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

GRANT PARK CAPITAL, LLC,
Plaintiff,
-vs-
CITY OF BALTIC, ET AL,
Defendants.

BEFORE: THE HONORABLE JUDGE DOUGLAS BARNETT,
Circuit Judge, Second Judicial Circuit
Sioux Falls, South Dakota,
on March 7, 2023.

APPEARANCES: ANNA LIMOGES
ANDREW GROCOTT
Goosmann Law
Sioux Falls, South Dakota 57108

ALEX MASTELLAR
Rinke Noonan
St. Cloud, Minnesota 56301

For the Plaintiff;

JOHN R. HUGHES
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Sioux Falls, South Dakota 57105

WILLIAM GARRY
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Cadwell Law Firm
Sioux Falls, South Dakota 57104

For the Defendants.

* * * * *

LISA CARLSON, RPR, CRR
Official Court Reporter
Sioux Falls, South Dakota

1 THE COURT: We are on the record in the matter of Grant Park
2 Capital v. the City of Baltic and several named defendants
3 in two separate files, 22-2968, which the Court has commonly
4 referred to as the "certiorari" or the "petition" file, as
5 well as 22-2973, which we commonly referred to at the
6 previous hearing as the "declaratory judgment" file.

7 Counsel, would you please note your appearances.

8 MR. HUGHES: Your Honor, John Hughes, one of the counsel of
9 record for all of the respondents and defendants, your
10 Honor.

11 MR. MASTELLAR: Alex Mastellar on behalf of Grant Park
12 Capital.

13 THE COURT: Thank you.

14 We were here previously -- I believe it was on
15 February 14th -- where we heard argument in these files
16 relative to the motions to dismiss in both files.

17 We were scheduled to reconvene on Wednesday,
18 February 22nd. However, there was a blizzard or a weather
19 event in the state of South Dakota, pretty much covering the
20 entire state of South Dakota, if I remember correctly, that
21 was the catalyst, if you will, or the cause for the
22 courthouse to be closed.

23 Initially, it started with Mr. Mastellar
24 anticipating the weather eventuality and requesting a reset,
25 which the Court agreed. Ultimately, the courthouse ended up

1 being closed.

2 I would just note as, a housekeeping matter, there
3 was an email sent last week by Mr. Hughes to the parties,
4 and it noted some additional authorities relative to these
5 files. The Court has reviewed that authority. It was a
6 case that this was decided last year, *Hostler*,
7 H-O-S-T-L-E-R, v. *Davison County Drainage Commission*.
8 That's 22 SD 24. The Court filed the email and the contents
9 thereof.

10 Ms. Limoges, on behalf of the plaintiff and
11 petitioner, requested the opportunity to make additional
12 argument as well as supplement authority. The Court
13 authorized that as well. I have a copy of that email up
14 here along with the attached decision. So it would be the
15 Court's intent to go ahead and file it at the conclusion of
16 today's hearing.

17 I have reviewed the arguments of counsel from the
18 February 14th hearing. The Court also, as the parties are
19 aware, in preparation of the February 14th hearing, reviewed
20 all of the filings therein; the authorities; the respective
21 briefing, which was very voluminous; the attachments; the
22 affidavits; and everything contained in the file that was
23 provided to the Court.

24 Essentially, the respondent and defendant -- the
25 arguments, it appears to the Court, have been parallel as to

1 both of these lawsuits for the most part. There is a
2 claim -- or excuse me -- a noted 12(B)(1) for lack of
3 subject matter jurisdiction, as well as a 12(B)(5) for
4 failure to state a claim upon which relief can be granted.

5 As I stated, those arguments somewhat paralleled
6 each other as to these files. The lack of subject matter
7 jurisdiction arguments and authorities is based heavily upon
8 the notion of Chapter 11-4 of our South Dakota Codified Law,
9 which governs the exhaustion -- essentially, the
10 exhaustion of administrative remedies prior to seeking
11 relief through a petition for writ of certiorari.

12 The -- is there -- and before I go any further,
13 are there any other housekeeping matters that the parties
14 needed to address?

15 MR. HUGHES: No, your Honor.

16 THE COURT: Mr. Mastellar?

17 MR. MASTELLAR: Nothing, your Honor.

18 THE COURT: Okay.

19 Initially, the Court is going to note that it
20 finds persuasive the authorities as cited by the defendant
21 and respondent, and the Court is going to dismiss both of
22 these lawsuits based upon the argument and authorities
23 contained therein with the exception that the Court is not
24 going to find that there was not proper service in this
25 case.

1 The Court -- I understand that that was an
2 alternate or alternative argument, but the Court is not
3 going to find dismissal based upon that.

4 But as to the arguments based upon Chapter 11-4,
5 as well as the failure to -- or corresponding lack of
6 jurisdiction of subject matter, as well as the failure to
7 state a claim upon which relief could be granted, the Court
8 is going to grant those. I just wanted to get that out in
9 the open before we start. And I will have somewhat of a
10 recitation for the parties as well before we adjourn.

11 The facts as laid out -- I don't think there's a
12 whole lot of disagreement as to the facts in terms of
13 historically how this came about. I am not going to go into
14 a lengthy recitation.

15 There was -- beginning in April of 2022 -- some
16 complaints that were received by the City of Baltic relative
17 to these two developments by the developer, which is Grant
18 Park, LLC or Grant Park Capital. There were a number of
19 things or deficiencies that were noticed or concerns.

20 Ultimately, that led up to the Planning and Zoning
21 Commission making a decision -- I believe it was on
22 July 27th of 2022 -- to suspend building permits that were
23 authorized for these areas. And then, ultimately, that in
24 turn led to an October 26, 2022 -- it was a joint zoom
25 meeting between the Planning and Zoning Commission and the

1 City Council, which further discussed City complaints and
2 which ended or culminated with what was referred to at the
3 previous hearing as a "November 13th letter" that was sent
4 by Grant Park Capital to the officials with the City of
5 Baltic. That was essentially an appeal, if you will, from
6 the decisions relative to what has led up to these disputes.

7 So the arguments generally are as follows: The
8 City argues that Grant Park has failed to exhaust its
9 administrative remedies provided by appeal to the Board of
10 Adjustment as provided in SDCL Chapter 11-4. And there are
11 numerous provisions contained that have been cited by the
12 parties in various points of their arguments and authorities
13 and briefing relative to these cases.

14 Grant Park maintains that they didn't have really
15 any other option as their hand was pushed, if you will, or
16 their hand was pressed; and that regardless of whether the
17 Board had authority to hear the appeal, they argue that it
18 had exhausted its administrative remedies; and that it had
19 been an extraordinary factual situation in these cases
20 warranting judicial review or, in this case, warranting
21 judicial review, of which the Court does not find
22 extraordinary factual situation circumstances.

23 [Reading] The Court's authority to act in a
24 particular class of cases is conferred solely by statutory
25 or constitutional authorities. And it can't be conferred on

1 a court or denied to a court by the acts of the parties or
2 the procedures that they employ.

3 That's the *Huber* case, which has been mentioned a
4 number of times, I believe, in argument as well as the
5 written submissions. That's a 2009 SD 64, South Dakota
6 case.

7 [Reading] Under Chapter 11.4, [sic] the South
8 Dakota Codified Laws, the Board of Adjustment is empowered
9 by statute to hear and decide appeals where it is alleged
10 there is error in any order, requirement, decision, or
11 determination made by any administrative official in the
12 enforcement of this chapter or any ordinance adopted
13 pursuant to this chapter.

14 Chapter 11.4 -- excuse me -- 11-4 requires an
15 appeal from the administrative officer's decision. That's
16 SDCL -- *Elliott V. Board of County Commissioners of Lake*
17 *County*, 2005 SD 92. Furthermore, SDCL 11-4-19 states:
18 [Reading] An aggrieved party is barred from pursuing any
19 other avenue of appeal until the Board of Adjustment holds a
20 hearing on the appeal and issues a final decision on the
21 merits. After the Board of Adjustment issues a final
22 decision on the merits, the aggrieved party may appeal that
23 decision to the circuit court. And that's SDCL 11-4-25.

24 It appears, especially noting -- I believe it was
25 the last portion of that statute -- the Court especially

1 notes that that language appears to be very clear. [Reading]
2 So, therefore, a party must appeal a decision to the Board
3 of Adjustment -- of the -- from the Board of Adjustment -- I
4 better take a sip of water -- through writ of certiorari
5 relative to that statute.

6 The fourth element as noted and also cited in the
7 *Huber* case is really where it comes into play here, and that
8 is the petition must be presented to the Court within
9 30 days after the Board of Adjustment's decision in this
10 particular case. And the *Huber* decision does note that all
11 four portions of that -- those elements must be made.

12 However, the Court finds that the timing in this
13 case, that was not met, that fourth element relative to the
14 filing of the petition for writ of certiorari, which was --
15 you would think I would have the date memorized.

16 MR. HUGHES: November 23rd, your Honor.

17 THE COURT: Thank you.

18 The lawsuits -- and the record is clear on this,
19 but the lawsuits were filed a few hours apart on
20 November 23, 2022.

21 The Board of adjustment's final decision --
22 however, they did find the issues as being moot -- was not
23 issued until mid-January of 2023, as established by the
24 record. And so those four prongs were not met.

25 There was also argument as to there not being an

1 appropriate authorized official in which could act in these
2 proceedings or who made -- who could have been served, or
3 appropriately deciding -- or that specific person deciding
4 the particular issues that are at dispute, I guess, for lack
5 of a better term.

6 The Court, upon further reflection and research
7 and contrary to Grant Park's assertion -- the appeal from
8 the Board of Adjustment need not necessarily come from a
9 specific person that is an authorized individual. The Court
10 found persuasive the citations to SDCL 11-4-11, 11-6-1 (1),
11 and 11-6-2 as persuasive and noting that Planning and Zoning
12 would suffice.

13 So then here the City filed motions to dismiss the
14 petition for writ of certiorari on December 19th of 2022.
15 Grant Park since obtained review of the joint motion of the
16 Board of Adjustment through public hearing on January 6th.
17 That was ultimately finalized by the Board of Adjustment --
18 and I eluded to this somewhat before on January 9th of
19 2023 -- unanimously finding that the entire joint motion was
20 in fact moot.

21 As we previously discussed. It was filed --
22 meaning the verified petition for writ of certiorari -- was
23 filed on November 21st -- on November 23, 2022. Therefore,
24 the filing took place before, contrary to SDCL 11-4.
25 Therefore, making that lawsuit the Court -- this Court finds

1 that it does not have subject matter jurisdiction in order
2 to hear that particular lawsuit.

3 I did -- I did refer to the service issue briefly
4 at the top. The Court does not find that service was not
5 properly effectuated. 15-6-4 -- I want to make sure I have
6 this right. I apologize. I meant to look at this before I
7 came up. I might have a typo here. Under 15-6-4 (b) (4) --
8 and I might have a typo here, but -- [Reading] The action be
9 against a public corporation within the state, service may
10 be made as follows: Upon the first or second class
11 municipality, by serving upon the mayor or any alderman or
12 commissioner.

13 Because there were two City officials that were
14 served in these files -- I believe it was the Wednesday
15 before Thanksgiving, if I recall the file correctly --
16 service -- the Court finds service would have been adequate.

17 So, essentially, in concluding, at least this
18 first portion under South Dakota statute as well as *Lamar*
19 *Advertising, a South Dakota LLC v. Rapid City*, which is 2020
20 SD 30, specifically the language and holding in *Lamar* that
21 discusses the exhaustion of administrative remedies before
22 seeking relief, such as the petitioners and plaintiffs did
23 here; that for these foregoing reasons as well as *Lamar's*
24 prodigy, Chapter SDCL 11-4, the Court finds that the
25 verified petition for writ of certiorari is appropriately

1 dismissed as well as the lawsuit contained in SDCL -- excuse
2 me -- in 22-2973.

3 In addition, as to the motion dismiss under
4 12(b) (5), the Court notes the legal authorities -- and this
5 is well established in South Dakota -- that a 12(b) (5)
6 motion tests the legal sufficiency and not necessarily the
7 facts of the pleading.

8 The fact that these matters did not comport with
9 SDCL Chapter 11-4 certainly plays into the dismissal under
10 failure to state a claim. In addition, the legislature
11 amended SDCL chapter -- excuse me -- 11-3-12. And the Court
12 finds this authority very persuasive relative to the failure
13 to state a claim.

14 That statute states as follows: [Reading] No
15 governing body shall be required to open and prove or
16 maintain any such dedicated streets, alleyways, commons, or
17 other public grounds solely by virtue of having approved a
18 plat or having partially accepted any such donation or
19 grant.

20 The arguments of the defendant and petitioner
21 focus strenuously on the City of Baltic allegedly, and I
22 don't think I am using the correct word, but the moving
23 target, if you will, the having to comply with additional
24 requests. And also the argument was the inappropriate
25 demand for additional requests relative to these two

1 developments.

2 The Court finds the arguments of the respondent
3 and the defendants more persuasive relative to the statutory
4 scheme, the statutory language in SDCL 11-6-33, as well as
5 11-3-12. 11-6-33 suggests that the City is also not
6 prevented from imposing additional requirements.

7 The Court would note the approval of a plat by the
8 council shall not be deemed to constitute or effect an
9 acceptance by the municipality or public of the dedication
10 of any street or other ground shown on the -- on the plat.

11 Arguably, Grant Park's acknowledgment of the
12 subdivision regulations and the owner certificates also
13 meant the construction still needed to comply with all of
14 the applicable regulations; and that the City could enforce
15 those regulations.

16 Therefore, on the face as well of the pleadings
17 the Court finds that a dismissal in that file is appropriate
18 under 12(B)(5). Therefore, Grant Park's request for
19 declaratory judgment will be dismissed on those grounds as
20 well.

21 That's the extent of my ruling.

22 MR. HUGHES: One question, your Honor.

23 THE COURT: Mr. Hughes.

24 MR. HUGHES: Is the dismissal with prejudice as to both?

25 THE COURT: It is not.

1 MR. HUGHES: Okay.

2 THE COURT: Unless you have -- I did not note any specific
3 authority unless the parties can direct me to where they
4 cited it in their briefing.

5 MR. HUGHES: We only made the request, your Honor.

6 THE COURT: Yep. You made the request.

7 MS. LIMOGES: Your Honor --

8 THE COURT: And I denied it.

9 MR. HUGHES: Agreed. Thank you.

10 THE COURT: You said, "your Honor?"

11 MS. LIMOGES: I was going ask: Normally, the prevailing
12 party does do a proposed order. Would you like the City to
13 do that or us to?

14 THE COURT: That's what I was going to get to at the end. I
15 would ask that the prevailing party in these two lawsuits
16 draft the appropriate paperwork and orders.

17 I would further ask that you confer with opposing
18 counsel as to its content. If you need me to settle any
19 disputes as to content, I will do so.

20 MR. HUGHES: Certainly, your Honor.

21 THE COURT: Otherwise, if you can agree on the language
22 relative to what has been stated here today, just submit it
23 as a proposed document via Odyssey.

24 MR. HUGHES: Does the Court anticipate having Findings of
25 Fact and Conclusions of Law in the order?

1 THE COURT: Submit those if you want. I don't think under
2 the law that it is absolutely necessary, but I will -- I am
3 not going to tell you how to run your case, Mr. Hughes.

4 MR. HUGHES: Your Honor, the final issue for us is we will
5 move for an award of attorney's fees, your Honor.

6 THE COURT: I did not --

7 MR. HUGHES: We did make the request in the pleadings, your
8 Honor. We anticipated doing that by motion following the
9 conclusion of the Court's rulings today. That's what we
10 anticipated.

11 THE COURT: I did not have that in my notes that I had to
12 decide that today.

13 MR. HUGHES: No, I don't believe so. I just wanted to make
14 the Court and opposing counsel aware that it is forthcoming.

15 THE COURT: What I am going to do relative to that issue is
16 I am going to ask that you submit a separate pleading, if
17 you could, please.

18 MR. HUGHES: Certainly.

19 THE COURT: With some -- I will tell you. I am not trying
20 to sound nebulous or trying to sound like I am playing hide
21 the ball, but what I would prefer, especially in this case,
22 are some specifics.

23 I am not asking you for -- I'm not asking for your
24 internal billing statements from your law firm or anything,
25 but I definitely would prefer specifics as to time spent,

1 dollar amounts, that sort of thing. And I will review it.
2 And we can set it for -- if you want to set it for a hearing
3 down the road, we can.

4 Obviously, I am very well aware that there is
5 another lawsuit that has been filed in these matters. And I
6 started receiving some emails relative to that as well. And
7 I will tell you in my review of Odyssey, it appears as
8 though Judge Houwman has been assigned to that file. So I
9 will address with Judge Houwman that I sat on these two
10 files, and it would make sense that this Court keeps the
11 files or that it would keep the new file.

12 I am just aware of one; right? One new one?

13 MR. MASTELLAR: (Nods.)

14 MR. HUGHES: If I may make a request. I provided courtesy
15 copies of filings of the respondents in that case, which is
16 docketed at 23-310.

17 THE COURT: I didn't have the number memorized yet.

18 MR. HUGHES: Okay. Well, I do, your Honor.

19 There is a 20-page spreadsheet that shows the
20 virtual duplication of the allegations in all three of these
21 cases.

22 So we believe it certainly meets the test of
23 Rule 42, SDCL 15-6-42A, which provides -- and actually the
24 Court can consolidate -- or, I guess, in this case it would
25 be -- well, it could be a consolidation. It's just that the

1 Court has ruled on these two matters today.

2 But we do certainly think judicial economy and all
3 of the time and energy and effort that the Court has put
4 into that matter would be -- in essence, require duplication
5 with another Judge. But, obviously, the matters of the
6 presiding judge and other judges is something that's far
7 beyond our ability to influence.

8 But, I guess, I would certainly request that upon
9 review of that appendix to the brief filed in the 310 case,
10 case, I think the Court will see a virtual -- the
11 commonality of the facts and legal issues are virtually --
12 it's "virtual" to use a modern term. They are virtual
13 mirror images of each other.

14 THE COURT: Based upon Mr. Hughes's arguments, do you have
15 any other comment, Mr. Mastellar?

16 MR. MASTELLAR: I do not.

17 THE COURT: Okay. I will leave it at this. I will visit --
18 Ms. Limoges, go ahead.

19 MS. LIMOGES: The third lawsuit is not in front of the
20 Court. And we would ask you even -- I am not sure right off
21 the bat what that statute is. I don't have them all
22 memorized probably as much as Mr. Hughes, but I am not sure
23 what the relevance of this hearing -- in this hearing that
24 other lawsuit has, whether there's a spreadsheet or not.

25 If -- and so I would ask the Court to, I guess,

1 ignore it.

2 THE COURT: I am not considering anything substantive
3 relative to that lawsuit. And I will be blunt with all of
4 you, and I will own this, this might just be on me if I
5 opened the proverbial can of worms there.

6 I am just aware that Mr. Mastellar practices out
7 of St. Cloud. And I am guessing he's probably the most
8 difficult of anyone to get scheduled relative to you being
9 an out-of-state attorney.

10 So I just mentioned what I mentioned at the end
11 simply to make the parties aware of what I was aware of.
12 And if it -- and I will visit with Judge Houwman if it makes
13 sense for this Court to keep the case. I will discuss it
14 with the presiding judge.

15 MS. LIMOGES: Thank you, your Honor. And last thing. If
16 that does get reassigned, I don't believe that we get
17 notification through e-courts for reassignment of a specific
18 case. I have always received the email from either Judge
19 Sogn or whoever, whether that case does get reassigned. And
20 if it does, we would be ready to provide you with a flash
21 drive as requested previously if you let us know.

22 THE COURT: Okay. Anything else?

23 MR. HUGHES: No, your Honor.

24 THE COURT: Did I rule on everything that was outstanding?

25 MR. HUGHES: I believe so, your Honor.

1 THE COURT: Okay. I thought I covered everything. And at
2 least my notes would indicate that I covered everything.

3 MR. MASTELLAR: For clarity, the dec action -- that was
4 dismissed based on Rule 12(B) (5)?

5 THE COURT: (5) and (1).

6 MR. MASTELLAR: Both. So pretty much your recitation would
7 apply to both cases?

8 THE COURT: Yes. And if I wasn't clear about that from the
9 top, I am now.

10 The only other thing I had on my list was there
11 was mention by one party of Rule 11 sanctions at the last
12 hearing. That's not before me. It's not part of this
13 lawsuit, to my knowledge. And, therefore, I am not doing
14 anything with it at all. And will not.

15 MS. LIMOGES: Thank you.

16 One last request. And it's for Lisa. We would
17 like to request a transcript.

18 THE COURT REPORTER: Copies?

19 MR. HUGHES: Copy. Sure.

20 THE COURT: I would note from Mr. Hughes' email as well that
21 he requested a transcript from the February 14th hearing.

22 MR. HUGHES: Roxie is pretty well back-logged, but she's
23 working on it, Judge.

24 THE COURT: We are adjourned.

25 (End of proceedings.)

