

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

:SS

COUNTY OF MINNEHAHA) SECOND JUDICIAL CIRCUIT

GRANT PARK CAPITAL, LLC, * MOTIONS

Plaintiff, * HEARING

-vs- *

CITY OF BALTIC, ET AL, * CIV. 22-2973

Defendants. * CIV. 22-2968

BEFORE: THE HONORABLE JUDGE DOUGLAS BARNETT,
Circuit Judge, Second Judicial Circuit
Sioux Falls, South Dakota

APPEARANCES: Ms. Anna Limoges, Attorney at Law,
Goosmann Law Sioux Falls, South Dakota
Mr. Alex Mastellar, Attorney at Law Rinke
Noonan St. Cloud, Minnesota
For the Plaintiff;

Mr. John R. Hughes, Attorney at Law
Hughes Law Firm Sioux Falls, South Dakota
Mr. William Garry, Attorney at Law
Ms. Melissa Jelen, Attorney at Law
Cadwell Law Firm Sioux Falls, South Dakota

For the Defendants.

PROCEEDINGS: The above-entitled proceedings commenced at
2:30p.m., on the 14th day of February, 2023,
in Courtroom 5C, at the Minnehaha County
Courthouse, Sioux Falls, South Dakota.

Roxane R. Osborn
605-782-3032
Sioux Falls, South Dakota



1 MR. MASTELLAR: It's specifically in that 15.01. It
2 just defines --

3 THE COURT: -- can, and I hunted for it. I cannot find
4 a South Dakota supreme Court case that defines it that way.
5 Can you cite one to me?

6 MR. MASTELLAR: That defines the authorized official as
7 the Baltic zoning regulation defines it?

8 THE COURT: Yeah, and-and upholds or recognizes and
9 affirms the argument that you're making. I hunted for a case
10 and I can't find one. I couldn't find one in another state
11 that was similar.

12 MR. MASTELLAR: Well, our --I guess our position is
13 they haven't followed that, the chain of command there, and
14 therefore it's very rare. I lve-I lve not seen a situation
15 where there is no authorized official, but then after the
16 fact a different Board is identified as an authorized
17 official. One --

18 THE COURT: -- well, and that's -that's kind of what I'm
19 getting at. We, I mean I know they have really smart lawyers
20 in Minnesota. I've encountered a number of them in my day.
21 And we have really smart lawyers in South Dakota, and we have
22 all of these municipalities scattered across the state that
23 as Mr. Hughes says have just regular citizens serving on
24 their city councils, and commissions, and planning and zoning
25 Boards. This had to have happened somewhere.

1 MR. MASTELLAR: I, I guess, Your Honor, the City cited
2 this.

3 THE COURT: Does that make sense what I'm asking?

4 MR. MASTELLAR: I, I understand what you're saying.

5 THE COURT: Okay.

6 MR. MASTELLAR: And I, again, I don't have a case that
7 says exactly what you're looking for.

8 THE COURT: Okay.

9 MR. MASTELLAR: And the City

10 THE COURT: I just wanted to make sure I wasn't missing
11 anything.

12 MR. MASTELLAR: No.

13 THE COURT: Cause like I said, if there was a lawyer in
14 South Dakota that came up with the argument, I would have
15 suspected it got ran up at some point.

16 MR. MASTELLAR: Sure. So, I guess for-for sort of an --
17 a comparison. The City cites the Sierra Club versus Clay
18 County Board of Adjustment case, for the contention that the
19 planning and zoning commission, um, is an authorized
20 official, and that case can be distinguished completely from
21 this case because the Clay County's ordinance states that the
22 planning and zoning commission can make permit decisions for
23 conditional use permits. It's specific --

24 THE COURT: --so their text is different from the one
25 in play here?

1 MR. MASTELLAR: They, well, they did, if they hired
2 someone to be that authorized official or have that person
3 make the decision.

4 THE COURT: That's what I'm getting at.

5 MR. MASTELLAR: Yeah. Urn, and so the intent of an
6 appeals process, an internal appeals process would be that a
7 party may or some authorized official makes a decision, and
8 then if you appeal it, you would appeal it in theory to
9 different people, right. In this case if the --

10 THE COURT: --well, don't you appeal it to the Board of
11 Adjustment?

12 MR. MASTELLAR: You would --

13 THE COURT: -- I mean the statutes just dead bang clear
14 on that for me.

15 MR. MASTELLAR: No. I-I-I would agree that's where you
16 would appeal it, but the original decision has to be made by
17 the authorized official, and so then you would appeal that
18 decision to the Board of Adjustment which are different
19 people than the people that made the original decision. It's
20 a due process thing. It's having another party or another
21 Board review the decision.

22 In this case, if the City's argument holds, their
23 planning commission is their Board of Adjustment and their
24 planning commission, the Board of Adjustment then here's the
25 planning commission's decision which are the same people.

1 Your Honor. I know the council minutes says it's the final
2 plat, but under the subdivision regulations the plats
3 themselves don't say their final, and they're not final.

4 And-and this developer is going to be holding all of
5 these public improvements and trust until it gets its act
6 together and complies with-with the clear and plain
7 subdivision requirements of the City of Baltic. We've had
8 two other residential developments built in that town. We've
9 never had anything approaching these kinds of issues. What
10 happened is around the end of August the engineers were
11 exchanging memos, and Grant Park did not like what the city's
12 engineer was saying. And so we end up in litigation.

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

23 Ah, I-I assure the court that if there is a decision at
24 odds with the city's powers there is going to be a flood of
25 amicus briefs, from all kinds of municipalities and counties.

1 The South Dakota municipal league, SECOG. They'll all be in
2 a throng because if this developer can hold this city hostage
3 and try to externalize all of these needed improvements to
4 protect the health and safety and welfare of these citizens,
5 including water pressure, Your Honor. This concerns over the
6 water pressure for fighting fires. I mean this is getting
7 into the merits, but what the city wants is dismissal with
8 prejudice of these cases, and let's go back, and let's
9 prepare if Grant Park needs to file a petition for variance
10 with the P and Z.

11 I-I-I told Anna Lomez (sp) that back in mid-November. I
12 had to send her the subdivision regs, Your Honor.
13 This is how, this is the environment we're in on this,
14 It's called you prove to me that we have to do this: No, no,
15 no, no, you can't contract away your police powers, Your
16 Honor. And Lamar, as the court has recognized, drives that
17 a pile driver, and so I think that the pathway is
18 clear. These cases need to go away. They should have never
19 been brought and, and the city and the respondent defendants
20 respectfully request that the court will entertain a motion
21 for sanctions under Rule 11.

22 THE COURT: That's not in front of me today. I suspect
23 that's for another day if anyone's going to bring it.

24 MR. HUGHES: Yep. I, I told counsel that in a telephone
25 conversation that they're in Rule 11 territory, and so if-if

1 the court's decision is in line with the City's position,
2 then we are reserving the right to make a motion, Your Honor.

3 THE COURT: Mr. Mastellar, I'm going give you four
4 minutes. I, I've got another hearing at 3: 30, if we need to
5 go a little late, we can. I understand the importance to the
6 parties.

7 MR. MASTELLAR: I'll be very, very brief, and just to respond to
8 the last couple of comments.

9 THE COURT: And I, and this is the one thing I want you
10 to focus on is or well, you make your argument, then I'm
11 going to ask my last question.

12 MR. MASTELLAR: Mr. Hughes read, ah, citations to the
13 authorization to create a planning and zoning commission,
14 which would, and was cited in the city's reply brief at, it's
15 SDCL 11-4-11; 11-6-1; and 11-6-2. And the statutes state
16 what they state. All those roles are related to policy
17 making such as recommending boundaries of zoning districts.
18 What regulations are appropriate? Development of a
19 comprehensive plan. Um, you know legislative functions. Um,
20 I'm not saying what the definition of authorized official is.
21 I'm citing the city's ordinance that says what the definition
22 of unauthorized official in the City of Baltic is. I mean
23 I'm just to be clear, I'm not, I'm other than just reading
24 15.01, that's all we are doing, and the planning commission
25 is not an authorized official under that ordinance.

1 MR. HUGHES: Yes. Yes, Your Honor. Between quasi-
2 judicial and-and non-quasi-judicial, we haven't had a quasi-
3 judicial hearing, Your Honor, before the Board of Adjustment
4 on any of these issues. And what Grant Park wants is they
5 don't want any of these additional points to be on their
6 nickel, and so since the City is saying they're within the
7 subdivision regulations that we're asking these things, they
8 should ask for variances, and then we can have a full blown
9 administrative hearing. The engineers can testify.

10 THE COURT: Okay. I'm tracking you and I'm going to cut
11 you off and go back to him.

12 MR. HUGHES: Thank you.

13 THE COURT: Thank you.

14 MR. MASTELLAR: The process that we are in today is --
15 stems from confusion about where we were at with the City in
16 their process. We've tried to when we're faced with
17 confusion. We did everything that we could to try and
18 prevent additional harm from occurring. And so if there's a
19 process that is more proper than the other, when we don't see
20 an authorized official decision and the planning commission
21 who is the Board of Adjustment makes a decision, 17.05 in the
22 regulation says all parties aggrieved by a Board of
23 Adjustment decision can appeal to the court pursuant to this.
24 They are one and the same. They were making --

25 THE COURT: --and that that tracks with 11-4 --

1 MR. MASTELLAR: --yep.

2 THE COURT: in the SDCL's.

3 MR. MASTELLAR: And that's what it says, yeah. And so
4 conservatively that's where, that's why the writ was filed.
5 The debt action was filed because we lre asking the court to
6 declare the rights and responsibilities under the final plat,
7 which is a deed. Conservatively, the November 10th letter, we
8 did not know where we were at with the process because it had
9 not followed a typical process. And so we're not trying to be
10 you know disruptive or you know we're just trying to
11 figure out where we're at.

12 THE COURT: Okay.

13 MR. MASTELLAR: And get back on the track.

14 THE COURT: This is just my last question. Did --every
15 case that I've looked at, and I-I don't think there's any
16 question, judicial review --and when you say process, I take
17 it you l re referring to planning, zoning, everything, whether
18 it's water, water pressure, whether it's drain off. Storm
19 sewers. You know these concerns. The three inspections by
20 DANR. Okay. These concerns that the court noted in the
21 record. Every case that I've looked at has said judicial
22 review, jurisdictional review what-what we're here to decide
23 today, review of government Boards and commissions.
24 Everything I see, it's a statutory creature. It's authorized
25 by statute. What statute authorized, I mean from your

1 position, what statute authorizes this court to have
2 jurisdiction over this petition and this complaint?

3 MR. MASTELLAR: Our-our-our position --

4 THE COURT: what SDCL?

5 MR. MASTELLAR: Sure. In 11-4-25, we are appealing what
6 the, what was a decision of the planning and zoning, who is
7 the Board of Adjustment on a zoning decision that we were
8 agreed from.

9 THE COURT: Well, now I'm not tracking you because when,
10 when this DEC action or I should say the petition because
11 that was filed three hours earlier. When the petition was
12 filed then the DEC, the DEC action a few hours later was
13 filed, ah, I should know these dates off the top of my head.
14 December --

15 MR. HUGHES: November 23. November 23, Your Honor.

16 THE COURT: Thank you. I was out deer hunting, that's
17 why.

18 MR. HUGHES: I wish I would have been.

19 THE COURT: Well, I wasn't involved in any of this on
20 November 23rd , ah, but I digress way too much information for
21 everybody here. There had not been a full blown
22 administrative review. That didn't take place until January
23 9th, and so this was filed before that.

24 So, you said 11-4-25, and the statutory, the whole
25 scheme of 11-4, and I apologize to my 3:30 hearing because

1 we, we're going a little over here. I'm not making that
2 connection then how you would, how I would have jurisdiction
3 if-if you 1 re relying on 11-4-25.

4 MR. MASTELLAR: And we read 17.05 of the, of the city's
5 zoning regulations that says any-any-any party that's
6 aggrieved by a decision of the Board of Adjustment can appeal
7 to the court for an 11-4-25. It's a two sentence on
8 provision in the zoning regulations.

9 THE COURT: Okay. Anything else?

10 MR. MASTELLAR: Was that, was that a two-part question?

11 THE COURT: That was a one part. If I made it a two-
12 part, then I'm sorry.

13 MR. MASTELLAR: That's all right. Thank you for your
14 time.

15 THE COURT: Anything else?

16 MR. MASTELLAR: No.

17 THE COURT: Okay. Well, here's what I 1 m going to do.
18 I'm not going to write on this. This needs to be answered
19 sooner than later, but, and I can definitely the court
20 absolutely recognizes that from the comments of both the
21 parties here.

22 That being said, you've all given me plenty more to chew
23 on here for a couple of days. This is, you know in the
24 meantime, and I'm not going to tell either party how to run
25 their case, but I would strongly encourage, and I --the