the Planning and Zoning Commission decisions or City Council decisions at issue.

- 7) Grant Park made the frivolous argument that the Planning and Zoning Commission and the City Council is not an “authorized official” of the City of Baltic. That argument directly contradicts SDCL Chs. 11-4 and 11-6, as well as the City of Baltic ordinances, Subdivision Regulations and zoning ordinances.
- 8) Grant Park made the frivolous argument that the City Council’s approval of a final plat constituted acceptance of the entire subdivision (including streets) and that it did not allow the Baltic Defendants to require Grant Park to comply with the applicable Subdivision Regulations, zoning regulations, soil erosion and sediment control regulations, all in direct contradiction of the Owner’s Certificate signed under oath by Brian Hefty on the plats at issue on behalf of Grant Park, the plain language of SDCL §§ 11-3-12, 11-6-33 and 11-4-7, and Article VII, Section 2 of the Subdivision Regulations. Hughes Affidavit, Exhibit 6; Defendants’ Brief in Support of Motion to Dismiss Pursuant to SDCL § 15-6-12(b)(1) – (5) and SDCL Ch. 11-4, pp. 1, 26-29. In support of this frivolous argument, Grant Park relied on the South Dakota Supreme Court’s decision in Hermann v. Board of Com’rs of City of Aberdeen, 285 N.W.2d 855, 857 (S.D. 1979) which was specifically overturned by the Legislature the following year when it amended SDCL § 11-3-12. Quite shockingly, Grant Park’s counsel doubled down on that argument during the motions hearing, even after counsel for the Baltic Defendants and the Court pointed out that the case law relied upon had been overturned by the Legislature and was no longer good law. Hughes Affidavit, Exhibit 7; 1980 South Dakota Session Laws, SDCL § 11-3-12.
- 9) Grant Park made the frivolous argument that it had no available administrative appeal process. Again, that argument directly contradicted SDCL Ch. 11-4 and the City of Baltic Zoning Regulations, in addition to Grant Park’s own actions of filing a notice of appeal on November 10, 2022, and pursuing its administrative appeal with the Board of Adjustment after commencing these civil actions.
- 10) SDCL § 11-4-29 outlines the limited judicial remedy available to Grant Park on a petition for writ of certiorari as follows: “The court may reverse or affirm, wholly or partly, or may modify the decision brought up for review.” Neither of these civil actions⁶ sought such relief.

⁶ The Complaint Prayer for Relief asks for a judicial declaration that building permits resume (§§ 1-2), that the Final Plats “are valid and binding” and preclude City demands for water and drainage improvements specified in an engineering memorandum dated November 9, 2022, (§ 3), that additional conditions and requirements not contained on the “approved Final Plats” cannot be imposed (§ 4), and for estoppel prohibiting the City from “creating, imposing, and enforcing additional conditions or requirements on the Development that are not contained in the approved and recorded Final Plats” (§ 5). Notably, § 6 requests the Court for an award to Grant Park of its “costs and disbursements **and attorney fees** as allowed by law.” (Emphasis added). The Verified Petition Prayer for Relief is identical insofar as it requests, “an order wholly reversing and vacating . . . Respondents’ demand for water looping improvements and refusal

The foregoing unequivocally demonstrates that both of these actions were frivolous at the time they were filed. The claims and arguments asserted herein by Grant Park were wholly without merit and unwarranted under well-established South Dakota statutory law and case law. No argument was made by Grant Park for the extension, modification or reversal of existing law or the establishment of new law. Accordingly, an award of attorneys' fees is warranted under SDCL §§15-17-51 and/or 15-6-11(c).

C. Both actions were brought for malicious purposes.

Litigants need only show that a lawsuit was either frivolous *or* malicious to recover attorney fees. Healy, at ¶ 34, 934 N.W.2d at 567. In this case, the Baltic Defendants should also be awarded attorneys' fees under SDCL §§ 15-17-51 and/or 15-6-11(c), in that the overall circumstances demonstrate that these frivolous actions were also brought for a malicious and improper purpose. "Malice . . . exists when the proceedings are instituted primarily for an improper purpose. An improper purpose occurs in situations where[] the plaintiff in the original action was actuated by any unjustifiable motive, . . . [such] as where his primary motive was hostility or ill will, or where his sole purpose was to deprive the defendant of a beneficial use of his property" or "where he did not believe his claim would be held valid[.]" Healy, at ¶ 34, 934 N.W.2d at 567; Stratmeyer v. Engberg, 2002 S.D. 91, ¶ 20, 649 N.W.2d 921, 926. An action is also malicious if it "is begun in malice, and without probable cause to believe it can succeed, and which finally ends in failure." Stratmeyer, at ¶ 20, 649 N.W.2d at 926.

A review of the record and the frivolous allegations in this matter reveals that Grant Park commenced these two actions (and has now commenced a third action – 49CIV23-000310) with

to consider and/or approve of building permits until certain improper and non-jurisdictional demands are met" (¶ B).

an improper purpose, namely to harass, intimidate and pressure the Baltic Defendants to resume issuing building permits and to force the Baltic Defendants to settle and agree to having the taxpayers of Baltic pay for these subdivision improvements. Instead of complying with the ordinances and regulations governing residential subdivision development or proceeding with a proper appeal to the Board of Adjustment pursuant to SDCL § 11-4-25, Grant Park proceeded in total disregard of well-settled South Dakota law on municipal planning and zoning and commenced not just one, but two separate lawsuits against the Baltic Defendants, and did so on the day before Thanksgiving as well.

Moreover, Grant Park named the individual members of the City Council and Planning and Zoning Commission as parties, in addition to the City of Baltic and the Baltic Planning and Zoning Commission. Then, a mere nine days before Christmas, Grant Park filed a Motion for Temporary Restraining Order Without Notice and Preliminary and Permanent Injunction, with a supporting 133-page Affidavit of Counsel, a 20-page Affidavit of Brian Hefty, a 23-page Affidavit of Mike Wendland, and a 29-page brief. That Motion was swiftly denied, *sua sponte*, by the Honorable Jon Sogn.

On November 9, 2022, Justin Heim, P.E., ISG, Inc., the City of Baltic's engineering firm, provided a Memorandum to Grant Park's counsel of record, Brian Hefty, owner of Grant Park, and Pat Carey, P.E., Banner Associates, Grant Park's engineering firm, which states, in pertinent part:

As noted in previous correspondence, maintenance of the streets within the development are the responsibility of the Developer until acceptance and approval by the City. Said maintenance includes snow removal during the winter months/ the City of Baltic is willing to provide snow removal services within the development for the upcoming winter at a rate agreed upon by the Developer and City. Hughes Affidavit, Exhibit 8; ISG Memorandum, November 9, 2022, p. 2. (Emphasis added).

Grant Park's pursuit of injunctive relief under these facts is a particularly egregious example of the maliciousness of Grant Park's outrageous litigation conduct, and emphasizes the misuse and abuse of the judicial system to leverage a financial outcome in favor of Grant Park and at the expense at the citizens and taxpayers of the City of Baltic. Bringing baseless claims to leverage a settlement is improper and sanctionable litigation misconduct. Smizer v. Drey, 2016 S.D. 3, ¶ 24, 873 N.W.2d at 705.

As the Court has noted, the filings by Grant Park are unnecessarily voluminous, which has needlessly increased the cost of litigation. Again, this is more evidence that these cases have been commenced and prosecuted for malicious and improper purposes.⁷

Finally, based on the absolute baselessness of the claims in these two lawsuits as discussed in detail above, it is apparent that Grant Park, who was represented by four attorneys from two separate law firms in these proceedings, brought both of these actions without any legitimate belief that its claims against the Baltic Defendants were valid. This is particularly the case where the law firms and counsel representing Grant Park had previously represented parties involving similar claims and litigation tactics that resulted in holdings adverse to Grant Park in these actions, just months prior to these actions being commenced. *See e.g.* Hostler v. Davison Cnty. Drainage Comm'n, 2022 S.D. 24, 974 N.W.2d 415 (county ordinance cannot confer subject matter jurisdiction in circuit court declaratory action); McLaen v. White Twp., 2022 S.D. 26, 974 N.W.2d 714, ¶ 24, fn 1, ¶ 35 (timeframe within which an administrative appeal must be brought also

⁷ Notably, Grant Park's pleadings in these two matters are now being published by a group recently formed as "South Dakotans for Transparent Government" (suspected to be driven and financed by Grant Park and/or Brian Hefty) to support a petition to recall City of Baltic Mayor Deborah McIsaac. *See* <https://recallmcisaac.com/documents>; <https://www.mitchellrepublic.com/news/south-dakota/baltic-s-d-draws-political-spotlight-over-rare-recall-development-dispute>

applies to declaratory judgment action; estoppel against public entities disfavored and available only in exceptional circumstances to prevent manifest injustice).

In sum, both of these actions were frivolous and/or commenced for improper and malicious purposes. As a consequence, the Baltic Defendants are entitled to an award of attorneys' fees under SDCL §§ 15-17-51 and/or 15-6-11(c).

D. Attorneys' Fees Incurred by the Baltic Defendants

There are a number of factors to be considered by a trial court in determining a reasonable award of attorneys' fees in civil cases:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent.

Id. (quoting City of Sioux Falls v. Kelley, 513 N.W.2d 97, 111 (S.D. 1994)). No single factor determines whether attorneys' fees should be awarded, "but rather all of the factors should be taken into consideration in determining a reasonable fee." Id. "However, before considering any of the factors listed above, the calculation of attorney fees must begin with the hourly fee multiplied by the attorney's hours." Id. ¶ 30.

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

In this case, a review of the record and filings in these two cases is dispositive regarding the time, effort, and novelty of the case before the Court. Grant Park's

voluminous filings and the frivolous claims without support in the law exacerbated the additional effort required by the Baltic Defendants in these cases.

Counsel for the Baltic Defendants have literally been required in the vigorous defense of these cases to produce a primer on municipal law and the planning and zoning processes of administrative law and residential subdivision development. *See* Affidavit of William C. Garry, Affidavit of John R. Hughes, Exhibits 1-3.

The following Table contains an itemized summary of the attorneys' fees requested:

Attorney	Hours	Rate	Fees
William C. Garry	53.2	\$185	\$ 9,842.00
Melissa Jelen	74.6	\$185	\$13,801.00
Andrew Hurd	1.1	\$165	\$ 181.50
John R. Hughes	326	\$195	\$63,570.00

As such, fees in the total amount of \$87,394.50 (as itemized), is an entirely reasonable amount to fully review the voluminous record and filings in this case, and to file and fully brief and argue the motions to dismiss on multiple grounds which resulted in both actions being dismissed under SDCL § 15-6-12(b)(1) and (5).

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

Grant Park's abuse of the judicial process required the Baltic Defendants to review, research, and respond to two separate actions consisting of the voluminous record filed by Grant Park as part of its pleadings. The Baltic Defendants were required to bring motions to dismiss in two separate actions, necessitating the immediate devotion of their full attention and resources continuously for several weeks.

(3) the fee customarily charged in the locality for similar legal services;

These hourly rates are entirely appropriate, and quite frankly, far below the standard rate for such civil litigation. The regular hourly rates are: \$250 per hour for Attorney Bill Garry, \$250 per hour for Attorney Melissa Jelen, and \$200 per hour for Attorney Andrew Hurd. The regular hourly rate for Attorney John Hughes is \$300 per hour.

(4) the amount involved and the results obtained;

From the onset, and through the hearings on the motions to dismiss of February 14 and March 7, 2023, these two matters have been time-sensitive and time-intensive at the onset through the hearings. The claims and defenses presented by the Baltic Defendants were adopted by the Court in dismissing both actions in their entirety pursuant to SDCL § 15-6-12(b)(1) and (5).

(5) the time limitations imposed by the client or by the circumstances;

With Grant Park failing to respond to the December 2, 2022, correspondence from counsel for the Baltic Defendants, a Motion to Dismiss pursuant to SDCL § 15-6-12(b)(1) and (5) must be filed on or before thirty days following service of process. With service of process having been made on November 23, 2022, immediately prior to the Thanksgiving Day weekend, immediate action was necessary, which continued into December 19 and 21, 2023, when the Motions to Dismiss were filed just a few days prior to the Christmas and New Year's Holidays. Furthermore, the Plaintiff/Petitioner's objective in these lawsuits was to leverage a settlement and externalize onto the citizens and taxpayers of Baltic in excess of the more than \$1,000,000 in necessary public improvements that Grant Park persists in its refusal to either pay or perform.

(6) the nature and length of the professional relationship with the client;

Attorney John R. Hughes is the sole owner of Hughes Law Office in Sioux Falls, South Dakota. He was first appointed as City Attorney for the City of Baltic in May 1996 and served until February 2021. He was reappointed as City Attorney in May 2023, and continues to represent the City of Baltic. These two cases were the first cases on which Cadwell Sanford Deibert & Garry LLP were engaged to represent the City of Baltic as co-counsel.

(7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and

Attorney John R. Hughes earned his Juris Doctor (With Distinction, Order of the Coif) in 1982 from the University of Nebraska College of Law. He ranked in the top 5 percent of his graduation class of 160. Attorney Hughes served two years on the editorial board of the Nebraska Law Review as Lead Articles Editor and Executive Editor, respectively. Following graduation, he practiced as an associate attorney for Baird Holm, LLP in Omaha, Nebraska, until 1984, when he relocated to Sioux Falls, South Dakota. For more than forty years, his practice areas have included commercial and business law and litigation, civil trial and appellate practice, serious personal injury, wrongful death, municipal law, and adoption law. Attorney Hughes has been rated AV by Martindale-Hubbell since 1995.

Attorney William C. Garry is a partner at Cadwell Sanford Deibert & Garry LLP and has been at the Cadwell Law Firm for 41 years. His practice areas include insurance defense, civil litigation, mediations, and alternative dispute resolution. Attorney Garry is

a former State Bar President, and has served on various legal communities throughout his career, including the South Dakota Bar Disciplinary Committee.

Attorney Melissa Jelen is a partner at the Cadwell Law Firm and has been at the Cadwell Law Firm for 12 years. Her practice areas include insurance defense, civil litigation, complex business litigation, adoptions, guardianships and intellectual property rights. She graduated Sterling Honors from law school, ranked number one in her class. Prior to joining the Cadwell Law Firm, she served as the law clerk for the First Judicial Circuit for the State of South Dakota.

Attorney Andrew Hurd is an associate attorney at the Cadwell Law Firm and has been at the Cadwell Law Firm since 2021. Prior to joining the Cadwell Law Firm, he served as a law clerk for the Second Judicial Circuit for the State of South Dakota. Attorney Hurd's practice area is general litigation, with an emphasis on employment, contract and real property disputes. Attorney Hurd graduated cum laude from the University of South Dakota Knudson School of Law in 2020.

(8) whether the fee is fixed or contingent.

Attorney John Hughes' rate is \$195 per hour. Attorneys Bill Garry and Melissa Jelen's rates are \$185 per hour. Attorney Andrew Hurd's rate is \$165 per hour.

SUMMARY

At the conclusion of the hearing on February 14, 2023, counsel for the Baltic Defendants stated the following:

[T]his developer is going to be holding all of these public improvements and [sic][in] trust until it gets its act together and complies with-with the clear and plain subdivision requirements of the City of Baltic. We've had two other residential developments built in that town. We've never had anything approaching these kinds of issues. What happened is around the end of August the engineers were

exchanging memos, and Grant Park did not like what the City's engineer was saying. And so we end up in litigation.

And I want to, I want to end with Rule 11, because this case has been troubling me for a long time, and you know inexperienced lawyers can make missteps. They can. They can overreach on dubious merits of potential legal claims. They can try to get settlement by-by-by doing these things, but these lawyers are neither inexperienced, nor are they making a good faith effort to expand or change controlling law. And I, ah, I-I-I hope this court is open. They have no objectively reasonable basis for the positions they've taken. . . .

I-I-I told Anna Lomez [sic][Limoges] that back in mid-November. I had to send her the subdivision regs, Your Honor/ this is how, this is the environment we're in on this. It's called you prove to me that we have to do this: No, no, no, no, you can't contract away your police powers, Your Honor. And Lamar, as the court has recognized, drives that a pile driver, and do I think that the pathway is clear. These cases need to go away. They never should have been brought and, and the city and the respondent defendants respectfully request that the court will entertain a motion for sanctions under Rule 11. Hughes Affidavit, Exhibit 5; HT 02-14-2023, pp. 46-48.

As noted above, Attorneys' fees are recoverable under SDCL §§ 15-17-42, 15-17-51, and/or 15-6-11.

CONCLUSION

For all of the reasons set forth above, the Baltic Defendants respectfully request that this Court grant the Motion for Attorneys' Fees and Application for Taxation of Costs and Disbursements and enter an Order and Judgment against Grant Park Capital, LLC, and Grant Park's counsel of record, Rinke Noonan, Ltd., and Alex T. Mastellar, and Goosmann Law Firm and Anna Limoges and Andrew Grocott, jointly and severally, and in favor of the Baltic Defendants, in the total sum of \$87,394.50 in attorneys fees' and costs and disbursements in the total sum of \$304.53.

Dated this 27th day of April, 2023.

CADWELL SANFORD DEIBERT & GARRY LLP

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Attorneys for Defendants/Respondents

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 27th day of April, 2023, a true and correct copy of the foregoing was served electronically using the Odyssey File and Serve system which will send notification of such filing to the following:

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