IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

PIERCE MCDOWELL AND
BARBARA MCDOWELL,

Plaintiffs/Appellees,

vs.

JOSEPH SAPIENZA AND SARAH JONES SAPIENZA, M.D.,

Defendants/Appellants,

CITY OF SIOUX FALLS,

Defendant/Appellee.

Appeal No. 28234
City of Sioux Falls Notice of Review No. 28239
Pierce and Barbara McDowell Notice of Review No. 28252

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

The Honorable John Pekas, Circuit Court Judge

BRIEF OF APPELLANTS

Richard L. Travis
Adam R. Hoier
May & Johnson, P.C.
6805 S. Minnesota Ave.
P.O. Box 88738
Sioux Falls, SD 57109
Attorneys for Appellants Joseph and Sarah Sapienza

Steven M. Johnson
Scott A. Abdallah
Ronald A. Parsons
Shannon R. Fallon
Johnson, Janklow, Abdallah, Reiter & Parson, L.L.P.
P.O. Box 2348
Sioux Falls, SD 57101
Attorneys for Appellees Pierce & Barbara McDowell

William C. Garry
Melissa R. Jelen
Cadwell, Sanford, Deibert & Garry, L.L.P.
P.O. Box 2498
Sioux Falls, SD 57101
bgarry@cadlaw.com
mjelen@cadlaw.com
Attorneys for Appellee City of Sioux Falls

NOTICE OF APPEAL FILED APRIL 19, 2017 - #28234
NOTICE OF REVIEW OF APPELLEE CITY OF SIOUX FALLS
FILED MAY 1, 2017 - #28239
NOTICE OF REVIEW OF APPELLEES PIERCE AND BARBARA MCDOWELL
FILED MAY 8, 2017 - #28252

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

SOUTH DAKOTA CASE LAW

SOUTH DAKOTA STATUTES AND REGULATIONS

OTHER CASE LAW

OTHER AUTHORITIES

INTRODUCTORY STATEMENT

References to the Settled Record from the Circuit Court file shall be denoted by "SR", followed by the appropriate page number(s). References to the Trial Transcript shall be denoted by "TT", followed by the appropriate date and page number(s). Appellants Joseph and Sarah Jones Sapienza shall be referred to collectively as "Sapienzas." Appellees Pierce and Barbara McDowell shall be referred to collectively as "McDowells" and Appellee City of Sioux Falls shall be referred to as "City."

JURISDICTIONAL STATEMENT

This is an appeal from the Trial Court's Judgment, which was signed by Judge John Pekas on March 17, 2017, and filed on March 20, 2017, (SR 1731-32), as well as the Trial Court's Order on Objections to Plaintiffs' and Defendants' Proposed Findings of Fact and Conclusions of Law, which was signed by Judge John Pekas on March 17, 2017, and filed on March 20, 2017. (SR 1726-29.) Notice of Entry of Judgment, (SR 1733-36), and Notice of Entry of Order on Objections to Plaintiffs' and Defendants' Proposed Findings of Fact and Conclusions of Law were filed and served on March 21, 2017. (SR 1740-45.) Notice of Appeal was filed by Appellants on April 19, 2017. (SR 1790-91.) Appellee City of Sioux Falls' Notice of Review was filed on May 1, 2017. Appellees Pierce and Barbara McDowells' Notice of Review was filed on May 8, 2017. The Judgment and the Order on Objection to Plaintiffs' and Defendants' Proposed Findings of Fact and Conclusions of Law are final orders that are appealable under South Dakota law. (SR 1726-29 and 1731-32.)

STATEMENT OF THE ISSUES PRESENTED

I. Whether the trial court erred in holding that ARSD 24:52:07:04 applies to the Sapienza home.

Hon. Judge Pekas held that ARSD 24:52:07:04, pertaining to historic properties, applied to the newly constructed Sapienza home.

ARSD 24:52:07:04
ARSD 24:52:07:01

II. Whether the trial court erred in holding that International Residential Code § R1003.9 is a setback requirement applicable to the Sapienza home.

Hon. Judge Pekas held that International Residential Code § R1003.9 ("IRC § R1003.9"), pertaining to the location and use of wood burning fireplaces in relation to adjacent structures, is a setback requirement applicable to the Sapienza home, requiring the Sapienza home to either be moved or reconstructed to comply with its terms.

IRC § R1003.9
Sioux Falls Zoning Ordinance Section 160.094 ("SFZO § 160.094")
30 E. 33rd St. Realty LLC v. PPF Off Two Park Ave. Owner, LLC, 963 N.Y.S.2d 106 (N.Y. App. Div. 2013)

III. Whether the trial court erred in its analysis of the factors relevant to claims for injunctive relief, including the fourth factor identified by the South Dakota Supreme Court in *Strong v. Atlas Hydraulics, Inc.*, 2014 S.D. 69, ¶ 11, 855 N.W.2d 133, 138, i.e., "[i]n balancing the equities, is the hardship to be suffered by the enjoined party . . . disproportionate to the . . . benefit to be gained by the injured party?"

Hon. Judge Pekas, balancing the equities, held that the McDowells are entitled to injunctive relief requiring the Sapienzas to tear down or substantially remodel their $1 million plus house because the size and location of the Sapienza home (1) prevents the McDowells from using their wood burning fireplace, (2) deprives the McKennan Park Historic District of the McDowells' smoking chimney, and (3) deprives the McDowell home of natural sunlight.

Strong v. Atlas Hydraulics, Inc., 2014 S.D. 69, 855 N.W.2d 133
Harksen v. Peska, 1998 S.D. 70, 581 N.W.2d 170
Hoffman v. Bob Law, Inc., 2016 S.D. 94, 888 N.W.2d 569

IV. Whether the trial court entered findings of fact and conclusions of law sufficient to allow for a meaningful review on appeal.

Hon. Judge Pekas, in his Memorandum Decision dated and filed December 27, 2016, states on several occasions, while analyzing the McDowells' claims for negligence and nuisance against the Sapienzas and the City, that "a reasonable fact finder could conclude" or "a reasonable fact finder may find."

Wiswell v. Wiswell, 2010 S.D. 32, 781 N.W.2d 479

V. Whether the trial court erred in denying the Sapienzas' affirmative defense of laches.

Hon. Judge Pekas held that the facts fail to show that the McDowells had full knowledge of the facts supporting their claims, but engaged in unreasonable delay before seeking relief.

Tovsland v. Reub, 2004 S.D. 93, 686 N.W.2d 392

VI. Whether the trial court erred in denying the Sapienzas' affirmative defense of assumption of the risk.

Hon. Judge Pekas held that a reasonable fact finder could find that the McDowells did not have actual or constructive knowledge of the risk posed by the Sapienza home until after construction was nearly complete.

Stone v. Von Eye Farms, 2007 S.D. 115, 741 N.W.2d 767
Brown Cty. v. Meidinger, 271 N.W.2d 15 (S.D. 1978)

STATEMENT OF THE CASE

This action was commenced by the McDowells in Circuit Court, Second Judicial Circuit, Minnehaha County. (SR 1-13.) The Honorable John Pekas was assigned to the case. The McDowells brought claims for negligence and nuisance against the Sapienzas seeking money damages and injunctive relief for the construction of the Sapienza home at 1323 South Second Avenue, Sioux Falls, South Dakota. (*Id.*) The McDowells also brought claims for negligence and inverse condemnation against the City seeking money damages from the City for allowing the construction of the Sapienza home. (*Id.*)

At the pretrial conference on June 13, 2016, the parties agreed to bifurcate the remedy phase of the trial with the request for injunctive relief to be heard first, and the request for money damages to be heard at a later date, but only if the trial court found that the McDowells had an adequate remedy at law. (SR 565-66.) The money damages phase of the trial has not been held.

The trial court ultimately held in favor of the McDowells on their claims against the Sapienzas, and granted the McDowells' request for injunctive relief. (SR 1303-31 and 1731-32.) Specifically, the court held the Sapienza home violates ARSD 24:52:07:04 and IRC § R1003.9, and must either be remodeled to comply with those regulations, or torn down and rebuilt. (*Id.*)

While the trial court ordered the parties to prepare proposed findings of fact and conclusions of law, the court ultimately rejected each of the parties' proposals. (SR 1726-29.) In their place, the court adopted its Memorandum Decision and Order as its Findings of Fact and Conclusions of Law. (*Id.*)

STATEMENT OF FACTS

The Sapienzas moved to Sioux Falls approximately four years ago so that Dr. Sapienza could pursue an employment opportunity with Sanford Health. (TT 6/29/16 at 244:13-19.) Upon moving to Sioux Falls, the Sapienzas entered into negotiations with Dr. William and Kathy Avery (the "Averys") to purchase the Averys' home at 1323 South Second Avenue (the "Property"). (TT 6/29/16 at 245:7-25.) The Property is located across the street from McKennan Park and within the McKennan Park Historic District. (TT 6/28/16 at 97:16-17.) The home located on the Property was not listed on either the state or the national historic register, and was categorized as an "intrusion"

property, *i.e.*, a property that takes away from the historic nature of the district. (TT 6/28/16 at 51:20-53:3; *see also* TT 6/29/16 at 122:12-123:4 (Carla Williams testifying the prior home was an intrusion property).)

During negotiations, the Averys informed the Sapienzas that there was another party interested in purchasing the Property. (TT 6/29/16 at 246:1-13.) While the Sapienzas did not know it at the time, the other party was the McDowells, who lived directly to the north of the Averys at 1321 South Second Avenue. (*Id.*)

The Sapienzas purchased the Property from the Averys for $300,000. (TT 6/28/16 at 102:2-3.) While the Sapienzas originally planned to renovate the home on the Property, complications arose, including a rodent problem, which made renovation infeasible and impractical. (TT 6/29/16 at 247:5-23.) Therefore, the Sapienzas decided to have the home razed. (*Id.*) The Sapienzas hired Bob Natz ("Natz") on July 26, 2013, to design a new home for the Property. (TT 6/29/16 at 247:24-248:5.) Using the renderings prepared by Natz, the Sapienzas presented the design for their new home to the Sioux Falls Board of Historic Preservation (the "Board"), seeking the Board's approval of the design. (TT 6/29/16 at 253:17-19.)

A question and answer session was conducted during the May 14, 2014, hearing, in which Mr. Sapienza disclosed a number of potential changes from what was depicted on the renderings, including a change in the siding from cedar shake shingles to lapboard, and the fact that the home's size would be larger than the previous home. (TT 6/29/16 at 254:12-257:17.) The Board unanimously approved the design of the new home at the May 14, 2014, hearing. (TT 6/28/16 at 178:14-16.)

Attorney Matt Tobin ("Tobin") represented the McDowells at the hearing. (TT 6/29/16 at 219:23-221:7.) Tobin did not express any objections whatsoever to the renderings of the home, the size, design, or footprint of the home, or the comments and changes to the renderings as expressed by Mr. Sapienza. (*Id.*) Tobin also did not express any concern about the Sapienza home's proximity to the McDowell home. (*Id.*) Tobin only voiced concern about a retaining wall which encroached upon the Sapienzas' property. (TT 6/29/16 at 221:1-222:7.)

Following completion of the design phase and the unanimous approval of the plans by the Board, the Sapienzas engaged Sorum Construction to build the home. (TT 6/29/16 at 39:2-8.) Sorum Construction applied for and was issued a building permit by the City on or about October 22, 2014. (TT 6/29/16 at 39:2-8 and 41:17-42:4, Trial Exhibit 13.) Construction began shortly thereafter. Throughout the construction and completion of the Sapienza home, the City inspected the home numerous times. (TT 6/28/16 at 212:22-214:8 and 216:4-11.) The Sapienzas, however, were never issued a citation for violating any City Ordinance or building regulation, and all permits required during the construction of the Sapienza home were issued by the City. (*Id.*)

In May of 2015, Mrs. McDowell called the City of Sioux Falls Fire Inspector to request an inspection of the chimney on the McDowell home. (TT 6/28/16 at 161:25-163:11.) The fire inspector relayed this request to the mechanical inspector, Gary Klarenbeek ("Klarenbeek"). (*Id.*) Klarenbeek inspected the McDowells' chimney and alerted Mrs. McDowell that the fireplace could not be used because the chimney violated IRC § R1003.9 of the International Residential Code adopted by the City. (*Id.*) IRC §

R1003.9 provides that "[c]himneys shall extend at least 2 feet (610 mm) higher than any portion of a building within 10 feet (3048 mm), but shall not be less than 3 feet (914 mm) above the highest point where the chimney passes through the roof." The McDowell chimney was less than 10 feet from the Sapienza home, and was shorter than the Sapienza home. (TT 6/28/16 at 164:10-165:19.) Klarenbeek offered the McDowells alternatives that would allow them to continue using the fireplace, including the installation of a gas insert in the fireplace. (*See* TT 6/29/16 at 231:7-10 (Pierce McDowell acknowledging that a gas insert is a viable option).) In lieu of implementing any of the alternatives, however, the McDowells chose to file suit against the Sapienzas. (SR 1-13.)

The McDowells filed suit on May 14, 2015, asserting claims for negligence and nuisance. (*Id.*) The suit came almost seven-and-a-half months after construction began on the Sapienza home, and after the Sapienzas had expended more than $650,000 in costs relating to the home's construction. (TT 6/28/16 at 101:20-102:3; TT 6/29/16 at 60:2-6.)

The suit sought money damages and injunctive relief for violation of IRC § R1003.9 and ARSD 24:52:07:04. (SR 1-13.) As it relates to IRC § R1003.9, the McDowells alleged that IRC § R1003.9 is a setback requirement that conflicts with Sioux Falls Zoning Ordinance Section 160.094 ("SFZO § 160.094"), which requires a 5-foot setback for sideyards in the McKennan Park District. (*Id.*) Thus, through the application of

SDCL § 11-4-6,[1] the McDowells argued that IRC § R1003.9, not SFZO § 160.094, should control the required sideyard setback between the Sapienza home and the McDowell home. Notably, the evidence presented at trial demonstrates that the Sapienza home is located *at least* 5 feet off of the north property line. (TT 6/29/16 at 182:8-12.)

As for ARSD 24:52:07:04, which provides:

> New construction or additions within a historic district must comply with The Secretary of the Interior's Standards for the Treatment of Historic Properties as incorporated by reference in § 24:52:07:02. In addition the following standards apply:
>
> ***
>
> (2) Height. The height of new buildings or additions to existing buildings may not exceed a standard variance of ten percent of the average height of historic buildings on both sides of the street where proposed new construction is to be located . . .

the McDowells alleged that the Sapienza home exceeds the average height of historic homes on both sides of the street where it is located by more than ten percent. (TT 6/28/16 at 25:17-28:20.) Therefore, the McDowells alleged that the Sapienza home

[1] SDCL § 11-4-6 provides:

> Whenever the regulations made under authority of this chapter require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under authority of this chapter shall govern.
>
> Wherever the provisions of any other statute or local ordinance or regulation require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or a less number of stories, or other higher standards than are required by the regulations made under authority of this chapter, the provisions of such statute or local ordinance or regulation shall govern.

violates ARSD 24:52:07:04, and, as such, must be remodeled, or demolished and rebuilt, to comply with the administrative rule.

STANDARD OF REVIEW

"Statutory interpretation and application are questions of law, and are reviewed by this Court under the de novo standard of review." *Rotenberger v. Burghduff*, 2007 S.D. 7, ¶ 8, 727 N.W.2d 291, 294. "Statutes are to be construed to give effect to each statute and so as to have them exist in harmony. It is a fundamental rule of statutory construction that the intention of the law is to be primarily ascertained from the language expressed in the statute." *Id.* In doing so, this Court "give[s] words their plain meaning and effect, and read[s] statutes as a whole, as well as enactments relating to the same subject." *Id.* (internal citations and quotations omitted).

This Court "recently clarified [its] standard of review for the grant or denial of an injunction" in *Magner v. Brinkman*, 2016 S.D. 50, ¶ 19, 883 N.W.2d 74, 82–83. *Hoffman v. Bob Law, Inc.*, 2016 S.D. 94, ¶ 10, 888 N.W.2d 569, 573. First, the Court "determine[s] whether an injunction was statutorily authorized under SDCL 21–8–14, a question of law review[ed] de novo." *Id.* (citing *Magner*, 2016 S.D. 50, ¶ 19, 883 N.W.2d at 83). "If the injunction was authorized, 'the court's subsequent decision to grant or deny the injunction is reviewed for an abuse of discretion.'" *Id.* (quoting *Magner*, 2016 S.D. 50, ¶ 19, 883 N.W.2d at 83). "An abuse of discretion is an error of law or 'discretion exercised to an unjustified purpose, against reason and evidence.'" *Id.* (quoting *Stahl v. Pollman*, 2006 S.D. 51, ¶ 9, 716 N.W.2d 794, 796).

Finally, this Court applies the "clearly erroneous" standard of review to a trial court's findings of fact and conclusions of law. *See Mettler v. Williamson*, 424 N.W.2d

670, 671 (S.D. 1988); *Wiswell v. Wiswell*, 2010 S.D. 32, ¶ 10, 781 N.W.2d 479, 482. "A finding is 'clearly erroneous' when after reviewing all of the evidence [the Court is] left with a definite and firm conviction that a mistake was made." *Mettler*, 424 N.W.2d at 671 (citations omitted).

LEGAL ARGUMENT

I. The trial court erred in holding that ARSD 24:52:07:04 applies to the Sapienza home.

The McDowells argued, and the trial court held, that the Sapienzas had a duty to comply with ARSD 24:52:07:04 during the construction of their home. (SR 1303-31.) The McDowells argued that the Sapienza home violates the "ten percent standard variance" requirement found in ARSD 24:52:07:04 by as much as 8.42 feet. (TT 6/28/16 at 26:2-20.) The McDowells', and, consequently, the trial court's reliance on ARSD 24:52:07:04, however, is misplaced.

ARSD 24:52:07:01, the applicability provision of ARSD Ch. 24:52:07, provides that, "[t]he rules in this chapter apply to historic properties listed on the state register or the national register, or both." A number of witnesses, including the McDowells' expert, Spencer Ruff ("Ruff"), testified that the home previously located on the land now occupied by the Sapienza home was not listed on either the state or national registers of historic properties.

> Q. So as I review Exhibit 60 and the reference to 1323 South 2nd Avenue, on Page 28, that property was identified as an intrusion into the historic district, correct?
>
> A. Yes.
>
> Q. Meaning not in compliance with the standards applicable to be eligible to be classified as a historic home?

A. . . . [T]hat is correct.

Q. And that's the address of the current Sapienza home, correct?

A. That is correct.

Q. Meaning that the home that was there prior to the construction of the Sapienza home was an intrusion and not in compliance with the standards for historical home, correct?

A. Correct.

Q. Meaning that home would not have been listed on the state register of historical homes, correct?

A. Correct.

Q. Not listed on the federal register of historic homes?

A. Correct.

Q. And from your perspective and knowledge and familiarity with historic properties, what is the significance when a property is not listed on the state register of historical homes or the federal register of historical homes?

A. The home has no significance historically.

Q. Meaning it's not eligible for federal grants pertaining to historic renovations or to renovations in the applicable federal grants?

A. Correct.

Q. In essence, the house that was there prior to the Sapienza house was not a historic home?

A. Yes, it was not.

(TT 6/28/16 at 51:20-53:3; *see also* TT 6/29/16 at 122:12-123:4 (Carla Williams testifying the prior home was an intrusion property).) Therefore, because the prior home

was not listed on the state or national register, it was not a historic property and the provisions of ARSD 24:52:07:04 do not apply.[2]

Such a conclusion is consistent with this Court's long-standing position on statutory interpretation. "When the language of a statute is clear and unambiguous, our interpretation is confined to declaring the meaning as plainly expressed." *Salzer v. Barff*, 2010 S.D. 96, ¶ 5, 792 N.W.2d 177, 179 (citing *Perdue, Inc. v. Rounds*, 2010 S.D. 38, ¶ 7 n. 2, 782 N.W.2d 375, 377 n. 2). The language of ARSD 24:52:07:01 is clear, "[t]he rules in this chapter *apply to historic properties listed on the state register or the national register, or both*." ARSD 24:52:07:04 is a rule within ARSD Ch. 24:52:07. Therefore, the provisions of ARSD 24:52:07:04 only apply to "historic properties" on the "state register or the national register, or both." Neither the prior home, nor the Sapienza home are listed on the state or national register. Thus, ARSD 24:52:07:04 does not apply to the Property.

Further, the trial court's concern that failing to apply ARSD 24:52:07:04 to the Sapienza home would render the regulation a nullity is unpersuasive. (SR 1303-31.) Contrary to the trial court's assertions, ARSD 24:52:07:01 and ARSD 24:52:07:04 can be applied in such a way that the provisions of each rule can be given full effect without impacting the other. ARSD 24:52:07:01 provides that regulations within the chapter apply to "historic properties listed on the state register or the national register, or both." ARSD 24:52:07:04, in turn, states that it applies to "[n]ew construction or additions

[2] Likewise, no evidence was presented showing that the Sapienza home is listed on the state or national register. In fact, Ruff testified that he was not aware whether the home was listed on either register, or if it had been nominated for listing. (TT 6/28/16 at 77:23-78:5.) As noted by the McDowells' counsel, the Sapienza home could not be listed on the state or national register, as it is new construction, and, therefore, not a historic property. (TT 6/30/16 at 141:22-142:4.)

within a historic district." Therefore, read together, ARSD 24:52:07:04 applies to "new construction or additions" to "historic properties listed on the state or the national register, or both," and located "within a historic district." This is a reasonable reading of the regulations, and complies with this Court's long-standing position that "[w]hen the language of a statute is clear and unambiguous, our interpretation is confined to declaring the meaning as plainly expressed." *Salzer*, 2010 S.D. 96, ¶ 5, 792 N.W.2d at 179 (citing *Perdue, Inc.*, 2010 S.D. 38, ¶ 7 n. 2, 782 N.W.2d at 377 n. 2)

As such, the Sapienza home is not subject to ARSD 24:52:07:04, and the trial court's holding to the contrary must be reversed. Likewise, the trial court's finding of negligence and nuisance based on the Sapienzas' alleged violation of ARSD 24:52:07:04 has no basis in the facts.

II. The trial court erred in holding that IRC § R1003.9 is a setback requirement applicable to the Sapienza home.

The McDowells' argument regarding SDCL § 11-4-6, and the alleged conflict between SFZO § 160.094 and IRC § R1003.9 (Trial Exhibit 42), is, similarly, without merit. To begin with, contrary to the McDowells' assertions, SDCL § 11-4-6 is a rule of construction, and it does not give rise to a statutory duty upon which a claim of negligence may be based. SDCL § 11-4-6 merely provides that where there is a conflict between zoning ordinances/regulations regarding issues, such as setbacks, the ordinance/regulation that imposes the higher standard applies. The McDowells rely on this language to argue that there is a conflict regarding the required setback for the Sapienza home when comparing SFZO § 160.094 and IRC § R1003.9. A plain reading of those regulations, however, discloses no such conflict.

While the McDowells are correct in noting that SFZO § 160.094 requires a setback of 5 feet for side yards, IRC § R1003.9 does not address setbacks. In fact, IRC § R1003.9 has nothing to do with setbacks and the required distances between homes. Rather, IRC § R1003.9 deals with the required height for chimneys, providing that "[c]himneys shall extend at least 2 feet (610 mm) higher than any portion of a building within 10 feet (3048 mm), but shall not be less than 3 feet (914 mm) above the highest point where the chimney passes through the roof." (Trial Exhibit 42.) Thus, there is no conflict between SFZO § 160.094 and IRC § R1003.9 requiring the application of SDCL § 11-4-6. In fact, absent setback requirements similar to SFZO § 160.094, IRC § R1003.9 would allow homes to be built inches from each other, with the only requirement being that the chimneys on the homes must be "at least 2 feet . . . higher than any portion of a building within 10 feet." Simply put, in constructing their home, the only setback requirements the Sapienzas were required to comply with were those found in SFZO § 160.094.

The only testimony offered by the McDowells regarding the application of IRC § R1003.9, was that of Ruff. A cursory review of Ruff's testimony, however, demonstrates that he has a fundamental misunderstanding of IRC § R1003.9.

Q. Okay. Exhibit 42 would that be a copy of the relevant portion of the International Building Code adopted by the City of Sioux Falls that remits to this fireplace and chimney issue?

A. Yes, sir.

***

Q. Will you go to page -- it looks like 3.

A. Yes, sir, I'm there.

Q. Okay. Read that for us, would you please[?]

A. Under the termination, is that what you're referring to?

Q. Yes.

A. Termination: "Chimney shall extend at least 2 feet higher than any portion of the building within 10 feet, which shall not be less than 3 feet above the highest point when the chimney passes through the roof."

***

Q. . . . Mr. Ruff. What's the relevance of this provision with regard to your review and investigation of the Sapienza project?

A. The requirement that there be a 10-foot separation between the fireplace and the McDowell house and any other wall placed adjacent to it.

(TT 6/28/16 at 31:7-34:9.) As stated above, IRC § R1003.9 does not require that structures be built 10 feet away from neighboring chimneys. Rather, IRC § R1003.9 requires that chimneys be "at least 2 feet (610 mm) *higher than any portion* of a building within 10 feet." (Trial Exhibit 42) (emphasis added). Thus, a building could be closer than 10 feet, so long as the chimney's termination point is 2 feet higher than the neighboring structure. This distinction is significant because it directly refutes Mr. Ruff's opinion that IRC § R1003.9 is a setback requirement. (*See* TT 6/28/16 at 37:15-38:15.) A plain reading of IRC § R1003.9 indicates that it is a height/use requirement that applies to the owner of the chimney, *i.e.*, the McDowells.

This conclusion is consistent with the testimony of the City's chief building inspector Ron Bell ("Bell"). Bell was the senior city official responsible for ensuring compliance with IRC § R1003.9. When questioned regarding which party, if any, bears responsibility for complying with IRC § R1003.9, Bell testified:

Q. You're familiar with the chimney regulation?

A. Yes, sir.

Q. And as best you can define it in lay person's terms, do so, please.

A. It's a provision in the mechanical code which has also been transferred into the residential code to say that where you have a wood burning fireplace, the termination of the chimney has to be at least 2 feet above any portion of a roof within 10 feet of that chimney termination.

Q. So the chimney does not have to extend 2 feet above the highest point of adjoining property, as an example?

A. No.

Q. It would be property within 10 feet of the termination point?

A. Any roof within 10 feet. It has to extend 2 foot within any roof within 10 feet of the termination.

Q. The chimney regulation at issue here applies to the McDowell's, correct?

***

A. One more time?

Q. Chimney regulation at issue here applies to the McDowell's, does it not?

***

A. The code does not make a distinction on properties. It says any roof within 10 feet.

Q. But as the regulation reads, it's the owner of the fireplace and the chimney that cannot be used, correct?

A. If that chimney is less than 2 foot within any other structure within 10 feet, that chimney could be a fire hazard.

(TT 6/28/16 at 217:2-218:13.)

This conclusion is also consistent with the New York Supreme Court, Appellate Division's decision in *30 E. 33rd St. Realty LLC v. PPF Off Two Park Ave. Owner, LLC,*

963 N.Y.S.2d 106 (N.Y. App. Div. 2013). There, the defendant's predecessor in interest had "built a taller building on property adjoining plaintiff's building," causing plaintiff's building to fall out of compliance with an ordinance similar to IRC § R1003.9. *Id.* at 107. To remedy this issue, defendant's predecessor in interest extended the chimney on plaintiff's building to meet the height requirements of the building code. *Id.* Several years later, the building code was amended "and, for the first time, required the owner of a taller, later-built building, not only to extend the height of any chimneys in adjoining buildings to conform to Code requirements, but also to maintain and repair the chimney." *Id.* Following this amendment, plaintiff brought suit against the defendant, arguing that "the defendant is responsible, pursuant to the 1968 Building Code of the City of New York . . . § 27-860(f)(4), to repair the chimney on its property." *Id.* In holding that no such duty existed, as there was no indication that the amendment was meant to be retroactive, the court also noted that "an owner's 'responsibility to alter the chimney of [adjoining properties] to conform to height requirements . . . , and to maintain and repair them . . . , is clearly imposed by statute and *did not exist at common law*.'" *Id.* (citations omitted) (emphasis added). In essence, the court held that, absent a statutory requirement, a landowner has no duty to ensure that his/her neighbor's chimney complies with the height requirements contained in the building code.

Contrary to the McDowells' claims, and the trial court's holding, IRC § R1003.9 is not a setback requirement. Rather, it is a height/use requirement that applies to the owner of the chimney – not neighboring landowners. Thus, there is no conflict between SFZO § 160.094 and IRC § R1003.9 requiring the application of SDCL § 11-4-6. Further, because there is no conflict, the trial court's finding that the Sapienzas violated IRC § R1003.9 when

they built their home 6 feet from the north property line is unfounded, as is the court's finding of negligence and nuisance based on that alleged violation.

III. The trial court erred in granting the McDowells' request for injunctive relief.

SDCL § 21-8-14 states:

> 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; (2) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief; (3) Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or (4) Where the obligation arises from a trust.

The South Dakota Supreme Court has identified the following factors that must be considered when deciding if a permanent injunction is appropriate:

> (1) Did the party to be enjoined cause the damage?
>
> (2) Would irreparable harm result without the injunction because of lack of an adequate and complete remedy at law?
>
> (3) Is the party to be enjoined acting in bad faith or is the injury-causing behavior an innocent mistake?
>
> (4) In balancing the equities, is the hardship to be suffered by the enjoined party . . . disproportionate to the . . . benefit to be gained by the injured party?

Strong v. Atlas Hydraulics, Inc., 2014 S.D. 69, ¶ 11, 855 N.W.2d 133, 138 (quoting *New Leaf, LLC v. FD Dev. of Black Hawk LLC*, 2010 S.D. 100, ¶ 15, 793 N.W.2d 32, 35).

A. The McDowells failed to demonstrate irreparable harm.

"'Harm is . . . irreparable where … it cannot be readily, adequately, and completely compensated with money.'" *Strong*, 2014 S.D. 69, ¶ 17, 855 N.W.2d at 140 (quoting *Knodel v. Kassel Twp.*, 1998 S.D. 73, ¶ 13, 581 N.W.2d 504, 509 (internal quotations and citations omitted)). The McDowells presented absolutely no evidence as

to why their inability to use their wood burning fireplace cannot be assigned a monetary value. Whether as a diminution in value to their house as a whole, or otherwise, the McDowells' alleged loss in this case can clearly be compensated through a monetary judgment. The trial court acknowledged as much when it held that "[t]he value of the McDowells' residence declined and they lost the use of their wood burning fireplace." (SR 1322.) This finding of diminution in market value was based, solely, on the testimony of one of the McDowells' neighbors, Lisa Nykamp, who, at one time, wanted to purchase the McDowell home, but after the construction of the Sapienza home, stated that she would only purchase the McDowell home if the price was greatly reduced. (SR 1325.) If the value of the McDowell home *was* impacted by the construction of the Sapienza home, such a finding supports, rather than conflicts with, a finding that the McDowells have not suffered irreparable harm. As a result, an award of money damages would easily remedy any decrease in value experienced by the McDowells.

Additionally, aside from Mrs. McDowell, every witness who was questioned on the subject admitted that the issue with the McDowell fireplace could easily be resolved by converting the wood burning fireplace to a gas fireplace. (*See* TT 6/28/16 at 80:2-12 (Spencer Ruff); TT 6/29/16 at 77:16-80:3 (Brad Sorum); TT 6/29/16 231:7-10 (Pierce McDowell); TT 6/30/16 at 78:7-22 (Adam Nyhaug).) Ruff, for instance, testified as follows:

> Q. Now, the -- you testified that the converting the McDowell wood burning fire fireplace to a gas burning fireplace wouldn't be compatible with the historic nature of the home; is that right?
>
> A. That is correct.
>
> Q. It would however eliminate the fire hazard, would it not?

A. Yes.

Q. And that's the purpose -- that's what the chimney termination statute is designed for; is that right?

A. That is correct.

(TT 6/28/16 at 80:2-12.) Moreover, Mr. McDowell admitted during cross-examination that converting the fireplace to a gas fireplace was a "viable" option.

Q. Do you think the option for a gas insert into your fireplace is viable, Pierce?

A. I think it's certainly viable. It's certainly not something we want to do, like to do.

(TT 6/29/16 231:7-10.)

The McDowells' argument regarding loss of natural sunlight due to the size and location of the Sapienza home, likewise, does not amount to irreparable harm. While South Dakota has not considered this issue directly, other jurisdictions have. Those jurisdictions hold that property owners do not have a right to a view unobstructed by neighboring structures.

> The general rule is that a lawful building or structure cannot be complained of as a private nuisance merely because it obstructs the view of neighboring property . . .
>
> The above rule finds its genesis in the repudiation of the traditional English doctrine of ancient lights. Under that doctrine, a landowner acquired an easement for light across an adjoining landowner's property and could prevent the adjoining landowner from obstructing the light once the easement was established by the passage of time . . . The ancient lights doctrine as applied to claims involving views has been repudiated by every state considering it. One basis for the doctrine's repudiation is that "it is not adapted to the conditions existing in this country and could not be applied to rapidly growing communities without working mischievous consequences to property owners." . . . An additional basis for the doctrine's repudiation is that providing a landowner with what is essentially an unwritten negative prescriptive easement over a neighbor's property would frustrate the purpose

> of the recording statutes, one objective of which is to ensure that all property rights are recorded and discoverable by a diligent title search.

Kruger v. Shramek, 565 N.W.2d 742, 747 (Neb. Ct. App. 1997) (internal citations and quotations omitted); *see also Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357, 359 (Fla. Dist. Ct. App. 1959) (holding that "[n]o American decision has . . . held that . . . a landowner has a legal right to the free flow of light and air across the adjoining land of his neighbor."). The rule stated in *Kruger* is the majority rule. *Id.* As such, because the McDowells do not have a right to natural sunlight on the south side of their home, they have failed to show that they have suffered harm, let alone irreparable harm, justifying the issuance of a permanent injunction.

Given these facts, the alleged harm in this case, *i.e.*, the McDowells' inability to use their wood burning fireplace, their loss of natural sunlight, and the alleged diminution in value to their home, can be "'readily, adequately, and completely compensated with money.'" *Strong*, 2014 S.D. 69, ¶ 17, 855 N.W.2d at 140 (quoting *Knodel*, 1998 S.D. 73, ¶ 13, 581 N.W.2d at 509 (internal quotations and citations omitted)). Thus, injunctive relief is not appropriate.[3]

Moreover, because pecuniary compensation *will* afford adequate relief in this case, this Court does not have to engage in an abuse of discretion analysis regarding the trial court's grant of injunctive relief. *Hoffman*, 2016 S.D. 94, ¶ 10, 888 N.W.2d at 573 (citing *Magner*, 2016 S.D. 50, ¶ 19, 883 N.W.2d at 83). This Court's analysis of the grant or denial of injunctive relief begins with SDCL § 21-8-14, and is conducted de

[3] To the extent the McDowells claim converting their wood burning fireplace to a gas fireplace will destroy the character of their home, it is worth noting the McDowells recently constructed a new addition to their own home, wherein they installed a gas fireplace. (TT 6/28/16 at 189:23-190:13.)

novo. *Id.* Therefore, because the requirements of SDCL § 21-8-14 have not been satisfied, this Court can reverse the trial court's grant of injunctive relief without giving any deference to the trial court's findings. *Id.*

B. The Sapienzas acted in good faith.

Similarly, there is no evidence that the Sapienzas acted in any way but the utmost good faith during the construction of their home. The Sapienzas did everything that a reasonable, prudent person would do under the same or similar circumstances. Before construction even began, the Sapienzas hired an architect/designer, Natz, to help design their home and ensure that it complied with all zoning ordinances and building codes. (TT 6/29/16 at 253:11-16.) Thereafter, the Sapienzas presented the plans for their home to the Board. The McDowells did not attend the Board hearing, but sent an attorney, Tobin, to appear on their behalf. (TT 6/29/16 at 219:23-221:7.) Notably, their attorney did not voice any objections to the architect's renderings of the home, the size, design, or footprint of the home, or the comments and changes to the renderings as expressed by Mr. Sapienza during the hearing. (*Id.*) During the hearing, Mr. Sapienza advised the Board that revisions to the renderings were going to be implemented, including the use of lapboard siding rather than using cedar shake siding as depicted in the architectural rendering. (TT 6/29/16 at 254:12-257:17.) The Chairman of the Board, Adam Nyhaug, testified at trial that lapboard was more in line with the district's character than cedar shake. (TT 6/30/16 at 69:11-19.) Based on the presentation, the renderings, and the plans submitted to the Board, the Board unanimously approved the building plans and greenlit construction. (TT 6/28/16 at 178:14-16.)

Having obtained the Board's approval, the Sapienzas proceeded to hire a general contractor who presented the building plans to the City. (TT 6/29/16 at 39:2-8.) The City reviewed the plans to verify that, among other things, the plans complied with all applicable zoning ordinances. (TT 6/29/16 at 39:2-8 and 41:17-42:4, Trial Exhibit 13.) The City found no issues with the building plans and issued a Building Permit. (*Id.*) Once construction began on the Sapienzas' home, the Sapienzas relied on the knowledge of their general contractor, as well as all of its subcontractors, to verify and make certain of full compliance with all zoning ordinances and building codes. (TT 6/30/16 at 21:6-14.) Moreover, all required inspections were conducted by the City throughout the construction process to verify continued compliance with all ordinances. (TT 6/28/16 at 212:22-214:8 and 216:4-11.) Significantly, no building code or zoning violations have been issued to the Sapienzas to date. (*Id.*)

Simply put, all of the Sapienzas' actions – from initial planning through completion of construction – have been prudent and reasonable. They did everything and anything an ordinary reasonable person would do under the same or similar circumstances to ensure that their home was in compliance with all laws and regulations, *i.e.*, they relied on the expertise of their architects, designers, and contractors. Numerous witnesses agreed that such reliance is reasonable under the circumstances, including the McDowells' expert, Ruff.

> Q. . . . In your opinion, is it unreasonable on the part of the Sapienza's to rely on the knowledge and expertise of the professionals that they hire --
>
> A. It's not -- pardon me.
>
> Q. -- Natz and Associates and Sorum Construction to ensure compliance with zoning ordinances?

A. It's not unreasonable for them to expect that they would have the knowledge.

Q. And it doesn't surprise you that they don't have the personal knowledge of those zoning ordinances, correct?

A. You are correct.

Q. Same question in respect to rules, regulations and standards of new construction within a historic district. Is it unreasonable on the part of the Sapienza's to rely upon the experts they have hired to ensure compliance?

A. Not unreasonable.

(TT 6/28/16 at 74:15-75:7; *see also* TT 6/28/16 at 193:1-4 (Barbara McDowell testifying to the same); TT 6/28/16 at 199:14-17 (Bell testifying that they expect the contractors to know the rules and regulations – not the homeowners); TT 6/29/16 at 76:18-22 (Brad Sorum testifying the it is reasonable for homeowners to rely on their contractor's expertise relating to codes and regulations); TT 6/29/16 at 179:2-7 (Natz testifying that it was reasonable for the Sapienzas to rely on his expertise regarding rules and regulations).)

Simply put, the Sapienzas did everything that was required of them prior to constructing their new home. As such, there is no evidence that the Sapienzas acted in any way other than the utmost good faith.

C. The balancing of the equities weighs in favor of the Sapienzas.

Finally, in balancing the equities, the harm that would be suffered by the Sapienzas if injunctive relief was granted is disproportionate to the benefit that would be gained by the McDowells or the McKennan Park Historic District as a whole, as asserted by the trial court. If the trial court's decision is affirmed, the Sapienzas will be required to significantly redesign their home, or completely demolish their home and rebuild it from scratch, just so the McDowells can continue to burn wood in their fireplace and enjoy a little more natural

sunlight in their home. Even at the most surface level, these arguments fail to satisfy the balancing of the equities requirement for the issuance of a permanent injunction.

The trial court's decision would require the Sapienzas to incur hundreds of thousands in additional construction costs. Such an outcome is not reasonable when the McDowells could continue to enjoy their fireplace by converting it from wood burning to gas at a substantially lower cost. (*See* TT 6/28/16 at 80:2-12 (Ruff); TT 6/29/16 at 77:16-80:3 (Brad Sorum); TT 6/29/16 231:7-10 (Pierce McDowell); TT 6/30/16 at 78:7-22 (Adam Nyhaug).) Moreover, despite the allegedly significant loss the McDowells suffered as a result of the construction of the Sapienza home, it is worth noting that the McDowells, even after the "issues" with the Sapienza home became apparent, proceeded to invest hundreds of thousands of dollars into their home by building an addition on the west side. (TT 6/28/16 at 190:21-191:7.) Notably, this addition includes a fireplace that, not inconsequently, is gas rather than wood burning. If the harm the McDowells have suffered as a result of the Sapienza home is truly so significant as to justify tearing down the Sapienza home and rebuilding from scratch, one is left to question why the McDowells invested such a large amount of money in their own home without first resolving this issue. Additionally, if converting the subject fireplace into a gas fireplace is not even an option in the eyes of the McDowells, as it will allegedly destroy the historic value of their home, how do the McDowells justify the installation of a gas fireplace in their new addition? The answer – they cannot. The harm that would be suffered by the Sapienzas if the permanent injunction is upheld substantially outweighs any benefit the McDowells would realize from the continued use of their wood burning fireplace. As such, the trial court's decision must be reversed.

Likewise, the McDowells' ability to enjoy more natural sunlight in their home does not outweigh the significant financial burden that granting a permanent injunction would place upon the Sapienzas. If the trial court's decision is allowed to stand, the Sapienzas will be required to invest hundreds of thousands of dollars, *on the low end*, remodeling their home so that the McDowells can have more natural sunlight on the south side of their home. Such a result is, quite simply, absurd. This is especially so, given the fact that the McDowells have failed to establish that they have a right to the sunlight that has allegedly been blocked by the Sapienza home. The majority rule provides that property owners do not have a right to a view unobstructed by neighboring structures. *Kruger*, 564 N.W.2d at 747. As such, because the McDowells do not have a right to natural sunlight on the south side of their home, the harm that would be suffered by the Sapienzas through the grant of a permanent injunction is disproportionate to any benefit the McDowells may receive.

A similar argument can be made with regard to the trial court's finding that the benefits to the McKennan Park Historic District as a whole, particularly the ability to see smoke rising from the McDowell's fireplace and remedying the "disproportionate" size of the Sapienza home, outweigh any harm that would be suffered by the Sapienzas to bring their home into compliance with IRC § R1003.9 and ARSD 24:52:07:04. (SR 1323.) While the ability to see smoke rising from a fireplace is certainly an intangible benefit, to argue that such a relatively minor visual aspect of *one* historic home in the entire McKennan Park Historic District justifies the destruction or substantial remodel, at a cost of hundreds of thousands of dollars or more, of the Sapienza home is, quite simply, incomprehensible. Similarly, there is no evidence that the size of the Sapienza home has adversely impacted the

historic district, especially to such a degree as to justify the significant financial waste that would result from the grant of a permanent injunction.

This conclusion is supported by the South Dakota Supreme Court's decision in *Harksen v. Peska*, 1998 S.D. 70, 581 N.W.2d 170. There, the trial court had ordered the removal of a home built on land in violation of a restrictive covenant. *Harksen*, 1998 S.D. 70, ¶ 10, 581 N.W.2d at 172-73. On appeal, the Court reversed, holding that ordering removal of the home, worth approximately $100,000, was not reasonable where the harm suffered by the plaintiffs was comparably minimal. *Id.* at ¶¶ 33-4, 581 N.W.2d at 176. Applying this reasoning to the present case, issuing an injunction that, in all actuality, will require the Sapienzas to tear down their home and rebuild from scratch at a cost of hundreds of thousands of dollars, if not more, is not reasonable where the benefit to be received by the McDowells and the McKennan Park Historic District as a whole is comparatively minimal.

Further support for this position can be found in this Court's recent decision in *Hoffman v. Bob Law, Inc.*, 2016 S.D. 94, 888 N.W.2d 569. While *Hoffman* involved a physical encroachment, it looked to the same four factor test employed in all injunctive relief cases. In doing so, this Court held that "the fourth factor[, the balancing of the equities,] plays the dominant role in encroachment cases." 2016 S.D. 94, ¶ 15, 888 N.W.2d at 574. This Court went on to state that, while "no one should be permitted to take land of another merely because he is willing to pay a market price for it . . . requiring removal of an encroachment may constitute economic waste if the encroaching structure must be destroyed." *Id.* (internal citations and quotations omitted). As such, the Court adopted "the dominant approach in the encroachment cases[, which] is to balance the relative hardships and equities and to grant or deny the injunction as the balance may seem to indicate." *Id.*

(internal citations and quotations omitted). This approach "encourages the denial of injunctive relief where the expense or hardship to be suffered by the [trespasser] is disproportionate to the small benefit to be gained by the injured party." *Id.* (internal citations and quotations omitted). Thus, "[a] court may deny an injunction if the hardship to the trespasser—e.g., the cost to remove the encroachment and loss of value to the remaining structure—is disproportionate to any benefit gained by the landowner." *Id.*

Applying this test, the Court held that the cost to remove a leach field ($150,000) and obtain an easement for a septic tank ($25,000), which were knowingly built on the wrong property, was disproportionate to any harm that would be suffered by the property owner. *Id.* at ¶ 16, 888 N.W.2d at 574-75. According to the Court, "In this case, removal of the remaining encroachments may be unlike the removal of an entire building or structure at an enormous and disproportionate expense." *Hoffman*, 2016 S.D. 94, ¶ 18, 888 N.W.2d at 575–76 (citing *Amkco, Ltd. v. Welborn*, 130 N.M. 155, 21 P.3d 24, 29 (2001) (denying removal when removal would result in loss of $188,837 in expenses, plus annual profits, and a $1,250,000 project when value of encroached land was $14,700); *Graven v. Backus*, 163 N.W.2d 320, 326 (N.D. 1968) (denying removal when cost to remove and rebuild encroachment was $5,300 and value of the portion of land encroached on was between $8.50 and $9.00)). Therefore, because the balancing of the equities factor is the "dominant factor" considered by the Court, this Court determined that the more appropriate remedy was an award of nominal damages in the amount of $1. *Id.* at ¶¶ 19-20, 888 N.W.2d at 576-77.

If the cost of removing a physical encroachment ($175,000), particularly a septic system, outweighs the benefit that would be obtained by the non-offending property owner,

certainly the ability to continue using a single wood burning fireplace, to see additional sunlight on one side of a home, or to see smoke rising from a chimney, is outweighed by the hundreds of thousands of dollars, or more, that would be required to remodel or rebuild the Sapienza home. As a result, the trial court abused its discretion in granting the McDowells' request for injunctive relief, and its decision must be reversed.

IV. The trial court did not enter sufficient findings of fact or conclusions of law to allow for a meaningful review on appeal.

This Court has long held that "[w]here required, findings [of fact] and conclusions [of law] are necessary so that this Court may review the circuit court's decision to ensure the correctness of its judgment." *Wiswell v. Wiswell*, 2010 S.D. 32, ¶ 6, 781 N.W.2d 479, 481. This Court has further held that "[w]e require some reasonable measure of consistency and exactness in a circuit court's findings as a predicate for adequate appellate review." *Id.* at ¶ 10, 781 N.W.2d at 482 (citing *Eichmann v. Eichmann*, 485 N.W.2d 206, 208 (S.D.1992) (irreconcilable inconsistencies prevent meaningful appellate review); *Wilson v. Wilson*, 434 N.W.2d 742, 744 (S.D.1989) (inconsistencies render findings clearly erroneous and prevent meaningful review)). The findings of fact entered by Judge Pekas lack the exactness required by this Court, and fail to comply with SDCL § 15-6-52(a), which provides, "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall, unless waived as provided in § 15-6-52(b), *find the facts specially and state separately its conclusions of law thereon,* and judgment shall be entered pursuant to § 15-6-58." (Emphasis added). As a result, this matter must be remanded with direction that Judge Pekas enter sufficient findings of fact and conclusions of law to allow for meaningful appellate review.

Injunctive relief is a remedy. Therefore, in order for the trial court to grant injunctive relief, it must have found the allegedly offending party guilty of a particular wrong or wrongs. The wrongs alleged by the McDowells are negligence and nuisance. The trial court, however, never made specific findings regarding either cause of action to justify any remedy being imposed against the Sapienzas, let alone the remedy of injunctive relief.

While each party proposed its own separate findings of fact and conclusions of law, the trial court ultimately rejected those proposals, instead adopting its own findings of fact and conclusions of law consistent with its Memorandum Decision. (SR 1726-29.) The problem is, the trial court did not enter specific findings of fact regarding the McDowells' allegations of negligence or nuisance. (SR 1318 and 1321.) Rather, in the case of the McDowells' negligence claim, the trial court stated:

> A reasonable fact finder may find that the Sapienzas are therefore in violation of a city zoning ordinance, which gives rise to the McDowells' claim for negligence on this matter. For these reasons, the McDowells may maintain their action for negligence against the Sapienzas and there may be a remedy but it might not be adequate."

(SR 1318.) The trial court *was the fact finder*. Thus, it was the trial court's job to determine whether the Sapienzas were or were not negligent. The trial court, however, failed to do so. Instead, the trial court, for reasons that are not entirely clear, decided that "[a] reasonable fact finder *may* find that the Sapienzas" were negligent. (*Id.*) As a result, the trial court's decision granting the McDowells' request for injunctive relief based on the Sapienzas' alleged negligence is premature because there has not been a determination regarding whether or not the Sapienzas were, in fact, negligent.

The same problem exists with the trial court's finding, or, more accurately, lack of a finding, on the McDowells' claim for nuisance. (SR 1321.) In its Memorandum Decision, the trial court stated:

> The court finds that a reasonable fact finder could conclude that negligent or reckless conduct of allegedly violating specific regulations resulting in "an invasion of [the McDowells'] interest in the private use and enjoyment of land[.]" . . . For that reason, the McDowells have sufficiently established that there is a cause of action for statutory nuisance under South Dakota law . . . There may be a remedy but it might not be adequate.

(*Id.*) Again, the trial court *was the fact finder*. Thus, it was the trial court's job to determine whether or not the Sapienzas' conduct amounted to nuisance. Finding that "a reasonable fact finder could conclude" that the Sapienzas were guilty of nuisance, or that "a cause of action for statutory nuisance" exists is not the same as finding that the Sapienzas engaged in conduct amounting to a nuisance. Thus, the trial court's decision granting the McDowells' request for injunctive relief based on the Sapienzas' alleged nuisance behavior is premature, as there has not been a decision regarding whether or not the Sapienzas did, in fact, engage in such behavior.

For these reasons, the trial court's decision should be remanded so that proper findings of fact and conclusions of law may be entered to allow this Court to conduct a meaningful review on appeal.

V. The trial court erred in holding that the Sapienzas' affirmative defense of laches is not supported by the evidence.

In order to prove laches, the Sapienzas must show: "1) [The McDowells] had full knowledge of the facts upon which [this] action was based, 2) regardless of [their] knowledge, [they] engaged in unreasonable delay in commencing suit, and 3) allowing [them] to maintain the action would prejudice other parties." *Tovsland v. Reub*, 2004 S.D.

93, ¶ 28, 686 N.W.2d 392, 402 (citing *Bonde v. Boland*, 2001 S.D. 98, ¶ 17, 631 N.W.2d 924, 927 (other citations omitted)). The Sapienzas appeared before the Board on May 14, 2014, seeking approval of the building plans for their home. (TT 6/29/16 at 254:12-257:17.) Mr. McDowell testified that attorney Tobin appeared at the meeting on the McDowells' behalf, but that he was only there to address the potential removal of a retaining wall between the two properties. (TT 6/29/16 at 221:1-222:7.) He voiced no objection regarding the size, location, or materials to be used in the construction of the Sapienza home. (*Id.*) Thus, the plans for the Sapienza home were unanimously approved. (TT 6/28/16 at 178:14-16.)

Thereafter, the Sapienzas obtained a building permit for their home on or about October 22, 2014, at which point construction began. (TT 6/29/16 at 39:2-8 and 41:17-42:4, Trial Exhibit 13.) No formal action was taken by the McDowells seeking to prevent or stop construction of the Sapienza home, however, until a cease and desist letter was sent and this lawsuit was filed in May 2015, roughly one year after the McDowells first had information available to them regarding the size and location of the Sapienza home, and after the Sapienzas had expended more than $650,000 on the home. (TT 6/28/16 at 101:20-102:3; TT 6/29/16 at 60:2-6 and 95:24-96:1.)

Notably, the McDowells have offered no reason as to why they did not seek to challenge the Board's approval of the Sapienza home prior to May 14, 2015, other than to claim that they thought it was "too late." (TT 6/29/16 at 224:14-225:1.) No evidence, however, was presented confirming this belief. Moreover, Ruff testified that the dimensions, visual appearance, and height of the Sapienza home as built are consistent with the plans submitted to, and unanimously approved by, the Board on May 14, 2014.

(TT 6/28/16 at 69:10-71:9.) Thus, any claim the McDowells may make regarding changes to the size and massing of the Sapienza home between May 14, 2014, and May 14, 2015, are without merit. This conclusion is supported by an August 2014 text message from Mr. McDowell to Mr. Sapienza wherein Mr. McDowell stated, "[I] have to forewarn you that my wife is really suffering about all of this. [T]he home is just way too big for the lot. [Y]ou will move in five years and we [will] live with it forever. [T]ough gig for us. [N]ot your problem or fault . . . just a tough gig for us." (TT 6/29/16 at 234:17-235:23, Trial Exhibit 35.)

Regardless, the facts demonstrate the McDowells, either individually, or through their attorney, had full knowledge of the facts on which this action is based as early as May 14, 2014. Despite that knowledge, the McDowells engaged in unreasonable delay in commencing suit, waiting exactly one year from the date of the original Board meeting to serve their Complaint. During that time, the Sapienzas expended a substantial amount of money in the construction of their home. Thus, allowing the McDowells to proceed with this suit and obtain an injunction from the trial court has significantly prejudiced the Sapienzas, who completed construction on, and moved into, their home more than a year ago. As a result, the McDowells' claims are barred by the doctrine of laches, and the trial court's decision should be reversed.

VI. The trial court erred in holding that the Sapienzas' affirmative defense of assumption of the risk is not supported by the evidence.

"A defendant asserting assumption of the risk must establish three elements: 1) that the plaintiff had actual or constructive knowledge of the risk; 2) that the plaintiff appreciated the character of the risk; and 3) that the plaintiff voluntarily accepted the risk, given the time knowledge, and experience to make an intelligent choice." *Stone v. Von*

Eye Farms, 2007 S.D. 115, ¶ 19, 741 N.W.2d 767, 772 (citations omitted). The harm the McDowells claim to have suffered was possible from the day they purchased their home. The evidence at trial demonstrated that the McDowells were aware that their home was only two feet off the property line, and, therefore, the "harm" they have suffered in this case was always a possibility.

> Q. Now, when you (Mrs. McDowell) purchased your home in 1991, you were aware of the fact that your south setback was only 2 feet from the property line, correct?
>
> A. Correct.
>
> Q. And so you were conscious of the fact -- or presumably you were conscious of the fact that adjoining properties to the south could be placed in relatively close proximity to your south property, correct?
>
> A. Correct.

(TT 6/28/16 at 171:4-12.)

A home with a nonconforming status, such as the McDowell home, opens the possibility to a lower negotiated sale price in recognition of the risks that come with purchasing such a property. No one should be held more responsible for the consequences of owning a nonconforming structure than the owners of the nonconforming structure. The trial court, however, has allowed the McDowells to push that responsibility off onto the Sapienzas by granting the McDowells' request for injunctive relief. This result is contrary to South Dakota law.

> Nonconforming structures and uses do not receive special protection, in fact, South Dakota courts have stated otherwise. The spirit of the zoning ordinance is to restrict rather than to increase any nonconforming use and to secure the gradual elimination of any nonconforming use. A provision of such an ordinance which would allow a continuation of a nonconforming use is to be, and should be, strictly construed and any provisions limiting nonconforming uses should be liberally construed.

Brown Cty. v. Meidinger, 271 N.W.2d 15, 18 (S.D. 1978). The McDowells have had the ability to burn wood in the fireplace connected to their nonconforming home since 1991, and because they did nothing to preserve that ability, they must now suffer the consequences.

CONCLUSION

The trial court erred when it held that IRC § R1003.9 and ARSD 24:52:07:04 apply to the Sapienza home. Because it is the application of those regulations that the trial court relied on in finding for the McDowells on their claims of negligence and nuisance, said findings are not supported by the facts. Additionally, because there is an adequate remedy at law, either by installing a gas insert or compensating the McDowells for the diminution in value to their home, if any, the McDowells cannot satisfy the requirements of SDCL § 21-8-14, and injunctive relief is not warranted.

Even if the McDowells were able to satisfy SDCL § 21-8-14, there is no evidence that the Sapienzas acted in bad faith in the construction of their home. Likewise, the harm that would be suffered by the Sapienzas in bringing their home into compliance with IRC § R1003.9 and ARSD 24:52:07:04 is vastly disproportionate to the benefit that would be gained by the McDowells. As such, injunctive relief is not appropriate.

The trial court's failure to enter specific findings of fact on the McDowells' claims for negligence and nuisance further complicates matters by preventing this Court from conducting a meaningful review on appeal. As such, this matter should, at the very least, be remanded with direction to the trial court to enter appropriate findings of fact and conclusions of law.

Finally, the evidence presented at trial established that the McDowells were aware of the dimensions, visual appearance, and height of the Sapienza home more than a year before they filed suit against the Sapienzas. Likewise, the McDowells knew that their home was built only two feet off of the south property line, and, therefore, another home could be built only seven feet away from their home. As a result, the trial court erred when it found that the Sapienzas' affirmative defenses of laches and assumption of the risk were not supported by the evidence.

For these reasons, the Sapienzas respectfully request that this Court reverse the trial court's decision, and enter an order finding that IRC § R1003.9 and ARSD 24:52:07:04 do not apply to the Sapienza home, that the trial court's findings of negligence and nuisance on the part of the Sapienzas are not supported by the evidence, and that the undisputed facts do not warrant the granting of a permanent injunction. Alternatively, the Sapienzas ask that this Court reverse the trial court's decision, and enter an order finding that the McDowells' claims are barred by the doctrine of laches and/or assumption of the risk. Alternatively, the Sapienzas ask that this Court reverse and remand this matter to the trial court with direction to enter specific findings of fact and conclusions of law on the issues of negligence and nuisance.

REMAINDER OF PAGE INTENTIONALLY LEFT BLANK

Respectfully submitted this 5th day of June, 2017.

MAY & JOHNSON, P.C.

BY /s/ Adam R. Hoier

Richard L. Travis
Adam R. Hoier
6805 S. Minnesota Ave.
P.O. Box 88738
Sioux Falls, SD 57109-8738
(605) 336-2565; Fax: (605) 336-2604
dtravis@mayjohnson.com
ahoier@mayjohnson.com
Attorneys for Defendants/Appellants Joseph Sapienza and Sarah Jones Sapienza, M.D.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Brief of Appellants were served on each of the following by United States mail, first class, postage prepaid thereon, and via e-mail this 5th day of June, 2017:

Steven M. Johnson
Scott A. Abdallah
Ronald A. Parsons, Jr.
Shannon R. Fallon
Johnson, Janklow, Abdallah,
Reiter & Parsons, LLP
P.O. Box 2348
Sioux Falls, SD 57101-2348
steve@johnsonabdallah.com
scott@johnsonabdallah.com
ron@johnsonabdallah.com
shannon@johnsonabdallah.com
Attorneys for Plaintiffs Pierce McDowell and Barbara McDowell

William C. Garry
Melissa R. Jelen
Cadwell, Sanford, Deibert & Garry, LLP
200 E. 10th St. #200
P.O. Box 2498
Sioux Falls, SD 57101
bgarry@cadlaw.com
mjelen@cadlaw.com
Attorneys for Defendant
City of Sioux Falls

/s/ Adam R. Hoier
Adam R. Hoier

CERTIFICATE OF COMPLIANCE

The undersigned, attorney for the Appellants, hereby certifies that this Brief complies with the type volume limitations as stated in SDCL § 15-26A-66(b)(2). The number of words in the Brief totals 9,859 and the number of characters for the same totals 49,922.

/s/ Adam R. Hoier
Adam R. Hoier

APPENDIX

TABLE OF CONTENTS FOR APPENDIX

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
PIERCE McDOWELL and BARBARA McDOWELL, PLAINTIFFS, VS. **JOSEPH SAPIENZA and SARAH JONES SAPIENZA, M.D., CITY OF SIOUX FALLS** DEFENDANTS.	CIV. 15-1320 **JUDGMENT**

The Plaintiffs Pierce and Barbara McDowell commenced this case against the Defendants Joseph and Sarah Sapienza for negligence and nuisance and against the City of Sioux Falls for negligence and inverse condemnation arising out of the construction of the of Sapienza residence at 1323 South Second Avenue, Sioux Falls, South Dakota. The Court previously entered an order on June 27, 2016, bifurcating the remedy phase of the trial such that evidence was heard only on the injunction phase and held that evidence of damages would be heard at a subsequent time only if the Court found that the Plaintiff had an adequate remedy at law. The parties came before the Court for a court trial on June 28-30, 2016. The Plaintiffs were present and were represented by Steven M. Johnson and Shannon R. Falon of Johnson, Janklow, Abdallah, Reiter & Parsons, LLP. Defendants Joseph Sapienza and Sarah Jones Sapienza, M.D. were also present and were represented by Richard L. Travis and Ryan Peterson of May & Johnson, P.C. Defendant City of Sioux Falls was present through representative Ron Bell and represented by William Garry of Cadwell, Sanford Deibert & Garry, LLP. The Court, having considered all of the evidence and the

file in its entirety, and the Court having previously issued a Memorandum Decision and Order dated December 27, 2016, and having entered Findings of Fact and Conclusions of Law dated the 17th day of March, 2017; it is now hereby:

ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiffs have no adequate remedy at law and therefore they are GRANTED a permanent injunction pursuant to SDCL 21-8-14.

2. Defendants Joseph and Sarah Sapienza must bring their residence into compliance with South Dakota Administrative Rule 24:52:07:04, the Secretary of the Interior Regulations for new construction in historic districts, and the chimney clearance building code IRC R1003.9, curing all violations found by this Court. (Exs. 27, 28, and 43).

3. Defendant City of Sioux Falls is GRANTED judgment on Plaintiffs' Pierce and Barbara McDowells' claim against it for inverse condemnation.

4 . Pursuant to SDCL 15-6-54(d), costs in the amount of $_____ are taxed against the Defendants and awarded to the Plaintiffs.

Dated this 17 day of March, 2017.

BY THE COURT:

Honorable John Pekas
Circuit Court Judge

ATTEST: Angelia M. Gries, Clerk of Courts

By: _____ DEPUTY

FILED
MAR 20 2017
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
PIERCE McDOWELL and BARBARA McDOWELL, PLAINTIFFS, VS. **JOSEPH SAPIENZA and SARAH JONES SAPIENZA, M.D., CITY OF SIOUX FALLS** DEFENDANTS.	CIV. 15-1320 ORDER ON OBJECTIONS TO PLAINTIFF'S AND DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come before the court for hearing on March 13, 2017, and the Court having heard all of the argument of counsel on the Plaintiff's and the Defendant's Proposed Findings of Fact and Conclusions of Law sustains in part Defendant's objections to Plaintiff's proposed Findings of Fact and Conclusions of Law and sustains in part Plaintiff's objections to the Defendant's proposed Findings of Fact and Conclusions of Law.

1. Plaintiffs Proposed Findings of Facts.

The court finds the following:

a. Findings #32 and #96 are the same.
b. Findings #33 and #98 are the same.
c. Finding #77 is the same as Conclusion #103.
d. Finding #78 is the same as Conclusion #104 .
e. Finding #79 is the same as Conclusion #105 .
f. Finding #80 is the same as Conclusion #106 .
g. Finding #81 is the same as Conclusion #107 .
h. Finding #82 is the same as Conclusion #108 .
i. Finding #83 is the same as Conclusion #109 .
j. Finding #84 is the same as Conclusion #110 .
k. Finding #85 is the same as Conclusion #111 .
l. Finding #86 is the same as Conclusion #112 .
m. Finding #87 is the same as Conclusion #113 .
n. Finding #88 is the same as Conclusion #114 .

o. Finding #89 is the same as Conclusion #115 .
p. Finding #90 is the same as Conclusion #116 .
q. Finding #91 is the same as Conclusion #117 .
r. Finding #56 is the same as Conclusion #149.
s. Conclusion of Law #83 is contrary to the Memorandum Decision.
t. Conclusion of Law #84 is contrary to the Memorandum Decision.
u. Conclusion of Law #85 is contrary to the Memorandum Decision.

The court rejects the Plaintiff's Proposed Findings of Fact and Conclusions of Law.

2. Defendant Sapienza's Proposed Findings of Fact and Conclusions of Law.

The court finds the following:

a. Findings #8 is contrary to the Memorandum Decision.
b. Findings #12 is contrary to the Memorandum Decision.
c. Finding #63 is contrary to the Memorandum Decision.
d. Finding #65 is contrary to the Memorandum Decision.
e. Conclusion of Law #17 is contrary to the Memorandum Decision.
f. Conclusion of Law #20 is contrary to the Memorandum Decision.
g. Conclusion of Law #26 is contrary to the Memorandum Decision.
h. Conclusion of Law #28 is contrary to the Memorandum Decision.
i. Conclusion of Law #29 is contrary to the Memorandum Decision.
j. Conclusion of Law #30 is contrary to the Memorandum Decision.
k. Conclusion of Law #35 is contrary to the Memorandum Decision.
l. Conclusion of Law #36 is contrary to the Memorandum Decision.
m. Conclusion of Law #37 is contrary to the Memorandum Decision.
n. Conclusion of Law #41 is contrary to the Memorandum Decision.
o. Conclusion of Law #42 is contrary to the Memorandum Decision.
p. Conclusion of Law #43 is contrary to the Memorandum Decision.
q. Conclusion of Law #44 is contrary to the Memorandum Decision.
r. Conclusion of Law #46 is contrary to the Memorandum Decision.
s. Conclusion of Law #47 is contrary to the Memorandum Decision.
t. Conclusion of Law #48 is contrary to the Memorandum Decision.
u. Conclusion of Law #49 is contrary to the Memorandum Decision.
v. Conclusion of Law #63 is contrary to the Memorandum Decision.
w. Conclusion of Law #65 is contrary to the Memorandum Decision.
x. Conclusion of Law #66 is contrary to the Memorandum Decision.

The court rejects Defendant Sapienza's Proposed Findings of Fact and Conclusions of Law.

3. Defendant City of Sioux Falls Proposed Findings of Fact and Conclusions of Law.

The court finds the following:

a. Findings #5 is contrary to the Memorandum Decision.
b. Conclusion of Law #13 is contrary to the Memorandum Decision.
c. Conclusion of Law #19 is contrary to the Memorandum Decision.
d. Conclusion of Law #22 is contrary to the Memorandum Decision.
e. Conclusion of Law #23 is contrary to the Memorandum Decision.
f. Conclusion of Law #24 is contrary to the Memorandum Decision.
g. Conclusion of Law #25 is contrary to the Memorandum Decision.
h. Conclusion of Law #37 is contrary to the Memorandum Decision.
i. Conclusion of Law #54 is contrary to the Memorandum Decision.
j. Conclusion of Law #60 is contrary to the Memorandum Decision.
k. Conclusion of Law #61 is contrary to the Memorandum Decision.
l. Conclusion of Law #62 is contrary to the Memorandum Decision.
m. Conclusion of Law #64 is contrary to the Memorandum Decision.
n. Conclusion of Law #65 is contrary to the Memorandum Decision.
o. Conclusion of Law #66 is contrary to the Memorandum Decision.

The court rejects the Defendant City of Sioux Falls Proposed Findings of Fact and Conclusions of Law.

IT IS HEREBY ORDERED ADJUDGED AND DECREED as follows:

1. The court rejects the Plaintiff's Proposed Findings of Fact and Conclusions of Law.

2. The court rejects the Defendant Sapienza's Proposed Findings of Fact and Conclusions of Law.

3. The court rejects the Defendant City of Sioux Falls Proposed Findings of Fact and Conclusions of Law.

4. The court adopts its own Findings of Facts and Conclusions of Law consistent with the Memorandum Decision.

Dated this 17 day of March, 2017.

BY THE COURT:

Honorable John Pekas
Circuit Court Judge

ATTEST: Angelia M. Gries, Clerk of Courts

By: _____
DEPUTY

FILED
MAR 20 2017
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
PIERCE McDOWELL and BARBARA McDOWELL, PLAINTIFFS, VS. **JOSEPH SAPIENZA and SARAH JONES SAPIENZA, M.D., CITY OF SIOUX FALLS** DEFENDANTS.	CIV. 15-1320 Memorandum Decision and Order

A hearing was held on June 28-30, 2016, before the Court, Hon. John Ryan Pekas, Circuit Judge presiding, on the Plaintiff's bifurcated trial for injunctive relief, the Plaintiff were represented by Steven M. Johnson and Shannon R. Falon of Johnson, Janklow, Abdallah, Reiter & Parsons, LLP. Defendants Joseph Sapienza and Sarah Jones Sapienza, M.D. were represented by Richard L. Travis of May & Johnson, P.C. Defendant City of Sioux Falls was represented by William Garry of Cadwell, Sanford Deibert & Garry, LLP. Prior to trial, the court granted an Order sought by Plaintiffs Pierce McDowell and Barbara McDowell (the "McDowells") bifurcating the remedy phase of the trial. The parties submitted written briefs on September 27, 2016, with supplemental letter briefs on December 16 and December 20, 2016. As a result, this court has reviewed the evidence presented at trial as well as the post-trial briefs that were subsequently filed. After thoughtful review, the court finds that the McDowell's are entitled to injunctive relief requiring the Defendants Joseph Sapienza and Sarah Jones Sapienza (the "Sapienzas") must bring their residence into compliance with the Administrative Rules of South

Dakota 24:52:07:04 and Secretary of the Interior Regulations regarding the requirements for new construction in historic districts (Exhibit 27 and 28) or rebuild it.

Additionally, the court was presented with Plaintiffs' claims against Defendant City of Sioux Falls ("the City") for inverse condemnation and negligence. The court finds that Plaintiffs' claim against the City for inverse condemnation is not supported by the evidence, but Plaintiffs could maintain their cause of action against the City for negligence but are precluded due to the granting of the permanent injunction.

FACTUAL BACKGROUND

The McDowells have lived at their residence at 1321 South Second Avenue, Sioux Falls, South Dakota, in the McKennan Park Historic District for the past twenty-four years. Their residence was originally constructed in 1924 and is listed on the National Register of Historic Places. The McDowell residence is also a landmark property possessing architectural significance that merits distinction as a historic property and is listed on the National Register of Historic Places regardless of the location within a historic district.

McKennan Park became a historic district listed on the National Register of Historic Places in 1984. (Ex. 50). The McKennan Park Historic District certainly holds special meaning for many residents of the City of Sioux Falls and gives "roots" to the residents who call the park home. The nomination form to place the McKennan Park Historic District on the National Register described the area as follows:

> A strong sense of unity is evident in the McKennan Park District. This neighborhood consists of well maintained houses and landscaped yards. Very few of the front facades of these homes have been altered, and many of the houses have been in the possession of only one or two families since they were built. The attractive landscaping and many large trees of the park and boulevard contribute to the cohesive character and sense of neighborhood in the McKennan Park District

(Ex. 60). The McDowells submit to this Court that the cohesive character of McKennan Park remains intact today.

At the time the McDowells' residence was built, zoning ordinances only required a two-foot setback off the property line, and the residence was built exactly two feet from the property line on the south side of the lot on which it sits. Over time the zoning ordinances changed, but the McDowells' property was grandfathered into compliance with those new ordinances.

In 2013, the Sapienza's purchased the lot at 1323 South Second Avenue, which was located immediately to the south of the McDowells' property. The Sapienza's hired Bob Natz to design the residence they wished to build on the property. Mr. Natz, the original designer of the Sapienza residence understood and embraced the historical significance of designing a residence to be constructed in the McKennan Park Historic District. Mr. Natz was aware of the state administrative regulations and Secretary of the Interior Regulations regarding the requirements for new construction in historic districts. (Exhibit 27 and 28) Mr. Natz toured the historic district with the Sapienza's to review the architectural styles to help guide their design process. Mr. Natz testified, "Mckennan Park is a very important area for the town. It's very important to me. It needs to - anybody that designs or builds in that neighborhood has to have a level or social responsibility and verse themselves in the community and look around the try to fit themselves in. (T.T. June 29, 2016, p. 165-166). On May 14, 2014, Mr. Natz presented the Sapienza's with the potential design for their residence, which they eventually accepted. On May 14, 2014, the Sapienzas' proposal to raze the existing residence on the property and construct a new residence with the plans designed by Mr. Natz was submitted to the Sioux Falls Board of Historic Preservation (the "Board").

Mr. Natz and the Sapienza's had a disagreement and ultimately he was terminated. The design plans were not complete. One issue of concern from Mr. Natz was the need for a proper survey of the property. Mr. Natz pressured Mr. Sapienza about the need for the survey. Mr. Sapienza failed to allow Mr. Natz to engage a surveyor and told Mr. Natz that he knew a surveyor and he would take care of it. [1] (Exhibit 69) Mr. Natz recalled that the name of the surveyor was Chuck Hansen and in all his years he never heard of anyone that performed surveys by that name. After the dismissal of Mr. Natz, he received a desperate request to provide renderings of his designs to the Sapienza's because they were presenting their plans to the Sioux Fall Board of Historic Preservation Board. The Board had to grant approval. Mr. Natz prepared the renderings and gave them to the Sapienza's. (Exhibit 29) The renderings were merely drawings that implied the appearance of the structure not actual construction. The renderings had trees to the north which implied there would be space for trees. There was no agreement as to the setbacks between the residences with varying lengths of seven (7) to eleven (11) feet on May 7, 2014. (Exhibit 75) Mr. Natz knew of the ten foot space setback requirement for a fireplace which was on the south side of the McDowell residence. Mr. Natz did not attend the meeting of the Board and only Mr. Sapienza attended on May 14, 2014.

At the hearing with the Board, the renderings were presented. The Board asked several questions, and applied the standards produced to them from staff at the city for historic districts that derive from the Administrative Rules of South Dakota ("ARSD") and Secretary of the Interior Regulations regarding the requirements for new construction in historic districts. (Exhibit 27 and 28) The Board had the regulations but have not applied them. Specifically,

---

1 Joseph Sapienza obtained his relator license in South Dakota but is not actively selling real estate.

> Massing, size and scale of new construction **must be compatible with surrounding historic building.(emphasis added)** Overall architectural features of new construction must be of contemporary design which does not directly mimic historic buildings. Architectural elements such as windows, doors, and cornices must be similar in rhythm, pattern, and scale to comparable elements and adjacent historic buildings. **The overall visual appearance of new construction may not dominate or be distracting to the surrounding historic landscape. (emphasis added)**

ARSD 24:52:07:04. (Exhibit 28 no. 1) There are height regulations that must also be applied by the Board. Specifically, "The height of new buildings or additions to existing buildings **may not exceed a standard variance of 10% of the average height of historic buildings (emphasis added)** on both sides of the street where proposed new construction is to be located." (Exhibit 28 no. 2) The Board members testified that they were not specifically aware of these regulations at the hearing for the Sapienza's. Prior Chairperson, Dixie Hieb, testified that the adjacent property, the McDowell's, must be considered to determine the height for the standard variance. This was not done for the Board. The Secretary of the Interior Regulations requires for related new construction in historic districts that ". . . related new construction **shall not destroy historic materials that characterize the property. (emphasis added)** The new work shall be differentiated from the old and shall be compatible with the . . . scale, and architectural features to protect the historic integrity of the property and its environment." (Exhibit 27 no. 9) This was not considered in relationship with the McDowell property and the close proximity of their fireplace to the Sapienza's.

Without the required information, the Board approved the proposal. After getting approval, Mr. Sapienza sent requests to various contractors to redraw the approved plans including moving the proposed house one (1) to two (2) feet closer to the McDowell property. Specifically, he requested on June 6, 2014,"Would like to see the house slid to the north 1-2 feet to give us an extra foot or 2 of driveway space on the south side if set back allows." (Exhibit 8

no. 7) Out of concern, Dick Sorum warned the Sapienza's on June 20, 2014, that there were problems with moving the house closer to the McDowell's as well as the size of the house. He wrote,

> Josh,
>
> I had to go to the city for a building permit for some folks, so I talk to the zoning people and the gal gave me a copy of the zoning for your area. I put that copy in the mail box at 1323 S. 2nd it appears to me that **the house as drawn is too tall for the lot. (emphasis added)** The drawings show about 41' tall and the city allows 35'. **The setback is five on the north lot line. If you hope to go closer to the lot line, then you have to apply for a variance. (emphasis added)**
>
> I talked to Dennis and he will meet with us some day after work. That way your wife may be able to join us. He is fishing right now so I will let you know what will work for him and see if that works for you folks.
>
> Dick

(Exhibit 7) This warning was sent on June 20, 2014. After receipt of this email, the Sapienza's had Dick Sorum redraw the plans which were previously approved by the Board. There is a dispute as to whether the redrawn plans were ever re-approved by the Board.

The Sorum's were not familiar with the guidelines regarding constructing residences in historic districts. They had never built a residence in a historic district before taking on the Sapienza project. (T.T. June 29, 2016, P. 37, 90-91). Dick Sorum testified that he did not even know that there was a height limitation in historic districts that differed from the Sioux Falls zoning ordinance's height restriction. (Id., p. 91). Despite this lack of knowledge and experience, the Sorum's redrew Natz's copyrighted plans for the Sapienza residence. The plans deviated from the plans that had already been approved by the Board. (Id., p. 99). The new plans resulted in several violations of the requirements the code for construction of new residences mandated in historic districts. (Exhibit 58) Brad Sorum testified that the new plans that his father prepared

which altered Natz's plans were approved by the liaison to the Board. Brad Sorum testified that when he and his father went to the City historic office regarding the change in the plans, he explained that the lady that approved the building plans was out-of-town. So at that time, they left paperwork there and then sometime after that, Dick Sorum went back after the person that approved the building plans got back in town and that's all he knew about it. (T.T. June 29, 2016, P. 83). Brad Sorum testified at trial that he now remembers a ten-minute conversation with this unknown lady where they allegedly discussed the changes to the plans and she apparently gave her approval. (Id., p. 65-66). Dick Sorum testified at trial consistent with Brad Sorum's first version of events that the woman that they needed to speak to was not present in the office. So they simply left the plans and no discussion took place. (Id., P. 109). No City officials testified that they had a conversation with the Sorum's regarding the new plans. Debra Gaikowski was the city liaison to the Board of Historic Preservation at the time in question. She testified but was not asked if the new plans were approved. (T.T. June 30, 2016 pp. 52-66). According to the Plaintiff's expert, Spencer Ruff, the Sapienza's had an obligation to take their project back before Board for approval after they made so many changes to the plans. (T.T. June 28, 2016 p. 44)

Mr. Sapienza met with Mr. McDowell over drinks and presented the plans to Mr. McDowell in August of 2014. Mr. McDowell later sent a text message to Mr. Sapienza,

> i have to forewarn you that my wife is really suffering about all of this. the home is just way too big for the lot. you will move in five years and we live with it forever. tough gig for us. not your problem or fault... just a tough gig for us. [sic]

(Exhibit 35) There was little communication regarding the plans after the text.

On October 22, 2014, the City issued a building permit to the Sapienza's to begin construction of their residence, which appeared to comply with the thirty-five foot (35')

maximum height and five-foot (5') minimum side yard setback requirements pursuant to City of Sioux Falls Ordinance § 160.094. The construction of the residence began with pouring foundation in November of 2015.

During construction of the Sapienzas' residence, the McDowell's grew worried about how close it was to the lot line on the south side of the property. Ms. McDowell contacted the fire department over the Sapienza residence's close proximity to their fireplace. After review, the fireplace was within ten (10) feet of the Sapienza residence. The fire department ticketed the McDowell's and ordered them not to use their historic fireplace or risk all damages resulting from it. (Exhibit 23) The McDowell's decided to retain Attorney Steve Johnson in regard to their belief that something needed to be done about the Sapienzas' construction of their residence. On May 8, 2015, Attorney Johnson sent a cease and desist letter to the Sapienza's, advising them to stop the construction of their residence or else bear the responsibility of having to defend a potential legal action.[2] The letter referenced that the McDowells' house may be found to be noncompliant with the residential building as a result of construction on the Sapienzas' residence. Despite this letter, the construction of the residence continued. Brad Sorum testified that he reviewed the letter and would continue to build until the property owner, Mr. Sapienza, told him to stop. Mr. Sapienza testified that he was relying on Mr. Sorum to tell him he should

---

[2] The entire contents of the letter stated:

Dear Mr. & Mrs. Sapienza:

This law firm has been retained by Pierce and Barbara McDowell in connection with the issues surrounding your home construction and its encroachment upon their property. We request that you immediately cease and desist all construction on the property located at 1323 South Second Avenue, Sioux Falls, SD. As a result of the construction of your lot, the McDowell residence has been allegedly found to be non-compliant with the residential building code, and the McDowells have been informed by the City of Sioux Falls that they are not permitted to utilize their fireplace or their chimney. Moreover, we believe your home fails to comply with the zoning code with respect to height restrictions and applicable setbacks. Should you choose to continue to pursue construction at 1323 South Second Avenue, you will be doing so at your own risk as we intend to file legal action and pursue all remedies available at law.

stop building. The result was that the house continued to be built because the owner and builder never discussed the cease and desist letter and the potential ramifications.

Ultimately, the residence was completely constructed five feet from the north side of the lot line, creating a space of just seven feet between the Sapienzas' residence and the McDowells' residence. While the Sapienza's residence is in compliance with the applicable building codes and zoning ordinances provided by the City, the McDowell's claim that the Sapienzas' residence does not comply with the applicable ARSD with regard to height, mass, and scale. Additionally, as a result of the height of the Sapienzas' residence and the close distance from the McDowells' residence, the McDowell's are no longer able to use their wood fireplace because it has become a fire hazard.[3] The McDowell's claim that this is detrimental to the historic and sentimental value of their residence as it would force them to replace the existing fireplace with a gas fireplace in order to conform with the building codes which may not be supported by the fireplace design. Additionally, the McDowell's contend that the height of the Sapienzas' residence blocks a substantial amount of natural sunlight from the south that reaches the McDowells' residence and invades the privacy of their residence by having windows that overlook windows into the McDowells' residence, notably into the bedroom and bathroom of the McDowells' eleven-year old daughter.

Several property owners in the McKennan Park Historic District had great concern over the Sapienza residence. Carla Williams testified that she considers the requirements for the historic district important and she takes them seriously. When she decided to redo her kitchen,

---

[3] Ron Bell, the Chief Building Official for the City of Sioux Falls, testified at trial that the residential housing code requires that where there is a wood burning fireplace, the termination of the chimney has to be at least two feet above any portion of a roof within 10 feet of that chimney termination, which would apply to the use of the McDowells' wood fireplace. T.T. June 28, 2016 at 217.

there was an issue regarding a window that faced her garage. It took over three (3) years to save the money to have the construction done within the requirements of the historic district. The permissiveness of the city and the looming Sapienza residence causes Ms. Williams to feel as she is a "sitting duck" for the next non-compliant builder. Todd Nelson testified that he lived for over twenty-seven (27) years in the historic district. He testified that the Sapienza residence is non-conforming in the historic district. Lisa Nykamp testified that she lived in the historic district. She is in the business of buying and selling properties. She sought to purchase the McDowell residence prior to the Sapienza house being built. She informed the McDowell's to call her when they were going to sell if they were ever going to sell their house. She toured the house and appreciated the natural sunlight and character of the residence. At one point they negotiated the selling of the residence, but they had to back out at the time due to extenuating circumstances. At the time, they were offering $950,000 to $975,000 for the residence. After she noticed the Sapienza construction, she received a call from the McDowell's that they were interested in selling. Ms. Nykamp saw the looming structure adjacent to the McDowell residence. She spent over 80 minutes in the McDowell residence. The natural sunlight was gone due to the Sapienza residence. The interior of the residence was no longer light but very dark. She opened the upstairs window and could touch the scaffolding of the Sapienza house with her hand. Ms. Nykamp testified she cried because the house she sought no longer existed. After speaking with her husband, they thought to offer half of what the McDowell's wanted but reconsidered. Ms. Nykamp testified she couldn't live there.

The McDowell's engaged the services of Spencer Ruff. Mr. Ruff is an expert in the area of historic districts and architecture. After careful review of the Sapienza residence and the McDowell residence, he determined there were violations of state administrative regulations and

regulations from the interior department. Mr. Ruff determined that the McDowell is a landmark residence with structural significance. (Exhibit 60) He reviewed the construction and determined that it violated state administrative regulations. Specifically,

> Massing, size and scale of new construction **must be compatible with surrounding historic building.(emphasis added)** Overall architectural features of new construction must be of contemporary design which does not directly mimic historic buildings. Architectural elements such as windows, doors, and cornices must be similar in rhythm, pattern, and scale to comparable elements and adjacent historic buildings. **The overall visual appearance of new construction may not dominate or be distracting to the surrounding historic landscape. (emphasis added)**

(Exhibit 28 no. 1) Mr. Ruff testified that the Sapienza residence was dominating compared to the other residence adjacent to it. Mr. Ruff testified that the height regulations are violated by the Sapienza residence. Specifically, "The height of new buildings or additions to existing buildings **may not exceed a standard variance of 10% of the average height of historic buildings (emphasis added)** on both sides of the street where proposed new construction is to be located." (Exhibit 28 no. 2) Mr. Ruff determined that the height of the Sapienza residence measured from the front step to the top gable was 44.50'. The average height of the adjacent residences was 36.08' which resulted in the Sapienza exceeding the height regulations by 8.42 feet. (Exhibit 62) Mr. Ruff reviewed the Secretary of the Interior Regulations for related new construction in historic districts that ". . . related new construction **shall not destroy historic materials that characterize the property. (emphasis added)** The new work shall be differentiated from the old and shall be compatible with the . . . scale, and architectural features to protect the historic integrity of the property and its environment." (Exhibit 27 no. 9) He expressed concern over the new construction and the effect on the integrity of the use of the McDowell fireplace. (T.T. June 28, 2016 p. 46) Before the construction, smoke from the fireplace could be observed in the historical context of the neighborhood. The Sapienza house

robbed the public of observing the smoking fire place in the context of the historic district and the McDowell residence as a landmark historic property.

On May 13, 2015, during construction of the Sapienzas' residence, the McDowell's brought this lawsuit against the Sapienza's and the City. The McDowell's claim that they are entitled to permanent injunctive relief from the Sapienza's on the grounds of negligence and private or public nuisance, and are entitled to relief from the City on the grounds of negligence and inverse condemnation.

Additional facts will be added as necessary.

ANALYSIS

Injunctive Relief

The McDowell's seek injunctive relief in their favor on the theories of negligence and nuisance.

1. Standard of Review

The standard for a trial court's determination of whether a plaintiff is entitled to injunctive relief is well-established. *Hoffman v. Bob Law, Inc.*, 2016 SD 94, ___ N.W.2d ___. (citing *Magner v. Brinkman*, 2016 S.D. 50, ¶ 19, 883 N.W.2d 74, 82-83.) The court must first determine whether an injunction was statutorily authorized under SDCL 21-8-14, a question of law reviewed de novo. *Magner v. Brinkman*, ¶ 19, 883 N.W.2d at 83. Furthermore,

> Granting or denying an injunction rests in the sound discretion of the trial court. We will not disturb a ruling on injunctive relief unless we find an abuse of discretion. An abuse of discretion can simply be an error of law or it might denote a discretion exercised to an unjustified purpose, against reason and evidence.

Halls v. White, 2006 S.D. 47, ¶ 4, 715 N.W.2d 577, 579 (quoting *Hendrickson v. Wagners, Inc.*, 1999 SD 74, ¶ 14, 598 N.W.2d 507, 510-11) (citations omitted). The trial court's findings of fact will be reviewed under a clearly erroneous standard, while conclusions of law are reviewed de novo. *Id.*

2. Negligence

The McDowell's first claim the Sapienza's are liable for negligence with respect to the violations of the standards for constructing residences in a historic districts and violations of the chimney code regarding setback requirements. Negligence is the breach of a duty owed to another, the proximate cause of which results in an injury. *Lindblom v. Sun Aviation, Inc.*, 2015 S.D. 20, ¶ 19, 862 N.W.2d 549, 555. In order to prevail on a claim for negligence, the plaintiff must prove four elements: (1) duty, (2) breach of that duty, (3) causation, and (4) damages. *Hamilton v. Sommers*, 2014 S.D. 76, ¶ 21, 855 N.W.2d 855, 861-62 (citing *Bernie v. Catholic Diocese of Sioux Falls*, 2012 S.D. 63, ¶ 15, 821 N.W.2d 232, 240).

The McDowell's contend that the Sapienza's had a statutory duty to follow the law when constructing their residence and they breached that duty by failing to comply with the administrative rules for historic districts. ARSD 24:52:07:04. The standard for constructing a residence in the McKennan Park Historic District is established by the administrative regulations. Specifically, the McDowell's argue that the measured height of the Sapienza residence to be 44.50 feet tall, while the South Dakota Administrative Code only allowed the residence to be 36.08 feet tall. Under the administrative rules, the McDowell's argue that the

Sapienza residence is 8.42 feet taller than what is permitted under South Dakota law.[4] ARSD 24:52:07:04.

The Sapienza's argue that the administrative rules have no application to this case because the lot on which their residence sits is not listed on either the state or national registers of historic properties. ARSD 24:52:07:04. The Sapienza's cite to testimony from the McDowells' expert, Spencer Ruff, who stated that the residence that was previously located on the land now occupied by the Sapienza's was not listed as a historic property and that "[t]he home has no significance historically." (T.T. June 28, 2016 at 52.) The Sapienza's argue that Sioux Falls Zoning Ordinances should apply, which their residence would be in compliance with rather than the administrative rules. Under their theory, then the Sapienza's would be correct that there was no breach of duty. The result is that the McDowell's would not be successful in their claim for negligence.

The McDowell's correctly point to the language in the administrative rules which states that "[n]ew construction or additions within a historic district must comply with The Secretary of the Interior's Standards for the Treatment of Historic Properties as incorporated by reference in § 24:52:07:02." ARSD 24:52:07:04. The administrative rules list eleven criteria that must be followed when constructing a new residence in a historic district, even if at the time the regulation is invoked, there is no residence in existence yet. The McDowell's further state that

---

[4] ARSD 24:52:07:04(2) states:
Height. The height of new buildings or additions to existing buildings may not exceed a standard variance of ten percent of the average height of historic buildings on both sides of the street where proposed new construction is to be located[.]
The average height of existing

homes in the area was 32.84 feet, and a ten percent variance in that height as permitted by the variation would only allow the home to be 36.08 feet tall at its highest point. *See* Trial Exhibit 62.

the regulation would be a nullity if applied only to properties listed on the state or national register, as residence that have not been built yet would obviously be overlooked.

The court finds that is unreasonable for the Sapienza's to contend their residence is not within the historical district. Even if the property was not listed on the state or national historical register, it is apparent that the Sapienza's were aware, or at least should have been aware, that their property was part of a historic district. Several jurisdictions looking at a common scheme or plan in a residential area have found an enforceable restrictive covenant where it is sufficiently implied by the conduct and expectations of the parties or is known to the buyer. *See, e.g., Skyline Woods Homeowners Ass'n, Inc. v. Broekemeier*, 758 N.W.2d 376 (Neb. 2008); *Shalimar Ass'n v. D.O.C. Enterprises, Ltd.*, 142 Ariz. 36, 688 P.2d 682 (Ariz.App.1984); *Ute Park Summer Homes Ass'n v. Maxwell Land Gr. Co.*, 427 P.2d 249 (N.M. 1967). Allowing for a violation of a restrictive covenant or administrative rule regarding historic districts when the scheme or plan is apparent would render these types of regulations meaningless. As a result, the McDowell's are correct in their assertion that there may be a remedy for negligence against the Sapienza's for their violations of historical district requirements.

Further, the McDowell's contend that the Sapienza's are also liable for negligence for their violation of the chimney code regarding setback requirements. The McDowell's argue that when there is a conflict between building regulations, the resolution must be in favor of the stricter regulation. SDCL § 11-4-6. Under that statute, the McDowell's assert that it was necessary for the Sapienza's to construct their residence a sufficient distance from the McDowell residence to leave a minimum ten-foot clearance for the McDowells' chimney. IRC Section R1003.9. The Sapienza's argue that residential code does not apply to setbacks, as it only provides that chimneys should be at a required height. IRC Section R1003.9. Instead, they

contend that Sioux Falls Zoning Ordinance ("SFZO") Section 160.094, which requires a setback of five feet for side yards, is the only setback regulation that is applicable, because under SDCL § 11-4-6, there is no conflict between the SFZO and the IRC Sections.

While the Sapienza's are correct that there is no direct conflict between SFZO Section 160.094 and IRC Section R1003.9, a collateral conflict arises between the two regulations in the present situation. Here, the IRC Section R1003.9 requirement that there is clearance for a chimney for any building that is within ten (10) feet of another building creates a conflict with SFZO Section 160.094 requiring the five foot setback, even though the two regulations are not in absolute conflict. Because the residence are seven (7) feet apart in accordance with SFZO Section 160.094, but IRC Section R1003.9 is still being violated, SDCL § 11-4-6 should be broadly construed to recognize the possibility of this type of discrepancy. A reasonable fact finder may find that the Sapienza's are therefore in violation of a city zoning ordinances, which gives rise to the McDowell's claim for negligence on this matter. For these reasons, the McDowell's may maintain their action for negligence against the Sapienza's and there may be a remedy but it might not be adequate.

3. Nuisance

The next contention the McDowell's allege is that the Sapienza's are liable not only for negligence, but also under the theory of nuisance for violations of the historic district requirements and for violating setback requirements. "A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either . . . [a]nnoys, injures, or endangers the comfort repose, health, or safety of others; offends decency; . . . [or] [i]n any way renders other persons insecure in life, or in the use of property." SDCL § 21-10-1. A public nuisance "affects at the same time an entire community or neighborhood, or any considerable

number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal[,]" while "[e]very other nuisance is private." SDCL § 21-10-3. The remedy for a nuisance can either be an injunction, damages, or both. SDCL § 21-10-9. "[T]he existence of a nuisance is subject to a rule of reason. It involves the maintenance of a balance between the right to use property and the right to enjoy property unaffected by others' uses." *Prairie Hills Water and Development Co. v. Gross*, 2002 S.D. 133, ¶ 30, 653 N.W.2d 745, 752 (citing *Aberdeen v. Wellman*, 352 N.W.2d 204, 205 (S.D. 1984)). "This rule of reason requires that a nuisance must be a condition that 'substantially invades and unreasonably interferes with another's use, possession, or enjoyment of his land.'" *Id.* (citing *Greer v. City of Lennox*, 107 N.W.2d 337, 339 (S.D. 1961)).

The court finds that a reasonable fact finder could conclude that the Sapienza's have violated historic requirements in the McKennan Park Historic District, which disrupts the character of the neighborhood and does not fit the size and space requirements under current regulations. Additionally, such a fact finder could find that a violation of the setback requirements by the Sapienza's resulted in the McDowell's effectively having no use for their fireplace and a blockage of natural light into their residence. The McDowell's allege that this establishes common law nuisance and that an injunction should be granted.

The South Dakota Supreme Court, using the Restatement (Second) of Torts, has identified the conduct that may give rise to a claim of nuisance:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Atkinson v. City of Pierre, 2005 S.D. 114, ¶ 13, 706 N.W.2d 791, 796 (citations omitted). The court finds that the McDowell's established a prima facie claim for common law nuisance by establishing their prima facie claim against the Sapienza's for negligence. The court finds that a reasonable fact finder could conclude the negligent or reckless conduct of allegedly violating specific regulations resulted in "an invasion of [the McDowells'] interest in the private use and enjoyment of land[.]" *Id.* For that reason, the McDowell's have sufficiently established that there is a cause of action for statutory nuisance under South Dakota law. SDCL § 21-10-1. There may be a remedy but it might not be adequate.

4. Proper Form of Relief

Because the McDowell's have established that there are causes of action against the Sapienza's for negligence and nuisance, the court must next look to the proper form of relief. The matter before the court at this interval is whether the McDowell's are entitled injunctive relief, requiring the Sapienza's to reconstruct or relocate their residence in order to satisfy their breach of law or resolve the alleged nuisance. Under South Dakota law, a permanent injunction may be granted under certain specified circumstances: "(1) Where pecuniary compensation would not afford adequate relief; (2) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief; (3) Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or (4) Where the obligation arises from a trust." SDCL § 21-8-14. The McDowell's are claiming that pecuniary compensation would not afford them adequate relief to appropriately remedy the loss of use and enjoyment of their land.

The South Dakota Supreme Court has instructed courts to evaluate four factors when considering injunctive relief. *Hoffman v. Bob Law, Inc.*, 2016 S.D. 94, ¶12, ___ N.W.2d ___, ___. These factors include (1) whether the party to be enjoined caused the damage; (2) whether

irreparable harm would result without an injunction; (3) whether the party to be enjoined acted in bad faith as opposed to making an "innocent mistake"; and (4) whether, after balancing the equities, the hardship that would be suffered by the enjoined party would be disproportionate to the benefit gained by the party seeking the injunction. *Id.* The ultimate decision, after weighing these factors, "rests in the discretion of the trial court." *Prairie Hills Water and Development Co. v. Gross*, 2002 S.D. 133, ¶ 36, 653 N.W.2d 745, 753. The court has diligently reviewed these factors in making its determination that an injunction should be granted in this case.

This court finds that the Sapienza's brought the harm under the first factor. The courts finds there were certain regulations breached by the Sapienza's, and they are the party to be enjoined. Under the second factor, the court finds that the McDowell's will suffer an irreparable injury. Their historic property will no longer be allowed to utilize the fireplace depriving the smoking chimney from the historic landmark property and the historic district. As to the third factor, the court finds that the Sapienza's acted in bad faith rather than an innocent mistake in the construction of their residence.[5] The fourth factor requires that after balancing the equities, the hardship that would be suffered by the enjoined party would be disproportionate to the benefit gained by the party seeking the injunction. The court does, recognize that the fourth factor requires the balancing of the McDowells' request for an injunction, as the harm that would be suffered by the Sapienza's would appear to be disproportionate to the benefit gained by the McDowell's if an injunction were granted.

---

5 The evidence indicates that the Sapienza's could have been more diligent in gathering the appropriate approval before building their residence. There are indications that the Sapienza's took radical actions. They hired a designer but fired him after he kept seeking a survey. They stated they would hire Chuck Nelson for a survey and never did hire one. They submitted renderings that implied trees to the north. After approval, they sought to move their house closer to the McDowell's. They never presented or sought new approval for the plans they rewrote to the City.

Under the second factor, the McDowell's show an irreparable harm would result if an injunction were not granted. "Harm is only irreparable 'where . . . it cannot be readily, adequately, and completely compensated with money.'" *Knodel v. Kassel Tp.*, 1998 S.D. 73, ¶ 13, 581 N.W.2d 504, 509 (citing *Maryhouse, Inc. v. Hamilton*, 473 N.W.2d 472, 475 (S.D. 1991). The value of the McDowells' residence declined and they lost the use of their wood burning fireplace. The party, Ms. Nykamp, that was interested in the historic property testified she couldn't live there. The property is sellable, but the historic context is forever undermined. The historic residence and the historic district are not capable of being remedied by a monetary judgment. The McDowell's argue "to maintain the desired tone of the land, to prevent nuisances, and to secure the attractiveness of the land," could be irreparably harmed by even a minor violation. *Harksen v. Peska*, 1998 S.D. 70, ¶ 26, 581 N.W.2d 170, 175. The context of the Sapienza residence violates the ten (10) percent structural variance as well as destroys their historic property (ie: chimney) in violation of the administrative rules and federal regulations. The McDowell's recently constructed a new addition to their residence, where they installed a gas fireplace out of sight of the public in the back of their property above the garage. The Sapienza's argue a gas fireplace insert to the historic chimney is a viable alternative rather than rebuilding their residence to be in compliance. Spencer Ruff testified that the large metal attachment for a gas fireplace on the top of the historic chimney is a change in the appearance of the historic landmark residence in violation of rules relevant to historic landmark residences. (Exhibit 28) The McDowell's claim that any change in the chimney that is affixed to the south side of the historic landmark residence is devastating. Furthermore, the character of their residence is devastated by the building of the oversized Sapienza residence. Both of these facts

are enough to show that the harm is irreparable and unable to be cured by monetary compensation.

The fourth factor requires the court to balance the equities in determining the hardship upon the party sought to be enjoined. The Sapienza's argue in their post-trial briefs that even at the most external level of analysis, the argument that they should be required to tear down and reconstruct their residence so that the McDowell's can continue to have a wood burning fireplace fails to satisfy the balancing of the equities factor. On the other hand, the court upheld an injunction that prohibited a defendant from keeping cattle adjacent to the plaintiff's land, so that the cattle would not trespass onto the plaintiff's property and use up his food and water resources. *Ladson v. BPM Corp.*, 2004 S.D. 74, ¶ 19, 681 N.W.2d 863, 868.[6] In that case, however, the court recognized that there were no lesser sanctions available, stating that "[w]hile we recognized that prohibiting an individual or corporation from use of its land is a sanction of the most serious kind, herein the record indicates the trial court considered lesser alternatives and concluded they would not grant relief[.]" *Id.* In the present case, monetary damages would not be a lesser alternative to an injunction that would provide relief. Monetary damages were not appropriate because of the physical invasion onto the plaintiff's land took away the plaintiff's own resources which were used for his own ranching operation. *Id.* Here, there is no physical trespass. However the harm to the McDowell's is that their historic landmark residence with includes a prominent chimney will no longer smoke due to the overbearing Sapienza residence.

---

[6] The McDowell's brief incorrectly states that the *Ladson* court "upheld an injunction that had the effect of dissolving the defendant's ranching operation and prohibited the defendant from using its land because there were no lesser sanctions available to the court that would have prevented the defendant's livestock from trespassing on the plaintiff's land." Plaintiff's Post-Trial Brief at 34. Instead, the court explained that the trial court recognized a complete injunction would effectively dissolve the defendant's ranching operation, and thus, it was necessary to grant the injunction only to land that was adjacent to the plaintiff's land. *Ladson* at ¶ 19, 681 N.W.2d at 686.

A gas insert changes the outward appearance with a metal attachment extending from the chimney. That cannot be cured by monetary relief. It robs the historic district of the smoking chimney from a historic landmark residence. Furthermore, the Sapienza residence in too tall in height being over eight feet taller than permissible compared to adjacent residences within the historic district. The house undermines the entire historic district. A monetary award would not remedy this and the Sapienza's ought to conform their residence or rebuild their residence.

In another case, the South Dakota Supreme Court found that an injunction that was granted by the trial court was "simply too harsh considering the intangibility of the harm suffered by [the plaintiff]." *Harksen v. Peska*, 1998 S.D. 70, ¶ 33, 581 N.W.2d 170, 176. The harm alleged by the plaintiff was that his property value went down as a result of the cabin that was built by the defendant resulting in the violation. *Harksen v. Peska*, 1998 SD 70, ¶ 19, 581 N.W.2d 170, 174. This was a claim that could be cured through money damages to the court, and would not result in the defendant having to tear down his cabin, which would have cost over $100,000. *Id.* at ¶ 33, 581 N.W.2d at 176. Additionally, the court looked at the harm suffered by other cabin owners in the development, just as the McDowell's have asked this court to do in the present case. *Id.* at ¶ 33, 581 N.W.2d at 176 n. 11. The court noted that only one person brought suit for the harm, and this did not provide enough evidence for the court to consider damages by all other cabin owners. *Id.* Nevertheless, the present case is factually distinguishable. Several property owners in the McKennan Park Historic District testified. They were not parties but did express a great concern over the Sapienza property violating the historic district requirements. Several property owners in the McKennan Park Historic District had great concern over the Sapienza residence. Carla Williams testified that she considers the requirements for the historic district important and when she decided to redo her kitchen, there was an issue regarding a window that

faced her garage. It took over three (3) years to save the money to have the construction done within the requirements of the historic district. The Sapienza residence causes Ms. Williams to feel as she is a "sitting duck" for the next non-compliant builder. Todd Nelson testified that he lived for over twenty-seven (27) years in the historic district. He testified that it is non-conforming in the historic district. Lisa Nykamp testified that she lived in the historic district. She is in the business of buying and selling properties. She sought to purchase the McDowell residence prior to the Sapienza house being built. She informed the McDowell's to call her when they were going to sell if they were ever going to sell their house. She toured the house and appreciated the natural sunlight and character of the residence. At one point they negotiated a sell of the residence, but they had to back out at the time due to extenuating circumstances. At the time, they were offering $950,000 to $975,000 for the residence. After she noticed the Sapienza construction, she received a call from the McDowell's that they were interested in selling. Ms. Nykamp saw the looming structure adjacent to the McDowell residence. She spent over 80 minutes in the McDowell residence. The natural sunlight was gone due to the Sapienza residence. The interior of the residence was no longer light but very dark. She opened the upstairs window and could touch the scaffolding of the Sapienza house with her hand. Ms. Nykamp testified she cried because the house she sought no longer existed. After speaking with her husband, they thought to offer half of what the McDowell's wanted but reconsidered. Ms. Nykamp testified she couldn't live there. The McDowell residence is a historic landmark property that is recognized as historically significant regardless of the historic district. The witnesses that testified were concerned not only for the historic property the McDowell's own but also for the entire historic district. A monetary judgment will not alleviate the violation. After applying the court's holding in *Harksen*, the court requires the Sapienza's to rebuild their

residence to bring it into compliance with the administrative rules and Department of Interior regulations. (Exhibit 27 and 28).

Under the factors laid out by the South Dakota Supreme Court for determining whether injunctive relief is the necessary remedy, the court finds that the McDowell's are entitled to an injunction that requires the Sapienza's to rebuild their residence to bring it into compliance with the administrative rules and Department of Interior regulations. (Exhibit 27 and 28).

I. Claims Against the City

The McDowell's have claims against the City on two theories: inverse condemnation and negligence. The City disputes these claims raising several affirmative defenses including laches, assumption of the risk, and protection under the public duty doctrine.

1. Negligence

The McDowell's first claim against the City is that it is liable for negligence in failing to follow SDCL § 11-4-6 governing the setback requirements that were violated by the construction of the Sapienza residence, as well as the City's failure to follow the historic codes.[7] The evidence demonstrates that the City approved the proposal of the Sapienza house on October 22, 2014. This was after the proposals were allegedly changed following the Sapienza's first presentation of the plans to the Board. (*See* T.T. June 18, 2016 at 71)(Trial Exhibit 29) A reasonable jury could conclude that the City was aware of the plans for the residence. A reasonable fact finder could determine this to have resulted in a violation of IRC Section R1003.9, requiring that there is clearance for a chimney for any building that is within ten feet of

[7] As previously noted, IRC Section R1003.9 and SFZO Section 160.094 conflict in this situation, and as a result SDCL § 11-4-6 is applicable.

another building. Additionally, the City was aware of ARSD 24:52:07:04, despite their contention that this administrative rule does not apply.

The court has already established that there is a cause of action in negligence and in nuisance against the Sapienza's for the building of the Sapienza's residence which allegedly violated SDCL § 11-4-6, IRC Section R 1003.9, and ARSD 24:52:07:04. The only question before the court is whether the City can be held liable for negligence in granting a building permit that would violate these regulations. First, any contention that it was unforeseeable for the McDowell's to be harmed after issuing a building permit that failed to follow building codes is unpersuasive. Even though the City did not have a relationship with the Sapienza's in any direct condition, it is not necessary that one existed. Rather, what matters is the "foreseeability of injury to another" that determines whether a duty was owed. *See Thompson v. Summers*, 1997 S.D. 103, ¶ 13, 567 N.W.2d 387, 392. It is evident in this case that the City owes a duty to the McDowell's, just like it owes a duty to anyone else who would be negatively affected by the issuance of a building permit that would violate zoning and construction regulations. Although the exact harm may not be foreseeable, the harm that resulted here could be seen as a harm that is within the class of reasonably foreseeable hazards that are to be prevented. *See Kirlin v. Halverson*, 2008 S.D. 107, ¶ 38, 758 N.W.2d 436, 451. The harm is foreseeable to the city.

In this case, the City raises three defenses that it believes would bar the McDowell's claims for negligence. The first defense is that the "public duty doctrine declares that the 'government owes a duty of protection to the public, not to the particular persons or classes.'" *E.P. v. Riley*, 1999 S.D. 163, ¶ 15, 604 N.W.2d 7, 12 (quoting *Tipton v. Town of Tabor*, 1997 S.D. 96, ¶ 10, 567 N.W.2d 351, 356). The City's reliance on this doctrine, as applied in *Riley*, is implausible in the present case. In *Riley*, the South Dakota Supreme Court explicitly clarified

that "the public duty rule extends only to issues involving law enforcement or public safety." *Id.* at ¶ 22, 604 N.W.2d at 13-14. Despite the City's argument that building codes serve the sole purpose of protecting the public as a whole, it is clear from the nature of this case that law enforcement and public safety is not at issue. Rather, the issue is whether the City acted with proper administration in issuing a permit that violated building regulations. Thus, in this case involving such violations, this court finds that the public duty doctrine is inapplicable.

Lastly, both the Sapienza's and the City attempt to use the affirmative defense of laches. In order to prevail on the defense of laches, the City would be required to show that the McDowell's had full knowledge of the facts and engaged in an unreasonable delay before seeking relief. *See Burch v. Bricker*, 2006 S.D. 101, ¶ 15, 724 N.W.2d 604, 608. In this case, there is evidence to show that the McDowell's may not have had full knowledge of the facts up until the time that they sought the relief. At trial, the Sapienza's attempted to demonstrate that Mr. McDowell had given up on any action against them when he sent a text in August 2014 to Mr. Sapienza which stated:

> i have to forewarn you that my wife is really suffering about all of this. the home is just way too big for the lot. you will move in five years and we live with it forever. tough gig for us. not your problem or fault ... just a tough gig for us.

(Exhibit 35) While the text may indicate that the McDowell's were aware that the residence being built by the Sapienza's was going to be too big, the court finds that this text alone does not suggest that the McDowell's were aware of all the facts upon which their action is based. At that time, the foundation had not been poured. The McDowell's did not have an idea of how tall the house would be. It was not until after the City approved the plans that the McDowell's acquired the requisite knowledge that led to this action. After carefully weighing the equities, the City and the Sapienza's fail to demonstrate that this defense is applicable to the facts presented at trial.

Furthermore, the defense of assumption of the risk, as argued by the Sapienza's, is a defense that is left for a finder of fact to determine. For a defendant to be successful on the affirmative defense of assumption of the risk, three elements must be established: "1) that the plaintiff had actual or constructive knowledge of the risk; 2) that the plaintiff appreciated the character of the risk; and 3) that the plaintiff voluntarily accepted the risk, given the time knowledge, and experience to make an intelligent choice." *Stone v. Von Eye Farms*, 2007 S.D. 115, ¶ 19, 741 N.W.2d 767, 772. From looking at the evidence, a reasonable fact finder could determine that because the McDowell's did not have full knowledge until after the house began its construction, neither the Sapienza's nor the City have shown that the McDowell's assumed the risk by waiting for the construction to be complete. This factual question is not a determination for the court at this time given the order on bifurcation and the granting of the injunction.

2. Inverse Condemnation

The McDowell's next claim that the City is liable to them on the theory of inverse condemnation is brought under Article VI, § 13, and Article XVII, § 18 of the South Dakota Constitution. According to those constitutional provisions, private property cannot be taken for public use or damaged without just compensation, and municipal corporations and individuals are vested with the privilege of taking private property in exchange for just compensation. *Id.*

The South Dakota Supreme Court has held that "where no part of an owner's land is taken[,] but because of the taking and use of other property located as to cause damage to an owner's land, such damage is compensable." *Rupert v. City of Rapid City*, 2013 S.D. 13, ¶ 9, 827 N.W.2d 55, 60-61 (quoting *Krier v. Dell Rapids Twp.*, 2006 S.D. 10, ¶ 23, 709 N.W.2d 841, 847). Further, "[t]he underlying intent of the [damages] clause is to ensure that individuals are not unfairly burdened by disproportionately bearing the cost of projects intended to benefit the

public generally." *Id.* (quoting *Hall v. S.D. Dep't of Transp.*, 2011 S.D. 70, ¶ 37, 806 N.W.2d 217, 230).

The McDowell's assert that by negligently granting plans through the Board to the Sapienza's and allowing the Sapienza residence to be constructed in a fashion that would interfere with the McDowell's use of their property, the City has essentially committed a taking of the McDowell's property. The McDowell's, however, fail to make any showing of an actual taking under South Dakota law, whether it be a physical taking or a regulatory taking. The Supreme Court made it clear that the government must have either taken property or prevented someone from having taken property because of the government's own use for the property. *Rupert v. City of Rapid City*, 2013 S.D. 13, ¶ 9, 827 N.W.2d 55, 60-61 (quoting *Krier v. Dell Rapids Twp.*, 2006 S.D. 10, ¶ 23, 709 N.W.2d 841, 847). Even if the City was negligent in awarding a building permit to the Sapienza's to build their property, the City has not taken the property or prevented the McDowell's from using their property for the benefit of the City or for effectuating any regulations. Instead, the McDowell's have not presented sufficient evidence to demonstrate that there was a taking under the current case law in South Dakota. As a result, the McDowell's claim against the City for inverse condemnation fails.

ORDER

Based upon the foregoing, it is ordered:

1) That the McDowell's are entitled to injunctive relief that the Sapienza's must bring their residence into compliance with the Administrative Rules of South Dakota 24:52:07:04 and Secretary of the Interior Regulations regarding the requirements for new construction in historic districts (Exhibit 27 and 28) or rebuild it;

2) That judgment be entered in favor of the City on the McDowell's claim of inverse condemnation;

3) That the McDowell's may maintain their action against the City for negligence but the factual question is not a determination for the court at this time given the order on bifurcation and the granting of the injunction.

4) The attorney for the McDowell's will prepare a Judgment accordingly.

5) The parties may submit their proposed findings and conclusions.

Dated this 27 day of December, 2016.

BY THE COURT:

Honorable John Pekas
Circuit Court Judge

ATTEST: Angelia M. Gries, Clerk of Courts
By: DEPUTY

FILED
DEC 27 2016
Minnehaha County, S.D.
Clerk Circuit Court

24:52:07:01. Applicability. The rules in this chapter apply to historic properties listed on the state register or the national register, or both.

Source: 16 SDR 239, effective July 9, 1990.

General Authority: SDCL 1-19A-5.

Law Implemented: SDCL 1-19A-5.

24:52:07:04. Standards for new construction and additions in historic districts. New construction or additions within a historic district must comply with **The Secretary of the Interior's Standards for the Treatment of Historic Properties** as incorporated by reference in § 24:52:07:02. In addition the following standards apply:

(1) Compatibility of design. Massing, size, and scale of new construction must be compatible with surrounding historic buildings. Overall architectural features of new construction must be of contemporary design which does not directly mimic historic buildings. Architectural elements such as windows, doors, and cornices must be similar in rhythm, pattern, and scale to comparable elements in adjacent historic buildings. The overall visual appearance of new construction may not dominate or be distracting to the surrounding historic landscape;

(2) Height. The height of new buildings or additions to existing buildings may not exceed a standard variance of ten percent of the average height of historic buildings on both sides of the street where proposed new construction is to be located;

(3) Width. The width of new buildings or additions to existing buildings must be similar to adjacent historic buildings;

(4) Proportion. The relationship between the height and width of new buildings or additions to existing buildings must be similar in proportion to existing historic buildings. The proportion of openings in the facades of new construction or additions must be compatible with similar openings in adjacent historic buildings;

(5) Rhythm and scale. The rhythm, placement, and scale of openings, prominent vertical and horizontal members, and separation of buildings which are present in adjacent historic buildings must be incorporated into the design of new buildings or additions to existing buildings;

(6) Materials. Materials which make up new buildings or additions to existing buildings must complement materials present in nearby historic properties. New materials must be of similar color, texture, reflective qualities, and scale as historical materials present in the historic district;

(7) Color. The colors of materials, trim, ornament, and details used in new construction must be similar to those colors on existing historic buildings or must match colors used in previous historical periods for identical features within the historic district;

(8) Details and ornament. The details and ornament on new buildings or additions to existing buildings must be of contemporary design that is complementary to those features of similar physical or decorative function on adjacent historic buildings;

(9) Roof shape and skyline. The roof shape and skyline of new construction must be similar to that of existing historic buildings;

(10) Setting. The relationship of new buildings or additions to existing buildings must maintain the traditional placement of historic buildings in relation to streets, sidewalks, natural topography, and lot lines; and

(11) Landscaping and ground cover. Retaining walls, fences, plants, and other landscaping elements that are part of new construction may not introduce elements which are out of character with the setting of the historic district.

Source: 16 SDR 239, effective July 9, 1990; 21 SDR 50, effective September 21, 1994; 24 SDR 73, effective December 4, 1997; 28 SDR 182, effective July 10, 2002.

General Authority: SDCL 1-19A-5, 1-19A-11, 1-19A-29.

Law Implemented: SDCL 1-19A-5, 1-19A-11.1.

R1003.8 Additional load.
Chimneys shall not support loads other than their own weight unless they are designed and constructed to support the additional load. Construction of masonry chimneys as part of the masonry walls or reinforced concrete walls of the building shall be permitted.

R1003.9 Termination.
Chimneys shall extend at least 2 feet (610 mm) higher than any portion of a building within 10 feet (3048 mm), but shall not be less than 3 feet (914 mm) above the highest point where the chimney passes through the roof.

R1003.9.1 Chimney caps.
Masonry chimneys shall have a concrete, metal or stone cap, sloped to shed water, a drip edge and a caulked bond break around any flue liners in accordance with ASTM C 1283.

R1003.9.2 Spark arrestors.
Where a spark arrestor is installed on a masonry chimney, the spark arrestor shall meet all of the following requirements:

1. The net free area of the arrestor shall not be less than four times the net free area of the outlet of the chimney flue it serves.

2. The arrestor screen shall have heat and corrosion resistance equivalent to 19-gage galvanized steel or 24-gage stainless steel.

3. Openings shall not permit the passage of spheres having a diameter greater than $^1/_2$ inch (13 mm) nor block the passage of spheres having a diameter less than $^3/_8$ inch (10 mm).

4. The spark arrestor shall be accessible for cleaning and the screen or chimney cap shall be removable to allow for cleaning of the chimney flue.

R1003.9.3 Rain caps.
Where a masonry or metal rain cap is installed on a masonry chimney, the net free area under the cap shall not be less than four times the net free area of the outlet of the chimney flue it serves.

R1003.10 Wall thickness.
Masonry chimney walls shall be constructed of *solid masonry* units or hollow masonry units grouted solid with not less than a 4-inch (102 mm) nominal thickness.

R1003.10.1 Masonry veneer chimneys.
Where masonry is used to veneer a frame chimney, through-flashing and weep holes shall be installed as required by Section R703.

R1003.11 Flue lining (material).
Masonry chimneys shall be lined. The lining material shall be appropriate for the type of *appliance* connected, according to the terms of the *appliance* listing and manufacturer's instructions.

R1003.11.1 Residential-type appliances (general).
Flue lining systems shall comply with one of the following:

1. Clay flue lining complying with the requirements of ASTM C 315.

2. Listed and labeled chimney lining systems complying with UL 1777.

3. Factory-built chimneys or chimney units listed for installation within masonry chimneys.

4. Other *approved* materials that will resist corrosion, erosion, softening or cracking from flue gases and condensate at temperatures up to 1,800°F (982°C).

Sioux Falls Zoning Ordinance § 160.094 BULK REGULATIONS.

(a) *General requirements.* The maximum height and minimum lot requirements within the DD4 form shall be as follows except that before building, renovating, or reconstructing the owner must first adhere to the standards of § 160.092:

Required Front Yard:	20 feet [1] or corner lot [2].
Required Side Yard:	5 feet.
Required Rear Yard:	10 feet.
Required Lot Frontage:	25 feet.
Maximum Height:	35 feet.
Required Buffer Yard:	10 feet total (Level A) adjacent to highways.
1 The front yard may be reduced up to ten feet when a front garage is recessed back ten feet from the front of the house. 2 On a corner lot the two required front yards must be equal in the aggregate to at least 30 feet as long as one required front yard is ten feet and a garage that has direct access to a street must have a minimum of a 20-foot required front yard.	

(b) *Double frontage lots.*

(1) The yard with access to parking situated on a lot as provided by this title shall always be considered a front yard.

(2) Any front yard without access to legal parking and is not a buffer yard shall be considered have a 10-foot required yard and shall comply with the driveway safety zone.

(Ord. 9-13, passed 3-19-2013)

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NOS. 28234, 28239, 28252

PIERCE MCDOWELL and BARBARA MCDOWELL,

Plaintiffs and Appellees,

vs.

JOSEPH SAPIENZA and SARAH JONES SAPIENZA, M.D.,

Defendants and Appellants; and

CITY OF SIOUX FALLS,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE JOHN R. PEKAS
CIRCUIT COURT JUDGE

BRIEF OF APPELLEES PIERCE AND BARBARA MCDOWELL

Steven M. Johnson
Ronald A. Parsons, Jr.
Shannon R. Falon
JOHNSON JANKLOW ABDALLAH
REITER & PARSONS LLP
101 S. Main Ave, Suite 100
Sioux Falls, SD 57104

Attorneys for Appellees
Pierce and Barbara McDowell

Notice of appeal filed April 19, 2017
Notices of review filed May 1 and 8, 2017

Attorneys for Defendants and Appellants:

Richard L. Travis
Adam R. Hoier
MAY & JOHNSON P.C.
6805 S. Minnesota Ave
Sioux Falls, SD 57109

Attorneys for Appellee City of Sioux Falls:

William C. Garry
Melissa R. Jelen
CADWELL SANFORD DEIBERT & GARRY LLP
P.O. Box 2498
Sioux Falls, SD 57101-2498

Attorney for Amicus Curiae South Dakota State Historical Society:

MARTY J. JACKLEY
ATTORNEY GENERAL

Paul S. Swedlund
ASSISTANT ATTORNEY GENERAL
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
(605) 773-3215

TABLE OF CONTENTS

TABLE OF CONTENTS (CONT).

Page

TABLE OF AUTHORITIES

South Dakota Cases:

TABLE OF AUTHORITIES (CONT.)

Other Cases:

Statutes:

Other Authorities:

TABLE OF AUTHORITIES (CONT.)

PRELIMINARY STATEMENT

References to the settled record as reflected by the Clerk's Index are cited as (R.) with the page number.

STATEMENT OF JURISDICTION

As a supplement to the statement of jurisdiction set forth by the appellants, the McDowells respectfully state that this Court has appellate jurisdiction under SDCL 15-26A-3(1), (2) and/or (5), providing that "[a]ppeals to the Supreme Court from the circuit court may be taken as provided in this title from: (1) A judgment; (2) An order affecting a substantial right, made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken;" or "(5) An order which grants … any of the remedies of … injunction[.]"

STATEMENT REGARDING ORAL ARGUMENT

Appellees Pierce and Barbara McDowell respectfully request the privilege of appearing for oral argument before this Court.

STATEMENT OF ADDITIONAL ISSUE RAISED BY NOTICE OF REVIEW

I. Did the circuit court err in failing to include in the Judgment entered in this case the finding of liability in favor of the McDowells on their negligence claim brought against the City of Sioux Falls?

The circuit court failed to do so.

- SDCL 11-4-6
- IRC § R1003.9
- SDCL 1-19A-11
- ARSD 24:52:07:04

STATEMENT OF THE CASE

On May 13, 2015, Pierce and Barbara McDowell filed this action for a permanent injunction in Minnehaha County Circuit Court against Joseph and Sarah Sapienza and the City of Sioux Falls. (R. 4). After the trial court denied competing motions for summary judgment, (R. 427), a court trial was set before the Honorable John R. Pekas, Circuit Judge. (R. 451).

The trial was held on June 28-30, 2016. (R. 571). On December 27, 2016, the trial court filed its Memorandum Decision and Order. (R. 1303). First, it granted injunctive relief against the Sapienzas and held that they must bring the home into compliance with applicable regulations and statutes or rebuild it. (R. 1326, 1330). The trial court also held that although the City owed a duty to the McDowells and that their claim was not barred by the public duty doctrine or any of its asserted affirmative defenses, there would be no legal remedy issued at that time due to the injunction granted against the Sapienzas. (R. 1327-31, 1303-04).

The parties proposed findings of fact and conclusions of law.[1] Following a hearing on March 13, 2017, the trial court entered an order adopting its own findings and conclusions consistent with its memorandum opinion. (R. 1728). The court specifically rejected numerous proposed findings and conclusions by both the Sapienzas and the City as contrary to its memorandum decision. (R. 1727-28).

[1] The McDowells' proposed findings and conclusions inadvertently were not filed. Under SDCL 15-26A-56, the parties stipulated to include them in the record. The order to do so was filed on July 10, 2017.

On March 17, 2017, the trial court entered judgment holding that: (1) the McDowells did not have an adequate remedy at law and were entitled to an injunction under SDCL 21-8-14; (2) the Sapienzas were required to bring their residence into compliance with South Dakota Administrative Rule 24:52:07:04, the Secretary of the Interior Regulations for new construction in historic districts, and the chimney clearance building code IRC R1003.9, so as to cure all violations; and (3) granting judgment against the McDowells on their claim against the City for inverse condemnation. (R. 1732).

This appeal followed.

STATEMENT OF THE FACTS

Pierce and Barbara McDowell have lived in their home in the McKennan Park Historic District for almost twenty-five years. (R. 1622). The home was originally constructed in 1924 and is listed on the National Register of Historic Places. (R. 584, 1622, 1627). The McDowell home is also a landmark property, meaning that it possesses such architectural significance that it stands on its own as a historic property and is properly listed on the National Register even if it was not located in a historic district. (R. 583-84, 1622).

The McKennan Park Historic District

The McDowell home is located in the McKennan Park Historic District. Historic districts play an important role in our modern society. As explained by Spencer Ruff, an architect with expertise in historic districts, in his report:

> In 1966, the U.S. Conference of Mayors wrote a report that concluded that Americans suffered from a sense of "rootlessness." They recommended historic preservation to help Americans with a sense of orientation. That same year the National Register of Historic Places was created to instill that sense of orientation that mayors were looking for. The mayors recommended that the historic preservation program not focus solely on individual buildings but also on "areas and districts which contain special meaning for the community."

(R. 1622). The McKennan Park neighborhood became a historic district listed on the National Register of Historic Places in 1984. (R. 1608). The nomination form to place it on the National Register described the area as follows:

> A strong sense of unity is evident in the McKennan Park District. This neighborhood consists of well maintained houses and landscaped yards. Very few of the front facades of these homes have been altered, and many of the houses have been in the possession of only one or two families since they were built. The attractive landscaping and many large trees of the park and boulevard contribute to the cohesive character and sense of neighborhood in the McKennan Park District.

(R. 1663). That cohesive character has continued into modern times. The McKennan Park Historic District certainly holds special meaning for many Sioux Falls residents, giving "roots" both to those who call the district home and those who otherwise enjoy the park as members of the community. (R. 913, 919-20, 931-32).

When the McDowells remodeled their home on a few occasions over the years, they appeared before the Sioux Falls Board of Historic Preservation to obtain approval for the changes. (R. 721).

Sapienzas buy the house next door

In 2013, Joseph and Sarah Sapienza purchased the lot at 1323 South Second Avenue, just south of the McDowell home, and decided to knock down the existing house and build something new and much larger. (R. 1040). This is

a picture of the original house, then owned by the Avery family, before it was sold and eventually razed:

(R. 208, 724). Because the existing home was in the McKennan Park Historic District, the Sapienzas were required by state law to get approval from the Sioux Falls Board of Historic Preservation to demolish it and build a new structure. (R. 1534-35, 1570).

Sapienzas hire Natz to provide drawings

When they learned that the property was located in a historic district and that their new construction would have to comply with all historic district requirements, the Sapienzas retained the services of an architectural design firm, Bob Natz & Associates, to assist. (R. 1618-19).

Natz certainly understood and embraced the historical significance of designing a new home in a historic district, testifying that "McKennan Park is a very important area for the town. It's very important to me. It needs to – anybody that designs or builds in that neighborhood has to have a level of social responsibility and verse themselves in the community and look around and try to fit themselves in." (R.

958-59). Natz was aware of state law setting the requirements for new construction in historic districts. (R. 942, 1566-69). To inform his design, Natz toured the district with Josh Sapienza to review the architectural styles. (R. 944).

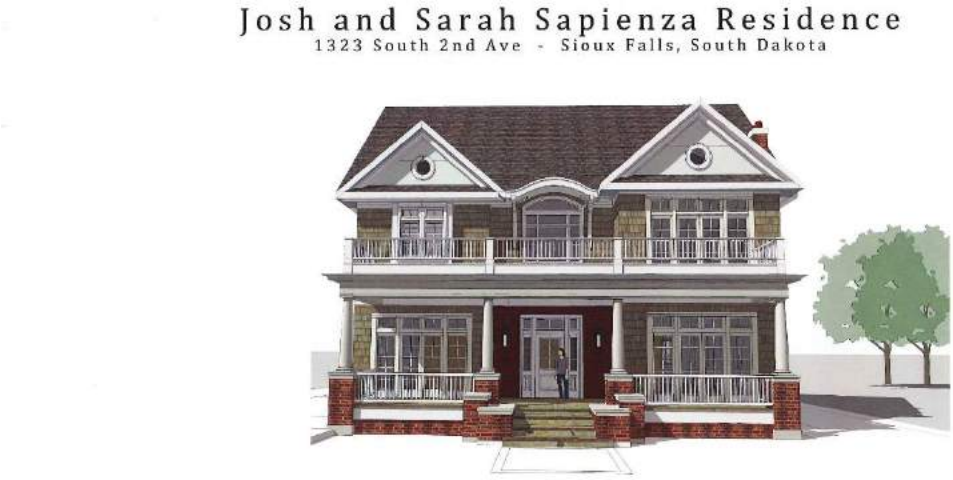
Natz then designed a residence for the Sapienzas consistent with the types of materials and finishes that fit the character of the McKennan Park Historic District. (R. 944, 1478; Ex. 2). He discussed with Josh Sapienza the importance of using noble materials such as stone, real wood, cedar and cedar shakes instead of fake materials that one might see in suburban neighborhoods. (R. 944).

From the beginning, Natz and his architect were concerned about the distance between the proposed construction and the McDowell home. (R. 954, 1699). Aware of the ten foot setback requirement, Natz told Sapienza repeatedly that they needed a professional survey of the property. (R. 954-56, 1564). Sapienza, however, did not allow Natz to obtain a professional survey and instead told Natz that that he "knew a surveyor" and would take of it himself, though Sapienza never did. (R. 709, 953, 1306).

Ultimately, Natz and the Sapienzas had a disagreement and they fired him. (R. 1611; Ex. 52). The design plans were not complete at the time that the relationship was terminated. (R. 950-51). Rather, the renderings were merely preliminary drawings that implied the appearance of the residence and were not intended to be used for its actual construction. (R. 951-52, 1583-84; Ex. 30).

The conceptual drawing on the first page of the plans prepared by the Natz firm depicted trees in an expanse to the north of the proposed Sapienza house,

indicating that there would be ample space between the new construction and the McDowell home to the north:



(R. 1478; Ex. 2). Regarding the north side yard setback, the accompanying plans showed varying lengths from seven to eleven feet. (R. 1478, 1582).

After being fired, Natz received a desperate request from Josh Sapienza to provide him with the preliminary renderings that he had prepared because Sapienza had to provide his plans to the Sioux Falls Board of Historic Preservation ("Board"). (R. 950). Natz sent the renderings as requested. (R. 950). On May 1, 2014, Josh Sapienza submitted an application to the Board detailing the project based on Natz's preliminary renderings. (R. 1570-72). Three days before the Board meeting on May 11, 2014, Natz emailed Sapienza an actual architectural drawing that included the McDowell house on the plans, but Sapienza did *not* take that drawing to the Board meeting. (R. 683-86, 1564-65; Ex. 26).

Sapienzas use Natz drawings to obtain Board approval

On May 14, 2014, Josh Sapienza attended a meeting of the Board and presented the project to raze the existing home and construct a new house at

1323 South Second Avenue. He did not bring Natz with him to the meeting. Instead, Sapienza gave the Board the conceptual drawing (shown above) Natz had developed that, by Sapienza's own admission, did not depict the house that he actually intended to build. (R. 1082, 1570; Ex. 29). He did not show the Board any other architectural plans of the mansion as it was intended to be built. (R. 1080-81). And he did not reveal how exceptionally close to the McDowell house he intended the new construction to be. (R. 698, 706-07).

Based on Josh Sapienza's representations, the Board approved both the demolition of the existing home and construction of the new proposed structure as projects that would not have an adverse effect on the McKennan Park Historic District. (R. 1535). The Board, however, had not been provided all of the information necessary regarding the construction required under the applicable regulations for building in historic districts, such as the height of surrounding buildings or their scale. (Ex. 1570).

After Board grants approval, Sapienzas completely redo plans

After obtaining approval, the Sapienzas hired Sorum Construction to redraw the Natz firm's preliminary architectural plans. (R. 892). One of the changes the Sapienzas sought was to move the house even *closer* to the McDowell home. (R. 687). Specifically, the Sapienzas wanted the new construction moved "to the north 1-2 feet to give us an extra foot or 2 of driveway space on the south side if set back allows." (R. 687, 1494; Ex. 8, no. 7). The change would help accommodate a six-foot wide flower bed between

the Sapienzas' planned driveway and the southern side of their house. (R. 1680). Sorum warned the Sapienzas that the house appeared to be too tall for the lot and told them if they wanted to move it even farther north, they would need a variance. (R. 1493; Ex. 7). Nonetheless, Sorum – who is not even an architect – completely redrew the Natz firm's architectural plans as directed. (R. 892).

Before taking on the Sapienza project, the Sorums had never built a home in a historic district and they were not familiar with the laws regarding constructing homes in historic districts. (R. 883-84). Sorum later admitted that he did not even know that there was a specific height limitation in historic districts that differed from the Sioux Falls zoning ordinance's general height restriction. (R. 884). Expert architect Spencer Ruff identified eleven material changes that were made to the plans *after* the project had been approved by the Board. (R. 611-13, 1623-24, Ex. 58). Ruff testified that the house built by the Sapienzas was a different structure entirely than the one for which they obtained approval from the Board. (R. 614).

Sapienzas do not obtain approval for redesigned plans

When significant changes are made to plans approved for new construction in a historic district, the applicant has a duty to take the project back before the Board of Historic Preservation to determine whether the changes impact its decision. (R. 614, 1624; Ex. 58 at 3). Due to the substantial material changes the Sapienzas had made to the project, Natz felt professionally obligated to report the violation to the City. (R. 948-49, R. 1562; Ex. 24). As he confessed in an email to a colleague at the time: "Man…not happy about some of these I might have to

report him to the city for the material changes. He brought the design in which [sic] met the historic preservations objectives and now is changing it to a suburban sh** stack." (R. 1562; Ex. 24). Natz called the Planning Department to make them aware of the situation. (R. 948-49, R. 1562; Ex. 24).

Had the Sapienzas been straightforward about what they were going to build, the Board of Historic Preservation would not have approved the new construction. (R. 614). In fact, seven of the nine Board members testified that they would *not* have approved the residence as it currently stands today, while the remaining two indicated that they would have to reassess the matter. (R. 614). Keith Thompson, an architect on the Board, testified that Mr. Sapienza falsely represented to the Board that the new house would be built on the "same footprint" as the existing, modest house that was to be demolished. (R. 805, 1581 – showing existing house set back between 9.3 feet and 8.5 feet from north lot line). Sapienza also told the Board that the new construction would result in "[g]aining 2000 square feet of green space." (R. 1579). As Ruff testified, however, the new construction actually resulted in the loss of 1,700 square feet of green space. (R. 594).

Elizabeth Schulze, another architect on the Board, testified that the Sapienzas had an obligation to tell the Board that the McDowell home was only two feet off the property line and that he did not disclose that fact to the Board. (R. 1688 at p. 14). Schulze further testified that Sapienza made misrepresentations regarding the materials that he intended to use for the project. (R. 1688 at p. 17). If the Board had been presented with accurate information about the structure that was eventually

built, she would not have been able to approve it, "[b]ecause we would have been able to see that the building was too close to the actual other residence to the north and that it was not in proportion at all in terms of height." (R. 1687 at p. 11).

Sapienzas begin construction of redesigned mansion

The City issued a building permit for the new construction on October 22, 2014. (R. 1502). The permit warned that it "shall not be construed as authority to violate, cancel or set aside any of the provisions of the building codes, zoning ordinances or any other law of the City of Sioux Falls except as specifically stipulated by modification or legally granted verification as described in this permit application." (R. 1502). It also stated that "[a]ny change to the approved plans must be submitted to the Building Services Department for approval before proceeding with any changes." (R. 1502).

As soon as the foundation was poured and she saw how close it was to her own home, Barbara McDowell began calling the City. (R. 728). When the McDowell home was built in 1924, the zoning ordinance only required a two foot setback and the home was placed two feet from the property line on the south side. (R. 729). As the ordinances changed over the time, the McDowell home was legally "grandfathered" into compliance since it fully complied with the laws in effect when it was built. *See* SDCL 11-2-26; SDCL 11-6-39.

Barbara McDowell called the City at least twelve times to complain about the close proximity of the Sapienza construction to her home, as well as how incredibly

tall it was. (R. 728-30). The City offered no assistance and incorrectly told her that the Sapienza home complied with all applicable codes and regulations. (R. 731-32).

The McDowells also asked the Sapienzas if they would consider putting the driveway on the north side instead of the south to increase the distance between their houses to conform to the law. (R. 709, 727-28). Mr. Sapienza declined, in part because it was more important to him that the house conform to "Feng Shui." (R. 709-10). Feng Shui is a Chinese philosophy of physical and aesthetic harmony. (R. 710). It teaches that negative energy comes from the north and so "suggests limiting the number of windows and exposure from the north side of the home." (R. 710). For that reason, among others, the north side of the structure was designed as a giant three-story wall, with few windows, to stand as a barricade against "negative energy." (R. 710). Distressingly, one of the only windows in the north wall of the Sapienza mansion is aligned with – and looks directly into – the bathroom and bedroom of the McDowells' eleven-year-old daughter. (R. 720, 736).

Cease and Desist Notice

The Sapienzas were informed early on in the construction process by legal counsel for the McDowells to cease and desist all construction efforts and advised that if they did not do so, the McDowells intended to pursue legal action. (R. 1505; Ex. 14). Delivered on May 8, 2015, the cease and desist notice stated:

> This law firm has been retained by Pierce and Barbara McDowell in connection with the issues surrounding your home construction and its encroachment upon their property. We request that you immediately cease and desist all construction on the property located at 1323 South Second Avenue, Sioux Falls, SD.

> As a result of the construction of your lot, the McDowell residence has been allegedly found to be non-compliant with the residential building code, and the McDowells have been informed by the City of Sioux Falls that they are not permitted to utilize their fireplace or their chimney.
>
> Moreover, we believe your home fails to comply with the zoning code with respect to height restrictions and applicable setbacks. Should you choose to continue to pursue construction at 1323 South Second Avenue, you will be doing so at your own risk as we intend to file legal action and pursue all remedies available at law.

(R. 669-71, 1505). The Sapienzas reviewed the notice and spoke with their contractor, but took no action to halt or slow construction to consider the issues, or even consult a lawyer. (R. 669-71, 712, 846). When the cease and desist notice was delivered, the partially built structure next to the McDowell home looked like this:

(R. 1697; Ex. 72). As one can see, substantial work was yet to be done on the home. (R. 844). Construction continued well into the litigation and was not completed until January 2016, eight months after the cease and desist notice. (R. 427, 844).

When the Sapienza mansion was finally done, it towered over the McDowell home. (R. 737). The new construction was so close that it almost completely walled

off the McDowell home on the southern side, eliminating any privacy, casting it into shadows, and creating a narrow corridor between the houses where nothing can grow. (R. 737). When they look out of their southern windows on both stories of their home, all they can see is a giant yellow wall:

(R. 226, 1843 – Physical Exhibits 17, 63-65, 70, 79). The only exception is that the few windows on the Sapienza wall align with windows on the McDowell home, so that if the shades are not kept closed at all times, as Barb McDowell testified, "we can see into their home and they can see into our home." (R. 736).

Height Violation

The evidence at trial established beyond dispute that the house as constructed by the Sapienzas violated governing law. South Dakota Administrative Code 24:52:07:04 regarding new construction in historic districts applies to homes constructed in the McKennan Park Historic District and it establishes a maximum allowable height, mass, and scale. (R. 581, 1566-69).

Spencer Ruff was the only expert to testify at trial on these issues and his opinions were uncontested. Ruff is an expert in architecture and historic districts. (R. 577, 1620-25). As he explained, pursuant to S.D. Admin. Code 24:52:07:04(2), the house is 8.42 feet too tall. (R. 595-96, 1622, 1678). Ruff used the measurements taken by a land surveyor of surrounding properties to perform the necessary calculations and found that the average height of existing homes was 32.84 feet. (R. 595-96, 1678). He then allowed for the ten percent variance in height permitted under the regulation and found that the Sapienza house legally was not permitted to be taller than 36.08 feet. (R. 595-96, 1678). It is undisputed that the house as constructed is 44.50 feet tall. (R. 595-96, 1678).

Mass and Scale Violations

Ruff also explained that the mass and scale of the Sapienza house is out of proportion when compared with adjacent properties in violation of the first provision of ARSD 24:52:07:04. (R. 598-99, 658, 1622; Ex. 58). He testified that the Sapienza residence is dominating when compared to other residences adjacent to it. (R. 597). Ruff further found that the Sapienza residence violated requirements three and four

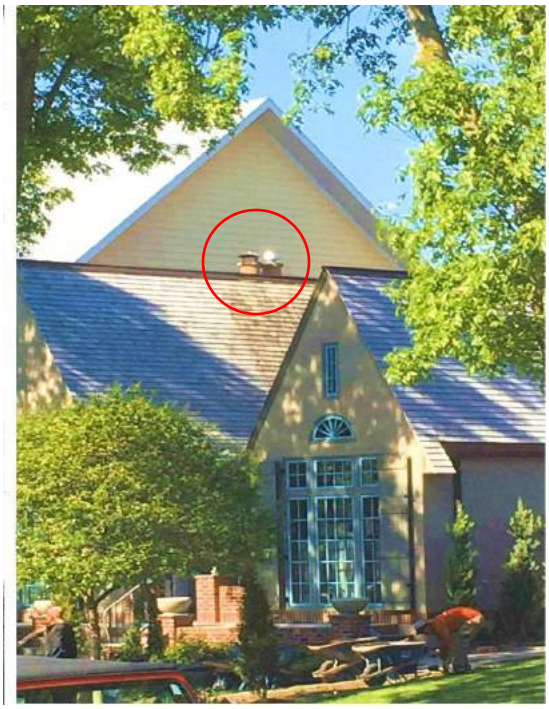
of the regulation because the home had a broader width than surrounding properties and was out of proportion with adjacent historic homes. (R. 1624; Ex. 58). As he explained, the Sapienza residence is out of character for the neighborhood in that it does not fit the mass, scale and height requirements of the historic regulations. (R. 587, 596-99, 1624; Ex. 58).

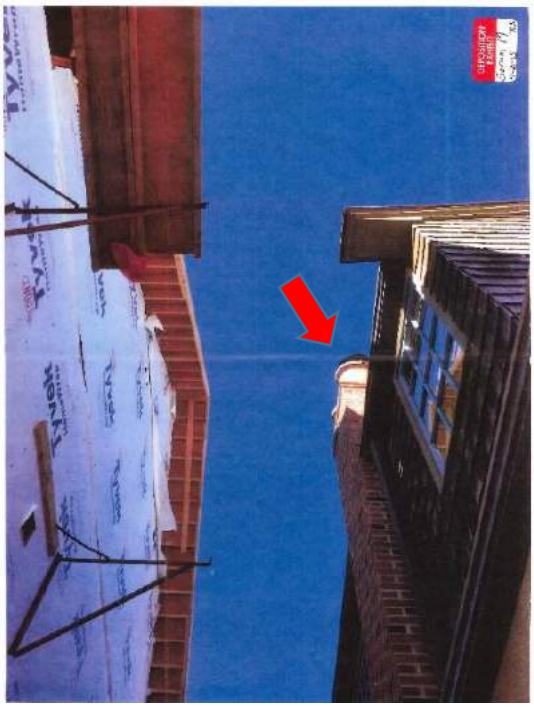
Chimney Set-Back Violation

The Sapienza house is also closer to the McDowell home than permitted by law. The McDowell home has had a wood burning fireplace with a masonry chimney on the southern side since it was built in 1924. (Ex. 17). Sioux Falls has adopted the 2012 version of the International Residential Code ("IRC"). (R. 787). Pursuant to IRC Section R1003.9, "[c]himneys shall extend at least 2 feet (610 mm) higher than any portion of a building within 10 feet (3048 mm), but shall not be less than 3 feet (914 mm) above the highest point where the chimney passes through the roof. (R. 1594; Ex. 42). In other words, any part of the Sapienza house within ten feet of the McDowell chimney must be at least two feet *lower* than the chimney. (Ex. 42).

It is not. On May 4, 2015, the City inspected the McDowell property. (R. 1561; Ex. 23). According to its report, the "[e]ave of new house [Sapienza home] is about 10 feet above and 6' horizontal from chimney termination." (R. 1561; Ex. 23). The inspector reported that: "I informed Barbara [McDowell] that her wood fireplace was a fire hazard and unsafe to use, as the code requires a chimney termination to be 2' above any portion of a building within 10'." (R. 1561; Ex. 23).

In the left photograph, the top of the McDowell chimney is circled in red below the looming third story of the Sapienza mansion. On the right, the chimney is indicated by a red arrow. The Sapienzas constructed their house within six feet of the McDowell chimney – and ten feet higher – in clear violation of the fire code:





(R. 1843 – Physical Exhibits 17, 63-65, 70, 79).

As the result of these violations established at trial, the circuit court entered injunctive relief holding that the Sapienzas were required to bring their new construction into compliance with the law. (R. 1732). The McDowells respectfully request that this Court affirm the remedy granted by the circuit court.

STANDARD OF REVIEW

This Court reviews questions of law de novo. *See Estate of Laue*, 2010 S.D. 80, ¶ 10, 790 N.W.2d 765, 768. Whether an injunction is statutorily authorized is reviewed de novo, and the subsequent decision to grant or deny the injunction is reviewed for an abuse of discretion. *See Magner v. Brinkman*, 2016 S.D. 50, ¶ 19, 883 N.W.2d 74, 83. Findings of fact will not be reversed unless clearly erroneous. *See Wiswell v. Wiswell*, 2010 S.D. 32, ¶ 10, 781 N.W.2d 479, 482. In reviewing the sufficiency of the evidence, this Court accepts all evidence favorable to the prevailing party, and all reasonable inferences, without weighing credibility or resolving conflicts. *See Huether v. Mihm Transp. Co.*, 2014 S.D. 93, ¶ 15, 857 N.W.2d 854, 860. If there is evidence that, if believed by the fact finder, supports the verdict or judgment, this Court will affirm. *See id.*

SUMMARY OF THE ARGUMENT

The Sapienzas knocked down a modest home in the McKennan Park Historic District in Sioux Falls and, despite admonitions not to do so, erected a new, much larger structure on the same property, while misleading the Board of Historic Preservation in order to secure its approval for the project. The evidence established that the Sapienza mansion plainly is not on the "same footprint" as the house it replaced and does not comply with the maximum height restrictions that govern all new construction in historic districts. The Sapienza mansion is nearly eight and a half feet too tall. It towers over and dominates the McKennan Park Historic District and surrounding homes in clear violation of the law. The evidence also demonstrated

that the new construction was built too close to the lot line in clear violation of the fire code establishing a minimum required distance between any part of new construction and a neighboring property's wood-burning chimney.

Our laws governing construction in historic districts, and our ordinances addressing fire safety, were enacted for important reasons. As the circuit court recognized, choosing to ignore warnings and plow ahead to complete new construction after being informed of legal violations does not create some sort of immunity from our laws, particularly when one has misled the supervisory board about the fundamental nature of the construction sought to be approved.

In these particular circumstances, as the circuit court properly found, the only adequate remedy was to bring the offending structure into compliance with governing law. An injunction enforcing the law in this case certainly was not an abuse of discretion. As a result, the McDowells respectfully suggest that this Court should affirm the judgment requiring the new Sapienza mansion simply to comply the same legal requirements that govern all new construction in the McKennan Park Historic District and across the City of Sioux Falls.

ARGUMENT

I. Like all other new construction in the McKennan Park Historic District, the Sapienza house was required to comply with the maximum height limitation and other requirements set forth in ARSD 24:52:07:04.

The first argument raised by the Sapienzas is that their new construction in the McKennan Park Historic District did not have to comply with ARSD 24:52:07:04. Importantly, they do not dispute that the house they built clearly violates that

regulation if it is applicable; rather, they simply argue that it should not apply to them. The applicability of ARSD 24:52:07:04, entitled "Standards for new construction and additions in historic districts," to the Sapienzas' new construction in a historic district is a question of law reviewed de novo. The circuit court got it right.

Under its authority granted by the Legislature in SDCL §§ 1-19A-11 and 29, the State Historical Society Board of Trustees promulgated rules governing construction in historic districts. Those administrative rules have the force of law. *See Krsnak v. S.D. Dep't of Environment and Natural Resources*, 2012 S.D. 89, ¶ 16, 824 N.W.2d 429, 436; *State v. Guerra*, 2009 S.D. 74, ¶ 32, 772 N.W.2d 907, 916. They are "subject to the same rules of construction as are statutes." *In re Black Hills Power, Inc.*, 2016 S.D. 92, ¶ 8, 889 N.W.2d 631, 633.

The Sapienzas' argument that they are immune from ARSD 24:52:07:04 is based on ARSD 24:52:07:01, which states that "the rules in the chapter apply to historic properties listed on the state register or the national register, or both." The new house just built obviously is not itself individually listed on any historic register. The general provision of ARSD 24:52:07:01, however, clearly was not intended to apply to ARSD 24:52:07:04, because the latter regulation was drafted specifically to govern *new* construction:

> New construction or additions within a historic district must comply with The Secretary of the Interior's Standards for Treatment of Historic Properties as incorporated by reference in § 24:52:07:02. In addition the following standards apply:

ARSD 24:52:07:04 (R. 1568). The regulation goes on to list eleven criteria that must be followed when constructing a new house in a historic district, including a maximum height requirement for new construction:

> Height. The height of new buildings or additions to existing buildings may not exceed a standard variance of ten percent of the average height of historic buildings on both sides of the street where proposed construction is to be located.

ARSD 24:52:07:04(2). Additional requirements address the permissible width, mass, size, and scale of new homes, materials to be used, roof shape, and landscaping. ARSD 24:52:07:04(1)-(11). In addition, new construction in historic districts must comply with the Secretary of Interior's Preservation Guidelines contained in 36 C.F.R. Part 67. (R. 1566-68).

As evidenced by its plain language, this law was intended to apply to the *construction* of new houses. It applies when the house is being planned and built. At the time the regulation is implicated, there is no home yet in existence to be listed on any state or national historic register. The regulation would be a nullity if it applied only to properties already listed on the national or state register, as the Sapienzas unpersuasively suggest, because structures not yet built clearly are not eligible to be listed. Nonexistent houses cannot be registered.

To apply the requirement that a yet-to-be-constructed home first be on the national or state historic register before the rules limiting the manner and methods of construction in historic districts apply would yield an absurd and impossible result, rendering the regulation meaningless. Certainly, that is not the intent of the regulation. Rather, it was enacted to apply to new construction in historic districts,

exactly as it says. The Sapienzas' argument also begs the question: if they did not understand that the historic district regulations applied to them, why did they seek approval from the Board of Historic Preservation of their new construction project? Plainly, they sought approval because they *knew* the regulations applied.

II. Like all other new houses constructed in Sioux Falls, the Sapienza house was required to comply with the fire safety ordinance set forth in IRC § R1003.9.

The Sapienzas' second argument is that the new house they built was not required to comply with IRC § R1003.9 governing proximity of buildings to masonry chimneys. (R. 1596). Once again, they do not dispute that the structure violates the ordinance if it is applies; they simply argue it should not apply to them. Applicability of IRC R1003.9 is a question of law. And again, the circuit court got it right.

Sioux Falls zoning ordinance 160.094(a), addressing "*General requirements*," sets a *minimum* lot requirement that a new house be at least five feet from a side property line. (Sapienza App. 40). IRC R1003.9 then imposes an *additional* specific requirement that "[c]himneys shall extend at least 2 feet (610 mm) higher than <u>any portion of a building within 10 feet</u> (3048 mm), but shall not be less than 3 feet (914 mm) above the highest point where the chimney passes through the roof." (R. 1596). Under this ordinance, any part of the Sapienza house within ten feet of the McDowell chimney must be at least two feet *lower* than it. (R. 1596). The City's inspection of the properties found that the Sapienza house was within *six* feet and ten feet *higher* than the McDowell's chimney in violation of IRC R1003.9. (R. 1561).

The argument by the Sapienzas that they did not have to comply with the ordinance when building their new house, and only had to comply with zoning ordinance 160.094(a), is unpersuasive. They were required to follow *both* laws, each of which establishes, for different reasons, a minimum setback under specified conditions. To the extent one ordinance is deemed to conflict with another, moreover, the more stringent regulation must prevail. *See* SDCL 11-4-6. Under that statute, if greater width of side yards is required under a conflicting regulation or ordinance, the more restrictive regulation must control. The Chief Building Official for Sioux Falls confirmed that when different provisions of the code conflict, the more restrictive provision must be applied. (R. 764). Clearly, the ten-foot chimney clearance required under IRC R1003.9 is more restrictive than the five-foot side yard setback requirement of zoning ordinance 160.094. As a result, the Sapienzas had a duty to follow IRC R1003.9 when constructing their home.

The Sapienzas' reliance on *30 E. 33rd St. Realty LLC v. PPF Off Two Park Ave. Owner, LLC,* 105 A.D.3d 515 (N.Y. App. Div. 2013) is misplaced. That case concerns *retroactive* application of an amendment to a building code provision requiring the owner of a taller, later-built building who had extended the height of any chimneys in adjoining buildings to maintain and repair those extensions. *See id.* The court affirmed dismissal of the action, holding that the ordinance requiring repairs did not apply retroactively.

In contrast, the issue here is whether IRC R1003.9 permits construction of a new structure in violation of its requirements. The circuit court correctly held that it does not. The McDowells did nothing wrong. Their historic home fully complied with all applicable codes and regulations. It was not until the Sapienzas chose to ignore the requirements of IRC R1003.9 in building new construction that the code violation was created. One's neighbor cannot permissibly breach a legal duty to follow the most restrictive regulation when building new construction and thereby render a neighbor's house noncompliant with the code. The circuit court properly rejected such an illogical application of our laws. Rather, the party that violated the legal obligation to follow land use regulations is properly held to account for the violation.

III. The circuit court did not commit legal error or abuse its discretion in granting injunctive relief.

Next, the Sapienzas argue that the circuit court abused its discretion in granting injunctive relief. The preliminary question of whether an injunction is statutorily authorized under SDCL 21-8-14 is reviewed by this Court de novo. *See Magner*, 2016 S.D. 50, ¶ 19, 883 N.W.2d at 83. 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;
>
> (2) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;

SDCL 21-8-14(1) & (2). On appeal, the Sapienzas have offered almost no argument that an injunction was not statutorily authorized under SDCL 21-8-14. Such an

argument is futile, as the injunction granted here plainly was authorized under SDCL 21-8-14(1) or (2). Pecuniary compensation would not afford adequate relief to the McDowells for having to next to an illegally constructed nuisance that strips them of their privacy and enjoyment of their own home. Attempting to monetize a remedy would be extremely difficult. As the circuit court correctly held, no amount of compensation is sufficient to right the harm and interference with the use and enjoyment of land imposed by these legal violations. (R. 1322-23).

As this Court has recognized, "[i]ndividual parcels of real property are considered to be so unique that when an action is brought from breach of a contract for sale of land, specific performance may be ordered." *Estate of Olson,* 2008 S.D. 4, ¶ 28, 744 N.W.2d 555, 563. This Court has further held that non-uniformity of appearance damages all homeowners in a particular development. *See Brookside Townhouse,* 2004 S.D. 79, ¶ 20, 682 N.W.2d at 769. Similarly, the failure of a particular home in a historic district to comply with historic requirements is damaging to all other homes in the district. This Court has routinely enforced compliance with such rules in covenant cases by injunctive relief. *See Prairie Hills Water & Dev. Co.,* 2002 S.D. 133, 653 N.W.2d 745; *Spring Brook Acres Water Users Ass'n, Inc. v. George,* 505 N.W. 2d 778 (S.D. 1993); *Hammerquiest v. Warburton,* 458 N.W.2d 773 (S.D. 1990). The same result should hold here.

Once the threshold question of legal eligibility for an injunction under SDCL 21-8-14 is established, the circuit court's subsequent decision on whether to grant or deny an injunction is reviewed only for abuse of discretion. *See Magner*, 2016 S.D. 50,

¶ 18, 883 N.W.2d at 82; *Strong v. Atlas Hydraulics, Inc.*, 2014 S.D. 69, ¶ 10, 855 N.W.2d 133, 138. An abuse of discretion occurs when there "is a fundamental error of judgment, a choice outside the range of permissible choices, a decision which, on full consideration, is arbitrary or unreasonable." *Thurman v. CUNA Mut. Ins. Society*, 2013 S.D. 63, ¶ 11, 836 N.W.2d 611, 615-16.

As this Court has explained, relevant factors when deciding whether to grant injunctive relief include: (1) Did the party to be enjoined cause the damage? (2) Would irreparable harm result without the injunction because of lack of an adequate and complete remedy at law? (3) Is the party to be enjoined acting bad faith? (4) In balancing the equities, is the hardship to be suffered by the enjoined party disproportionate to the benefit to be gained by the injured party? *See Strong*, 2014 S.D. 69, ¶ 11, 855 N.W.2d at 139; *Brookside Townhouse,* 2004 S.D. 79, ¶ 19, 682 N.W.2d at 769. Considered as a whole, these factors and the equities weighed strongly in favor of the injunction.

A. Responsibility for damage

Regarding the first factor, the circuit court correctly found that the Sapienzas caused the harm. (R. 1321). *See Harksen v. Peska,* 1998 S.D. 70, ¶ 25, 581 N.W.2d 170, 175 (holding that defendant caused the damage because he was responsible for building the home in violation of the restrictive covenants). The Sapienzas have not made any argument on this factor and do not dispute that it thus weighed strongly against them. Surely, it is no defense for the Sapienzas to suggest that the blame lies with their contractors, who are their agents and whose actions are imputable to them.

See SDCL 59-6-9 (principal responsible to third person for negligent acts of agent). The Sapienzas are responsible for the violations created by their decisions.

B. Irreparable harm

The circuit court also correctly found that the harm is irreparable. (R. 1321). On this factor, the similarity of historic district requirements to restrictive covenants is instructive. This Court has explained that "given the purpose of covenants to maintain the desired tone of the land, to prevent nuisances, and to secure the attractiveness of the land, even a minor violation of the covenants could be irreparable." *Brookside Townhouse*, 2004 S.D. 79, ¶ 23, 682 N.W.2d at 769. The failure of this new construction to meet the legal requirements for historic districts impacts the desired tone of the neighborhood, created a nuisance, and has a significant detrimental impact on the attractiveness of the area to all of its residents and the City as a whole. The harm is irreparable and far reaching. Barbara McDowell testified about the devastating impact that the legal violations have had on their home:

> It has forever changed the way we utilize our home. The entire south side of the home is blocked by any sunlight, so fall and winter when we would love to have some southern exposure, there's none. We lack privacy in our very front living room. There's a security camera that is in full view of our gathering room where guests would appear. Our dining room, we can't use our fireplace, and we have a window – our windows look out to either their home or windows where we can see into their home or they can see into our home. Our daughter's bathroom has a window directly looking into her bathroom. Our daughter's bedroom has a window that is slightly adjacent, but can see into her bedroom.

(R. 736). The McDowells have always taken extraordinary care of their home and been meticulous with any remodeling projects to maintain the historical character of the home. (R. 722-24).

Other residents of the district are impacted as well. Lisa Nykamp loved the McDowell house but believed that the new construction next door, in violation of the historic district standards, made the property no longer desirable. (R. 930-92). Carla Williams testified that it was important for her family to live in a historic district because it protects the nature of the neighborhood, and is fearful that if the Sapienza residence is allowed to remain in its current non-conforming incarnation, "she is a sitting duck." (R. 912-13). Todd Nelson testified that his family likes living in a historic district because of the quality of life it brings, and believes that that the Sapienza mansion would be detrimental to his property if erected on the east side of the park where his home is located. (R. 919-20). Without the injunction, the harm to the McDowells will continue unabated and negatively affect their home, their lives, and the entire McKennan Park Historic District for the foreseeable future.

C. Bad faith

On the third factor, the circuit court found "that the Sapienza's acted in bad faith rather than an innocent mistake in the construction of their residence." (R. 1321). This factor also weighed strongly in favor of granting the injunction. The Board members testified that they rely upon the honesty of those who come before it to provide accurate and truthful information. (R. 1063-64). Josh Sapienza did not show the Board the architectural drawing by Natz showing the

proximity of the new construction to the McDowell property or any picture showing what he intended the house to look like. (R. 683-86, 1564-65). Rather, he provided conceptual drawings implying a wide, green space on the lot's north side and plans depicting a house he did not intend to build. (R. 1044, 1080-82). Elizabeth Schulze, an architect on the Board, testified that Sapienza had an obligation to disclose that the McDowell home was only two feet off the property line but did not do so. (R. 1688). She also testified that Sapienza made misrepresentations regarding the materials that he intended to use. (R. 1689).

Sapienza also did not inform the Board that the Sapienza residence would be 45 feet tall. (R. 1082, 1570-72). He provided no information regarding the ultimate height of the home. (R. 1570-72). Keith Thompson, an architect on the Board, testified that Sapienza falsely represented that the new house would be built on the same footprint as the existing house. (R. 805, 1581). Sapienza also falsely said there would be an addition of "2000 square feet of green space," when it actually resulted in the *loss* of 1,700 square feet of lawn. (R. 594, 1579).

After obtaining approval under false pretenses, the Sapienzas hired the Sorums, who had no knowledge of historic district requirements, to completely redraw Natz's plans, making the house significantly taller. (R. 830, 883-85, 892). They also moved it closer to the McDowell property. (R. 1494 #7). After making all these changes, neither Sapienza nor his builders sought Board approval. Seven out of nine board members testified that they would not have approved the home had the project come back before them. (R. 614).

Significantly, the Sapienzas were informed early on in the construction process to cease and desist all construction efforts and that they intended to pursue legal action, but they chose to continue building without even consulting a lawyer. (R. 1505). *See Harksen,* 1998 S.D. 70, ¶ 28, 581 N.W.2d at 175 (finding that ignoring letter from attorney regarding covenants and warning of legal action weighed in favor of finding that conduct was not an innocent mistake). When the notice was received, none of the windows were in the residence and substantial work was yet to be completed on the home. (Ex. 72). The mansion was not completed until eight months later in January 2016. (R. 844). The record fully supports the finding that Sapienza took calculated steps to obtain approval without having to comply with the governing laws. This was no innocent mistake.

D. Balancing the equities

Regarding the fourth factor, balancing of the interests is not always required because "in some situations the facts and relevant law may indicate that an injunction clearly should be granted or denied." *Prairie Hills Water and Development Co.,* 2002 SD 133, ¶ 39, 653 N.W. 2d at 754 (affirming injunction requiring defendant to move business despite high cost of relocating). Moreover, this Court will uphold injunctions even when the remedy imposed, due to the conduct that created the problem, is necessarily harsh. In *Ladson v. BPM Corp,* 2004 S.D. 74, ¶ 19, 681 N.W.2d 863, 868, this Court upheld an injunction that had the effect of dissolving the defendant's ranching operation because there were no lesser available sanctions that would have prevented the defendant's livestock from trespassing on the plaintiff's

land. In *Spring Brook Acres,* 505 N.W.2d at 780, this Court upheld an injunction requiring the defendant to remove a radio tower from its property because it violated a covenant contained in the easement.

In *City of Madison v. Clarke,* 288 N.W.2d 312, 314 (S.D. 1980) this Court found that the defendant had built a carport in violation of a zoning ordinance and required them to remove the roof on the carport. As this Court explained, "[e]conomic disadvantage, however, does not constitute unnecessary hardship. The hardship must be substantial and of compelling force, not merely for reasons of convenience or profit." *Id.* This Court went on to recognize that it was the defendant's "choice to build a carport in violation of the ordinance" and that the defendant "cannot now complain of the costs involved." *Id.*

The same is true here. The Sapienzas knowingly built new construction that did not comply with the historic district requirements or setback requirements imposed by the fire code under the circumstances. They misled the Board of Historic Preservation. They were warned not to proceed. They cannot now be heard to complain of the cost involved with making their home comply with laws they should have followed in the first place. This Court's precedent fully supports requiring the Sapienzas to bring the new construction into compliance with all legal requirements and applicable codes.

The *Harksen* case also is particularly instructive. There, this Court reversed the trial court's injunction requiring removal of a cabin built in violation of restrictive covenants because "the cabin [was] barely visible from the edge of [the plaintiff's]

land, and not visible at all from [the plaintiff's] building site." 1998 S.D. 70, ¶ 32, 581 N.W.2d at 176. This Court found that the "injunction was simply too harsh considering the intangibility of the harm suffered by [the plaintiff]." *Id.* It held that it would be inequitable to require destruction of the home when there was "really no burden on [the plaintiff]." *Id.*

The exact opposite is true in this case. The burden here is manifest. The new construction is a constant presence, looming above and almost directly up against the McDowell's home, causing extreme harm to the McDowells specifically and the historic district as a whole. The Sapienza structure dominates its neighbor, blocking out all natural sunlight. (R. 736). The McDowells' eleven-year-old daughter has virtually no privacy in her bedroom or her bathroom because the Sapienzas' windows peer into these rooms. (R. 736). The family cannot use their nearly 100-year-old fireplace that they adore and that has added ambiance to their home for the quarter of a century that they have lived there. (R. 736). As Mrs. McDowell lamented, "[i]t has forever changed the way we utilize our home." (R. 736). Other residents of the McKennan Park Historic District are afraid that they will suffer the same fate as the McDowells if the Sapienza mansion is allowed to stand uncorrected. Our land use regulations should provide a level of confidence and security on which citizens can rely, knowing that those who violate them will be held accountable.

Contrast this with the harm to the Sapienzas if they are held to make their house compliant with ARSD 24:52:07:04 and the Secretary of the Interior Regulations for new construction in historic districts. The house would need to be

8.42 feet shorter. At trial, Dick Sorum admitted that the nearly 20-foot third story attic is just insulation and rafters, with no finished living space. (R. 891). Thus, the Sapienzas could lower the roof without sacrificing any living space. Significantly, the Sapienzas did not introduce any evidence at trial regarding the supposed cost involved in altering the structure to comply with the law. Unsupported assertions in their appellate brief provide no basis for reversal on those grounds. (Brief at 25-26).

With respect to the fire code violation, the Sapienzas and City have both suggested that the McDowells should simply convert their fireplace from wood-burning to gas. That is truly no solution at all. The McDowell's expert explained why a gas insert fireplace would not remedy the problem and would be contrary to the historic district standards. (R. 619, 722-23). It is not possible to extend the chimney tall enough to comply with the regulation, and doing so would make fireplace unsafe, cause a fire hazard inside the McDowell home, and cause structural problems because it was not intended to support that much weight. (R. 657).

The only way to remedy the fire code violation is to move the Sapienza house the required distance to the south, so that every part, including its wooden eaves, is at least ten feet away from the termination of the chimney. That remedy places the burden on those who created the problem.

In balancing the harms, it also is important to note that to the extent that the Sapienzas are required to make their house comply with the law, they may have claims against others to recoup the cost of doing so. Certainly, one of the Sapienzas' themes at trial was that it was reasonable for them to rely on their contractors in

erecting this new construction. That may very well be. If, however, the mansion constructed as a result of the collective wisdom of those individuals violates the law, it is no legal defense for the Sapienzas that the professionals they hired approved it. Instead, the correct legal avenue for the Sapienzas is to seek to shift their responsibility through indemnity or contribution. *See Jorgensen Farms, Inc., v. Country Pride Corp., Inc.,* 2012 S.D. 78, 824 N.W.2d 410, 420 n.2. The Sapienzas can seek to pursue claims against these other parties for any costs associated with compliance.

All said, the balance of harms weighed strongly in favor of granting the injunction. None of the circuit court's findings have been shown to be clearly erroneous and its decision was not an abuse of discretion.

IV. This Court is capable of conducting meaningful review on appeal.

Next, the Sapienzas argue that the lower court did not enter sufficient findings or conclusions to allow for meaningful review on appeal. This argument has no merit. The court's findings and conclusions are set forth in its memorandum decision as permitted under SDCL 15-6-52(a). Even *oral* findings and conclusions are sufficient under the rule. *See id.* In addition, the court expressly rejected numerous findings and conclusions proposed by the Sapienzas and the City, finding them "contrary to the Memorandum Decision." (R. 1727-28). The court's detailed opinion, which plainly concluded that the Sapienzas violated multiple legal duties, is fully supported by the evidence and fully supports the grant of injunctive relief. (R. 1321 – "This court finds that the Sapienza's brought the harm under the first factor. The court finds there were certain regulations breached by the Sapienza's, and they

are the party to be enjoined"). There is no need for a remand in this case for additional fact-finding.

V. The circuit court's rejection of the affirmative defenses of laches and assumption of the risk is supported by the evidence.

Finally, the Sapienzas unpersuasively argue that the evidence did not support rejection of their affirmative defenses of laches and assumption of the risk.

Laches has no place in this litigation. To prevail, the Sapienzas would have had to prove that: (1) the McDowells had full knowledge of the facts upon which the action was based, (2) regardless of this knowledge, the McDowells engaged in an unreasonable delay before seeking relief in court, and (3) that it would be prejudicial to allow the McDowells to maintain the action. *See Burch v. Bricker,* 2006 S.D. 101, ¶ 15, 724 N.W.2d 604, 608.

Barbara McDowell began calling the City to inquire about the Sapienza residence in November 2014 as soon as the foundation was poured and she saw how close it was to her own home. She called the City a dozen times to complain about the close proximity as well as how tall the home was. (R. 728-30). The McDowells were diligent about seeking to hold the Sapienzas accountable and about requiring the City to enforce the law. Inspection of the chimney took place on May 4, 2015 and the report was issued three days later. (R. 1561). The McDowells filed this lawsuit and served the defendants on May 13, 2015. Five days passed from when the McDowells received the report and the filing of the case. Instituting legal action within three business days of learning of a violation cannot constitute laches.

The Sapienzas also have attempted to imply that the McDowells knew what the Sapienzas had planned for the project because of a text message that Pierce McDowell sent to Josh Sapienza in August 2014:

> I have to forewarn you that my wife is really suffering about all of this. [T]he home is just way too big for the lot. [Y]ou will move in 5 years and we will live with it forever. [T]ough gig for us. [N]ot your problem or fault… just a tough gig for us.

(R. 1593). This text message cannot serve as the basis for a laches defense, which requires full knowledge of the facts upon which the action is based. Mr. McDowell certainly did not have full knowledge when he made that statement in August 2014. At the time, he had very little idea as to what was actually going to be built next door. Construction had not yet begun. The foundation had not yet been poured. (R. 728). The building permit was not even issued for another two months. (R. 1502). He did not know how tall the house was going to be. All he knew about the house came from the rendering shown to him by Josh Sapienza one night in a dim restaurant in Sioux Falls. (R. 1013). The drawing showed a small cottage-style house that fit nicely on the lot and left adequate room for two trees located in between the proposed Sapienza house and his home. (R. 1014). When asked what his basis for the statement in text was, McDowell replied, "other than it being just the two stories and something that we historically had not been accustomed too, I don't know what else would have triggered that the home was too big." (R. 1027). He expressly said, "I didn't have the concern at that point enough to know that it was going to be what is now there." (R. 1028).

Information regarding the ultimate height of the mansion was not even given to the Board of Historic Preservation. (R. 1570-72). When the building permit was obtained in late October 2014, the height represented to the City was 40 feet, 2 inches. (R. 848). The house, however, ended up being nearly 45 feet tall. (R. 1678). There was no way for McDowell to know in August 2014 the height of the towering mansion that was to be built next door to him. He also did not know of the many changes that the Sapienzas intended to make to the plans they presented to the Board. He did not learn until May 2015 that he could no longer use his fireplace. (R. 1561). Laches cannot apply to these facts.

Even if the Court were to somehow entertain the notion of laches, it cannot be advanced by the Sapienzas because they have made misrepresentations and been adjudged guilty of bad faith by the circuit court. This Court has directed that laches is not available to a defendant that has "engaged in concealment, misleading tactics and misrepresentation." *Conway v. Conway,* 487 N.W.2d 21, 25 (S.D. 1992). Members of the Board testified regarding the Sapienzas' misrepresentations and misleading omissions. (R. 805, 1688-89). The Sapienzas cannot avail themselves of the defense of laches.

The circuit court also properly rejected any assumption of the risk defense. "A defendant asserting assumption of the risk must establish three elements: 1) that the plaintiff had actual or constructive knowledge of the risk; 2) that the plaintiff appreciated the character of the risk; and 3) that the plaintiff voluntarily accepted the

risk, given the time, knowledge, and experience to make an intelligent choice." *Stone v. Von Eye Farms,* 2007 S.D. 115, ¶ 19, 741 N.W.2d 767, 772.

Here, the argument appears to be that the McDowells assumed the risk of Sapienzas' many violations of the law when they purchased a home 25 years ago that did not conform to the modern five-foot setback. That argument is unpersuasive. The McDowells had no actual or constructive knowledge of the risk that the Sapienzas would build a house that fails to comply with the legal requirements for constructing a home in a historic district. The McDowell home, chimney and all, was present long before the Sapienzas started construction. It was the Sapienzas who had a duty to build their new construction in compliance with all applicable laws and regulations. They completely failed. The McDowells did not knowingly or voluntarily assume any risk that the Sapienza would build an illegally constructed mansion next door. Such an argument runs contrary to logic.

VI. Notice of Review: The City's liability for negligence should have been included in the judgment.

The City, like the Sapienzas, is liable in negligence to the McDowells for failing to follow the dictates of SDCL 11-4-6. Plainly, the City knew of IRC R1003.9 and SDCL 11-4-6. It also had an obligation to follow the historic codes. (R. 1566-69). The City knew that the more stringent regulation was to be applied if a conflict arose between two statutes or regulations. (R. 764). The evidence supported the conclusion that the City wrongfully permitted the Sapienzas to build their home in violation of the governing law. It was certainly foreseeable to the City that failure to enforce the code when issuing a building permit to the Sapienzas would harm the

McDowells. The City negligently abdicated its responsibility for code compliance and blindly issued a building permit to the Sapienzas, having no regard for code issues that might result. Based on the circuit court's decision, the McDowells are entitled to judgment against the City on the issue of liability. The circuit court erred in neglecting to expressly include that finding of liability in the judgment that it issued.

CONCLUSION

The integrity of historic districts such as McKennan Park is important to the fabric of our society. State and federal regulations govern new construction in such districts to protect their historic character. The new construction here runs afoul of those laws and should not be permitted to remain in its current incarnation. Pecuniary compensation would provide no remedy at all for the McDowells and would do nothing to protect the other residents of the McKennan Park Historic District.

If one can simply buy one's way out of having to comply with state and federal historic district requirements and local fire codes, then they truly have no meaning. Restrictive covenants entered into by private citizens to govern land developments are routinely granted protection by injunctive relief to remedy noncompliance. Historic districts that provide even stronger protection under the law should be enforced with no less resolve. The circuit court correctly held that the Sapienza mansion must be made to conform to the law. No other remedy affords adequate relief in this case.

WHEREFORE, Pierce and Barbara McDowell respectfully request that this Honorable Court affirm the grant of injunctive relief.

Dated this 8th day of August, 2017.

JOHNSON JANKLOW ABDALLAH REITER & PARSONS LLP

BY */s/ Ronald A. Parsons, Jr.*
Steven M. Johnson
Ronald A. Parsons, Jr.
Shannon R. Falon
101 S. Main Ave, Suite 100
Sioux Falls, SD 57104
(605) 338-4304

Attorneys for Appellees
Pierce and Barbara McDowell

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing brief was served electronically upon:

Attorneys for Appellants
Richard Travis - May & Johnson, PC
dtravis@mayjohnson.com

Attorneys for City of Sioux Falls
William Garry - Cadwell, Sanford, Deibert & Garry, L.L.P.
bgarry@cadlaw.com

Attorneys for *Amicus Curiae* South Dakota State Historical Society
Paul S. Swedlund – South Dakota Attorney General's Office
Paul.Swedlund@state.sd.us.gov

On this 8th day of August, 2017.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

CERTIFICATE OF COMPLIANCE

Under SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements of the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 9,999 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28234

City of Sioux Falls Notice of Review No. 28239

Pierce and Barbara McDowell Notice of Review No. 28252

PIERCE MCDOWELL AND BARBARA MCDOWELL,

Plaintiffs/Appellees,

vs.

JOSEPH SAPIENZA AND SARAH JONES SAPIENZA, MD,

Defendants/Appellants,

and

CITY OF SIOUX FALLS,

Defendant/Appellee.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

The Honorable John Pekas, Presiding Judge

BRIEF OF APPELLEE CITY OF SIOUX FALLS

William C. Garry
Melissa R. Jelen
Cadwell Sanford Deibert & Garry LLP
200 E. 10th St., Suite 200
PO Box 2498
Sioux Falls, SD 57101-2498
Attorneys for Appellee City of Sioux Falls

Steven M. Johnson
Shannon R. Falon
Scott Abdallah
Ronald Parson, Jr.
Johnson, Janklow, Abdallah,
Reiter & Parsons, LLP
101 S. Main Ave. #100
PO Box 2348
Sioux Falls, SD 57101-2348
Attorneys for Appellees Pierce McDowell and Barbara McDowell

Richard L. Travis
Adam R. Hoier
May & Johnson, PC
6805 S. Minnesota Ave. #100
PO Box 88738
Sioux Falls, SD 57109
Attorneys for Appellants Joshua Sapienza and Sarah Jones Sapienza, MD

Marty J. Jackley
Attorney General
Paul S. Swedlund
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501
Attorneys for Amicus Curiae South Dakota State Historical Society

---

NOTICE OF APPEAL FILED APRIL 19, 2017

NOTICE OF REVIEW OF APPELLEE CITY OF SIOUX FALLS FILED MAY 1, 2017

NOTICE OF REVIEW OF APPELLEES PIERCE AND BARBARA MCDOWELL FILED MAY 8, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page #

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

The following record citations and references will be used in this brief. Citations to the certified record will be denoted "R.", followed by the appropriate page number(s). Citations to the Trial Transcript will be denoted "TT", followed by the date of trial and appropriate page number(s). Citations to trial exhibits will be denoted "Ex. ___". Appellees Pierce and Barbara McDowell will be referred to collectively as "McDowells," Appellants Joseph and Sarah Jones Sapeinza, MD will be referred to collectively as "Sapienzas," and Appellee City of Sioux Falls will be referred to as "City."

JURISDICTIONAL STATEMENT

The Sapienzas appeal the trial court's Judgment and Order on Objections to Plaintiff's and Defendant's Proposed Findings of Fact and Conclusions of Law, which were both signed on March 17, 2017, and filed on March 20, 2017, by the Circuit Court for the Second Judicial Circuit of the State of South Dakota, the Honorable John Pekas presiding. (R. 1731-32, 1726-29). Notice of Entry of Judgment and Notice of Entry of Order on Objections to Plaintiffs' and Defendants' Proposed Findings of Fact and Conclusions of Law were filed and served on March 21, 2017. (R. 1733-36, 1740-45). The Sapienzas filed a timely Notice of Appeal on April 19, 2017. (R. 1790-91). The City filed a timely Notice of Review on May 1, 2017. The McDowells filed a timely Notice of Review on May 8, 2017.

STATEMENT OF THE ISSUES

I. Did the trial court err in determining that the public duty doctrine was not applicable?

The trial court concluded that the public duty doctrine was not applicable.

Hagen v. City of Sioux Falls, 464 N.W.2d 396 (SD 1990)
Tipton v. Town of Tabor (Tipton I), 538 N.W.2d 783 (SD 1995)

E.P. v. Riley, 1999 SD 163, 604 N.W.2d 7
Pray v. City of Flandreau, 2011 SD 43, 801 N.W.2d 451

II. Did the trial court err in failing to dismiss the negligence claim against the City?

The trial court did not dismiss the McDowells' negligence claim against the City.

Johnson v. Hayman & Associates, Inc., 2015 SD 63, 867 N.W.2d 698
IRC § R1003.9

III. Did the trial court enter findings of fact and conclusions law sufficient to allow for a meaningful review on appeal?

Throughout its analysis of the McDowells' claims against the Sapienzas and the City, the trial court, in its Memorandum Decision, made numerous statements that "a reasonable fact finder could conclude", that "a reasonable fact finder could determine", and that "a reasonable fact finder may find." The trial court rejected all of the parties' proposed findings of fact and conclusions of law, and instead, entered findings of fact and conclusions of law consistent with its Memorandum Decision.

Wiswell v. Wiswell, 2010 SD 32, 781 N.W.2d 479
Donohue v. Jennings, 334 N.W.2d 683 (SD 1983)
Repp v. Van Someren, 2015 SD 53, 866 N.W.2d 122
Grode v. Grode, 1996 SD 15, 543 N.W.2d 795

STATEMENT OF THE CASE

The McDowells commenced this action, asserting claims against the Sapienzas for negligence and nuisance and against the City for negligence and inverse condemnation in the Circuit Court for the Second Judicial Circuit of the State of South Dakota. (R. 1-13). The McDowells sought monetary damages and injunctive relief against the Sapienzas, and monetary damages against the City.

Following the pretrial conference on June 13, 2016, and upon agreement of the parties, the trial court signed an Order Granting Plaintiffs' Motion to Amend Bifurcate Remedy Phase of Trial providing that the Court "will take evidence [sic] only the injunctive phase of the case and will reconvene at a later time to take evidence on the

issue of damages only if the Court finds that the [McDowells] ha[ve] an adequate remedy at law." (R. 565-66).

A court trial on the injunction phase of the case was held on June 28 – June 30, 2016, the Honorable John Pekas presiding. (TT (6/28/16-6/30/16)). The trial court issued its Memorandum Decision and Order on December 27, 2017. (R. 1303-31). Therein, the trial court held in favor of the McDowells on their claims against the Sapienzas, determined that the McDowells have no adequate remedy at law, and granted the McDowells' request for permanent injunctive relief. *Id.* The trial court further held in favor of the City on the inverse condemnation claim.[1]

After ordering the parties to submit proposed findings of fact and conclusions of law, the trial court rejected all of the parties' proposals, and instead, entered an Order on Objections to Plaintiff's and Defendant's Proposed Findings of Fact and Conclusions of Law adopting findings of fact and conclusions of law consistent with its Memorandum Decision. *Id.*

The trial court entered a Judgment signed on March 17, 2017, and filed on March 20, 2017, granting a permanent injunction against the Sapienzas and entering a judgment in favor of the City on the McDowells' inverse condemnation claim. (R. 1731-32).

STATEMENT OF FACTS

The Sapienzas own the property located at 1323 South Second Avenue, Sioux Falls, South Dakota (hereinafter the "Sapienza Property"). (TT (6/28/16) 51:20-52:5, 97:16-17). The Sapienza Property lies within the McKennan Park historical district, but is not listed on the state register or the national register of historic places. (Ex. 60; TT

[1] The McDowells did not file a notice of review on this ruling, and therefore, they have waived it. *Johnson v. Radle*, 2008 SD 23, ¶ 19, 747 N.W.2d 644, 652.

(6/28/16) 52:6-15; TT (6/30/16) 24:2-10). At the time the Sapienzas purchased the Sapienza Property, it was denominated as an intrusion into the historic neighborhood and a noncontributing property to the historical district. (TT (6/28/16) 51:20-52:21).

On May 14, 2014, Joshua Sapienza presented a proposal to the Sioux Falls Board of Historic Preservation (the "Board") to raze the existing home and to construct a new home on the Sapienza property. (Ex. 29; TT (6/30/16) 67:25-68:24). Those proposals were approved by the Board. (Ex. 29; TT (6/28/16) 71:6-12).

On October 22, 2014, the City issued a building permit to the Sapienzas in connection with the construction of the new home on the Sapienza Property. (Ex. 13). In support of their application for a building permit, the Sapienzas submitted building plans which demonstrated that the home to be constructed on the Sapienza Property would comply with the thirty-five foot (35') maximum height and five-foot (5') minimum side yard setback requirements in City of Sioux Falls Ordinance §160.094 (hereinafter "SFO 160.094"). (Ex. 1, TT (6/29/16) 38:21-39:8). No information regarding the adjoining property was submitted to the City in relation to the issuance of the Sapienza building permit. (Ex. 1; TT (6/29/16) 42:10-17; TT (6/28/16) 198:19-24, 199:4-5).

It is undisputed that the Sapienza home, as constructed, complies with the maximum height and minimum side yard setback requirements of SFO 160.094. (TT (6/28/16) 58:12, 18-20, 172:4-7, 188:7-21, 203:14-15, 212:11-214:8; TT (6/29/16) 74:7-75:22, 104:12-105:14, 236:14-237:2).

The McDowells reside at 1321 South Second Avenue, Sioux Falls, South Dakota, which is the lot immediately to the north of the Sapienza Property. (TT (6/28/16) 149:23-

150:2; TT (6/29/16) 45:7-9). The McDowells' home is located two feet from the property line on the south side of the McDowells' lot. (TT (6/28/16) 39:5-6, 171:4-7). The McDowells' home has a wood burning fireplace with a chimney on the south end of the home. (Ex. 17, TT (6/28/16) 30:15-17). In May 2015, Barbara McDowell called the City fire inspector and requested an inspection of the McDowells' chimney. (Ex. 23; TT (6/28/16) 162:16-20, 164:10-20). The City inspector conducted an inspection and advised the McDowells of the potential for a building code violation if their wood fireplace were to be used. (Ex. 23, TT (6/28/16) 162:16-20, 164:10-165:19). Specifically, the McDowells' home would be in violation of International Residential Building Code § R1003.9 (IRC R1003.9) *if* the McDowells were to use their wood burning fireplace because the eave of the Sapienza home is approximately 10' above and 6' horizontal from the McDowells' chimney termination. (Ex. 23, TT (6/28/16) 164:10-165:19).

STANDARD OF REVIEW

This Court's standard of review is well settled:

> This Court reviews a trial court's findings of fact under the 'clearly erroneous' standard and overturns a trial court's conclusions of law only when the trial court erred as a matter of law. *Century 21 Associated Realty v. Hoffman,* 503 N.W.2d 861, 864 (S.D.1993) (citations omitted).... Questions of law are reviewed de novo. *City of Colton v. Schwebach,* 1997 SD 4, ¶ 8, 557 N.W.2d 769, 771. "This Court interprets statutes under a de novo standard of review without deference to the decision of the trial court." *In re Estate of Jetter,* 1997 SD 125, ¶ 10, 570 N.W.2d 26, 28.

In re Estate of Olson, 2008 SD 4, ¶ 8, 744 N.W.2d 555, 558 (quoting *Matter of Estate of O'Keefe*, 1998 SD 92, ¶ 7, 583 N.W.2d 138, 139).

Whether a duty exists is a question of law, fully reviewable by this Court on appeal. *Fisher Sand & Gravel Co. v. State By and Through South Dakota Dept. of*

Transp., 1997 SD 8, ¶ 12, 558 N.W.2d 864, 867 (citing *Tipton v. Town of Tabor (Tipton I)*, 538 N.W.2d 783, 785 (SD 1995)). Therefore, this Court considers the existence of a duty under the de novo standard. *Id.* (citing *Bland v. Davison County*, 507 N.W.2d 80, 81 (SD 1993)).

ARGUMENT

I. The trial court erred in determining that the public duty doctrine is not applicable.

The McDowells argued below that the City was negligent in issuing a building permit to the Sapienzas that allowed the Sapienzas to construct their home in violation of IRC R1003.9 and SDCL 11-4-6.[2] "In order to prevail in a suit based on negligence, a plaintiff must prove duty, breach of that duty, proximate and factual causation, and actual injury." *Bernie v. Catholic Diocese of Sioux Falls*, 2012 SD 63, ¶ 15, 821 N.W.2d 232, 240 (quoting *Highmark Fed. Credit Union v. Hunter*, 2012 SD 37, ¶ 9, 814 N.W.2d 413, 415). The duty required is the "duty on the part of the defendant to protect a plaintiff from injury." *Id.* (quoting *Clausen v. Aberdeen Grain Inspection,* 1999 SD 66, ¶ 11, 594 N.W.2d 718, 721). One generally owes no duty to control the conduct of third persons. *Pray v. City of Flandreau*, 2011 SD 43, ¶ 3, 801 N.W.2d 451, 453 (citing *Tipton I*, 538 N.W.2d at 785). Additionally, South Dakota continues to observe the public duty doctrine. *See Pray*, *supra*; *E.P. v. Riley*, 1999 SD 163, ¶ 15, 604 N.W.2d 7, 12 ("South Dakota has specifically refused to abrogate the public duty doctrine."). "The public duty doctrine declares that the 'government owes a duty of protection to the public, not to

[2] Importantly, this is the only theory of negligence against the City on which the McDowells submitted proposed findings of fact and conclusions of law. (R. 1866-1927). Consequently, any other theory of negligence against the City has been abandoned by the McDowells. *Stemper v. Stemper*, 415 N.W.2d 159 (SD 1987) ("A claim or theory not mentioned in the proposed findings of fact and conclusions of law is deemed abandoned.").

particular persons or classes.'" *Riley*, 1999 SD 163, ¶ 15, 604 N.W.2d at 12 (quoting *Tipton v. Town of Tabor (Tipton II)*, 1997 SD 96, ¶ 10, 567 N.W.2d 351, 356) (emphasis added). It "acknowledges that many 'enactments and regulations are intended only for the purpose of securing to individuals the enjoyment of rights and privileges to which they are entitled as members of the public, rather than for the purpose of protecting any individual from harm.'" *Id.* (emphasis added). As this Court explained in *Hagen v. City of Sioux Falls*, 464 N.W.2d 396, 399 (SD 1990):

> [A] legislative enactment … whose purpose is found to be exclusively (a) to protect the interests of the state or any subdivisions of it as such, or (b) to secure to individuals the enjoyment of rights or privileges to which they are entitled only as members of the public." … does not create a standard of conduct to be used to impose tort liability.

This Court clarified in *Riley* that the public duty rule extends only to issues involving public safety *or* law enforcement. 1999 SD 163, ¶ 22, 604 N.W.2d at 13-14. It appears that based on that clarification, the trial court held that the public duty doctrine was inapplicable, concluding:

> [d]espite the City's argument that building codes serve the sole purpose of protecting the public as a whole, it is clear from the nature of this case that law enforcement and public safety is not at issue. Rather, the issue is whether the City acted with proper administration in issuing a permit that violated building regulations. Thus, in this case involving such violations, this court finds that the public duty doctrine is inapplicable.

(R. 1328). The trial court's determination that the public duty doctrine is inapplicable in this case flies in the face of established precedent and was erroneous as a matter of law.

This case involves the City's issuance of a building permit and enforcement of its building code (specifically, IRC R1003.9). As previously held by this Court in *Hagen*, *supra*, those actions by the City serve the sole purpose of protecting the public as a

whole, not any particular individual or class of persons, and fall squarely within the public duty doctrine. As summarized by this Court in the *Riley* decision,

> [i]n *Hagen*, the issue was whether a city building code imposed a duty on the city building inspection office to a homeowner for allegedly negligent inspection and approval of faulty construction. This Court found that the language of the building code, upon which the homeowner-plaintiffs based their claim of negligent inspection, was aimed only at public safety or general welfare purposes. *Hagen*, 464 N.W.2d at 399. The building code did not create an obligation to a specific class of individual members of the public; rather, it created only a general duty to the public as a community. *Id.* Thus, we held the building code could not support the homeowner's negligence claim against the city building inspector's office because there was no duty established.

Riley, 1999 SD 163, ¶ 16, 604 N.W.2d at 12 (emphasis added). Indeed, this Court specifically recognized in *Hagen*,

> The purpose of a building code is to protect the public. This is well stated in 7 McQuillin, Municipal Corporations (3 ed.) § 24.507, p. 523:
>
> > **** The enactment and enforcement of building codes and ordinances constitute a governmental function. The primary purpose of such codes and ordinances is to secure to the municipality as a whole the benefits of a well-ordered municipal government, or, as sometimes expressed, to protect the health and secure the safety of occupants of buildings, and not to protect the personal or property interests of individuals.
>
> Building codes, the issuance of building permits, and building inspections are devices used by municipalities to make sure that construction within the corporate limits of the municipality meets the standards established. As such, they are designed to protect the public and are not meant to be an insurance policy by which the municipality guarantees that each building is built in compliance with the building codes and zoning codes. The charge for building permits is to offset expenses incurred by the city in promoting this public interest and is in no way an insurance premium which makes the city liable for each item of defective construction in the premises.

464 N.W.2d at 398 (citations omitted) (emphasis added). This Court's decision in *Hagen* makes abundantly clear that the City's issuance of a building permit and its enforcement of building codes and zoning ordinances fall squarely within the public duty doctrine.

This Court's more recent decision in *Pray*, likewise, supports the application of the public duty doctrine. 2011 SD 43, 801 N.W.2d 451. In that case, the plaintiff fell and was injured when a Rottweiler broke loose from its owner and dashed across the street toward her. *Id.* The plaintiff brought a negligence action against the dog owner and the City of Flandreau, asserting that that the city knew the dog was dangerous and negligently failed to enforce its vicious animal ordinance. *Id.* The trial court applied the public duty doctrine, concluding that the vicious animal ordinance is clearly for the protection of the public as a whole, and granted summary judgment to the city. *Id.* This Court affirmed the entry of summary judgment and the trial court's application of the public duty doctrine. *Id.*

This case warrants the same result as *Hagen* and *Pray* because it involves issues of public safety *and* law enforcement. IRC R1003.9, the residential building code directly at issue in this case, provides:

> Chimneys shall extend at least 2 feet (610 mm) higher than any portion of a building within 10 feet (3048 mm), but shall not be less than 3 feet (914 mm) above the highest point where the chimney passes through the roof.

The very purpose of this building code is fire prevention in order to protect the public. Indeed, the McDowells' own expert testified that this is a safety-based standard. (TT (6/28/16) 35:7-14). Thus, there is no question that the City's issuance of a building permit and enforcement of its building codes, specifically IRC R1003.9, involves issues of public safety. *See Hagen*, *supra* ("[T]he purpose of a building code is to protect the

public. …The primary purpose of such codes and ordinances is to protect the municipality as a whole…to protect the health and safety of occupants of buildings, and not to protect the personal or property interests of individuals."); *Taylor v. Stevens County,* 111 Wash.2d 159, 759 P.2d 447 (1988) (holding that "the duty to issue building permits and conduct inspections is to protect the health and safety of the general public."). This case also involves law enforcement, namely, the City's enforcement of its building codes. Therefore, this matter falls squarely under the public duty doctrine. *See e.g. Pray, supra*; *Riley, supra; Hagen, supra*. This Court's decision in *Hagen* leaves no question that building codes and the issuance of building permits are devices utilized by the City which are designed to protect the public as a whole. *Hagen, supra.*

South Dakota recognizes the "special duty" exception to the public duty rule. That exception recognizes that there may be some unique situations where a duty is owed to a particular class of persons separate from that owed to the general public. *Walther v. KPKA Meadowlands Ltd. Partnership,* 1998 SD 78, ¶ 18, 581 N.W.2d 527, 532. "[A] government entity is liable for failure to enforce its laws…when it assumes a special, rather than a public, duty." *Pray*, 2011 SD 43, ¶ 3, 801 N.W.2d at 453 (quoting *Tipton I,* 538 N.W.2d at 785). "To establish liability under this restrictive template, plaintiffs must show a breach of some duty owed to them as individuals." *Tipton II,* 1997 SD 96, ¶ 13, 567 N.W.2d at 358. "While many plaintiffs have invoked the special duty rule to support claims against public entities, most courts have found no liability for matters such as failure to adequately inspect a structure for violations of fire and building codes[.]" *Id.*[3]

[3] *See also Benson v. Kutsch*, 181 W.Va.1, 380 S.E.2d 36, 40 (1989) (occupant of apartment who was injured as a result of fire in apartment could not maintain action against city based upon city's alleged negligence in failing to conduct inspection which would have revealed violation of city's building and housing code requiring that

In *Tipton I, supra,* this Court retained the public duty doctrine but modified the bright-line test in *Hagen* which relied solely upon statutory language to ascertain the existence of a special duty to protect a person or class of persons, and substituted a four-part test to analyze whether a case is taken out of the realm of the public-duty rule based on the existence of a special duty. *Tipton I*, 538 N.W.2d at 787. To determine whether a special duty exists, four elements must be considered: (1) whether the city had actual knowledge of the dangerous condition; (2) whether persons reasonably relied on the city's representations and conduct; (3) whether an ordinance or statute is clearly for the protection of a particular class of persons rather than the public as a whole; and (4)

---

apartments be equipped with smoke detectors); *Rich v. City of Mobile,* 410 So.2d 385 (Ala. 1982) (city plumbing inspector does not owe duty to individual homeowners)*; Trianon Park Condominium Ass'n v. City of Hialeah,* 468 So.2d 912 (Fla.1985) (city could not be held liable in tort to individual owners of condominiums who sustained damages caused by severe roof leakage and other building defects allegedly arising out of negligent actions of city building inspectors in enforcing provisions of building code enacted pursuant to city police powers); *Grogan v. Commonwealth*, 577 S.W.2d 4 (Ky. 1979) (city and commonwealth could not be held liable as a result of their failure to enforce laws and regulations establishing safety standards for construction and use of buildings)*; E. Eyring & Sons Co. v. City of Baltimore,* 253 Md. 380, 252 A.2d 824 (1969) (held that acts of city carried out by bureau of building inspection in issuance of permits, supervision and inspection in connection with construction of church were exercise of police power to promote safety, health and welfare of public and were governmental in nature and city was immune from liability as result of performance of those acts); *Hoffert v. Owatonna Inn Towne Motel, Inc.*, 293 Minn. 220, 199 N.W.2d 158 (1972) (held that issuance of building permit did not make municipality an insurer against defective construction and that waiver of governmental immunity by city did not create duty toward claimants as individuals); *Fiduccia v. Summit Hill Constr. Co.,* 109 N.J.Super. 249, 262 A.2d 920 (1970) (held that municipality was immune from liability to landowner for building inspector's negligence in granting certificate of occupancy); *O'Connor v. City of New York*, 58 N.Y.2d 184, 460 N.Y.S.2d 485, 447 N.E.2d 33 (1983) (the city cannot be held liable for the omissions of its inspector, since the gas piping regulations are designed to benefit plaintiffs as members of the community but do not create a duty to plaintiffs as individuals which would subject the municipality to liability for failure to enforce a statute or regulation)*; Taylor,* 111 Wash.2d 159, 759 P.2d 447 (no actual duty was owed by local government to claimant alleging negligent issuance of a building permit or negligent inspection of a building; approval of construction plans and satisfactory inspections did not absolve builder from legal obligation to comply with building codes).

whether the city failed to use due care to avoid increasing the risk of harm. *Pray*, 2011 SD 43, ¶ 3, 801 N.W.2d at 453 (quoting *Tipton I*, 538 N.W.2d at 787). "Strong evidence concerning any combination of these factors may be sufficient to impose liability on a government entity." *Id.*, 2011 SD 43, ¶ 8, 801 N.W.2d at 454 (citing *Tipton I*, 538 N.W.2d at 787). However, meeting only one element, actual knowledge, is insufficient to establish a private duty. *Tipton II*, 1997 SD 96, ¶ 29, 567 N.W.2d 351, 364.

Thus, to establish that the City owed the McDowells a special duty, the McDowells must have shown some duty owed to them as individuals or as members of a class, rather than to the public as a whole. *Pray*, 2011 SD 43, ¶ 9, 801 N.W.2d at 454 (citing *Tipton II*, 1997 SD 96, ¶ 13, 567 N.W.2d at 358). It is insufficient that the city enacted a building code. "[E]nactments and regulations are intended only for the purpose of securing to individuals the enjoyment of rights and privileges to which they are entitled as members of the public, rather than for the purpose of protecting any individual from harm." *Id.* (quoting *Tipton II*, 1997 SD 96, ¶ 10, 567 N.W.2d at 356).

Importantly, the McDowells failed to propose any findings of fact or conclusions of law to support a claim that a special duty was owed to them by the City. (R. 1866-1927). "A claim or theory not mentioned in the proposed findings of fact and conclusions of law is deemed abandoned." *Stemper*, 415 N.W.2d 159, 160 (SD 1987). Consequently, this Court need not consider whether a special duty exists and its analysis can end here.

Nevertheless, at trial, the McDowells failed to present any evidence to demonstrate the existence of a special duty owed to them by the City under the *Tipton* factors.

a. Actual Knowledge

The South Dakota Supreme Court has defined "actual knowledge" as "knowledge of a 'violation of law constituting a dangerous condition.' Constructive knowledge is insufficient: a public entity must be uniquely aware of the particular danger or risk to which a plaintiff is exposed. It means knowing inaction could lead to harm." *Gleason v. Peters,* 1997 SD 102, ¶ 16, 568 N.W.2d 482, 486 (quoting *Tipton II,* 1997 SD 96, ¶ 17, 567 N.W.2d at 358). " '[A]ctual knowledge denotes a foreseeable plaintiff with a foreseeable injury.' " *Id.* (quoting *Tipton II,* 1997 SD 96, ¶ 18, 567 N.W.2d at 359). "Actual knowledge goes beyond simple failure to perceive a violation." *Tipton II,* 1997 SD 96, ¶ 17, 567 N.W.2d at 358. "Although actual knowledge may be shown by both direct and circumstantial evidence, it may not be established through speculation." *Id.*, 1997 SD 96, ¶ 18, 567 N.W.2d at 359. "Only where the circumstances are such that the defendant 'must have known' and not 'should have known' will an inference of actual knowledge be permitted." *Id.* "In sum, actual knowledge imports 'knowing' rather than 'reason for knowing.'" *Id.* "Constructive knowledge is too remote to sustain a special duty." *Id.*, 1997 SD 96, ¶ 27, 567 N.W.2d at 363.

At trial, the McDowells failed to present any evidence that the City had "actual knowledge" that its issuance of the building permit to the Sapienzas for construction of a home that complied with the maximum height and minimum setback requirements on the Sapienza Property would lead to the chimney on the McDowells' home on the McDowell

Property becoming out of compliance with the chimney height requirements of IRC R1003.9. The evidence demonstrated that the building plans submitted by the Sapienzas in support of their application for a building permit complied with City of Sioux Falls building codes and ordinances, including the maximum height and minimum side yard setbacks. No information regarding the McDowells' adjoining property was submitted to the City with the building permit application. (Ex. 1; TT (6/29/16) 42:10-17; TT (6/28/16) 198:19-24, 199:4-5). The City's Chief Building Official, Ron Bell, testified: "As it relates to new construction or additions, site plans are submitted and it's in relation to the property lines. There's nothing in the code that deals with adjoining structures under the assumption that the adjoining structures met code at the time of construction. … [O]ur permit issuance is based on property that's being affected by the construction." (TT (6/28/16) 198:19-24, 199:4-5).

The McDowells also failed to establish that the City had actual knowledge of the height and location of the McDowells' chimney in relation to the Sapienza Property at the time it issued the building permit to the Sapienzas. Nor did the McDowells demonstrate that the City "must have known" that the issuance of the Sapienzas' building permit would lead to the McDowells having a potential violation of the building code on their adjoining property. This factor was not met.

Notably, even if the McDowells established actual knowledge (which they did not), the actual knowledge factor must be coupled with at least one of the other factors to establish a special duty. *Tipton II*, 1997 SD 96, ¶ 29, 567 N.W.2d at 364. Evidence of actual knowledge alone is insufficient to establish that the City undertook a special or private duty. *Pray*, 2011 SD 43, ¶ 12, 801 N.W.2d at 455. "To conclude otherwise

would impose liability against a government entity for simple negligence, and would 'judicially intrude[ ] upon resource allocation decisions belonging to policy makers.'….Therefore, '[o]nly when actual knowledge is coupled with one or more of the factors, can we uphold both the spirit and substance of the private duty exception." *Id.* (citing *Tipton II*, 1997 SD 96, ¶ 28, 567 N.W.2d at 364). There is no evidence to support any of the three remaining factors.

b. Reasonable Reliance

The next factor to be analyzed is that of reasonable reliance. For reasonable reliance to occur, the McDowells must have depended on "specific actions or representations which [caused them] to forego other alternatives of protecting themselves." *Tipton II*, 1997 SD 96, ¶ 31, 567 N.W.2d at 364. "Reliance must be based on personal assurances." *Id.*, 1997 SD 96, ¶ 32, 567 N.W.2d at 365. Implicit insurance is not enough. *Walther*, 1998 SD 78, ¶ 25, 581 N.W.2d at 533. Here, there is absolutely no evidence of a direct promise or personal assurance made by the City to the McDowells. *Tipton II, supra.* (holding there was not reasonable reliance by the plaintiff because no direct promises were made); *Walther, supra.* (same). Likewise, there is no evidence that any personal assurance made by the City to the McDowells caused them to forego other alternatives to protect themselves. McDowells did not meet this factor either.

c. Ordinance for Protection of a Particular Class

This factor "permits recovery against a government entity for negligent failure to enforce its laws only when there is language in a statute or ordinance which shows an intent to protect a particular and circumscribed class of persons." *Walther*, 1998 SD 78, ¶ 29, 581 N.W.2d at 533. In this case, the building code at issue does not create any

special class to be protected or mandatory duty. IRC R1003.9 does not protect anyone in particular or any certain class of persons. Instead, as specifically recognized by this Court, building codes protect and benefit the general public. *Hagen, supra.*[4] McDowells did not identify any statute or ordinance that would support this factor.

d. Failure to Avoid Increasing Risk of Harm.

Under this factor, official action must either cause harm itself or expose the McDowells to new or greater risks, leaving them in a worse position than they were before official action. *Gleason,* 1997 SD 102, ¶ 25, 568 N.W.2d at 487. The City has to be more than negligent. *Pray*, 2011 SD 43, ¶ 14, 801 N.W.2d at 455-56. Failure to diminish harm is not enough under this factor. *Id.* In this case, the McDowells failed to demonstrate that any affirmative action by the City "contributed to, increased, or changed the risk which would have otherwise existed." *Gleason,* 1997 SD 102, ¶ 25, 568 N.W.2d

[4] *See also Hoffert*, 293 Minn. at 222-23, 199 N.W.2d at 160 (building codes, issuing building permits and building inspections do not give rise to tort liability because they are designed to protect public, not personal or property interests of individuals); *Georges v. Tudor*, 556 P.2d 564 (Wash. Ct. App. 1976) (same); *Wolfe v. Bennett PS & E, Inc.*, 95 Wash.App. 71, 974 P.2d 355, 359 (Div. II 1999) ("Governments enact building codes, zoning ordinances, and other land use regulations to protect the health and welfare of the general public.") *Taylor*, 111 Wash.2d at 164-65, 759 P.2d at 450 (1988) (holding that "the duty to issue building permits and conduct inspections is to protect the health and safety of the general public."); *Derwort v. Polk County*, 129 N.C.App. 789, 792, 501 S.E.2d 379, 381 (1998) ("The plain language of the statute and our case law thus indicate that subdivision control is a duty owed to the general public, not a specific individual."); *Mountaindale Condominium Ass'n, Inc. v. Zappone*, 1996 WL 409298 (Conn. Super. Ct. 1996) ("A majority of jurisdictions follow the rule that since the 'general purpose of building codes, building permits and building inspections is to protect the public, a building inspector is held to act exclusively for the benefit of the public…'. [S]ervices such as inspections mandated by municipal building or fire codes or other inspection laws are considered as services provided to the public in general and are not services rendered to the particular individual. Such laws, it is said, are not to protect the personal or property interest of an individual, but on the contrary are designed to secure to the municipality as a whole the benefits of a well-ordered municipal government, or are for the benefit of the common good.") (citation omitted).

at 487. Notably, Barbara McDowell testified that when McDowells purchased their home in 1991, she was aware that their south setback was only 2 feet from the property line and that adjoining properties to the south could be placed in relatively close proximity to the south side of their home. (TT (6/28/16) 171:4-12). McDowells' arguments do nothing more than claim that the City was negligent. This is insufficient. *See Walther*, 1998 SD 78, ¶ 34, 581 N.W.2d at 535.

The foregoing demonstrates that no private duty liability exists. The McDowells failed to establish any of the four Tipton factors. Notably, the great majority of jurisdictions have refused to find that land use regulations create a "special relationship" that imposes a duty on the government for the protection of individual landowners. S*ee e.g. Hoffert, supra; Georges, supra*; *Wolfe, supra; Derwort, supra; Mountaindale, supra.* South Dakota case law precedent requires the same result. *See Hagen, supra.* McDowells failed to meet the requirements of *Tipton I*, and thus, did not establish the existence of a special duty.

Under well-established South Dakota law, the sole duty owed by the City in its issuance of the Sapienzas' building permit was to the public as a whole. In the absence of any special duty owed by the City to the individual McDowells, the negligence claim against the City is barred by the public duty doctrine. To come to a different conclusion would require this Court to reject this state's longstanding recognition of the public duty doctrine and to abrogate its entire decision in *Hagen,* as well as *Tipton I* and its progeny. This unique case does not warrant such a result. Under South Dakota's public duty doctrine, the City owed no legally actionable duty of care to the McDowells, and the McDowells' negligence claim fails as a matter of law. Thus, the trial court erred in

holding that the public duty doctrine is inapplicable and in failing to dismiss the negligence claim against the City. This Court need not go any further in its analysis.

II. The trial court erred in failing to enter judgment in the City's favor on the McDowells' negligence claim.

Assuming arguendo that the public duty doctrine did not bar the McDowells' negligence claim, which it does, the McDowells failed to establish any duty that the City owed to them when it issued a building permit to the Sapienzas for construction of a home on the Sapienza Property. Nor did the McDowells establish that the City acted negligently in issuing a building permit to the Sapienzas.

a. The City did not owe the McDowells a duty when it issued a building permit to the Sapienzas.

Whether a duty exists depends on the relationship of the parties and public policy considerations. *Johnson v. Hayman & Associates, Inc.*, 2015 SD 63, ¶ 13, 867 N.W.2d 698, 702. That inquiry involves whether "a relationship exists between the parties such that the law will impose upon the defendant a legal obligation of reasonable conduct for the benefit of the plaintiff." *Estate of Shuck v. Perkins County,* 1998 SD 32, ¶ 8, 577 N.W.2d 584, 586. Additionally, "[a] duty can be created by statute or common law." *First American Bank & Trust, N.A. v. Farmers State Bank of Canton*, 2008 SD 83, ¶ 16, 756 N.W.2d 19, 26.

As the trial court found, there is no relationship that exists between the City and the McDowells that would create a duty. (R. 1327). Nor is there a statutory duty. The McDowells argued below that the City violated a statutory duty established by SDCL 11-4-6. That argument was appropriately rejected by the trial court. SDCL 11-4-6 provides:

> Whenever the regulations made under authority of this chapter require a greater width or size of yards, courts, or other open spaces, or require a

> lower height of building or less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under authority of this chapter shall govern.
>
> Wherever the provisions of any other statute or local ordinance or regulation require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or a less number of stories, or other higher standards than are required by the regulations made under authority of this chapter, the provisions of such statute or local ordinance or regulation shall govern.

That statute clearly does not create any duty owed by the City to the McDowells. SDCL 11-4-6 is merely a rule of construction. Consequently, the City did not owe any statutory duty to the McDowells.

In its Memorandum Decision, it appears that the trial court, without citing any evidence or entering any factual findings in support of its conclusion, determined that the City owed the McDowells a common law duty based on foreseeability of harm. That ruling was erroneous. The existence of a common law duty depends on the foreseeability of the injury. *McGuire v. Curry*, 2009 SD 40, ¶ 9, 766 N.W.2d 501, 505. Foreseeability in the duty sense is examined at the time of the alleged negligence, not at the time the injury occurred. *Id.*, 2009 SD 40, ¶ 19, 766 N.W.2d at 508. "The risk reasonably to be perceived defines the duty to be obeyed." *Johnson*, 2015 SD 63, ¶ 15, 867 N.W.2d at 702. "No one is required to guard against or take measures to avert that which a reasonable person under the circumstances would not anticipate as likely to happen." *Id.*

Here, the evidence presented at trial demonstrated that injury to the McDowells was not foreseeable at the time the City issued a building permit to the Sapienzas. Absolutely no relationship exists between the City and the McDowells. The building plans submitted by the Sapienzas to the City in support of their application for a building

permit demonstrated that the home they were proposing to construct on the Sapienza Property would fully comply with City of Sioux Falls building codes and zoning ordinances, including the maximum height and minimum side yard setbacks. (Ex. 1). No information was submitted to the City regarding the McDowells' adjoining property, and the record is devoid of any evidence that the City had actual knowledge of the location of the McDowells' chimney in relation to the Sapienza property at the time it issued the building permit. (Ex. 1; TT (6/29/16) 42:10-17; TT (6/28/16) 198:19-24, 199:4-5). Notably, Ron Bell testified that in his 32 years of working with planning and zoning for the City, this issue has never occurred. (TT (6/28/16) 216:4-18). Under these facts and circumstances, it was clearly not foreseeable that the City's issuance of a building permit to the Sapienzas for the construction of a new home that fully complies with the maximum height and minimum setback requirements would result in the McDowells' chimney on an adjoining property falling out of compliance with the height requirements of IRC R1003.9 at the time the building permit was issued. Consequently, the trial court erred in concluding that the City owed the McDowells a common law duty based on foreeability of injury.

In the absence of a duty, the McDowells' negligence claim against the City fails as a matter of law and the Court should have entered judgment in the City's favor on that claim. *See e.g. Johnson*, 2015 SD 63, 867 N.W.2d 698 (dismissing negligence claim). The trial court's failure to do so was erroneous as a matter of law.

b. The McDowells also failed to establish that the City acted negligently in issuing a building permit to the Sapienzas.

It is undisputed that the building plans submitted by the Sapienzas in support of their application for a building permit demonstrated that the proposed construction on the

Sapienza Property would fully comply with the *applicable* building codes and zoning ordinances. Importantly, those plans showed that the new construction on the Sapienza property would comply with the 35' maximum height requirement *and* the 5' minimum side yard setback requirements in SFO 160.094. It is also undisputed that the Sapienza home, as constructed, complies with the maximum height *and* minimum side yard setback requirements of SFO 160.094. (TT (6/28/16) 58:12, 18-20, 172:4-7, 188:7-21, 203:14-15, 212:11-214:8; TT (6/29/16) 74:7-75:22, 104:12-105:14, 236:14-237:2). In fact, the record is devoid of a single building code or zoning ordinance violation that exists on the Sapienza Property for which the subject building permit was issued. *Id.* *See also* (TT (6/28/16) 216:4-11). Instead, the only potential building code violation at issue in this case exists on the McDowell Property.

In addition, it is also important to note that the undisputed evidence demonstrated that no information regarding the McDowell Property was submitted to the City in relation to the issuance of the Sapienza building permit. Under South Dakota law and City of Sioux Falls Ordinances, no investigation or inspection of the McDowells' adjoining property by the City was required in order for the City to issue the building permit to the Sapienzas. Notably, the McDowells have failed to identify any statute or ordinance that required the City to investigate or inspect their property. Requiring the City to investigate all adjoining properties prior to the issuance of each building permit would cast an onerous burden on the City, which issues 10,000 building permits a year. (TT (6/28/16) 215:1-12). Instead, when reviewing a building permit application, the City operates under the assumption that the adjoining properties meet the code at the time it was constructed. *Id.* As Ron Bell testified:

Q. When a building permit is issued such as the one in question, does the City go out and look at the adjoining property to see how it might be affected by a building permit?

A. No, sir.

Q. Do you rely on the home owner and their contractor to check out that situation and comply with whatever provisions that are applicable?

A. As it relates to new construction or additions, site plans are submitted and it's in relation to the property lines. There's nothing in the code that deals with adjoining structures under the assumption that the adjoining structures met the code at the time of construction.

Q. My point is that if the City doesn't go out and look at the adjoining property, you're assuming that the owner and the contractor are going to comply with whatever code provisions are applicable in the building process?

A. Well again, our permit issuance is based on property that's being affected by the construction.

…

Q. You indicated that the City does not inspect adjoining properties when issuing building permits, correct?

A. Yes.

…

Q. Is it practical for the City to undertake comprehensive or inspections of adjoining properties each time it issues a building permit?

A. No.

Q. Why not?

A. We issue 10,000 building permits a year. We issue 650 houses a year. Again, besides that, the code does not relate to adjoining properties other than the property at hand as to meet the requirements within the plat or property lines. There's an assumption that the adjoining properties meet the code at the time that it was constructed based on national model standards.

(TT (6/29/16) 198:11-199:5, 214:9-11, 215:1-12). Public policy considerations strongly support the City's approach to the allocation of its resources in processing 10,000

building permit applications each year. The facts in this unique case simply do not support a conclusion that the City's actions were unreasonable or that the City breached any standard of care.

Although not entirely clear, it appears that the trial court ruled that the City could potentially be held liable for negligence for granting a building permit that would violate SDCL 11-4-6, IRC R1003.9 and ARSD 24:52:07:04. An examination of the undisputed evidence and those provisions, however, conclusively demonstrates that the building permit issued by the City did not violate SDCL 11-4-6, IRC R1003.9 or ARSD 24:52:07:04.

First, the trial court erred in determining that the building permit violated IRC R1003.9. That building code provides:

> Chimneys shall extend at least 2 feet (610 mm) higher than any portion of a building within 10 feet (3048 mm), but shall not be less than 3 feet (914 mm) above the highest point where the chimney passes through the roof.

IRC R1003.9. The building permit at issue only allowed construction on the Sapienza Property. The record is absolutely devoid of any evidence that the building permit issued by the City allowed the Sapienzas to construct a chimney on the Sapienza Property in violation of IRC R1003.9. Nor is there any evidence that the Sapienza home, as constructed, has a chimney that does not meet the height requirements of IRC R1003.9. Indeed, no such allegation has been made.

Second, SDCL 11-4-6 is merely a rule of construction that provides that when there is a conflict between zoning ordinances and/or regulations, the higher standard applies. SDCL 11-4-6 is not a land use regulation, and certainly does not give rise to a statutory duty owed by the City to the McDowells upon which a negligence claim could

be based. More importantly, SDCL 11-4-6 has no applicability here because there is absolutely no conflict between SFO 160.094 and IRC R1003.9. SFO 160.094 requires a minimum side yard *setback* of five (5) feet. IRC R1003.9 does not set forth any minimum setback requirements. In fact, IRC R1003.9 does not deal with setbacks whatsoever. Instead, IRC R1003.9 addresses the required *height* of chimneys. Thus, there is no conflict between IRC R1003.9 and SFO 160.094 that would require application of the rule of construction provided for in SDCL 11-4-6. Indeed, the Sapienza home, as constructed, complies with the setback requirements of SFO 160.094. Without moving the location of the Sapienza home, the McDowell home could comply with IRC R1003.9 if its chimney termination point was two feet (2') higher than the Sapienzas' home. Thus, there is no conflict between those two regulations that would bring SDCL 11-4-6 into play. The Sapienza building permit did not violate SDCL 11-4-6, plain and simple. The trial court's conclusion to the contrary is erroneous.

Finally, the trial court's conclusion that the building permit was issued in violation of the historic preservation height standards set forth in ARSD 24:52:07:04 is clearly erroneous because those standards do not apply to the Sapienza Property. ARSD 24:52:07:01, which precedes ARSD 24:52:07:04 in that same chapter, provides, "<u>The rules in this chapter apply to historic properties listed on the state register or the national register, or both.</u>" (emphasis added). The uncontroverted evidence at trial demonstrated that the Sapienza property is not on the state register or the national register. (TT (6/30/16) 24:2-10). Indeed, the McDowells' expert, Spencer Ruff, testified that the Sapienza property was not listed on the state register or the national register:

Q: So as I review Exhibit 60 and the reference to 1323 South 2nd Avenue, on

Page 28, that property was identified as an intrusion into the historic district, correct?

A: Yes.

Q: Meaning not in compliance with the standards applicable to be eligible to be classified as a historic home?

A. 76, that is correct.

Q: And that's the address of the current Sapienza home, correct?

A: That is correct.

Q: Meaning that's the home that was there prior to the construction of the Sapienza home was an intrusion and not in compliance with the standards for historical home, correct?

A: Correct.

Q: Meaning that home would not have been listed on the state register of historical homes, correct?

A: Correct.

Q: Not listed on the federal register of historic homes?

A: Correct.

(TT (6/28/16) 51:20-52:15) (emphasis added).

"When engaging in statutory interpretation, we give words their plain meaning and effect, and read statutes as a whole, as well as enactments relating to the same subject. When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and this Court's only function is to declare the meaning of the statute as clearly expressed." *Paul Nelson Farm v. South Dakota Dept. of Revenue*, 2014 SD 31, ¶ 10, 847 N.W.2d 550, 554. Because the Sapienza property is not listed on the state register or the national register, the rules and standards set forth in ARSD 24:52:07:04 do not apply to the Sapienza Property under the plain and unambiguous

language of ARSD 24:52:07:01. Consequently, any new construction on the Sapienza Property was not required to comply with any of the standards set forth in 24:52:07:04 because those standards only apply to properties that are on the state register or the national register under the plain and unambiguous language of ARSD 24:52:07:01. The Sapienza Property was not listed on either register. Thus, the trial court's determination that the building permit issued to the Sapienzas violated SDCL 11-4-6, IRC R1003.9 and ARSD 24:52:07:04 was clearly erroneous.

In sum, the McDowells failed to prove that the City acted negligently or unreasonably. The City's conduct in issuing a building permit to the Sapienzas, based on the submission of an application and building plans that fully complied with the applicable building codes and zoning ordinances for the Sapienza Property, was certainly reasonable. Importantly, the plans submitted undisputedly demonstrated that the new construction on the Sapienza Property would comply with the maximum height and minimum side yard setback requirements in accordance with SFO 160.094. Quite tellingly, the McDowells failed to come forward with any evidence to demonstrate that any aspect of the Sapienza home, as constructed, violates any building code or zoning ordinance. Consequently, the McDowells failed to establish that the City breach any recognized duty or standard of care owed to them.

For all these reasons, the trial court erred in failing to enter judgment in favor of the City on the McDowells' claim for negligence.

III. The trial court failed to enter sufficient findings of fact or conclusions of law to allow for a meaningful review on appeal.

SDCL 15-6-52(a) provides that "[i]n all actions tried upon the facts without a jury….the court shall, unless waived as provided in § 15-6-52(b), find the facts specially

and state separately its conclusions of law thereon[.]" "Where required, findings and conclusions are necessary so that this Court may review the circuit court's decision to ensure the correctness of its judgment." *Wiswell v. Wiswell*, 2010 SD 32, ¶ 6, 781 N.W.2d 479, 781. This Court requires "some reasonable measure of consistency and exactness in a circuit court's findings as a predicate for adequate appellate review." *Id.*, 2010 SD 32, ¶ 10, 781 N.W.2d at 482. Further, the trial court's findings must include ultimate, not evidentiary, facts. *Donohue v. Jennings*, 334 N.W.2d 683, 684 (SD 1983). This Court "cannot meaningfully review the trial court decision without the trial court's reasons for ruling the way it did." *Repp v. Van Someren*, 2015 SD 53, ¶ 10, 866 N.W.2d 122, 126 (quoting *Goeden v. Daum*, 2003 SD 91, ¶ 7, 668 N.W.2d 108, 110). Therefore, "[c]ircuit courts 'must ensure that findings of fact and conclusions of law are clearly entered.'" *Id.* (quoting *Donat v. Johnson*, 2015 SD 16, ¶ 14 n. 4, 862 N.W.2d 122, 128 n. 4 (quoting *Goeden*, 2003 SD 91, ¶ 9, 668 N.W.2d at 111)). "It is well-settled law that it is the trial court's duty to make required findings of fact, and the failure to do so constitutes reversible error." *Grode v. Grode*, 1996 SD 15, ¶ 29, 543 N.W.2d 795, 803.

In this case, the Memorandum Decision, which the trial court adopted as its findings of fact and conclusions of law after rejecting all of the parties' proposals, does not include ultimate facts and lacks the exactness required by this Court in order to conduct a meaningful review. Indeed, the trial court failed to make any specific or ultimate finding regarding the negligence claim against the City. Throughout the Memorandum Decision, the trial court makes numerous statements that "a reasonable fact finder could conclude," that "a reasonable fact finder could determine," and that a "reasonable fact finder may find." (R. 1303-1331). Notably, with respect to the

McDowells' negligence claim against the City, the trial court states in its Memorandum Decision:

> *A reasonable jury could conclude* that the City was aware of the plans for the residence. *A reasonable fact finder could determine* this to have resulted in a violation of IRC Section R100.9, requiring that there is clearance for a chimney for any building that is within ten feet of another building.
>
> ….
>
> This factual question is not a determination for the court at this time given the order on bifurcation and the granting of the injunction.

(R. 1326, 1329). A court trial was held in this case, and thus, the trial court was the fact finder. A cursory review of the Memorandum Decision demonstrates that the trial court failed to make ultimate findings on the McDowells' claims as required by SDCL 15-6-52(a). In its Memorandum Decision, the trial court also failed to identify with any specificity what facts or circumstances created a common law duty that was supposedly owed by the City to the McDowells, or how the City breached a duty owed to the McDowells. Nor did the trial court make any specific findings on the facts and circumstances in support of its conclusion that the public duty doctrine does not apply. Consequently, this matter must be reversed because the trial court failed to enter sufficient findings of fact or conclusions of law to allow for a meaningful review on appeal.

CONCLUSION

This matter should be reversed with direction to the trial court to enter Judgment in favor of the City. Alternatively, this matter should be remanded so that the trial court may enter sufficient findings of fact and conclusions of law that will allow this Court to conduct a meaningful review on appeal.

REQUEST FOR ORAL ARGUMENT

The City respectfully requests the opportunity to present oral argument to the Court.

Date: August 8, 2017.

CADWELL SANFORD DEIBERT & GARRY LLP

By /s/ *William C. Garry*
William C. Garry
Melissa R. Jelen
PO Box 2498
Sioux Falls SD 57101-2498
(605) 336-0828
E-mail: bgarry@cadlaw.com
mjelen@cadlaw.com
Attorneys for Defendant/Appellee
City of Sioux Falls

CERTIFICATE OF COMPLIANCE

I hereby certify that Appellee's Brief complies with the Type-Volume requirements of SDCL 15-26A-66 in the following manner: The Brief is 28 pages and was prepared using Microsoft Word and uses proportionally spaced font [Times New Roman] in 12-point type. Based on the word-count feature of the MS Word processing system, the Brief contains 9,488 words and 48,145 characters.

Dated: August 8, 2017.

/s/ *William C. Garry*
William C. Garry

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing Brief of Appellee City of Sioux Falls, with attached Appendix, was sent by e-mail for electronic filing and service to:

Ms. Shirley Jameson-Fergel, South Dakota Supreme Court Clerk
E-mail: scclerkbriefs@ujs.state.sd.us

Steven M. Johnson
Shannon R. Falon
Scott Abdallah
Ronald Parson, Jr.
Johnson, Janklow, Abdallah,
Reiter & Parsons, LLP
steve@janklowabdallah.com
shannon@janklowabdallah.com
sabdallah@janklowabdallah.com
ron@janklowabdallah.com

Richard L. Travis
Adam Hoier
May & Johnson, PC
dtravis@mayjohnson.com
ahoier@mayjohnson.com

Paul S. Swedlund
Assistant Attorney General
Paul.Swedlund@state.sd.us.gov

on August 8, 2017.

The original and two copies of the Brief of Appellees, with attached Appendix, were mailed, by U.S. mail, postage prepaid, to:

Ms. Shirley Jameson-Fergel
Clerk of the Supreme Court
500 East Capitol Avenue
Pierre SD 57501-5070

all on August 8, 2017.

/s/ *William C. Garry*
William C. Garry

APPELLEE CITY OF SIOUX FALLS'
APPENDIX INDEX

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
PIERCE McDOWELL and BARBARA McDOWELL, PLAINTIFFS, VS. **JOSEPH SAPIENZA and SARAH JONES SAPIENZA, M.D., CITY OF SIOUX FALLS** DEFENDANTS.	CIV. 15-1320 **JUDGMENT**

The Plaintiffs Pierce and Barbara McDowell commenced this case against the Defendants Joseph and Sarah Sapienza for negligence and nuisance and against the City of Sioux Falls for negligence and inverse condemnation arising out of the construction of the of Sapienza residence at 1323 South Second Avenue, Sioux Falls, South Dakota. The Court previously entered an order on June 27, 2016, bifurcating the remedy phase of the trial such that evidence was heard only on the injunction phase and held that evidence of damages would be heard at a subsequent time only if the Court found that the Plaintiff had an adequate remedy at law. The parties came before the Court for a court trial on June 28-30, 2016. The Plaintiffs were present and were represented by Steven M. Johnson and Shannon R. Falon of Johnson, Janklow, Abdallah, Reiter & Parsons, LLP. Defendants Joseph Sapienza and Sarah Jones Sapienza, M.D. were also present and were represented by Richard L. Travis and Ryan Peterson of May & Johnson, P.C. Defendant City of Sioux Falls was present through representative Ron Bell and represented by William Garry of Cadwell, Sanford Deibert & Garry, LLP. The Court, having considered all of the evidence and the

file in its entirety, and the Court having previously issued a Memorandum Decision and Order dated December 27, 2016, and having entered Findings of Fact and Conclusions of Law dated the 17th day of March, 2017; it is now hereby:

ORDERED, ADJUDGED AND DECREED as follows:

1. Plaintiffs have no adequate remedy at law and therefore they are GRANTED a permanent injunction pursuant to SDCL 21-8-14.

2. Defendants Joseph and Sarah Sapienza must bring their residence into compliance with South Dakota Administrative Rule 24:52:07:04, the Secretary of the Interior Regulations for new construction in historic districts, and the chimney clearance building code IRC R1003.9, curing all violations found by this Court. (Exs. 27, 28, and 43).

3. Defendant City of Sioux Falls is GRANTED judgment on Plaintiffs' Pierce and Barbara McDowells' claim against it for inverse condemnation.

4 . Pursuant to SDCL 15-6-54(d), costs in the amount of $_____ are taxed against the Defendants and awarded to the Plaintiffs.

Dated this 17 day of March, 2017.

BY THE COURT:

Honorable John Pekas
Circuit Court Judge

ATTEST: Angelia M. Gries, Clerk of Courts

By: _____ DEPUTY

FILED
MAR 20 2017
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
PIERCE McDOWELL and BARBARA McDOWELL, PLAINTIFFS, VS. **JOSEPH SAPIENZA and SARAH JONES SAPIENZA, M.D., CITY OF SIOUX FALLS** DEFENDANTS.	CIV. 15-1320 ORDER ON OBJECTIONS TO PLAINTIFF'S AND DEFENDANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come before the court for hearing on March 13, 2017, and the Court having heard all of the argument of counsel on the Plaintiff's and the Defendant's Proposed Findings of Fact and Conclusions of Law sustains in part Defendant's objections to Plaintiff's proposed Findings of Fact and Conclusions of Law and sustains in part Plaintiff's objections to the Defendant's proposed Findings of Fact and Conclusions of Law.

1. Plaintiffs Proposed Findings of Facts.

The court finds the following:

a. Findings #32 and #96 are the same.
b. Findings #33 and #98 are the same.
c. Finding #77 is the same as Conclusion #103.
d. Finding #78 is the same as Conclusion #104.
e. Finding #79 is the same as Conclusion #105.
f. Finding #80 is the same as Conclusion #106.
g. Finding #81 is the same as Conclusion #107.
h. Finding #82 is the same as Conclusion #108.
i. Finding #83 is the same as Conclusion #109.
j. Finding #84 is the same as Conclusion #110.
k. Finding #85 is the same as Conclusion #111.
l. Finding #86 is the same as Conclusion #112.
m. Finding #87 is the same as Conclusion #113.
n. Finding #88 is the same as Conclusion #114.

o. Finding #89 is the same as Conclusion #115.
p. Finding #90 is the same as Conclusion #116.
q. Finding #91 is the same as Conclusion #117.
r. Finding #56 is the same as Conclusion #149.
s. Conclusion of Law #83 is contrary to the Memorandum Decision.
t. Conclusion of Law #84 is contrary to the Memorandum Decision.
u. Conclusion of Law #85 is contrary to the Memorandum Decision.

The court rejects the Plaintiff's Proposed Findings of Fact and Conclusions of Law.

2. Defendant Sapienza's Proposed Findings of Fact and Conclusions of Law.

The court finds the following:

a. Findings #8 is contrary to the Memorandum Decision.
b. Findings #12 is contrary to the Memorandum Decision.
c. Finding #63 is contrary to the Memorandum Decision.
d. Finding #65 is contrary to the Memorandum Decision.
e. Conclusion of Law #17 is contrary to the Memorandum Decision.
f. Conclusion of Law #20 is contrary to the Memorandum Decision.
g. Conclusion of Law #26 is contrary to the Memorandum Decision.
h. Conclusion of Law #28 is contrary to the Memorandum Decision.
i. Conclusion of Law #29 is contrary to the Memorandum Decision.
j. Conclusion of Law #30 is contrary to the Memorandum Decision.
k. Conclusion of Law #35 is contrary to the Memorandum Decision.
l. Conclusion of Law #36 is contrary to the Memorandum Decision.
m. Conclusion of Law #37 is contrary to the Memorandum Decision.
n. Conclusion of Law #41 is contrary to the Memorandum Decision.
o. Conclusion of Law #42 is contrary to the Memorandum Decision.
p. Conclusion of Law #43 is contrary to the Memorandum Decision.
q. Conclusion of Law #44 is contrary to the Memorandum Decision.
r. Conclusion of Law #46 is contrary to the Memorandum Decision.
s. Conclusion of Law #47 is contrary to the Memorandum Decision.
t. Conclusion of Law #48 is contrary to the Memorandum Decision.
u. Conclusion of Law #49 is contrary to the Memorandum Decision.
v. Conclusion of Law #63 is contrary to the Memorandum Decision.
w. Conclusion of Law #65 is contrary to the Memorandum Decision.
x. Conclusion of Law #66 is contrary to the Memorandum Decision.

The court rejects Defendant Sapienza's Proposed Findings of Fact and Conclusions of Law.

3. Defendant City of Sioux Falls Proposed Findings of Fact and Conclusions of Law.

The court finds the following:

a. Findings #5 is contrary to the Memorandum Decision.
b. Conclusion of Law #13 is contrary to the Memorandum Decision.
c. Conclusion of Law #19 is contrary to the Memorandum Decision.
d. Conclusion of Law #22 is contrary to the Memorandum Decision.
e. Conclusion of Law #23 is contrary to the Memorandum Decision.
f. Conclusion of Law #24 is contrary to the Memorandum Decision.
g. Conclusion of Law #25 is contrary to the Memorandum Decision.
h. Conclusion of Law #37 is contrary to the Memorandum Decision.
i. Conclusion of Law #54 is contrary to the Memorandum Decision.
j. Conclusion of Law #60 is contrary to the Memorandum Decision.
k. Conclusion of Law #61 is contrary to the Memorandum Decision.
l. Conclusion of Law #62 is contrary to the Memorandum Decision.
m. Conclusion of Law #64 is contrary to the Memorandum Decision.
n. Conclusion of Law #65 is contrary to the Memorandum Decision.
o. Conclusion of Law #66 is contrary to the Memorandum Decision.

The court rejects the Defendant City of Sioux Falls Proposed Findings of Fact and Conclusions of Law.

IT IS HEREBY ORDERED ADJUDGED AND DECREED as follows:

1. The court rejects the Plaintiff's Proposed Findings of Fact and Conclusions of Law.

2. The court rejects the Defendant Sapienza's Proposed Findings of Fact and Conclusions of Law.

3. The court rejects the Defendant City of Sioux Falls Proposed Findings of Fact and Conclusions of Law.

4. The court adopts its own Findings of Facts and Conclusions of Law consistent with the Memorandum Decision.

Dated this 17 day of March, 2017.

BY THE COURT:

Honorable John Pekas
Circuit Court Judge

ATTEST: Angelia M. Gries, Clerk of Courts

By: _____
DEPUTY

FILED
MAR 20 2017
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
PIERCE McDOWELL and BARBARA McDOWELL, PLAINTIFFS, VS. **JOSEPH SAPIENZA and SARAH JONES SAPIENZA, M.D., CITY OF SIOUX FALLS** DEFENDANTS.	CIV. 15-1320 Memorandum Decision and Order

A hearing was held on June 28-30, 2016, before the Court, Hon. John Ryan Pekas, Circuit Judge presiding, on the Plaintiff's bifurcated trial for injunctive relief, the Plaintiff were represented by Steven M. Johnson and Shannon R. Falon of Johnson, Janklow, Abdallah, Reiter & Parsons, LLP. Defendants Joseph Sapienza and Sarah Jones Sapienza, M.D. were represented by Richard L. Travis of May & Johnson, P.C. Defendant City of Sioux Falls was represented by William Garry of Cadwell, Sanford Deibert & Garry, LLP. Prior to trial, the court granted an Order sought by Plaintiffs Pierce McDowell and Barbara McDowell (the "McDowells") bifurcating the remedy phase of the trial. The parties submitted written briefs on September 27, 2016, with supplemental letter briefs on December 16 and December 20, 2016. As a result, this court has reviewed the evidence presented at trial as well as the post-trial briefs that were subsequently filed. After thoughtful review, the court finds that the McDowell's are entitled to injunctive relief requiring the Defendants Joseph Sapienza and Sarah Jones Sapienza (the "Sapienzas") must bring their residence into compliance with the Administrative Rules of South

Dakota 24:52:07:04 and Secretary of the Interior Regulations regarding the requirements for new construction in historic districts (Exhibit 27 and 28) or rebuild it.

Additionally, the court was presented with Plaintiffs' claims against Defendant City of Sioux Falls ("the City") for inverse condemnation and negligence. The court finds that Plaintiffs' claim against the City for inverse condemnation is not supported by the evidence, but Plaintiffs could maintain their cause of action against the City for negligence but are precluded due to the granting of the permanent injunction:

FACTUAL BACKGROUND

The McDowells have lived at their residence at 1321 South Second Avenue, Sioux Falls, South Dakota, in the McKennan Park Historic District for the past twenty-four years. Their residence was originally constructed in 1924 and is listed on the National Register of Historic Places. The McDowell residence is also a landmark property possessing architectural significance that merits distinction as a historic property and is listed on the National Register of Historic Places regardless of the location within a historic district.

McKennan Park became a historic district listed on the National Register of Historic Places in 1984. (Ex. 50). The McKennan Park Historic District certainly holds special meaning for many residents of the City of Sioux Falls and gives "roots" to the residents who call the park home. The nomination form to place the McKennan Park Historic District on the National Register described the area as follows:

> A strong sense of unity is evident in the McKennan Park District. This neighborhood consists of well maintained houses and landscaped yards. Very few of the front facades of these homes have been altered, and many of the houses have been in the possession of only one or two families since they were built. The attractive landscaping and many large trees of the park and boulevard contribute to the cohesive character and sense of neighborhood in the McKennan Park District

(Ex. 60). The McDowells submit to this Court that the cohesive character of McKennan Park remains intact today.

At the time the McDowells' residence was built, zoning ordinances only required a two-foot setback off the property line, and the residence was built exactly two feet from the property line on the south side of the lot on which it sits. Over time the zoning ordinances changed, but the McDowells' property was grandfathered into compliance with those new ordinances.

In 2013, the Sapienza's purchased the lot at 1323 South Second Avenue, which was located immediately to the south of the McDowells' property. The Sapienza's hired Bob Natz to design the residence they wished to build on the property. Mr. Natz, the original designer of the Sapienza residence understood and embraced the historical significance of designing a residence to be constructed in the McKennan Park Historic District. Mr. Natz was aware of the state administrative regulations and Secretary of the Interior Regulations regarding the requirements for new construction in historic districts. (Exhibit 27 and 28) Mr. Natz toured the historic district with the Sapienza's to review the architectural styles to help guide their design process. Mr. Natz testified, "Mckennan Park is a very important area for the town. It's very important to me. It needs to - anybody that designs or builds in that neighborhood has to have a level or social responsibility and verse themselves in the community and look around the try to fit themselves in. (T.T. June 29, 2016, p. 165-166). On May 14, 2014, Mr. Natz presented the Sapienza's with the potential design for their residence, which they eventually accepted. On May 14, 2014, the Sapienzas' proposal to raze the existing residence on the property and construct a new residence with the plans designed by Mr. Natz was submitted to the Sioux Falls Board of Historic Preservation (the "Board").

Mr. Natz and the Sapienza's had a disagreement and ultimately he was terminated. The design plans were not complete. One issue of concern from Mr. Natz was the need for a proper survey of the property. Mr. Natz pressured Mr. Sapienza about the need for the survey. Mr. Sapienza failed to allow Mr. Natz to engage a surveyor and told Mr. Natz that he knew a surveyor and he would take care of it. [1] (Exhibit 69) Mr. Natz recalled that the name of the surveyor was Chuck Hansen and in all his years he never heard of anyone that performed surveys by that name. After the dismissal of Mr. Natz, he received a desperate request to provide renderings of his designs to the Sapienza's because they were presenting their plans to the Sioux Fall Board of Historic Preservation Board. The Board had to grant approval. Mr. Natz prepared the renderings and gave them to the Sapienza's. (Exhibit 29) The renderings were merely drawings that implied the appearance of the structure not actual construction. The renderings had trees to the north which implied there would be space for trees. There was no agreement as to the setbacks between the residences with varying lengths of seven (7) to eleven (11) feet on May 7, 2014. (Exhibit 75) Mr. Natz knew of the ten foot space setback requirement for a fireplace which was on the south side of the McDowell residence. Mr. Natz did not attend the meeting of the Board and only Mr. Sapienza attended on May 14, 2014.

At the hearing with the Board, the renderings were presented. The Board asked several questions, and applied the standards produced to them from staff at the city for historic districts that derive from the Administrative Rules of South Dakota ("ARSD") and Secretary of the Interior Regulations regarding the requirements for new construction in historic districts. (Exhibit 27 and 28) The Board had the regulations but have not applied them. Specifically,

1 Joseph Sapienza obtained his relator license in South Dakota but is not actively selling real estate.

> Massing, size and scale of new construction **must be compatible with surrounding historic building.(emphasis added)** Overall architectural features of new construction must be of contemporary design which does not directly mimic historic buildings. Architectural elements such as windows, doors, and cornices must be similar in rhythm, pattern, and scale to comparable elements and adjacent historic buildings. **The overall visual appearance of new construction may not dominate or be distracting to the surrounding historic landscape. (emphasis added)**

ARSD 24:52:07:04. (Exhibit 28 no. 1) There are height regulations that must also be applied by the Board. Specifically, "The height of new buildings or additions to existing buildings **may not exceed a standard variance of 10% of the average height of historic buildings (emphasis added)** on both sides of the street where proposed new construction is to be located." (Exhibit 28 no. 2) The Board members testified that they were not specifically aware of these regulations at the hearing for the Sapienza's. Prior Chairperson, Dixie Hieb, testified that the adjacent property, the McDowell's, must be considered to determine the height for the standard variance. This was not done for the Board. The Secretary of the Interior Regulations requires for related new construction in historic districts that ". . . related new construction **shall not destroy historic materials that characterize the property. (emphasis added)** The new work shall be differentiated from the old and shall be compatible with the . . . scale, and architectural features to protect the historic integrity of the property and its environment." (Exhibit 27 no. 9) This was not considered in relationship with the McDowell property and the close proximity of their fireplace to the Sapienza's.

Without the required information, the Board approved the proposal. After getting approval, Mr. Sapienza sent requests to various contractors to redraw the approved plans including moving the proposed house one (1) to two (2) feet closer to the McDowell property. Specifically, he requested on June 6, 2014,"Would like to see the house slid to the north 1-2 feet to give us an extra foot or 2 of driveway space on the south side if set back allows." (Exhibit 8

no. 7) Out of concern, Dick Sorum warned the Sapienza's on June 20, 2014, that there were problems with moving the house closer to the McDowell's as well as the size of the house. He wrote,

> Josh,
>
> I had to go to the city for a building permit for some folks, so I talk to the zoning people and the gal gave me a copy of the zoning for your area. I put that copy in the mail box at 1323 S. 2nd it appears to me that **the house as drawn is too tall for the lot. (emphasis added)** The drawings show about 41' tall and the city allows 35'. **The setback is five on the north lot line. If you hope to go closer to the lot line, then you have to apply for a variance. (emphasis added)**
>
> I talked to Dennis and he will meet with us some day after work. That way your wife may be able to join us. He is fishing right now so I will let you know what will work for him and see if that works for you folks.
>
> Dick

(Exhibit 7) This warning was sent on June 20, 2014. After receipt of this email, the Sapienza's had Dick Sorum redraw the plans which were previously approved by the Board. There is a dispute as to whether the redrawn plans were ever re-approved by the Board.

The Sorum's were not familiar with the guidelines regarding constructing residences in historic districts. They had never built a residence in a historic district before taking on the Sapienza project. (T.T. June 29, 2016, P. 37, 90-91). Dick Sorum testified that he did not even know that there was a height limitation in historic districts that differed from the Sioux Falls zoning ordinance's height restriction. (Id., p. 91). Despite this lack of knowledge and experience, the Sorum's redrew Natz's copyrighted plans for the Sapienza residence. The plans deviated from the plans that had already been approved by the Board. (Id., p. 99). The new plans resulted in several violations of the requirements the code for construction of new residences mandated in historic districts. (Exhibit 58) Brad Sorum testified that the new plans that his father prepared

which altered Natz's plans were approved by the liaison to the Board. Brad Sorum testified that when he and his father went to the City historic office regarding the change in the plans, he explained that the lady that approved the building plans was out-of-town. So at that time, they left paperwork there and then sometime after that, Dick Sorum went back after the person that approved the building plans got back in town and that's all he knew about it. (T.T. June 29, 2016, P. 83). Brad Sorum testified at trial that he now remembers a ten-minute conversation with this unknown lady where they allegedly discussed the changes to the plans and she apparently gave her approval. (Id., p. 65-66). Dick Sorum testified at trial consistent with Brad Sorum's first version of events that the woman that they needed to speak to was not present in the office. So they simply left the plans and no discussion took place. (Id., P. 109). No City officials testified that they had a conversation with the Sorum's regarding the new plans. Debra Gaikowski was the city liaison to the Board of Historic Preservation at the time in question. She testified but was not asked if the new plans were approved. (T.T. June 30, 2016 pp. 52-66). According to the Plaintiff's expert, Spencer Ruff, the Sapienza's had an obligation to take their project back before Board for approval after they made so many changes to the plans. (T.T. June 28, 2016 p. 44)

Mr. Sapienza met with Mr. McDowell over drinks and presented the plans to Mr. McDowell in August of 2014. Mr. McDowell later sent a text message to Mr. Sapienza,

> i have to forewarn you that my wife is really suffering about all of this. the home is just way too big for the lot. you will move in five years and we live with it forever. tough gig for us. not your problem or fault… just a tough gig for us. [sic]

(Exhibit 35) There was little communication regarding the plans after the text.

On October 22, 2014, the City issued a building permit to the Sapienza's to begin construction of their residence, which appeared to comply with the thirty-five foot (35')

maximum height and five-foot (5') minimum side yard setback requirements pursuant to City of Sioux Falls Ordinance § 160.094. The construction of the residence began with pouring foundation in November of 2015.

During construction of the Sapienzas' residence, the McDowell's grew worried about how close it was to the lot line on the south side of the property. Ms. McDowell contacted the fire department over the Sapienza residence's close proximity to their fireplace. After review, the fireplace was within ten (10) feet of the Sapienza residence. The fire department ticketed the McDowell's and ordered them not to use their historic fireplace or risk all damages resulting from it. (Exhibit 23) The McDowell's decided to retain Attorney Steve Johnson in regard to their belief that something needed to be done about the Sapienzas' construction of their residence. On May 8, 2015, Attorney Johnson sent a cease and desist letter to the Sapienza's, advising them to stop the construction of their residence or else bear the responsibility of having to defend a potential legal action.[2] The letter referenced that the McDowells' house may be found to be noncompliant with the residential building as a result of construction on the Sapienzas' residence. Despite this letter, the construction of the residence continued. Brad Sorum testified that he reviewed the letter and would continue to build until the property owner, Mr. Sapienza, told him to stop. Mr. Sapienza testified that he was relying on Mr. Sorum to tell him he should

---

[2] The entire contents of the letter stated:

Dear Mr. & Mrs. Sapienza:

This law firm has been retained by Pierce and Barbara McDowell in connection with the issues surrounding your home construction and its encroachment upon their property. We request that you immediately cease and desist all construction on the property located at 1323 South Second Avenue, Sioux Falls, SD. As a result of the construction of your lot, the McDowell residence has been allegedly found to be non-compliant with the residential building code, and the McDowells have been informed by the City of Sioux Falls that they are not permitted to utilize their fireplace or their chimney. Moreover, we believe your home fails to comply with the zoning code with respect to height restrictions and applicable setbacks. Should you choose to continue to pursue construction at 1323 South Second Avenue, you will be doing so at your own risk as we intend to file legal action and pursue all remedies available at law.

stop building. The result was that the house continued to be built because the owner and builder never discussed the cease and desist letter and the potential ramifications.

Ultimately, the residence was completely constructed five feet from the north side of the lot line, creating a space of just seven feet between the Sapienzas' residence and the McDowells' residence. While the Sapienza's residence is in compliance with the applicable building codes and zoning ordinances provided by the City, the McDowell's claim that the Sapienzas' residence does not comply with the applicable ARSD with regard to height, mass, and scale. Additionally, as a result of the height of the Sapienzas' residence and the close distance from the McDowells' residence, the McDowell's are no longer able to use their wood fireplace because it has become a fire hazard.[3] The McDowell's claim that this is detrimental to the historic and sentimental value of their residence as it would force them to replace the existing fireplace with a gas fireplace in order to conform with the building codes which may not be supported by the fireplace design. Additionally, the McDowell's contend that the height of the Sapienzas' residence blocks a substantial amount of natural sunlight from the south that reaches the McDowells' residence and invades the privacy of their residence by having windows that overlook windows into the McDowells' residence, notably into the bedroom and bathroom of the McDowells' eleven-year old daughter.

Several property owners in the McKennan Park Historic District had great concern over the Sapienza residence. Carla Williams testified that she considers the requirements for the historic district important and she takes them seriously. When she decided to redo her kitchen,

[3] Ron Bell, the Chief Building Official for the City of Sioux Falls, testified at trial that the residential housing code requires that where there is a wood burning fireplace, the termination of the chimney has to be at least two feet above any portion of a roof within 10 feet of that chimney termination, which would apply to the use of the McDowells' wood fireplace. T.T. June 28, 2016 at 217.

there was an issue regarding a window that faced her garage. It took over three (3) years to save the money to have the construction done within the requirements of the historic district. The permissiveness of the city and the looming Sapienza residence causes Ms. Williams to feel as she is a "sitting duck" for the next non-compliant builder. Todd Nelson testified that he lived for over twenty-seven (27) years in the historic district. He testified that the Sapienza residence is non-conforming in the historic district. Lisa Nykamp testified that she lived in the historic district. She is in the business of buying and selling properties. She sought to purchase the McDowell residence prior to the Sapienza house being built. She informed the McDowell's to call her when they were going to sell if they were ever going to sell their house. She toured the house and appreciated the natural sunlight and character of the residence. At one point they negotiated the selling of the residence, but they had to back out at the time due to extenuating circumstances. At the time, they were offering $950,000 to $975,000 for the residence. After she noticed the Sapienza construction, she received a call from the McDowell's that they were interested in selling. Ms. Nykamp saw the looming structure adjacent to the McDowell residence. She spent over 80 minutes in the McDowell residence. The natural sunlight was gone due to the Sapienza residence. The interior of the residence was no longer light but very dark. She opened the upstairs window and could touch the scaffolding of the Sapienza house with her hand. Ms. Nykamp testified she cried because the house she sought no longer existed. After speaking with her husband, they thought to offer half of what the McDowell's wanted but reconsidered. Ms. Nykamp testified she couldn't live there.

The McDowell's engaged the services of Spencer Ruff. Mr. Ruff is an expert in the area of historic districts and architecture. After careful review of the Sapienza residence and the McDowell residence, he determined there were violations of state administrative regulations and

regulations from the interior department. Mr. Ruff determined that the McDowell is a landmark residence with structural significance. (Exhibit 60) He reviewed the construction and determined that it violated state administrative regulations. Specifically,

> Massing, size and scale of new construction **must be compatible with surrounding historic building.(emphasis added)** Overall architectural features of new construction must be of contemporary design which does not directly mimic historic buildings. Architectural elements such as windows, doors, and cornices must be similar in rhythm, pattern, and scale to comparable elements and adjacent historic buildings. **The overall visual appearance of new construction may not dominate or be distracting to the surrounding historic landscape. (emphasis added)**

(Exhibit 28 no. 1) Mr. Ruff testified that the Sapienza residence was dominating compared to the other residence adjacent to it. Mr. Ruff testified that the height regulations are violated by the Sapienza residence. Specifically, "The height of new buildings or additions to existing buildings **may not exceed a standard variance of 10% of the average height of historic buildings (emphasis added)** on both sides of the street where proposed new construction is to be located." (Exhibit 28 no. 2) Mr. Ruff determined that the height of the Sapienza residence measured from the front step to the top gable was 44.50'. The average height of the adjacent residences was 36.08' which resulted in the Sapienza exceeding the height regulations by 8.42 feet. (Exhibit 62) Mr. Ruff reviewed the Secretary of the Interior Regulations for related new construction in historic districts that ". . . related new construction **shall not destroy historic materials that characterize the property. (emphasis added)** The new work shall be differentiated from the old and shall be compatible with the . . . scale, and architectural features to protect the historic integrity of the property and its environment." (Exhibit 27 no. 9) He expressed concern over the new construction and the effect on the integrity of the use of the McDowell fireplace. (T.T. June 28, 2016 p. 46) Before the construction, smoke from the fireplace could be observed in the historical context of the neighborhood. The Sapienza house

robbed the public of observing the smoking fire place in the context of the historic district and the McDowell residence as a landmark historic property.

On May 13, 2015, during construction of the Sapienzas' residence, the McDowell's brought this lawsuit against the Sapienza's and the City. The McDowell's claim that they are entitled to permanent injunctive relief from the Sapienza's on the grounds of negligence and private or public nuisance, and are entitled to relief from the City on the grounds of negligence and inverse condemnation.

Additional facts will be added as necessary.

ANALYSIS

Injunctive Relief

The McDowell's seek injunctive relief in their favor on the theories of negligence and nuisance.

1. *Standard of Review*

The standard for a trial court's determination of whether a plaintiff is entitled to injunctive relief is well-established. *Hoffman v. Bob Law, Inc.*, 2016 SD 94, ___ N.W.2d ___. (citing *Magner v. Brinkman*, 2016 S.D. 50, ¶ 19, 883 N.W.2d 74, 82-83.) The court must first determine whether an injunction was statutorily authorized under SDCL 21-8-14, a question of law reviewed de novo. *Magner v. Brinkman*, ¶ 19, 883 N.W.2d at 83. Furthermore,

> Granting or denying an injunction rests in the sound discretion of the trial court. We will not disturb a ruling on injunctive relief unless we find an abuse of discretion. An abuse of discretion can simply be an error of law or it might denote a discretion exercised to an unjustified purpose, against reason and evidence.

Halls v. White, 2006 S.D. 47, ¶ 4, 715 N.W.2d 577, 579 (quoting *Hendrickson v. Wagners, Inc.*, 1999 SD 74, ¶ 14, 598 N.W.2d 507, 510-11) (citations omitted). The trial court's findings of fact will be reviewed under a clearly erroneous standard, while conclusions of law are reviewed de novo. *Id.*

2. Negligence

The McDowell's first claim the Sapienza's are liable for negligence with respect to the violations of the standards for constructing residences in a historic districts and violations of the chimney code regarding setback requirements. Negligence is the breach of a duty owed to another, the proximate cause of which results in an injury. *Lindblom v. Sun Aviation, Inc.*, 2015 S.D. 20, ¶ 19, 862 N.W.2d 549, 555. In order to prevail on a claim for negligence, the plaintiff must prove four elements: (1) duty, (2) breach of that duty, (3) causation, and (4) damages. *Hamilton v. Sommers*, 2014 S.D. 76, ¶ 21, 855 N.W.2d 855, 861-62 (citing *Bernie v. Catholic Diocese of Sioux Falls*, 2012 S.D. 63, ¶ 15, 821 N.W.2d 232, 240).

The McDowell's contend that the Sapienza's had a statutory duty to follow the law when constructing their residence and they breached that duty by failing to comply with the administrative rules for historic districts. ARSD 24:52:07:04. The standard for constructing a residence in the McKennan Park Historic District is established by the administrative regulations. Specifically, the McDowell's argue that the measured height of the Sapienza residence to be 44.50 feet tall, while the South Dakota Administrative Code only allowed the residence to be 36.08 feet tall. Under the administrative rules, the McDowell's argue that the

Sapienza residence is 8.42 feet taller than what is permitted under South Dakota law.[4] ARSD 24:52:07:04.

The Sapienza's argue that the administrative rules have no application to this case because the lot on which their residence sits is not listed on either the state or national registers of historic properties. ARSD 24:52:07:04. The Sapienza's cite to testimony from the McDowells' expert, Spencer Ruff, who stated that the residence that was previously located on the land now occupied by the Sapienza's was not listed as a historic property and that "[t]he home has no significance historically." (T.T. June 28, 2016 at 52.) The Sapienza's argue that Sioux Falls Zoning Ordinances should apply, which their residence would be in compliance with rather than the administrative rules. Under their theory, then the Sapienza's would be correct that there was no breach of duty. The result is that the McDowell's would not be successful in their claim for negligence.

The McDowell's correctly point to the language in the administrative rules which states that "[n]ew construction or additions within a historic district must comply with The Secretary of the Interior's Standards for the Treatment of Historic Properties as incorporated by reference in § 24:52:07:02." ARSD 24:52:07:04. The administrative rules list eleven criteria that must be followed when constructing a new residence in a historic district, even if at the time the regulation is invoked, there is no residence in existence yet. The McDowell's further state that

---

[4] ARSD 24:52:07:04(2) states:
Height. The height of new buildings or additions to existing buildings may not exceed a standard variance of ten percent of the average height of historic buildings on both sides of the street where proposed new construction is to be located[.]
The average height of existing

homes in the area was 32.84 feet, and a ten percent variance in that height as permitted by the variation would only allow the home to be 36.09 feet tall at its highest point. *See* Trial Exhibit 62.

the regulation would be a nullity if applied only to properties listed on the state or national register, as residence that have not been built yet would obviously be overlooked.

The court finds that is unreasonable for the Sapienza's to contend their residence is not within the historical district. Even if the property was not listed on the state or national historical register, it is apparent that the Sapienza's were aware, or at least should have been aware, that their property was part of a historic district. Several jurisdictions looking at a common scheme or plan in a residential area have found an enforceable restrictive covenant where it is sufficiently implied by the conduct and expectations of the parties or is known to the buyer. *See, e.g., Skyline Woods Homeowners Ass'n, Inc. v. Broekemeier*, 758 N.W.2d 376 (Neb. 2008); *Shalimar Ass'n v. D.O.C. Enterprises, Ltd.*, 142 Ariz. 36, 688 P.2d 682 (Ariz.App.1984); *Ute Park Summer Homes Ass'n v. Maxwell Land Gr. Co.*, 427 P.2d 249 (N.M. 1967). Allowing for a violation of a restrictive covenant or administrative rule regarding historic districts when the scheme or plan is apparent would render these types of regulations meaningless. As a result, the McDowell's are correct in their assertion that there may be a remedy for negligence against the Sapienza's for their violations of historical district requirements.

Further, the McDowell's contend that the Sapienza's are also liable for negligence for their violation of the chimney code regarding setback requirements. The McDowell's argue that when there is a conflict between building regulations, the resolution must be in favor of the stricter regulation. SDCL § 11-4-6. Under that statute, the McDowell's assert that it was necessary for the Sapienza's to construct their residence a sufficient distance from the McDowell residence to leave a minimum ten-foot clearance for the McDowells' chimney. IRC Section R1003.9. The Sapienza's argue that residential code does not apply to setbacks, as it only provides that chimneys should be at a required height. IRC Section R1003.9. Instead, they

contend that Sioux Falls Zoning Ordinance ("SFZO") Section 160.094, which requires a setback of five feet for side yards, is the only setback regulation that is applicable, because under SDCL § 11-4-6, there is no conflict between the SFZO and the IRC Sections.

While the Sapienza's are correct that there is no direct conflict between SFZO Section 160.094 and IRC Section R1003.9, a collateral conflict arises between the two regulations in the present situation. Here, the IRC Section R1003.9 requirement that there is clearance for a chimney for any building that is within ten (10) feet of another building creates a conflict with SFZO Section 160.094 requiring the five foot setback, even though the two regulations are not in absolute conflict. Because the residence are seven (7) feet apart in accordance with SFZO Section 160.094, but IRC Section R1003.9 is still being violated, SDCL § 11-4-6 should be broadly construed to recognize the possibility of this type of discrepancy. A reasonable fact finder may find that the Sapienza's are therefore in violation of a city zoning ordinances, which gives rise to the McDowell's claim for negligence on this matter. For these reasons, the McDowell's may maintain their action for negligence against the Sapienza's and there may be a remedy but it might not be adequate.

3. Nuisance

The next contention the McDowell's allege is that the Sapienza's are liable not only for negligence, but also under the theory of nuisance for violations of the historic district requirements and for violating setback requirements. "A nuisance consists in unlawfully doing an act, or omitting to perform a duty, which act or omission either . . . [a]nnoys, injures, or endangers the comfort repose, health, or safety of others; offends decency; . . . [or] [i]n any way renders other persons insecure in life, or in the use of property." SDCL § 21-10-1. A public nuisance "affects at the same time an entire community or neighborhood, or any considerable

number of persons, although the extent of the annoyance or damage inflicted upon the individuals may be unequal[,]" while "[e]very other nuisance is private." SDCL § 21-10-3. The remedy for a nuisance can either be an injunction, damages, or both. SDCL § 21-10-9. "[T]he existence of a nuisance is subject to a rule of reason. It involves the maintenance of a balance between the right to use property and the right to enjoy property unaffected by others' uses." *Prairie Hills Water and Development Co. v. Gross*, 2002 S.D. 133, ¶ 30, 653 N.W.2d 745, 752 (citing *Aberdeen v. Wellman*, 352 N.W.2d 204, 205 (S.D. 1984)). "This rule of reason requires that a nuisance must be a condition that 'substantially invades and unreasonably interferes with another's use, possession, or enjoyment of his land.'" *Id.* (citing *Greer v. City of Lennox*, 107 N.W.2d 337, 339 (S.D. 1961)).

The court finds that a reasonable fact finder could conclude that the Sapienza's have violated historic requirements in the McKennan Park Historic District, which disrupts the character of the neighborhood and does not fit the size and space requirements under current regulations. Additionally, such a fact finder could find that a violation of the setback requirements by the Sapienza's resulted in the McDowell's effectively having no use for their fireplace and a blockage of natural light into their residence. The McDowell's allege that this establishes common law nuisance and that an injunction should be granted.

The South Dakota Supreme Court, using the Restatement (Second) of Torts, has identified the conduct that may give rise to a claim of nuisance:

> One is subject to liability for a private nuisance if, but only if, his conduct is a legal cause of an invasion of another's interest in the private use and enjoyment of land, and the invasion is either (a) intentional and unreasonable, or (b) unintentional and otherwise actionable under the rules controlling liability for negligent or reckless conduct, or for abnormally dangerous conditions or activities.

Atkinson v. City of Pierre, 2005 S.D. 114, ¶ 13, 706 N.W.2d 791, 796 (citations omitted). The court finds that the McDowell's established a prima facie claim for common law nuisance by establishing their prima facie claim against the Sapienza's for negligence. The court finds that a reasonable fact finder could conclude the negligent or reckless conduct of allegedly violating specific regulations resulted in "an invasion of [the McDowells'] interest in the private use and enjoyment of land[.]" *Id.* For that reason, the McDowell's have sufficiently established that there is a cause of action for statutory nuisance under South Dakota law. SDCL § 21-10-1. There may be a remedy but it might not be adequate.

4. *Proper Form of Relief*

Because the McDowell's have established that there are causes of action against the Sapienza's for negligence and nuisance, the court must next look to the proper form of relief. The matter before the court at this interval is whether the McDowell's are entitled injunctive relief, requiring the Sapienza's to reconstruct or relocate their residence in order to satisfy their breach of law or resolve the alleged nuisance. Under South Dakota law, a permanent injunction may be granted under certain specified circumstances: "(1) Where pecuniary compensation would not afford adequate relief; (2) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief; (3) Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or (4) Where the obligation arises from a trust." SDCL § 21-8-14. The McDowell's are claiming that pecuniary compensation would not afford them adequate relief to appropriately remedy the loss of use and enjoyment of their land.

The South Dakota Supreme Court has instructed courts to evaluate four factors when considering injunctive relief. *Hoffman v. Bob Law, Inc.*, 2016 S.D. 94, ¶12, ___ N.W.2d ___, ___. These factors include (1) whether the party to be enjoined caused the damage; (2) whether

irreparable harm would result without an injunction; (3) whether the party to be enjoined acted in bad faith as opposed to making an "innocent mistake"; and (4) whether, after balancing the equities, the hardship that would be suffered by the enjoined party would be disproportionate to the benefit gained by the party seeking the injunction. *Id.* The ultimate decision, after weighing these factors, "rests in the discretion of the trial court." *Prairie Hills Water and Development Co. v. Gross*, 2002 S.D. 133, ¶ 36, 653 N.W.2d 745, 753. The court has diligently reviewed these factors in making its determination that an injunction should be granted in this case.

This court finds that the Sapienza's brought the harm under the first factor. The courts finds there were certain regulations breached by the Sapienza's, and they are the party to be enjoined. Under the second factor, the court finds that the McDowell's will suffer an irreparable injury. Their historic property will no longer be allowed to utilize the fireplace depriving the smoking chimney from the historic landmark property and the historic district. As to the third factor, the court finds that the Sapienza's acted in bad faith rather than an innocent mistake in the construction of their residence.[5] The fourth factor requires that after balancing the equities, the hardship that would be suffered by the enjoined party would be disproportionate to the benefit gained by the party seeking the injunction. The court does, recognize that the fourth factor requires the balancing of the McDowells' request for an injunction, as the harm that would be suffered by the Sapienza's would appear to be disproportionate to the benefit gained by the McDowell's if an injunction were granted.

---

[5] The evidence indicates that the Sapienza's could have been more diligent in gathering the appropriate approval before building their residence. There are indications that the Sapienza's took radical actions. They hired a designer but fired him after he kept seeking a survey. They stated they would hire Chuck Nelson for a survey and never did hire one. They submitted renderings that implied trees to the north. After approval, they sought to move their house closer to the McDowell's. They never presented or sought new approval for the plans they rewrote to the City.

Under the second factor, the McDowell's show an irreparable harm would result if an injunction were not granted. "Harm is only irreparable 'where . . . it cannot be readily, adequately, and completely compensated with money.'" *Knodel v. Kassel Tp.*, 1998 S.D. 73, ¶ 13, 581 N.W.2d 504, 509 (citing *Maryhouse, Inc. v. Hamilton*, 473 N.W.2d 472, 475 (S.D. 1991). The value of the McDowells' residence declined and they lost the use of their wood burning fireplace. The party, Ms. Nykamp, that was interested in the historic property testified she couldn't live there. The property is sellable, but the historic context is forever undermined. The historic residence and the historic district are not capable of being remedied by a monetary judgment. The McDowell's argue "to maintain the desired tone of the land, to prevent nuisances, and to secure the attractiveness of the land," could be irreparably harmed by even a minor violation. *Harknen v. Peska*, 1998 S.D. 70, ¶ 26, 581 N.W.2d 170, 175. The context of the Sapienza residence violates the ten (10) percent structural variance as well as destroys their historic property (ie: chimney) in violation of the administrative rules and federal regulations. The McDowell's recently constructed a new addition to their residence, where they installed a gas fireplace out of sight of the public in the back of their property above the garage. The Sapienza's argue a gas fireplace insert to the historic chimney is a viable alternative rather than rebuilding their residence to be in compliance. Spencer Ruff testified that the large metal attachment for a gas fireplace on the top of the historic chimney is a change in the appearance of the historic landmark residence in violation of rules relevant to historic landmark residences. (Exhibit 28) The McDowell's claim that any change in the chimney that is affixed to the south side of the historic landmark residence is devastating. Furthermore, the character of their residence is devastated by the building of the oversized Sapienza residence. Both of these facts

are enough to show that the harm is irreparable and unable to be cured by monetary compensation.

The fourth factor requires the court to balance the equities in determining the hardship upon the party sought to be enjoined. The Sapienza's argue in their post-trial briefs that even at the most external level of analysis, the argument that they should be required to tear down and reconstruct their residence so that the McDowell's can continue to have a wood burning fireplace fails to satisfy the balancing of the equities factor. On the other hand, the court upheld an injunction that prohibited a defendant from keeping cattle adjacent to the plaintiff's land, so that the cattle would not trespass onto the plaintiff's property and use up his food and water resources. *Ladson v. BPM Corp.*, 2004 S.D. 74, ¶ 19, 681 N.W.2d 863, 868.[6] In that case, however, the court recognized that there were no lesser sanctions available, stating that "[w]hile we recognized that prohibiting an individual or corporation from use of its land is a sanction of the most serious kind, herein the record indicates the trial court considered lesser alternatives and concluded they would not grant relief[.]" *Id.* In the present case, monetary damages would not be a lesser alternative to an injunction that would provide relief. Monetary damages were not appropriate because of the physical invasion onto the plaintiff's land took away the plaintiff's own resources which were used for his own ranching operation. *Id.* Here, there is no physical trespass. However the harm to the McDowell's is that their historic landmark residence with includes a prominent chimney will no longer smoke due to the overbearing Sapienza residence.

[6] The McDowell's brief incorrectly states that the *Ladson* court "upheld an injunction that had the effect of dissolving the defendant's ranching operation and prohibited the defendant from using its land because there were no lesser sanctions available to the court that would have prevented the defendant's livestock from trespassing on the plaintiff's land." Plaintiff's Post-Trial Brief at 34. Instead, the court explained that the trial court recognized a complete injunction would effectively dissolve the defendant's ranching operation, and thus, it was necessary to grant the injunction only to land that was adjacent to the plaintiff's land. *Ladson* at ¶ 19, 681 N.W.2d at 686.

A gas insert changes the outward appearance with a metal attachment extending from the chimney. That cannot be cured by monetary relief. It robs the historic district of the smoking chimney from a historic landmark residence. Furthermore, the Sapienza residence in too tall in height being over eight feet taller than permissible compared to adjacent residences within the historic district. The house undermines the entire historic district. A monetary award would not remedy this and the Sapienza's ought to conform their residence or rebuild their residence.

In another case, the South Dakota Supreme Court found that an injunction that was granted by the trial court was "simply too harsh considering the intangibility of the harm suffered by [the plaintiff]." *Harksen v. Peska*, 1998 S.D. 70, ¶ 33, 581 N.W.2d 170, 176. The harm alleged by the plaintiff was that his property value went down as a result of the cabin that was built by the defendant resulting in the violation. *Harksen v. Peska*, 1998 SD 70, ¶ 19, 581 N.W.2d 170, 174. This was a claim that could be cured through money damages to the court, and would not result in the defendant having to tear down his cabin, which would have cost over $100,000. *Id.* at ¶ 33, 581 N.W.2d at 176. Additionally, the court looked at the harm suffered by other cabin owners in the development, just as the McDowell's have asked this court to do in the present case. *Id.* at ¶ 33, 581 N.W.2d at 176 n. 11. The court noted that only one person brought suit for the harm, and this did not provide enough evidence for the court to consider damages by all other cabin owners. *Id.* Nevertheless, the present case is factually distinguishable. Several property owners in the McKennan Park Historic District testified. They were not parties but did express a great concern over the Sapienza property violating the historic district requirements. Several property owners in the McKennan Park Historic District had great concern over the Sapienza residence. Carla Williams testified that she considers the requirements for the historic district important and when she decided to redo her kitchen, there was an issue regarding a window that

faced her garage. It took over three (3) years to save the money to have the construction done within the requirements of the historic district. The Sapienza residence causes Ms. Williams to feel as she is a "sitting duck" for the next non-compliant builder. Todd Nelson testified that he lived for over twenty-seven (27) years in the historic district. He testified that it is non-conforming in the historic district. Lisa Nykamp testified that she lived in the historic district. She is in the business of buying and selling properties. She sought to purchase the McDowell residence prior to the Sapienza house being built. She informed the McDowell's to call her when they were going to sell if they were ever going to sell their house. She toured the house and appreciated the natural sunlight and character of the residence. At one point they negotiated a sell of the residence, but they had to back out at the time due to extenuating circumstances. At the time, they were offering $950,000 to $975,000 for the residence. After she noticed the Sapienza construction, she received a call from the McDowell's that they were interested in selling. Ms. Nykamp saw the looming structure adjacent to the McDowell residence. She spent over 80 minutes in the McDowell residence. The natural sunlight was gone due to the Sapienza residence. The interior of the residence was no longer light but very dark. She opened the upstairs window and could touch the scaffolding of the Sapienza house with her hand. Ms. Nykamp testified she cried because the house she sought no longer existed. After speaking with her husband, they thought to offer half of what the McDowell's wanted but reconsidered. Ms. Nykamp testified she couldn't live there. The McDowell residence is a historic landmark property that is recognized as historically significant regardless of the historic district. The witnesses that testified were concerned not only for the historic property the McDowell's own but also for the entire historic district. A monetary judgment will not alleviate the violation. After applying the court's holding in *Harksen*, the court requires the Sapienza's to rebuild their

residence to bring it into compliance with the administrative rules and Department of Interior regulations. (Exhibit 27 and 28).

Under the factors laid out by the South Dakota Supreme Court for determining whether injunctive relief is the necessary remedy, the court finds that the McDowell's are entitled to an injunction that requires the Sapienza's to rebuild their residence to bring it into compliance with the administrative rules and Department of Interior regulations. (Exhibit 27 and 28).

I. Claims Against the City

The McDowell's have claims against the City on two theories: inverse condemnation and negligence. The City disputes these claims raising several affirmative defenses including laches, assumption of the risk, and protection under the public duty doctrine.

1. Negligence

The McDowell's first claim against the City is that it is liable for negligence in failing to follow SDCL § 11-4-6 governing the setback requirements that were violated by the construction of the Sapienza residence, as well as the City's failure to follow the historic codes.[7] The evidence demonstrates that the City approved the proposal of the Sapienza house on October 22, 2014. This was after the proposals were allegedly changed following the Sapienza's first presentation of the plans to the Board. (*See* T.T. June 18, 2016 at 71)(Trial Exhibit 29) A reasonable jury could conclude that the City was aware of the plans for the residence. A reasonable fact finder could determine this to have resulted in a violation of IRC Section R1003.9, requiring that there is clearance for a chimney for any building that is within ten feet of

[7] As previously noted, IRC Section R1003.9 and SFZO Section 160.094 conflict in this situation, and as a result SDCL § 11-4-6 is applicable.

another building. Additionally, the City was aware of ARSD 24:52:07:04, despite their contention that this administrative rule does not apply.

The court has already established that there is a cause of action in negligence and in nuisance against the Sapienza's for the building of the Sapienza's residence which allegedly violated SDCL § 11-4-6, IRC Section R 1003.9, and ARSD 24:52:07:04. The only question before the court is whether the City can be held liable for negligence in granting a building permit that would violate these regulations. First, any contention that it was unforeseeable for the McDowell's to be harmed after issuing a building permit that failed to follow building codes is unpersuasive. Even though the City did not have a relationship with the Sapienza's in any direct condition, it is not necessary that one existed. Rather, what matters is the "foreseeability of injury to another" that determines whether a duty was owed. *See Thompson v. Summers*, 1997 S.D. 103, ¶ 13, 567 N.W.2d 387, 392. It is evident in this case that the City owes a duty to the McDowell's, just like it owes a duty to anyone else who would be negatively affected by the issuance of a building permit that would violate zoning and construction regulations. Although the exact harm may not be foreseeable, the harm that resulted here could be seen as a harm that is within the class of reasonably foreseeable hazards that are to be prevented. *See Kirlin v. Halverson*, 2008 S.D. 107, ¶ 38, 758 N.W.2d 436, 451. The harm is foreseeable to the city.

In this case, the City raises three defenses that it believes would bar the McDowell's claims for negligence. The first defense is that the "public duty doctrine declares that the 'government owes a duty of protection to the public, not to the particular persons or classes.'" *E.P. v. Riley*, 1999 S.D. 163, ¶ 15, 604 N.W.2d 7, 12 (quoting *Tipton v. Town of Tabor*, 1997 S.D. 96, ¶ 10, 567 N.W.2d 351, 356). The City's reliance on this doctrine, as applied in *Riley*, is implausible in the present case. In *Riley*, the South Dakota Supreme Court explicitly clarified

that "the public duty rule extends only to issues involving law enforcement or public safety." *Id.* at ¶ 22, 604 N.W.2d at 13-14. Despite the City's argument that building codes serve the sole purpose of protecting the public as a whole, it is clear from the nature of this case that law enforcement and public safety is not at issue. Rather, the issue is whether the City acted with proper administration in issuing a permit that violated building regulations. Thus, in this case involving such violations, this court finds that the public duty doctrine is inapplicable.

Lastly, both the Sapienza's and the City attempt to use the affirmative defense of laches. In order to prevail on the defense of laches, the City would be required to show that the McDowell's had full knowledge of the facts and engaged in an unreasonable delay before seeking relief. *See Burch v. Bricker*, 2006 S.D. 101, ¶ 15, 724 N.W.2d 604, 608. In this case, there is evidence to show that the McDowell's may not have had full knowledge of the facts up until the time that they sought the relief. At trial, the Sapienza's attempted to demonstrate that Mr. McDowell had given up on any action against them when he sent a text in August 2014 to Mr. Sapienza which stated:

> i have to forewarn you that my wife is really suffering about all of this. the home is just way too big for the lot. you will move in five years and we live with it forever. tough gig for us. not your problem or fault ... just a tough gig for us.

(Exhibit 35) While the text may indicate that the McDowell's were aware that the residence being built by the Sapienza's was going to be too big, the court finds that this text alone does not suggest that the McDowell's were aware of all the facts upon which their action is based. At that time, the foundation had not been poured. The McDowell's did not have an idea of how tall the house would be. It was not until after the City approved the plans that the McDowell's acquired the requisite knowledge that led to this action. After carefully weighing the equities, the City and the Sapienza's fail to demonstrate that this defense is applicable to the facts presented at trial.

Furthermore, the defense of assumption of the risk, as argued by the Sapienza's, is a defense that is left for a finder of fact to determine. For a defendant to be successful on the affirmative defense of assumption of the risk, three elements must be established: "1) that the plaintiff had actual or constructive knowledge of the risk; 2) that the plaintiff appreciated the character of the risk; and 3) that the plaintiff voluntarily accepted the risk, given the time knowledge, and experience to make an intelligent choice." *Stone v. Van Eye Farms*, 2007 S.D. 115, ¶ 19, 741 N.W.2d 767, 772. From looking at the evidence, a reasonable fact finder could determine that because the McDowell's did not have full knowledge until after the house began its construction, neither the Sapienza's nor the City have shown that the McDowell's assumed the risk by waiting for the construction to be complete. This factual question is not a determination for the court at this time given the order on bifurcation and the granting of the injunction.

2. Inverse Condemnation

The McDowell's next claim that the City is liable to them on the theory of inverse condemnation is brought under Article VI, § 13, and Article XVII, § 18 of the South Dakota Constitution. According to those constitutional provisions, private property cannot be taken for public use or damaged without just compensation, and municipal corporations and individuals are vested with the privilege of taking private property in exchange for just compensation. *Id.*

The South Dakota Supreme Court has held that "where no part of an owner's land is taken[,] but because of the taking and use of other property located as to cause damage to an owner's land, such damage is compensable." *Rupert v. City of Rapid City*, 2013 S.D. 13, ¶ 9, 827 N.W.2d 55, 60-61 (quoting *Krier v. Dell Rapids Twp.*, 2006 S.D. 10, ¶ 23, 709 N.W.2d 841, 847). Further, "[t]he underlying intent of the [damages] clause is to ensure that individuals are not unfairly burdened by disproportionately bearing the cost of projects intended to benefit the

public generally." *Id.* (quoting *Hall v. S.D. Dep't of Transp.*, 2011 S.D. 70, ¶ 37, 806 N.W.2d 217, 230).

The McDowell's assert that by negligently granting plans through the Board to the Sapienza's and allowing the Sapienza residence to be constructed in a fashion that would interfere with the McDowell's use of their property, the City has essentially committed a taking of the McDowell's property. The McDowell's, however, fail to make any showing of an actual taking under South Dakota law, whether it be a physical taking or a regulatory taking. The Supreme Court made it clear that the government must have either taken property or prevented someone from having taken property because of the government's own use for the property. *Rupert v. City of Rapid City*, 2013 S.D. 13, ¶ 9, 827 N.W.2d 55, 60-61 (quoting *Krier v. Dell Rapids Twp.*, 2006 S.D. 10, ¶ 23, 709 N.W.2d 841, 847). Even if the City was negligent in awarding a building permit to the Sapienza's to build their property, the City has not taken the property or prevented the McDowell's from using their property for the benefit of the City or for effectuating any regulations. Instead, the McDowell's have not presented sufficient evidence to demonstrate that there was a taking under the current case law in South Dakota. As a result, the McDowell's claim against the City for inverse condemnation fails.

ORDER

Based upon the foregoing, it is ordered:

1) That the McDowell's are entitled to injunctive relief that the Sapienza's must bring their residence into compliance with the Administrative Rules of South Dakota 24:52:07:04 and Secretary of the Interior Regulations regarding the requirements for new construction in historic districts (Exhibit 27 and 28) or rebuild it;

2) That judgment be entered in favor of the City on the McDowell's claim of inverse condemnation;

3) That the McDowell's may maintain their action against the City for negligence but the factual question is not a determination for the court at this time given the order on bifurcation and the granting of the injunction.

4) The attorney for the McDowell's will prepare a Judgment accordingly.

5) The parties may submit their proposed findings and conclusions.

Dated this 27 day of December, 2016.

BY THE COURT:

Honorable John Pekas
Circuit Court Judge

ATTEST: Angelia M. Gries, Clerk of Courts
By: DEPUTY

FILED
DEC 27 2016
Minnehaha County, S.D.
Clerk Circuit Court

SDCL 11-4-6. Conflict with other regulations – More stringent regulations govern.

Whenever the regulations made under authority of this chapter require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or less number of stories, or require a greater percentage of lot to be left unoccupied, or impose other higher standards than are required in any other statute or local ordinance or regulation, the provisions of the regulations made under authority of this chapter shall govern.

Wherever the provisions of any other statute or local ordinance or regulation require a greater width or size of yards, courts, or other open spaces, or require a lower height of building or a less number of stories, or other higher standards than are required by the regulations made under authority of this chapter, the provisions of such statute or local ordinance or regulation shall govern.

Source: SL 1927, ch 176, § 9; SDC 1939, § 45.2610.

Chapter 11-4

24:52:07:01. Applicability. The rules in this chapter apply to historic properties listed on the state register or the national register, or both.

Source: 16 SDR 239, effective July 9, 1990.
General Authority: SDCL 1-19A-5.
Law Implemented: SDCL 1-19A-5.

24:52:07:04. Standards for new construction and additions in historic districts. New construction or additions within a historic district must comply with **The Secretary of the Interior's Standards for the Treatment of Historic Properties** as incorporated by reference in § 24:52:07:02. In addition the following standards apply:

(1) Compatibility of design. Massing, size, and scale of new construction must be compatible with surrounding historic buildings. Overall architectural features of new construction must be of contemporary design which does not directly mimic historic buildings. Architectural elements such as windows, doors, and cornices must be similar in rhythm, pattern, and scale to comparable elements in adjacent historic buildings. The overall visual appearance of new construction may not dominate or be distracting to the surrounding historic landscape;

(2) Height. The height of new buildings or additions to existing buildings may not exceed a standard variance of ten percent of the average height of historic buildings on both sides of the street where proposed new construction is to be located;

(3) Width. The width of new buildings or additions to existing buildings must be similar to adjacent historic buildings;

(4) Proportion. The relationship between the height and width of new buildings or additions to existing buildings must be similar in proportion to existing historic buildings. The proportion of openings in the facades of new construction or additions must be compatible with similar openings in adjacent historic buildings;

(5) Rhythm and scale. The rhythm, placement, and scale of openings, prominent vertical and horizontal members, and separation of buildings which are present in adjacent historic buildings must be incorporated into the design of new buildings or additions to existing buildings;

(6) Materials. Materials which make up new buildings or additions to existing buildings must complement materials present in nearby historic properties. New materials must be of similar color, texture, reflective qualities, and scale as historical materials present in the historic district;

(7) Color. The colors of materials, trim, ornament, and details used in new construction must be similar to those colors on existing historic buildings or must match colors used in previous historical periods for identical features within the historic district;

(8) Details and ornament. The details and ornament on new buildings or additions to existing buildings must be of contemporary design that is complementary to those features of similar physical or decorative function on adjacent historic buildings;

(9) Roof shape and skyline. The roof shape and skyline of new construction must be similar to that of existing historic buildings;

(10) Setting. The relationship of new buildings or additions to existing buildings must maintain the traditional placement of historic buildings in relation to streets, sidewalks, natural topography, and lot lines; and

(11) Landscaping and ground cover. Retaining walls, fences, plants, and other landscaping elements that are part of new construction may not introduce elements which are out of character with the setting of the historic district.

Source: 16 SDR 239, effective July 9, 1990; 21 SDR 50, effective September 21, 1994; 24 SDR 73, effective December 4, 1997; 28 SDR 182, effective July 10, 2002.

General Authority: SDCL 1-19A-5, 1-19A-11, 1-19A-29.

Law Implemented: SDCL 1-19A-5, 1-19A-11.1.

International Residential Code § R1003.9

Chimneys shall extend at least 2 feet (610 mm) higher than any portion of a building within 10 feet (3048 mm), but shall not be less than 3 feet (914 mm) above the highest point where the chimney passes through the roof.

CITY OF SIOUX FALLS ORDINANCE § 160.094 BULK REGULATIONS.

(a) *General requirements.* The maximum height and minimum lot requirements within the DD4 form shall be as follows except that before building, renovating, or reconstructing the owner must first adhere to the standards of § 160.092:

Required Front Yard:	20 feet [1] or corner lot [2] .
Required Side Yard:	5 feet.
Required Rear Yard:	10 feet.
Required Lot Frontage:	25 feet.
Maximum Height:	35 feet.
Required Buffer Yard:	10 feet total (Level A) adjacent to highways.
1 The front yard may be reduced up to ten feet when a front garage is recessed back ten feet from the front of the house. 2 On a corner lot the two required front yards must be equal in the aggregate to at least 30 feet as long as one required front yard is ten feet and a garage that has direct access to a street must have a minimum of a 20-foot required front yard.	

(b) *Double frontage lots.*

(1) The yard with access to parking situated on a lot as provided by this title shall always be considered a front yard.

(2) Any front yard without access to legal parking and is not a buffer yard shall be considered have a 10-foot required yard and shall comply with the driveway safety zone.

(Ord. 9-13, passed 3-19-2013)

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 28234

PIERCE McDOWELL AND BARBARA McDOWELL,

Plaintiffs and Appellees,

v.

JOSEPH SAPIENZA AND SARAH JONES SAPIENZA, M.D.,

Defendants and Appellants

CITY OF SIOUX FALLS,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT
2nd JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE JOHN R. PEKAS
Circuit Court Judge

BRIEF OF *AMICUS CURIAE*

MARTY J. JACKLEY
ATTORNEY GENERAL
Paul S. Swedlund
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
ATTORNEYS FOR *AMICUS CURIAE*

STEVEN M. JOHNSON
RONALD A. PARSONS
Johnson, Janklow, Abdallah, Reiter & Parsons
P.O. Box 2348
Sioux Falls, SD 57101
ATTORNEYS FOR APPELLEES

RICHARD L. TRAVIS
ADAM R. HOIER
May & Johnson, P.C.
6805 S. Minnesota Avenue
P.O. Box 88738
Sioux Falls, SD 57109
ATTORNEYS FOR APPELLEES

WILLIAM C. GARRY
MELISSA R. JELEN
Cadwell, Sanford, Deibert & Garry, L.L.P.
P.O. Box 2498
Sioux Falls, SD 57101
ATTORNEYS FOR APPELLEE

Notice of Appeal Filed April 19, 2017

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

OTHER AUTHORITIES

STATEMENT OF LEGAL ISSUES

WHETHER ARSD 24:52:07:04's STANDARDS GOVERNING RESTORATION, REHABILITATION AND NEW CONSTRUCTION IN HISTORIC DISTRICTS APPLY TO THE CONSTRUCTION OF A NEW HOME IN AN HISTORIC DISTRICT ON A LOT FORMERLY OCCUPIED BY A NON-CONTRIBUTING STRUCTURE?

ARSD 24:52:07:04

Vieux Carre Property Owners v. City of New Orleans, 167 So.2d 367 (La. 1964)

A-S-P Associates v. City of Raleigh, 258 S.E.2d 450 (N.C. 1979)

Faulkner v. Town of Chestertown, 428 A.2d 879 (Ct.App.Md. 1981)

The trial court applied the state administrative rule to the subject home.

IS INJUNCTIVE ABATEMENT AN APPROPRIATE REMEDY FOR THE SUBJECT HOME'S NON-COMPLIANCE WITH ARSD 24:52:07:04?

Welton v. 40 E. Oak St. Bldg. Corp, 70 F.2d 377 (7th Cir. 1934)

Morikawa v. Zoning Board of Appeals of Town of Weston, 11 A.3d 735 (Conn.App. 2011)

City of Dallas v. Vanesko, 189 S.W.3d 769 (Texas 2005)

Golden Gate Water Ski Club v. Contra Costa County, 80 Cal.Rptr.3d 876 (Cal.Ct.App.1st 2008)

The trial judge enjoined appellants to bring the subject home into compliance with ARSD 24:52:07:04 and other generally applicable zoning restrictions.

EXAMINATION OF ISSUES

The questions presented have significant implications for the mission of historic preservation within the State of South Dakota.

A. South Dakota's Historic Preservation Laws

To understand ARSD 24:52:07:04's individual role in the scheme of the state's laws protecting its historic resources, one must understand

the scheme as a whole. South Dakota's principle statutory protections for historic properties and historic districts are located at SDCL 1-19A *et seq.* As long ago as 1989, the Office of the Attorney General observed that by enacting SDCL 1-19A "the legislature ha[d] attached substantial importance to the preservation of historic structures in this state." Attorney General Opinion No. 89-41, 1989 WL 505682. The Attorney General's 1989 opinion correctly identified SDCL 1-19A-11.1 as a "state-level Section 106," referring to Section 106 of the National Historic Preservation Act.[1]

Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971), is the foundational case underlying much of the country's historic preservation jurisprudence since the standards of many state preservation statutes (SDCL 1-19A-11.1 included) are replicated from the federal counterpart statute interpreted in that case. *Overton* examined statutes forbidding the use of public parkland for any federally-funded highway project "unless there [wa]s no feasible and prudent alternative to use of such land." *Overton,* 401 U.S. at 411. The court interpreted the statute to be a "plain and explicit bar" to the construction of highways through parks except in "the most unusual situations." *Overton,* 401 U.S. at 411.

---

[1] 16 U.S.C. §407(f); 49 U.S.C. §1653(f); *Lawrence Preservation Alliance v. Allen Realty,* 819 P.2d 138, 144 (Kan.App.2nd 1991); *Homich v. Lake County,* 779 So.2d 567 (Fla.App.5th 2001).

SDCL 1-19A-11.1's adoption of the "feasible and prudent" standard, after substantial jurisprudence had developed surrounding it, signals that it intends for the state's historic resources to receive protections commensurate with those enunciated in *Overton.*[2] Like Section 106, "if [SDCL 1-19A-11.1 is] to have any meaning, [a local governing entity] cannot approve the destruction of" historic property if there is a feasible and prudent alternative.[3] *Overton,* 401 U.S. at 413. SDCL 1-19A *et seq.* and ARSD 24:52:07 *et seq.* are, thus, "stringent," consistent with the "intent that there shall no longer be reckless, ill-considered, wanton desecration of [historical] sites significantly related to our country's [or state's] heritage." *Stop H-3 Association v. Coleman,* 533 F.2d 434, 438 (9th Cir. 1975).

Court decisions interpreting statutes similar to SDCL 1-19A-11.1 have consistently required permitting authorities and applicants to exhaustively examine *all* economically viable alternatives to any plan which would visit harm to historic property, and enjoined them from issuing permits where alternatives exist. *Friends of Bethany Place, Inc. v. Topeka,* 307 P.3d 1255, 1270 (Kan. 2013).[4] Such

---

[2] *State v. Strauser,* 63 N.W.2d 345, 347 (1954).

[3] ARSD 24:52:00:01(14).

[4] ARSD 24:52:13:03.

alternatives may entail other uses for which a property is adaptable,[5] reconfiguring or scaling back a proposed project,[6] relocating an historic structure, pursuing rezoning or code modification options that will assist with adaptively reusing the property, integrating an historic structure into new construction,[7] or selling an historic structure to a buyer willing to preserve it.[8]

For example, if a property owner wants to erect an office building on the site of an historic mansion, the owner must prove that the mansion itself cannot economically be adapted for use as office space, or some alternate economical use such as apartments.[9] Or, in *Archabal v. Hennepin County,* 495 N.W.2d 416 (Minn. 1993), where the county sought a permit to demolish an historic art deco armory to build a new county jail, the court denied the permit because there were alternative sites that could feasibly and prudently meet the security needs of a

---

[5] *Connecticut Historical Commission v. Wallingford,* 2011 WL 1087088 (Conn.Super.); *Save Old Stamford v. St. Andrew's Episcopal Church,* 2010 WL 625991 (Conn.Super.).

[6] *In re B.Y. Development,* 2000 SD 102, ¶ 17.

[7] *Wallingford,* Note 5.

[8] *Kalorama Limited Partnership v. District of Columbia,* 655 A.2d 865 (Ct.App.Dist.Col. 1995); *MB Associates v. Department of Licenses,* 456 A.2d 344 (Ct.App.Dist.Col. 1982); *First Presbyterian Church v York,* 360 A.2d 257 (Comm.Ct.Pa. 1976); *Maher v. New Orleans,* 516 F.2d 1051 (5th Cir. 1975); *Wallingford,* Note 5; *Historic Preservation Alliance v. Wichita,* 892 P.2d 518 (Ct.App.Kan. 1995); *Lafayette Baptist Church v. Board of Adjustment,* 599 S.W.2d 61 (Ct.App.Mo. 1980).

[9] *Kalorama,* Note 8; *Norwalk Preservation Trust v. Norwalk Inn and Conference Center,* 2008 WL 544508 (Conn.Super.).

modern jail facility without causing "community disruption of an extraordinary magnitude" or sacrificing a distinctive historic property to expediency. *Archabal,* 495 N.W.2d at 423. SDCL 1-19A-11.1 would be patently ineffectual if its protections could be circumvented simply by proposing a use wholly incompatible with a protected building as it exists.

B. ISSUE I: ARSD 24:52:07:04's Standards Applied To The Construction Of The Subject Home

Protective statutes and rules must apply to every property within a historic district in order to properly safeguard both the district as a whole and the individual properties within it. This imperative was recognized long ago in *Vieux Carre Property Owners v. New Orleans,* 167 So.2d 367 (La. 1964), where owners of historic properties in the French Quarter sued to compel local authorities to enforce historic property demolition restrictions in the district as a whole, not just to select properties "deemed to have architectural and historical value." *Vieux Carre,* 167 So.2d at 372.

Recognizing that the purpose of districting is to preserve "not only . . . the old buildings themselves, but to preserve the antiquity of the whole French and Spanish quarter, the *tout ensemble,* so to speak," the *Vieux Carre* court remarked how, with piecemeal enforcement, "practically all of the buildings in the deleted or exempted areas . . . w[ould] eventually be demolished or have their exteriors remodeled in a modern manner. And,

in a few years more, the rare charm and beauty of these ancient buildings will have completely vanished." *Vieux Carre,* 167 So.2d at 371.[10]

Thus, "[t]he clear purpose of defining the boundaries of the Vieux Carre was to enable the city and commission not only to preserve historically and architecturally significant buildings themselves, but to enable that authority to exercise 'reasonable control' over all other buildings within the Vieux Carre in order that their use would not destroy the 'quaint and distinctive character' of the entire Vieux Carre." *Vieux Carre,* 167 So.2d at 374. Anything short of comprehensive enforcement would have "an erosive effect on the value of other properties in the immediate neighborhood and, consequently, a detrimental effect on the entire Vieux Carre."[11] *Vieux Carre,* 167 So.2d at 371.

South Dakota's statutes and rules are likewise written to effectuate the purpose of preserving and protecting both individually historically and architecturally significant properties and the "quaint and distinctive character" of a district as a whole. *Vieux Carre,* 167 So.2d at 374.

SDCL 1-19A-2(3) defines "historic property" as "any building, structure, object, *district,* area, or site that is significant in the history, archaeology, paleontology, or culture of the state, its communities or the

---

[10] *New Orleans v. Pergament,* 5 So.2d 129 (La. 1941).

[11] *Golden Gate Water Ski Club v. Contra Costa County,* 80 Cal.Rptr.3d 876 (Cal.Ct.App.1st 2008).

nation." Per SDCL 1-19B-62, decisions affecting historic property must adhere to rules and standards promulgated pursuant to SDCL 1-19A-29. *Deadwood v. M.R. Gustafson Family Trust,* 2010 SD 5, ¶3.

Since SDCL 1-19A-2(3) broaches no distinction between a historic "district" or "property," administrative rules like ARSD 24:52:07:04 and ARSD 24:52:00:01(14) protect the "physical setting" and historic integrity of the McKennan Park Historic District and the McDowell house against the adverse effects of "new construction or additions within [the] historic district" equally and with the force of law,[12] consistent with the established principle that "preservation and protection of the setting or scene in which structures of architectural and historic significance are situated" is "just as important" as protecting the historic buildings themselves. *A-S-P Associates v. Raleigh,* 258 S.E.2d 444, 450 (N.C. 1979).

As observed in *Faulkner v. Chestertown,* 428 A.2d 879 (Ct.App.Md. 1981), any other construction would render the statutes, rules and their protective purposes a nullity. In *Faulkner*, property owners re-sided their building in a non-compliant manner. When the city directed the Faulkners to bring their building into compliance, they argued that "since their 'building was without known historical or architectural significance,' the town and the commission were without 'authority to thereafter control and restrict the changes desired and undertaken by

[12] *Krsnak v. Department of Environmental Resources,* 2012 SD 89, ¶16.

[them].'" *Faulkner,* 428 A.2d at 881. Rejecting this contention, the *Faulkner* court noted that applicable rules allowed the commission to consider not just the "historic and architectural value" of an individual structure, but also "its relationship to the historic value of the surrounding area." *Faulkner,* 428 A.2d at 882-83. These rules, the court said, "contradict the notion of the Faulkners that historic area zoning is directed only at preservation of the exteriors of buildings having historic or architectural merit and that since their building has neither the commission was without power" to curb non-compliant work that would adversely impact the district as a whole. *Faulkner,* 428 A.2d at 883.

Faulkner noted that "[g]enerally an historic district ordinance controls the demolition and exterior alteration of all buildings in the district, whether or not the buildings are historic or architecturally significant," for "the whole concept of historic zoning 'would be about as futile as shoveling smoke' if . . . because a building being demolished had no architectural or historical significance a historic district commission was powerless to prevent its demolition and the construction in its stead of a modernistic drive-in restaurant immediately adjacent" to protected historic property. *Faulkner,* 428 A.2d at 883-84, citing RATHKOPF, 2 The Law of Zoning and Planning § 19:11 (4th Ed.), Appendix 013. Consequently, "[s]ince the Faulkner's building was located within one of

Chestertown's historic districts," the court held "it to have been subject to the jurisdiction of the commission notwithstanding the fact that it had no architectural or historical significance" of its own.[13] *Faulkner,* 428 A.2d at 884.

As reflected in the foregoing authorities, "[i]t is widely recognized that preservation of the historic aspects of a district requires more than simply the preservation of those buildings of historic and architectural significance within the district." *A-S-P,* 258 S.E.2d at 450; 9A Environmental Law and Regulation in New York § 14:19 (2nd Ed.)(non-contributing property within historic district subject to review process because projects occurring on its site, such as demolition and new construction, may adversely impact neighboring historic properties), Appendix 016.[14] "Comprehensive regulation of the 'construction, reconstruction, alteration, restoration, or moving of buildings . . . in the historic district which would be incongruous with the historic aspects of the district' is the only feasible manner in which the historic aspects of an entire district can be maintained." *A-S-P*, 258 S.E.2d at 450-51; *Society for Ethical Culture v. Spatt,* 416 N.Y.S.2d 246, 250 (N.Y.App.1st 1979).

---

[13] *Billy Graham Evangelistic Association v. Minneapolis,* 667 N.W.2d 117, 122 (Minn. 2003); *A-S-P,* Page 7.

[14] *Annapolis v. Anne Arundel County,* 316 A.2d 807, 821 (Ct.App.Md. 1974).

C. ISSUE III: State Law Requires That The Subject Home Be Brought Into Compliance With ARSD 24:52:07:04

There seems to be no dispute that the subject home violates ARSD 24:52:07:04's standards (as well as certain generally-applicable setback restrictions). Generally, the remedy for non-compliance with historic preservation review processes or standards is to enjoin the offending project.[15] For example, in *Figarsky v. Historic District Commission of Norwich,* 368 A.2d 163, 166-67 (Conn. 1976), property owners were enjoined from demolishing a colonial-era building located on the village green. Despite the building's vernacular construction, general disrepair and being sandwiched between a McDonald's and a surface parking lot, the court found that the building, by virtue of its antiquity, contributed to the district as a whole.

The injunctive abatement remedy ordered here is challenged on the grounds that (1) the McDowell's injury is reparable by monetary compensation, (2) appellants acted in good faith and (3) the attendant hardship is inequitable.

1. The Damage To The McDowell House And The McKennan Park Historic District Is Not Reparable By Money Damages

Reducing the reparability analysis down to a monetary award to the McDowells does nothing to remedy the subject home's irreparable harm to the McKennan Park Historic District or vindicate the public's

---

[15] *Thompson v. Fugate,* 347 F.Supp. 120, 128 (E.D.Va. 1972); *National Trust v. Corps of Engineers,* 552 F.Supp. 784, 791 (S.D.Ohio 1982); *Stop H-3,* Page 3.

interest in obedience to the law. The notion that a monetary award to one aggrieved party is an adequate remedy relies on inapposite authorities involving properties protected by covenants. By contrast, this case implicates a statutorily protected class of property deemed to be of intrinsic value and benefit to the public at large.

Zoning laws enacted for the general welfare – *i.e.* for the delivery of air and light to streets, the preservation of historic properties, or the conservation of vital, scenic ecosystems – are accorded greater deference than unilateral property interests created by private covenants. "[T]here is a vast difference between the act of a community in . . . protecting the health of a community by improving sanitary conditions and the equity of one (limited strictly to dollars) who deliberately violates a zoning ordinance which was enacted for the promotion or protection of the health and welfare of the community." *Welton v. 40 East Oak St. Bldg. Corp,* 70 F.2d 377, 381 (7th Cir. 1934).

The necessity of an injunctive remedy in this case that vindicates both private and public interests is well illustrated by the analogous circumstances underlying the *Welton* decision. In *Welton,* the plaintiffs owned two apartment buildings adjacent to a third, the defendant's 20-story high-rise. The defendant's high-rise violated a local zoning ordinance that required a setback from the street of one foot for every nine feet of height. *Welton,* 70 F.2d at 378. *Welton* found that the setback violation was actionable because the ordinance was enacted for

the very purpose of preventing high-rise buildings from excessively encroaching on the delivery of air and light to public streets and smaller neighboring structures. *Welton,* 70 F.2d at 382-83.

Welton observed that the interests at stake and to be balanced in cases of zoning violations enacted for the general welfare are not purely private. As hard as it "endeavored to obtain [the high-rise building developer's] viewpoint when they propose[d] a money judgment to one who suffers small financial loss as satisfaction for violation of important ordinances enacted for the benefit of the public," the *Welton* court resolved that, "[i]n the fight for better living conditions in large cities, in the contest for more light and air, more health and comfort – the scales are not well balanced if dividends to the individuals outweigh health and happiness to the community." *Welton,* 70 F.2d at 383.

Consequently, *Welton* concluded that "financial relief to the [owners of the small adjacent apartment buildings wa]s not the only factor in weighing equities." *Welton,* 70 F.2d at 383. Rather, the weighing of equities also "involved that immeasurable but nevertheless vital element of respect for, and compliance with, the health ordinances of the city." *Welton,* 70 F.2d at 383. The court surmised that "[t]he surest way to stop the erection of high buildings in defiance of zoning ordinances is to remove all possibility of gain to those who build illegally. Prevention will never be accomplished by compromise after the building is erected, or through payment of a small money judgment to some

individual whose financial loss is an inconsequential item" in comparison to the public's interest in the enforcement of its zoning laws. *Welton,* 70 F.2d at 383.

Instead of a simple award of individual monetary relief, the *Welton* court entered a mandatory injunction requiring the high-rise developer to demolish those portions of the building out of compliance with the setback requirements, though the cost of abatement was $343,837 ($6,288,778 in 2017 dollars).[16] *Highland Park, Inc. v. North Haven Zoning Bd.,* 229 A.2d 356, 357 (Conn. 1967)(ordering demolition of home built only 5 feet from sideline of lot); *Madison v. Clarke,* 288 N.W.2d 312, 314 (S.D. 1980)(property owner could have avoided financial hardship associated with removing non-conforming carport by complying with permitting process).

Because of the paramount importance of the public's interest in safeguarding protected resources, "[w]hen use of a parcel violates applicable zoning rules, the responsible agency may obtain abatement – *i.e.* removal of the violation and restoration of legal use – even when substantial expense is involved." *IT Corp. v. Solano County Bd. of Supervisors,* 820 P.2d 1023 (Cal. 1991).[17] "The duty of courts is to

---

[16] http://www.saving.org/inflation/inflation.php?amount=1&year=1934.

[17] *Cornell v. Michaud,* 947 N.E.2d 1138 (Ct.App.Mass. 2011); *Gattineri v. McGeary,* 2016 WL 6465341 (Mass.Land Ct.); *New York v. Falack,* 175 A.2d 1189, 1191 (N.Y.App.2nd 1991); *Wyncock v. Carroll,* 345 S.E.2d 503 (Ct.App.S.C. 1986); *Pavia v. Medcalfe,* 257 N.Y.S.2d 447 (Sup.Ct.N.Y. 1965).

protect rights, and innocent complainants cannot be required to suffer the loss of their rights because of expense to the wrongdoer." *Welton,* 70 F.2d at 382.

For example, in *Golden Gate Water Ski Club v. Contra Costa County,* 80 Cal.Rptr.3d 876 (Cal.Ct.App.1st 2008), the court affirmed an order to demolish 28 residential dwelling units and private docks illegally constructed on an island in the Golden Gate owned by a private water ski club, observing that "[i]n the field of zoning, [courts] are dealing with a vital public interest – not one that is strictly between the municipality and the individual litigant." *Golden Gate,* 80 Cal.Rptr.3d at 887. "All residents of the community have a protectable property and personal interest in maintaining the character of an area as established by comprehensive and carefully considered zoning plans in order to promote the orderly physical development of the district and the city and to prevent the property of one person from being damaged by the use of neighboring property in a manner not compatible with the general location of the two parcels." *Golden Gate,* 80 Cal.Rptr.3d at 887. Thus, a private settlement which "permits [a] violation to continue gives no consideration to the interest of the public in the area nor to the strong public policy in favor of eliminating non-conforming uses and against expansion of such uses." *Golden Gate,* 80 Cal.Rptr.3d at 887.

As in *Welton,* the *Golden Gate* court found that "what little injustice might result from abating the club's illegal use present[ed] no

grounds for overriding the significant interest in open space and other land use limitations benefitting the public interest." Rather, it said, "the public interest should be of paramount importance." *Golden Gate,* 80 Cal.Rptr.3d at 890. Any remedy less than demolition, the court said, "would encourage others to violate land use and zoning ordinances on the assumption or hope their continued violations will allow them to circumvent the planning process." *Golden Gate,* 80 Cal.Rptr.3d at 891; *Feduniak v. California Coastal Commission,* 56 Cal.Rptr.2d 591 (Cal.Ct.App.6th 2007)(public's interest in protecting coastline areas outweighed property owner's interest in maintaining an illegal beachside private golf course, though cost of demolition and restoration of the acreage to native vegetation was $100,000). As in *Welton* and *Golden Gate,* the court below properly did not sacrifice protected resources and the public interest to the expediency of a monetary settlement to one aggrieved property owner.

2. Reliance On Contractor/Architect Or Erroneous Permit Is A Self-Created Hardship

Non-conforming structures built in reliance on the expertise of contractors and architects or a permit issued in error are not immune from injunctive abatement. Errors caused by persons employed by property owners fall into the category of self-created hardship. *Application of Fecteau,* 543 A.2d 693, 695 (Vt. 1988)("error of [someone]

employed by the owner" is "type of hardship that is self-created).[18] Zoning law strongly discourages deviations from building restrictions in order to excuse self-created hardships.[19]

For example, in *Morikawa v. Weston,* 11 A.3d 735 (Conn.App. 2011), the court was faced with whether a variance should issue to allow the roof of a newly-constructed home to exceed the town's 35-foot building height by 2½ feet. The owners submitted plans showing a proper roof of 35 feet but then built a roof of 37½ feet. The homeowners sought a *post hoc* variance on the grounds of hardship created by the error of the contractor and/or architect in building to the incorrect height. Though the homeowners' mistake in overbuilding the roof was genuinely innocent, *Morikawa* ruled that the "errors of the architect and/or general contractor that resulted in the roof exceeding the 35-foot height requirement [we]re attributable to the [homeowners] because the voluntary acts of those persons were *on behalf of* the" homeowners. *Morikawa,* 11 A.3d at 743. "Thus," the court ruled, "the hardship claimed [wa]s self-created." *Morikawa,* 11 A.3d at 743; *Fecteau,* 543 A.2d at 695 (surveyor's error resulting in foundation being poured 19 feet

---

[18] MCQUILLIN, 8 The Law of Municipal Corporations § 25.48 (3rd Ed.), Appendix 001; *Podmers v. Village of Winfield,* 350 N.E.2d 232 (Ill.App.3rd 1976); *Gedmin v. Chicago,* 232 N.E.2d 573 (Ill.App.2nd 1967); *Randolph Hills, v. Montgomery County Council,* 285 A.2d 620 (Md. 1972); *State ex rel. Markdale v. Zoning Bd.,* 133 N.W.2d 795 (Wis. 1965).

[19] 2 American Law of Zoning § 13:16 (5th Ed.), Appendix 018.

from the street rather than the required 30 is "the sort of mishap for which homeowner must bear responsibility").[20]

Again in *Dallas v. Vanesko,* 189 S.W.3d 769 (Texas 2005), the court examined whether a variance for an over-height roof was improperly denied. Like appellants, the Vaneskos tore down an existing home and rebuilt a larger one on the site. "To save money, they . . . decided to design the new structure themselves, without the assistance of architects and engineers, and act as their own general contractor." *Vanesko,* 189 S.W.3d at 770. The Vaneskos claimed hardship from the fact that they had built in reliance on a building "permit that was issued in error."[21] The *Vanesko* court ruled, however, that this was no circumstance warranting a variance because the hardship arose from "the way the Vaneskos chose to design their house." *Vanesko,* 189 S.W.3d at 774. *Hill v. Chester,* 771 A.2d 559, 561 (N.H. 2001)("failure to plan" is not a mitigating hardship); *Cromwell v. Ward,* 651 A.2d 424, 439-41 (Md.App. 1995)(erroneous issuance of building permit "conferred no vested right" to non-conforming use of property).

---

[20] Citing *Highland Park v. Zoning Board,* 229 A.2d 356 (Conn. 1967); *Pollard v. Zoning Board,* 438 A.2d 1186 (Conn. 1982).

[21] *Cromwell,* Page 17; *Durkin Village v. Zoning Bd.,* 946 A.2d 916, 923 (Conn.App. 2008).

Of note, in *Morikawa, Vanesko* and *Fecteau,* the homeowners' mistakes had genuinely been innocent, and none involved properties with special protection for their historic, scenic or ecological significance. Courts are even less accommodating of detriments to protected property or property owners who engage in a "studied and cavalier disregard" of zoning provisions and then invoke hardship and equity to obtain relief from the consequences of their unlawful act.[22] *Pavia v. Medcalfe,* 257 N.Y.S.2d 447, 451 (N.Y.App. 1965).

For example, in *Cornell v. Michaud,* 947 N.E.2d 1138, (Mass.App. 2011), a property owner built a house on a lot that applicable zoning had classified as too narrow for a single family residence knowing that it was legally questionable. Affirming the trial court's order to demolish the house, the *Cornell* court held that "where a landowner builds despite notice of non-conformity . . . the landowner acts at his own peril and cannot protest an order to restore the land to its preconstruction state." *Cornell,* 947 N.E.2d at 1146. "[T]o hold that self-inflicted hardships in and of themselves justif[y] variances" would "generate a plethora of such hardships [and] . . . also emasculate zoning ordinances." *Cromwell,* 651 A.2d at 439-41 (purpose of variance is not "to effect a legalization of a property owner's intentional or unintentional violations of zoning requirements").

---

[22] *Steele,* Page 19; *Alleghany Enterprises v. Bd. of Zoning,* 225 S.E.2d 383 (Va. 1976); *Bd. of Zoning v. Combs,* 106 S.E.2d 755 (Va. 1959).

3. Injunctive Abatement Is A Hardship At Law Only If It Is Extreme And Not Self-Created

An adverse impact on an historic property is condoned at law only if the denial of a permit or variance request would inflict "extreme hardship," and only if said hardship is *not* self-created. SDCL 1-19B-46; SDCL 1-19A-11.1. No South Dakota case has interpreted the term "extreme hardship" in the historic preservation context, but, in the larger scheme of zoning of which historic preservation is a part,[23] ordinary hardship generally means that the denial of a permit or variance request must work a *de facto* taking to warrant exception from zoning.[24]

Importantly, however, a municipal or judicial abatement order does *not* effect a taking when a zoning violation is self-created. "Manifestly, a self-inflicted hardship cannot be the cause of a constitutional deprivation of a landowner's rights." *Steele v. Fluvana County,* 436 S.E.2d 453, 457 (Va. 1993); *Welton,* 70 F.2d at 381 ("a willful wrong-doer is entitled to claim no favor"); MCQUILLIN, Appendix 001-002.[25]

If the hardship here was not self-created, injunctive abatement is the correct remedy unless the hardship is *extreme.* South Dakota's

---

[23] *Penn Central Transp v. New York City,* 438 U.S. 104 (1978); *Faulkner,* Page 7; *Figarsky,* Page 10; *Ithaca v. Tompkins Co.,* 355 N.Y.S.2d 275, 276 (Sup.Ct.N.Y. 5th 1974); *Annapolis,* Note 14.

[24] SDCL 1-19B-46 (commission may approve non-compliant use only where owner would experience "extreme hardship"); *Cole v. Huron,* 2000 SD 119; *Madison,* Page 13; *Chokecherry Hills Estates v. Deuel Coumty,* 294 N.W.2d 654 (S.D. 1980); *Kalorama,* Note 8.

[25] *York,* Note 8; *Maher,* Note 8; SDCL 1-19B-52.

customary test for ordinary hardship[26] examines (1) whether a property could yield a reasonable return if used for a purpose consistent with applicable zoning, (2) whether a project proponent's claimed hardship is due to a circumstance unique to the property as opposed to the zoning restriction itself, and (3) whether the proposed project would alter the character of the property and its surroundings.[27]

Per *Overton, extreme* hardship requires a heightened order of proof of these elements in order to afford historic properties due protection. The inquiry into the economic prudence of an available alternative does not require a "wide-ranging balancing of competing interests" given that "it will always be less costly and safer to build [a highway] straight through a park." "If Congress intended [costs and other interests in competition with preservation objectives] to be on an equal footing with preservation of parkland there would have been no need for the statutes." *Overton,* 401 U.S. at 412.

Since an alternative does not effect a taking simply because an owner is deprived of the highest or most profitable use of property,[28] or of assurances of monetary gain or against monetary loss,[29] the first element

---

[26] *Madison,* Page 13.

[27] An additional consideration may be whether any variance sought is the minimum that will relieve the hardship. *Oxford Corp. v. Zoning Bd.,* 34 A.3d 386, 295 (Penn. 2011); *Fecteau,* Page 15.

[28] *A-S-P,* Page 7.

[29] MCQUILLIN, Appendix 001-002.

generally is not satisfied when the hardship consists of strictly economic loss.[30] *B.Y. Development,* 2000 SD 102 at ¶ 17 ("economic considerations alone" do not excuse adverse impacts to historic structures); *Morikawa,* 11 A.3d at 741. Rather, *extreme* hardship exists only when historic zoning restrictions strip protected property of *all* viable economic use.[31] For example, in *Figarsky,* where property owners sought to demolish a dilapidated colonial-era tavern located on the village green rather than make repairs ordered by a city inspector, the court denied the demolition permit request because the Figarskys had "offered no evidence of the value of the house without repairs [or] its value if repaired." *Figarsky,* 368 A.2d at 166.

The economic element of the hardship test, in combination with SDCL 1-19A-11.1, requires hard evidence of the infeasibility and imprudence of abatement or abatement alternatives, such as (a) lowering the roof, (b) demolishing non-compliant portions of the home *in situ* and reconfiguring the home to bring it into compliance, or (c) lifting up and moving the house out of the side-yard setback onto a new foundation. Barring proof that abatement would render the subject home and land "worthless,"[32] the economic factor of the hardship test weighs in favor of

---

[30] *Morikawa,* Page 16; *Archabal,* Page 4; *A-S-P*, Page 7; *Stamford,* Note 5; *Figarsky,* Page 10; *Wallingford,* Note 5.

[31] *Oxford Corp.,* Note 27; *York,* Note 8; *Maher,* Note 8.

[32] *York,* Note 8.

injunctive abatement. MCQUILLIN, Appendix 001-002; *Figarsky*, 368 A.2d at 167.

The circumstances element of the hardship test is met only if "the subject site was in [some] way peculiar, unusual, or unique when compared to other properties in the neighborhood such that [an] ordinance's height restriction's impact upon the subject property would be different than the restriction's impact upon neighboring properties." *Cromwell,* 651 A.2d at 441. Since there is no assertion in this case that the subject home's non-conforming massing, configuration and placement on the lot was the only feasible means of profitably developing the land, the circumstances element weighs in favor of the trial court's abatement remedy.

The final element of the hardship test requires proof that the subject home does not alter the character of the McKennan Park Historic District. A lot-dominating "McMansion"-style home[33] whose massing is out of proportion to the surrounding structures of a substantially intact period neighborhood, and which was built in dereliction of prevailing neighborhood setbacks, inflicts a material alteration to the McKennan Park Historic District virtually as a matter of law. ARSD 24:52:07:02; ARSD 24:52:07:04. The third element of the hardship test, like the first two, also weighs in favor of injunctive abatement.

---

[33] https://en.wikipedia.org/wiki/McMansion.

CONCLUSION

Like their federal counterparts, SDCL 1-19A *et seq.* and ARSD 24:52:07 *et seq.* are a "plain and explicit bar" on projects that encroach upon, damage or destroy a designated historic property. The subject home is illegal because its non-compliant massing and siting were not the only feasible and prudent means of developing the lot. Abatement is mandatory if the subject home's non-conformity was self-created. If not self-created, injunctive abatement is required in order to effectuate SDCL 1-19A-11.1's protective purposes barring proof of *extreme* hardship.

Dated this 15th day of August 2017.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

Paul S. Swedlund
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Telephone: 605-773-3215
Facsimile: 605-773-4106
paul.swedlund@state.sd.us

CERTIFICATE OF COMPLIANCE

1. I certify that appellee's brief is within the typeface and volume limitations provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in proportional 12 point type. Appellee's brief contains 4,994 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Paul S. Swedlund
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of August 2017 a true and correct copy of the foregoing brief was served via e-mail on Richard L. Travis at dtravis@mayjohnson.com, William C. Garry at bgarry@cadlaw.com, and Ron A. Parsons at ron@johnsonabdallah.com.

Paul S. Swedlund
Assistant Attorney General

APPENDIX

8 McQuillin Mun. Corp. § 25:48 (3d ed.)

McQuillin The Law of Municipal Corporations July 2017 Update
Chapter 25. Zoning
I. In General
D. Balancing of Public Interest in Zoning and Private Interests in Property

§ 25:48. Effect of hardship, loss or gain to owner

West's Key Number Digest

- West's Key Number Digest, Zoning and Planning ⇨1053

Legal Encyclopedias

- Am Jur 2d, Zoning and Planning § 56

Generally, hardship, limitation of use or diminution or increase of value of private property does not in itself render a zoning measure unconstitutional, invalid,[1] or confiscatory.[2] Indeed, a zoning ordinance is not necessarily invalid although it is harsh and seriously depreciates the value of property involved,[3] since the interests of the individual must be secondary to the public welfare.[4] If there is an issuable fact as to whether the ordinance makes for the good of the community, the fact that it may be detrimental to some private interest is not material.[5] A lowering in value occurs in almost every instance where use of property is limited by a zoning ordinance, and while this factor should be considered in determining the validity of the ordinance it is not of itself decisive, particularly where the desired use would depreciate the value of other property in the area.[6] Nor is the test of the validity of a zoning measure its financial advantage or disadvantage to the owner arising from the measure or its enforcement.[7] The fact that uses permitted in a zoning ordinance result in lower profits, no profits, or actual loss is not sufficient to render the ordinance confiscatory or unconstitutional.[8] However, a city may not, through the device of zoning for a use to which property is not suited, depress its value preliminary to condemning it for a public purpose.[9]

Certainly a reduction in values, shared by most if not all owners in a locality, because of the common effect on properties of the general scheme of a zoning ordinance, is not in itself enough to render the ordinance confiscatory.[10] If the limitations upon the use of the property apply reasonably and fairly to all, the individual hardship and loss must be borne in order to make possible the greater advantage to the whole community.[11] Thus, one claiming to be injured and seeking a variance is obliged to prove that the ordinance has peculiarly injured his or her property and that he or she has suffered unique and special damages.[12]

APPENDIX 001

Mere diminution of market value or interference with the property owner's personal plans and desires relative to his or her property is insufficient to invalidate a zoning ordinance [13] or to entitle him or her to a variance [14] or rezoning. [15] Similarly, the fact that property is more valuable for an excluded use does not in itself void a zoning restriction. [16] Consistent with these principles, a zoning ordinance may classify property for residential purposes although it can be used more profitably or beneficially for commercial purposes [17] or for a particular commercial purpose, [18] such as a filling station, [19] or for industrial purposes. [20]

Thus, for example, a zoning ordinance prohibiting the removal of valuable clay beds from a residential district does not violate the protective provision of the constitution against damaging private property. [21] Nor is zoning invalid where it restrains removal of topsoil, if the use does not appear to be the only or most profitable one possible. [22] Moreover, a use, such as quarrying operations, may be an excluded use notwithstanding that such is the highest and best use for the property. [23] Undoubtedly, where loss to an owner prevented from a certain business or industrial use of property is inconsiderable in comparison with gain in the public welfare from a zoning regulation, that regulation will be upheld. [24] On the other hand, a zoning law which through prohibition of commercial or industrial uses in a designated district renders valuable properties in that district worthless or of little economic value, ordinarily, will be deemed invalid as to such properties, [25] if not invalid in toto. [26]

The fact that innocent buildings or uses may fall within a proscription does not invalidate a general plan to exclude objectionable buildings and uses. [27] The prohibition of certain uses of land or buildings does not render zoning ordinances void where there is no general prohibition of all use. [28]

Nevertheless, hardship must be considered in determining the validity of zoning regulations, [29] and when a hardship from zoning involves the destruction of all practical use or value of the property, it results in the ordinance being invalid. [30] Indeed, as a general rule in determining whether a zoning ordinance is unreasonable or confiscatory, the extent to which property values are diminished must be given consideration, [31] together with all the facts of the particular case. [32] A zoning law which does not render properties totally unsuitable for the uses to which they are restricted, but which merely diminishes their value, nevertheless may be unreasonable if the restrictions imposed are not based upon substantial requirements of the public welfare. [33] Moreover, while the extent to which property values are changed by a zoning ordinance is a proper consideration in determining the validity of an ordinance, the profit that would accrue to individual property owners if zoning restrictions were removed must be weighed against the detriment to the public welfare that would result from such action. [34] Also to be weighed is the lessening of values of other property in the area should restrictions be removed. [35]

It is important to note that the hardship to a property owner justifying invalidation of a zoning ordinance as it affects his or her premises is not a hardship the property owner has assumed or induced. [36] However, one who purchases property in the face of a preexisting classification, while not occupying a favorable position, may attack the validity of such restriction and reap the benefits of its removal. [37]

Footnotes

1 U.S.

Standard Oil Co. v. City of Marysville, 279 U.S. 582, 49 S. Ct. 430, 73 L. Ed. 856 (1929); L'Hote v. City of New Orleans, 177 U.S. 587, 597, 20 S. Ct. 788, 792, 44 L. Ed. 899 (1900); Standard Oil Co. v. City of Tallahassee, 183 F.2d 410 (5th Cir. 1950); Leventhal v. District of Columbia, 100 F.2d 94 (App. D.C. 1938)

Cal.

Hamer v. Town of Ross, 59 Cal. 2d 776, 31 Cal. Rptr. 335, 382 P.2d 375 (1963); Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515, 20 Cal. Rptr. 638, 370 P.2d 342 (1962); Town of Atherton v. Templeton, 198 Cal. App. 2d 146, 17 Cal. Rptr. 680 (1st Dist. 1961)

Colo.

Baum v. City and County of Denver, 147 Colo. 104, 363 P.2d 688 (1961); Frankel v. City and County of Denver, 147 Colo. 373, 363 P.2d 1063 (1961)

Conn.

Devaney v. Board of Zoning Appeals of City of New Haven, 132 Conn. 537, 45 A.2d 828 (1946)

Fla.

Town of Bay Harbor Islands v. Driggs, 522 So. 2d 912 (Fla. Dist. Ct. App. 3d Dist. 1988); City of Clearwater v. College Properties, Inc., 239 So. 2d 515 (Fla. Dist. Ct. App. 2d Dist. 1970) (reduction in value); Waring v. Peterson, 137 So. 2d 268 (Fla. Dist. Ct. App. 2d Dist. 1962), citing this treatise (airport area zone, valid with use, and graduated height restrictions)

Ill.

La Salle Nat. Bank v. City of Chicago, 27 Ill. 2d 278, 189 N.E.2d 273 (1963); Hannifin Corp. v. City of Berwyn, 1 Ill. 2d 28, 115 N.E.2d 315 (1953); Miller Bros. Lumber Co. v. City of Chicago, 414 Ill. 162, 111 N.E.2d 149 (1953)

Iowa

Neuzil v. City of Iowa City, 451 N.W.2d 159 (Iowa 1990); F. H. Uelner Precision Tools & Dies, Inc. v. City of Dubuque, 190 N.W.2d 465 (Iowa 1971); Anderson v. City of Cedar Rapids, 168 N.W.2d 739 (Iowa 1969)

Ky.

Fried v. Louisville and Jefferson County Planning and Zoning Com'n, 258 S.W.2d 466 (Ky. 1953)

Mass.

Caires v. Building Com'r of Hingham, 323 Mass. 589, 83 N.E.2d 550 (1949)

Mich.

Roll v. City of Troy, 370 Mich. 94, 120 N.W.2d 804 (1963); Paka Corp. v. City of Jackson, 364 Mich. 122, 110 N.W.2d 620 (1961); Industrial Land Co. v. City of Birmingham, 346 Mich. 667, 78 N.W.2d 656 (1956)

Miss.

Palazzola v. City of Gulfport, 211 Miss. 737, 52 So. 2d 611 (1951)

Mo.

Hoffmann v. Kinealy, 389 S.W.2d 745 (Mo. 1965); Miller v. Kansas City, 358 S.W.2d 100 (Mo. Ct. App. 1962); Deacon v. City of Ladue, 294 S.W.2d 616 (Mo. Ct. App. 1956)

Nev.

State ex rel. Davie v. Coleman, 67 Nev. 636, 224 P.2d 309 (1950)

N.J.

Stolz v. Ellenstein, 7 N.J. 291, 81 A.2d 476 (1951); Gabrielson v. Borough of Glen Ridge, 13 N.J. Misc. 142, 176 A. 676 (Sup. Ct. 1935)

N.Y.

Fox Meadow Estates v. Culley, 233 A.D. 250, 252 N.Y.S. 178 (2d Dep't 1931), aff'd, 261 N.Y. 506, 185 N.E. 714 (1933); Gordon v. Town of Huntington, 230 N.Y.S.2d 619 (Sup 1962); Village of Old Westbury v. Foster, 193 Misc. 47, 83 N.Y.S.2d 148 (Sup 1948)

Ohio

C. Miller Chevrolet, Inc. v. City of Willoughby Hills, 38 Ohio St. 2d 298, 67 Ohio Op. 2d 358, 313 N.E.2d 400 (1974); Cleveland Trust Co. v. Village of Brooklyn, 92 Ohio App. 351, 49 Ohio Op. 422, 110 N.E.2d 440 (8th Dist. Cuyahoga County 1952), quoting this treatise; Beerman v. City of Kettering,

14 Ohio Misc. 149, 43 Ohio Op. 2d 354, 237 N.E.2d 644 (C.P. 1965), judgment aff'd, 13 Ohio St. 2d 149, 42 Ohio Op. 2d 371, 235 N.E.2d 231 (1968)

Pa.

Miller & Son Paving, Inc. v. Wrightstown Tp., 499 Pa. 80, 451 A.2d 1002 (1982); Appeal of Kerr, 294 Pa. 246, 144 A. 81 (1928)

S.C.

Talbot v. Myrtle Beach Bd. of Adjustment, 222 S.C. 165, 72 S.E.2d 66 (1952)

Tex.

Edge v. City of Bellaire, 200 S.W.2d 224 (Tex. Civ. App. Galveston 1947), writ refused

Wis.

Jefferson County v. Timmel, 261 Wis. 39, 51 N.W.2d 518 (1952)

2 **U.S.**

Jackson Court Condominiums, Inc. v. City of New Orleans, 874 F.2d 1070 (5th Cir. 1989)

Ga.

Jones v. City of Atlanta, 257 Ga. 727, 363 S.E.2d 254 (1988) (disparity in fair market value insufficient to show "significant detriment")

Iowa

Neuzil v. City of Iowa City, 451 N.W.2d 159 (Iowa 1990)

Mass.

Massachusetts Broken Stone Co. v. Town of Weston, 346 Mass. 657, 195 N.E.2d 522 (1964); Marshall v. Town of Topsfield, 13 Mass. App. Ct. 425, 433 N.E.2d 1244 (1982); Monaghan v. Town of North Reading, 7 Mass. App. Ct. 922, 389 N.E.2d 786 (1979)

Mich.

Recreational Vehicle United Citizens Ass'n v. City of Sterling Heights, 165 Mich. App. 130, 418 N.W.2d 702 (1987) (permitting reasonable alternative uses)

N.H.

Claridge v. New Hampshire Wetlands Bd., 125 N.H. 745, 485 A.2d 287, 22 Env't. Rep. Cas. (BNA) 1208 (1984)

3 **U.S.**

City of St. Paul v. Chicago, St. P., M. & O. Ry. Co., 413 F.2d 762 (8th Cir. 1969); American Wood Products Co. v. City of Minneapolis, 21 F.2d 440 (D. Minn. 1927), aff'd, 35 F.2d 657 (C.C.A. 8th Cir. 1929); Standard Oil Co. v. City of Tallahassee, Fla., 87 F. Supp. 145 (N.D. Fla. 1949), judgment aff'd, 183 F.2d 410 (5th Cir. 1950)

Cal.

City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (2d Dist. 1954)

Ill.

Wesemann v. Village of La Grange Park, 407 Ill. 81, 94 N.E.2d 904 (1950) (value of property to owner is not a test of validity of zoning ordinance); Podmers v. Village of Winfield, 39 Ill. App. 3d 615, 350 N.E.2d 232 (2d Dist. 1976)

Ind.

Board of Zoning Appeals of Town of Meridian Hills v. Schulte, 241 Ind. 339, 172 N.E.2d 39 (1961)

Iowa

Neuzil v. City of Iowa City, 451 N.W.2d 159 (Iowa 1990)

Ky.

City of Richlawn v. McMakin, 313 Ky. 265, 230 S.W.2d 902 (1950)

Mich.

Dusdal v. City of Warren, 23 Mich. App. 583, 179 N.W.2d 188 (1970), judgment rev'd on other grounds, 387 Mich. 354, 196 N.W.2d 778, 4 Env't. Rep. Cas. (BNA) 1110 (1972)

N.H.

Claridge v. New Hampshire Wetlands Bd., 125 N.H. 745, 485 A.2d 287, 22 Env't. Rep. Cas. (BNA) 1208 (1984); R. A. Vachon & Son, Inc. v. City of Concord, 112 N.H. 107, 289 A.2d 646 (1972) (amendment increasing dimensional requirements for lot sizes in approved subdivision)

N.Y.

Vernon Park Realty v. City of Mount Vernon, 122 N.Y.S.2d 78 (Sup 1953), judgment aff'd, 282 A.D. 890, 125 N.Y.S.2d 112 (2d Dep't 1953), judgment aff'd, 307 N.Y. 493, 121 N.E.2d 517 (1954); Town of Hempstead v. Lynne, 32 Misc. 2d 312, 222 N.Y.S.2d 526 (Sup 1961)

Ohio

State ex rel. River Grove Park, Inc. v. City of Kettering, 118 Ohio App. 143, 25 Ohio Op. 2d 7, 193 N.E.2d 547 (2d Dist. Montgomery County 1962) (mandamus denied to compel issuance of permit for commercial building in residential zone), quoting this treatise; Cleveland Trust Co. v. Village of Brooklyn, 92 Ohio App. 351, 49 Ohio Op. 422, 110 N.E.2d 440 (8th Dist. Cuyahoga County 1952), quoting this treatise; Beerman v. City of Kettering, 14 Ohio Misc. 149, 43 Ohio Op. 2d 354, 237 N.E.2d 644 (C.P. 1965), judgment aff'd, 13 Ohio St. 2d 149, 42 Ohio Op. 2d 371, 235 N.E.2d 231 (1968), quoting this treatise

Wis.

Kmiec v. Town of Spider Lake, 60 Wis. 2d 640, 211 N.W.2d 471 (1973)

4 **Ala.**

Baggett v. City of Montgomery, 276 Ala. 166, 160 So. 2d 6 (1963)

Conn.

Damick v. Planning and Zoning Commission of Town of Southington, 158 Conn. 78, 256 A.2d 428 (1969)

Fla.

Waring v. Peterson, 137 So. 2d 268 (Fla. Dist. Ct. App. 2d Dist. 1962), citing this treatise (airport area zone, valid with use, and graduated height restrictions)

Ill.

Zenith Radio Corp. v. Village of Mount Prospect, 15 Ill. App. 3d 587, 304 N.E.2d 754 (1st Dist. 1973)

Iowa

Neuzil v. City of Iowa City, 451 N.W.2d 159 (Iowa 1990)

N.Y.

Shepard v. Village of Skaneateles, 300 N.Y. 115, 89 N.E.2d 619 (1949)

Ohio

Willott v. Village of Beachwood, 16 Ohio Op. 2d 423, 87 Ohio L. Abs. 143, 176 N.E.2d 337 (C.P. 1961), judgment rev'd on other grounds, 119 Ohio App. 403, 28 Ohio Op. 2d 44, 91 Ohio L. Abs. 353, 188 N.E.2d 625 (8th Dist. Cuyahoga County 1963), judgment rev'd on other grounds, 175 Ohio St. 557, 26 Ohio Op. 2d 249, 197 N.E.2d 201 (1964), citing this treatise

5 **Tex.**

City of Lubbock v. Whitacre, 414 S.W.2d 497 (Tex. Civ. App. Amarillo 1967), writ refused n.r.e., (Oct. 4, 1967)

6 **Ill.**

Grobman v. City of Des Plaines, 59 Ill. 2d 588, 322 N.E.2d 443 (1975); Gregory v. City of Wheaton, 23 Ill. 2d 402, 178 N.E.2d 358 (1961); Galt v. Cook County, 405 Ill. 396, 91 N.E.2d 395 (1950)

Mich.

Depreciation in value is not a definite yardstick by which to measure reasonableness of a zoning ordinance but will be given consideration, especially when ordinance destroys most of value of property involved. Long v. City of Highland Park, 329 Mich. 146, 45 N.W.2d 10 (1950)

7 **Ala.**

Cudd v. Homewood, 284 Ala. 268, 224 So. 2d 625 (1969); Leary v. Adams, 226 Ala. 472, 147 So. 391 (1933)

Ariz.

Klensin v. City of Tucson, 10 Ariz. App. 399, 459 P.2d 316 (Div. 2 1969)

Cal.

McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 264 P.2d 932 (1953); City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (2d Dist. 1954)

Conn.

Stapleton v. Zoning Bd. of Appeals of City of Bridgeport, 149 Conn. 706, 183 A.2d 750 (1962)

Fla.

State ex rel. Townsend v. Farrey, 133 Fla. 15, 182 So. 448 (1938)
Ill.
Liberty Nat. Bank of Chicago v. City of Chicago, 10 Ill. 2d 137, 139 N.E.2d 235 (1956)
Iowa
Plaza Recreational Center v. Sioux City, 253 Iowa 246, 111 N.W.2d 758.(1961)
Mass.
Kaplan v. City of Boston, 330 Mass. 381, 113 N.E.2d 856 (1953)
N.Y.
Town of Cortlandt v. McNally, 282 A.D. 1072, 126 N.Y.S.2d 702 (2d Dep't 1953)
Ohio
Cleveland Trust Co. v. Village of Brooklyn, 92 Ohio App. 351, 49 Ohio Op. 422, 110 N.E.2d 440 (8th Dist. Cuyahoga County 1952), quoting this treatise; Beerman v. City of Kettering, 14 Ohio Misc. 149, 43 Ohio Op. 2d 354, 237 N.E.2d 644 (C.P. 1965), judgment aff'd, 13 Ohio St. 2d 149, 42 Ohio Op. 2d 371, 235 N.E.2d 231 (1968), quoting this treatise
Tex.
Long v. City of Corpus Christi, 315 S.W.2d 24 (Tex. Civ. App. Eastland 1958), writ refused n.r.e

8 **U.S.**
Amdur v. City of Chicago, 638 F.2d 37 (7th Cir. 1980) (reducing size of buildings on certain parcels of land not taking)
Colo.
Nopro Co. v. Town of Cherry Hills Village, 180 Colo. 217, 504 P.2d 344 (1972); Richter v. City of Greenwood Village, 513 P.2d 241 (Colo. App 1973)
Ill.
American Nat. Bank & Trust Co. of Chicago v. City of Highland Park, 29 Ill. App. 3d 878, 331 N.E.2d 597 (2d Dist. 1975); Duryea v. City of Rolling Meadows, 119 Ill. App. 2d 445, 256 N.E.2d 32 (1st Dist. 1970); Reskin v. City of Northlake, 55 Ill. App. 2d 184, 204 N.E.2d 600 (1st Dist. 1965) (possibility that rezoning might double value does not mean that zoning is confiscatory)
Md.
Mayor and Council of Rockville v. Stone, 271 Md. 655, 319 A.2d 536 (1974)
N.Y.
Koff v. Incorporated Village of Flower Hill, 29 A.D.2d 655, 286 N.Y.S.2d 636 (2d Dep't 1968), order aff'd, 28 N.Y.2d 694, 320 N.Y.S.2d 747, 269 N.E.2d 406 (1971) (no proof that financial returns on whole tract would not allow recovery of purchase price); Setauket Development Corp. v. Romeo, 18 A.D.2d 825, 237 N.Y.S.2d 516 (2d Dep't 1963)
N.C.
Allgood v. Town of Tarboro, 281 N.C. 430, 189 S.E.2d 255 (1972)
Okla.
City of Tulsa v. Nicholas, 1963 OK 220, 385 P.2d 816 (Okla. 1963)

9 **Mich.**
Robyns v. City of Dearborn, 341 Mich. 495, 67 N.W.2d 718 (1954)
Minn.
Sanderson v. City of Willmar, 282 Minn. 1, 162 N.W.2d 494 (1968)
Regulatory taking, see § 25:43.

10 **U.S.**
Zahn v. Board of Public Works of City of Los Angeles, 274 U.S. 325, 47 S. Ct. 594, 71 L. Ed. 1074 (1927); Hadacheck v. Sebastian, 239 U.S. 394, 36 S. Ct. 143, 60 L. Ed. 348 (1915); Leventhal v. District of Columbia, 100 F.2d 94 (App. D.C. 1938)
Ill.
M & N Enterprises, Inc. v. City of Springfield, 111 Ill. App. 2d 444, 250 N.E.2d 289 (4th Dist. 1969)
Mo.
Strandberg v. Kansas City, 415 S.W.2d 737 (Mo. 1967)
N.Y.
Fitchett Crescent Corp. v. City of N.Y., 155 N.Y.S.2d 272 (Sup 1956)

N.C.
Appeal of Parker, 214 N.C. 51, 197 S.E. 706 (1938)
Pa.
Taylor v. Haverford Tp., 299 Pa. 402, 149 A. 639, 641 (1930); Appeal of Kerr, 294 Pa. 246, 144 A. 81 (1928)

11 Conn.
Devaney v. Board of Zoning Appeals of City of New Haven, 132 Conn. 537, 45 A.2d 828 (1946)

12 Common hardship as ground for variance, see § 25:179.37.
Proving unique hardship and difficulty, see § 25:179.36.
Unique hardship and complete loss to property owner, see § 25:49.

13 U.S.
Jackson Court Condominiums, Inc. v. City of New Orleans, 874 F.2d 1070 (5th Cir. 1989) (city-wide moratorium on time shares did not constitute taking); Amdur v. City of Chicago, 638 F.2d 37 (7th Cir. 1980) (reducing size of buildings on certain parcels of land not taking)
Ariz.
City of Phoenix v. Fehlner, 90 Ariz. 13, 363 P.2d 607 (1961); Klensin v. City of Tucson, 10 Ariz. App. 399, 459 P.2d 316 (Div. 2 1969)
Ark.
City of West Helena v. Bockman, 221 Ark. 677, 256 S.W.2d 40 (1953)
Conn.
Second Norwalk Corp. v. Planning and Zoning Commission of Town of Westport, 28 Conn. Supp. 426, 265 A.2d 332 (C.P. 1969)
Fla.
State ex rel. Office Realty Co. v. Ehinger, 46 So. 2d 601 (Fla. 1950)
Ga.
Smisson Gardens, Inc. v. Doles, 244 Ga. 468, 260 S.E.2d 865 (1979)
Ill.
Cosmopolitan Nat. Bank of Chicago v. City of Chicago, 22 Ill. 2d 367, 176 N.E.2d 795 (1961); Vedovell v. City of Northlake, 22 Ill. 2d 611, 177 N.E.2d 124 (1961); Dunlap v. City of Woodstock, 405 Ill. 410, 91 N.E.2d 434 (1950)
Mass.
Turnpike Realty Co. v. Town of Dedham, 362 Mass. 221, 284 N.E.2d 891, 4 Env't. Rep. Cas. (BNA) 1344, 3 Envtl. L. Rep. 20221 (1972)
Mich.
Korby v. Redford Tp., 348 Mich. 193, 82 N.W.2d 441 (1957); Krause v. City of Royal Oak, 11 Mich. App. 183, 160 N.W.2d 769 (1968)
Minn.
Beck v. City of St. Paul, 304 Minn. 438, 231 N.W.2d 919 (1975), citing this treatise
Mo.
Downing v. City of Joplin, 312 S.W.2d 81 (Mo. 1958); Flora Realty & Inv. Co. v. City of Ladue, 362 Mo. 1025, 246 S.W.2d 771 (1952)
N.Y.
Rowe St. Associates, Inc. v. Town of Oyster Bay, 63 Misc. 2d 46, 310 N.Y.S.2d 138 (Sup 1969), judgment aff'd, 34 A.D.2d 987, 313 N.Y.S.2d 94 (2d Dep't 1970), order aff'd, 27 N.Y.2d 973, 318 N.Y.S.2d 502, 267 N.E.2d 277 (1970); Schloeger v. Incorporated Village of Manorhaven, Nassau County, 96 N.Y.S.2d 146 (Sup 1950)
N.C.
Kinney v. Sutton, 230 N.C. 404, 53 S.E.2d 306 (1949)
Ohio
Ketchel v. Bainbridge Tp., 52 Ohio St. 3d 239, 557 N.E.2d 779, 1 A.L.R.5th 1137 (1990); State ex rel. Beerman v. City of Kettering, 120 Ohio App. 309, 29 Ohio Op. 2d 126, 201 N.E.2d 887 (2d Dist. Montgomery County 1963), quoting this treatise; Cleveland Trust Co. v. Village of Brooklyn, 92 Ohio App. 351, 49 Ohio Op. 422, 110 N.E.2d 440 (8th Dist. Cuyahoga County 1952), quoting this treatise

Tenn.
White v. Henry, 199 Tenn. 219, 285 S.W.2d 353 (1955); Brooks v. City of Memphis, 192 Tenn. 371, 241 S.W.2d 432 (1951)
W. Va.
G-M Realty, Inc. v. City of Wheeling, 146 W. Va. 360, 120 S.E.2d 249 (1961)

14 Ill.
Podmers v. Village of Winfield, 39 Ill. App. 3d 615, 350 N.E.2d 232 (2d Dist. 1976)
Ohio
Beerman v. City of Kettering, 14 Ohio Misc. 149, 43 Ohio Op. 2d 354, 237 N.E.2d 644 (C.P. 1965), judgment aff'd, 13 Ohio St. 2d 149, 42 Ohio Op. 2d 371, 235 N.E.2d 231 (1968), quoting this treatise
Unnecessary hardship or difficulty as ground for variance, see §§ 25:179.35 to 25:179.38.

15 Ill.
Oak Park Nat. Bank v. Village of Norridge, 133 Ill. App. 2d 327, 273 N.E.2d 47 (1st Dist. 1971) (application to build apartment building in single-family residential zone)
Grounds and requisites for rezoning, see § 25:105.

16 U.S.
Pompa Const. Corp. v. City of Saratoga Springs, 706 F.2d 418 (2d Cir. 1983)
Colo.
Wright v. City of Littleton, 174 Colo. 318, 483 P.2d 953 (1971); Baum v. City and County of Denver, 147 Colo. 104, 363 P.2d 688 (1961) (prohibition of most profitable use or development of land does not render zoning ordinance void)
Conn.
Town of Waterford v. Grabner, 155 Conn. 431, 232 A.2d 481 (1967); Teuscher v. Zoning Bd. of Appeals of Town of Westport, 154 Conn. 650, 228 A.2d 518 (1967)
Ill.
Cosmopolitan Nat. Bank of Chicago v. Village of Mount Prospect, 22 Ill. 2d 463, 177 N.E.2d 365 (1961); Hartung v. Village of Skokie, 22 Ill. 2d 485, 177 N.E.2d 328 (1961); Neef v. City of Springfield, 380 Ill. 275, 43 N.E.2d 947 (1942)
Kan.
Gaslight Villa, Inc. v. Governing Body, City of Lansing, 213 Kan. 862, 518 P.2d 410 (1974)
Ky.
Clark v. City of Paducah, 439 S.W.2d 84 (Ky. 1969); Fried v. Louisville and Jefferson County Planning and Zoning Com'n, 258 S.W.2d 466 (Ky. 1953); Schloemer v. City of Louisville, 298 Ky. 286, 182 S.W.2d 782 (1944)
Mass.
Maider v. Town of Dover, 1 Mass. App. Ct. 683, 306 N.E.2d 274 (1974)
Mich.
Krause v. City of Royal Oak, 11 Mich. App. 183, 160 N.W.2d 769 (1968)
N.H.
Carbonneau v. Town of Exeter, 119 N.H. 259, 401 A.2d 675 (1979), citing this treatise
N.J.
Rexon v. Board of Adjustment of Borough of Haddonfield, 10 N.J. 1, 89 A.2d 233 (1952); Greenway Homes v. Borough of River Edge, 137 N.J.L. 453, 60 A.2d 811 (N.J. Sup. Ct. 1948)
N.Y.
Schwartz v. Lee, 28 A.D.2d 921, 282 N.Y.S.2d 141 (2d Dep't 1967), order aff'd, 22 N.Y.2d 743, 292 N.Y.S.2d 123, 239 N.E.2d 216 (1968); Hopewell Gardens, Inc. v. Town of East Fishkill, 76 Misc. 2d 234, 349 N.Y.S.2d 481 (Sup 1973) (failure to include multifamily residence district in zoning scheme); Hayes v. City of Yonkers, 143 N.Y.S.2d 699 (Sup 1955), order aff'd, 1 A.D.2d 1031, 152 N.Y.S.2d 213 (2d Dep't 1956)
Ohio
State ex rel. Beerman v. City of Kettering, 120 Ohio App. 309, 29 Ohio Op. 2d 126, 201 N.E.2d 887 (2d Dist. Montgomery County 1963), quoting this treatise; Beerman v. City of Kettering, 14 Ohio Misc.

149, 43 Ohio Op. 2d 354, 237 N.E.2d 644 (C.P. 1965), judgment aff'd, 13 Ohio St. 2d 149, 42 Ohio Op. 2d 371, 235 N.E.2d 231 (1968), quoting this treatise

Tex.

City of El Paso v. Donohue, 163 Tex. 160, 352 S.W.2d 713 (1962)

Utah

Dowse v. Salt Lake City Corp., 123 Utah 107, 255 P.2d 723 (1953)

17 **U.S.**

Zahn v. Board of Public Works of City of Los Angeles, 274 U.S. 325, 47 S. Ct. 594, 71 L. Ed. 1074 (1927)

Cal.

Lagiss v. Kraintz, 104 Cal. App. 2d 793, 232 P.2d 541 (1st Dist. 1951); City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P.2d 34 (2d Dist. 1954)

Colo.

Baum v. City and County of Denver, 147 Colo. 104, 363 P.2d 688 (1961); City and County of Denver v. Chuck Ruwart Chevrolet, Inc., 32 Colo. App. 191, 508 P.2d 789 (App 1973) (enjoining operation of automobile sales lot in residential zone)

Conn.

Second Norwalk Corp. v. Planning and Zoning Commission of Town of Westport, 28 Conn. Supp. 426, 265 A.2d 332 (C.P. 1969)

Ill.

Neef v. City of Springfield, 380 Ill. 275, 43 N.E.2d 947 (1942); Merchants Nat. Bank of Aurora v. City of Aurora, 119 Ill. App. 2d 179, 255 N.E.2d 609 (2d Dist. 1970)

Iowa

Brackett v. City of Des Moines, 246 Iowa 249, 67 N.W.2d 542 (1954), citing this treatise

Ky.

Schloemer v. City of Louisville, 298 Ky. 286, 182 S.W.2d 782 (1944)

Md.

Serio v. Mayor and City Council of Baltimore, 208 Md. 545, 119 A.2d 387 (1956)

Mich.

Anderson v. City of Holland, 344 Mich. 706, 74 N.W.2d 894 (1956)

N.Y.

Sarisohn v. Town of Smithtown, 61 Misc. 2d 236, 305 N.Y.S.2d 188 (Sup 1969) (residential or residential-office)

Ohio

State ex rel. Beerman v. City of Kettering, 120 Ohio App. 309, 29 Ohio Op. 2d 126, 201 N.E.2d 887 (2d Dist. Montgomery County 1963), quoting this treatise; Beerman v. City of Kettering, 14 Ohio Misc. 149, 43 Ohio Op. 2d 354, 237 N.E.2d 644 (C.P. 1965), judgment aff'd, 13 Ohio St. 2d 149, 42 Ohio Op. 2d 371, 235 N.E.2d 231 (1968), quoting this treatise

Pa.

Vanguard Cellular System, Inc. v. Zoning Hearing Bd. of Smithfield Tp., 130 Pa. Commw. 371, 568 A.2d 703 (1989)

Tex.

City of El Paso v. Donohue, 163 Tex. 160, 352 S.W.2d 713 (1962); City of Dallas v. Lively, 161 S.W.2d 895 (Tex. Civ. App. Dallas 1942), writ refused; Lombardo v. City of Dallas, 47 S.W.2d 495 (Tex. Civ. App. Dallas 1932), writ granted, (July 6, 1932) and aff'd, 124 Tex. 1, 73 S.W.2d 475 (1934)

18 **Ill.**

Elmhurst Nat. Bank v. City of Chicago, 22 Ill. 2d 396, 176 N.E.2d 771 (1961) (supermarket and parking lot); La Salle Nat. Bank v. Village of Harwood Heights, 2 Ill. App. 3d 1040, 278 N.E.2d 114 (1st Dist. 1971); La Salle Nat. Bank v. Village of Palatine, 92 Ill. App. 2d 327, 236 N.E.2d 1 (1st Dist. 1968)

19 **Colo.**

Board of County Com'rs of Jefferson County v. Shaffer, 149 Colo. 18, 367 P.2d 751 (1961)

Ill.

River Forest State Bank & Trust Co. v. Village of Maywood, 23 Ill. 2d 560, 179 N.E.2d 671 (1962); Merchants Nat. Bank of Aurora v. City of Aurora, 119 Ill. App. 2d 179, 255 N.E.2d 609 (2d Dist. 1970); La Salle Nat. Bank v. Village of Palatine, 92 Ill. App. 2d 327, 236 N.E.2d 1 (1st Dist. 1968)

Mass.

Maider v. Town of Dover, 1 Mass. App. Ct. 683, 306 N.E.2d 274 (1974)

N.Y.

Snyder v. Burns, 27 Misc. 2d 645, 212 N.Y.S.2d 851 (Sup 1961)

20 **Conn.**

Samp Mortar Lake Co. v. Town Plan and Zoning Commission of Town of Fairfield, 155 Conn. 310, 231 A.2d 649 (1967) (change of only industrial lot in residential section to residential allowing continuation of nonconforming use)

Ill.

First Nat. Bank of Lake Forest v. Lake County, 7 Ill. 2d 213, 130 N.E.2d 267 (1955)

N.Y.

Ulmer Park Realty Co. v. City of N.Y., 270 A.D. 1044, 63 N.Y.S.2d 143 (2d Dep't 1946), judgment aff'd, 297 N.Y. 788, 77 N.E.2d 797 (1948); Application of Braunsdorf, 202 Misc. 471, 111 N.Y.S.2d 507 (Sup 1952)

Ohio

State ex rel. River Grove Park, Inc. v. City of Kettering, 118 Ohio App. 143, 25 Ohio Op. 2d 7, 193 N.E.2d 547 (2d Dist. Montgomery County 1962), quoting this treatise; s.c., State ex rel. Beerman v. City of Kettering, 120 Ohio App. 309, 29 Ohio Op. 2d 126, 201 N.E.2d 887 (2d Dist. Montgomery County 1963); Cleveland Trust Co. v. Village of Brooklyn, 92 Ohio App. 351, 49 Ohio Op. 422, 110 N.E.2d 440 (8th Dist. Cuyahoga County 1952), quoting this treatise; Beerman v. City of Kettering, 14 Ohio Misc. 149, 43 Ohio Op. 2d 354, 237 N.E.2d 644 (C.P. 1965), judgment aff'd, 13 Ohio St. 2d 149, 42 Ohio Op. 2d 371, 235 N.E.2d 231 (1968), quoting this treatise

21 **Va.**

West Bros. Brick Co. v. City of Alexandria, 169 Va. 271, 192 S.E. 881 (1937)

22 **Mass.**

Town of Burlington v. Dunn, 318 Mass. 216, 61 N.E.2d 243, 246, 168 A.L.R. 1181 (1945)

23 **U.S.**

Pompa Const. Corp. v. City of Saratoga Springs, 706 F.2d 418 (2d Cir. 1983)

24 **U.S.**

Pompa Const. Corp. v. City of Saratoga Springs, 706 F.2d 418 (2d Cir. 1983)

Pa.

Miller & Son Paving, Inc. v. Wrightstown Tp., 499 Pa. 80, 451 A.2d 1002 (1982)

R.I.

Johnson & Wales College v. DiPrete, 448 A.2d 1271, 5 Ed. Law Rep. 1187 (R.I. 1982)

Tenn.

Davidson County v. Rogers, 184 Tenn. 327, 198 S.W.2d 812 (1947) (stone quarrying operation prohibited in residential district)

25 **Fla.**

City of Clearwater v. College Properties, Inc., 239 So. 2d 515 (Fla. Dist. Ct. App. 2d Dist. 1970) (limiting use to professional and related services)

Minn.

Sanderson v. City of Willmar, 282 Minn. 1, 162 N.W.2d 494 (1968)

Ohio

Cleveland Builders Supply Co. v. City of Garfield Heights, 102 Ohio App. 69, 2 Ohio Op. 2d 65, 136 N.E.2d 105 (8th Dist. Cuyahoga County 1956)

Regulatory takings, see § 25:43.

26 See §§ 25:60, 25:67.

27 **N.Y.**

Bond v. Cooke, 237 A.D. 229, 262 N.Y.S. 199 (3d Dep't 1932); People v. Calvar Corp., 69 N.Y.S.2d 272 (County Ct. 1940), judgment aff'd, 286 N.Y. 419, 36 N.E.2d 644, 136 A.L.R. 1376 (1941)

Va.
Fairfax County v. Parker, 186 Va. 675, 44 S.E.2d 9 (1947)

28 **Va.**
Fairfax County v. Parker, 186 Va. 675, 44 S.E.2d 9 (1947)

29 **Ill.**
Braden v. Much, 403 Ill. 507, 87 N.E.2d 620 (1949); Ehrlich v. Village of Wilmette, 361 Ill. 213, 197 N.E. 567 (1935); Mobley v. City of Ottawa, 29 Ill. 2d 507, 194 N.E.2d 283 (1963)
Mich.
Redford Moving & Storage Co. v. City of Detroit, 336 Mich. 702, 58 N.W.2d 812 (1953) (depreciation of value of property zoned for residence, compared with value for commercial use, should be given consideration); Long v. City of Highland Park, 329 Mich. 146, 45 N.W.2d 10 (1950)
R.I.
Morgan v. Zoning Board of Review of Town of Warwick, 52 R.I. 338, 160 A. 922 (1932)

30 **Fla.**
Town of Bay Harbor Islands v. Driggs, 522 So. 2d 912 (Fla. Dist. Ct. App. 3d Dist. 1988)
Ind.
City of Anderson v. Associated Furniture & Appliances, Inc., 423 N.E.2d 293 (Ind. 1981)
Iowa
Neuzil v. City of Iowa City, 451 N.W.2d 159 (Iowa 1990) (downzoning as constitutional and not unconstitutional taking)
Mich.
Reibel v. City of Birmingham, 23 Mich. App. 732, 179 N.W.2d 243 (1970)
Tenn.
Bayside Warehouse Co. v. City of Memphis, 63 Tenn. App. 268, 470 S.W.2d 375 (1971)
Wis.
State ex rel. Nagawicka Island Corp. v. City of Delafield, 117 Wis. 2d 23, 343 N.W.2d 816 (Ct. App. 1983)
Unique hardship or complete loss to owner, see § 25:49.

31 **Colo.**
City and County of Denver v. Chuck Ruwart Chevrolet, Inc., 32 Colo. App. 191, 508 P.2d 789 (App 1973)
Ill.
Myers v. City of Elmhurst, 12 Ill. 2d 537, 147 N.E.2d 300 (1958); Mundelein Estates v. Village of Mundelein, 409 Ill. 291, 99 N.E.2d 144 (1951); Pioneer Trust & Sav. Bank v. Village of Oak Park, 408 Ill. 458, 97 N.E.2d 302 (1951)
Mich.
Paka Corp. v. City of Jackson, 364 Mich. 122, 110 N.W.2d 620 (1961); Industrial Land Co. v. City of Birmingham, 346 Mich. 667, 78 N.W.2d 656 (1956); Reibel v. City of Birmingham, 23 Mich. App. 732, 179 N.W.2d 243 (1970); Krause v. City of Royal Oak, 11 Mich. App. 183, 160 N.W.2d 769 (1968)
N.J.
Odabash v. Mayor and Council of Borough of Dumont, 65 N.J. 115, 319 A.2d 712 (1974)
N.Y.
Rockdale Const. Corp. v. Incorporated Village of Cedarhurst, Nassau County, N.Y., 94 N.Y.S.2d 601 (Sup 1949), judgment aff'd, 275 A.D. 1043, 91 N.Y.S.2d 926 (2d Dep't 1949), judgment aff'd, 301 N.Y. 519, 93 N.E.2d 76 (1950); Gardner v. Leboeuf, 24 Misc. 2d 511, 204 N.Y.S.2d 468 (Sup 1960), judgment aff'd, 15 A.D.2d 815, 226 N.Y.S.2d 678 (2d Dep't 1962)

32 See § 25:50.

33 **Colo.**
City and County of Denver v. Chuck Ruwart Chevrolet, Inc., 32 Colo. App. 191, 508 P.2d 789 (App 1973)
Ill.

People ex rel. R. Larsen & Co. v. City of Chicago, 24 Ill. 2d 15, 179 N.E.2d 676 (1962); Marquette Nat. Bank v. Cook County, 24 Ill. 2d 497, 182 N.E.2d 147, 95 A.L.R.2d 712 (1962); Bluhm v. City of Chicago, 110 Ill. App. 2d 136, 249 N.E.2d 108 (1st Dist. 1969)

34 **Ill.**
Evanston Best & Co. v. Goodman, 369 Ill. 207, 16 N.E.2d 131 (1938)
Pa.
Vanguard Cellular System, Inc. v. Zoning Hearing Bd. of Smithfield Tp., 130 Pa. Commw. 371, 568 A.2d 703 (1989)

35 **Ill.**
Elmhurst Nat. Bank v. City of Chicago, 22 Ill. 2d 396, 176 N.E.2d 771 (1961)
Mo.
Brain Trust, Inc. v. City of Raytown, 523 S.W.2d 156 (Mo. Ct. App. 1975) (stabilize without diminution)

36 **U.S.**
Jackson Court Condominiums, Inc. v. City of New Orleans, 874 F.2d 1070 (5th Cir. 1989) (property owner knew of proposed time-share moratorium prior to purchasing property)
Cal.
Town of Atherton v. Templeton, 198 Cal. App. 2d 146, 17 Cal. Rptr. 680 (1st Dist. 1961) (purchase of property in residential zone in expectation of change in law, making property more valuable for commercial uses)
Conn.
Eagan v. Zoning Bd. of Appeals of Old Lyme, 20 Conn. App. 561, 568 A.2d 811 (1990) (no self-inflicted hardship found)
D.C.
Murray v. District of Columbia Bd. of Zoning Adjustment, 572 A.2d 1055 (D.C. 1990) (owner's knowledge of neighborhood opposition and availability of appeal as self-created hardship)
Ill.
Podmers v. Village of Winfield, 39 Ill. App. 3d 615, 350 N.E.2d 232 (2d Dist. 1976) (self-imposed hardship); American Nat. Bank & Trust Co. of Chicago v. City of Highland Park, 29 Ill. App. 3d 878, 331 N.E.2d 597 (2d Dist. 1975); Western Nat. Bank of Cicero v. Village of Downers Grove, 122 Ill. App. 2d 107, 257 N.E.2d 803 (2d Dist. 1970) (remodeling single-family residence to multiple-family units)
Pa.
Conneen v. Speedy Muffler King, Inc./Bloor Automotive, Inc., 130 Pa. Commw. 365, 568 A.2d 700 (1989) (construction of building while zoning variance appeal pending)

37 **Ill.**
Chicago Title & Trust Co. v. Village of Wilmette, 27 Ill. 2d 116, 188 N.E.2d 33 (1963) (adjacent property owners also acquired their property knowing that classification was subject to constitutional limitations as it applied to other properties); La Salle Nat. Bank v. Village of Harwood Heights, 2 Ill. App. 3d 1040, 278 N.E.2d 114 (1st Dist. 1971)
N.Y.
Snyder v. Burns, 27 Misc. 2d 645, 212 N.Y.S.2d 851 (Sup 1961)

End of Document

2 Rathkopf's The Law of Zoning and Planning § 19:11 (4th ed.)

Rathkopf's The Law of Zoning and Planning
Database updated November 2006

Edward H. Ziegler, Jr., Arden H. Rathkopf, and Daren A. Rathkopf

Chapter 19. Historic Preservation Law
Christopher J. Duerksen[FN*]

II. Types of Property Subject to Control

References

§ 19:11. Private property in general—Nonhistoric buildings

Can buildings in historic districts that are not themselves of landmark quality be subject to preservation controls? In some states such as Indiana and Connecticut, enabling legislation specifically allows regulation of nonhistoric structures.[FN1] In at least one state, Michigan, an attorney general's opinion has precluded such regulation.[FN2] In other states, where the answer is not provided in state law, the issue has been raised in several cases. In these instances, the courts have consistently rejected the notion that nonhistoric structures are exempt from control. For example, in Society for Ethical Culture v. Spatt,[FN3] the property owner asserted that there was "no evidence to suggest that the Meeting House is of extraordinary architectural distinction or that it was ever the scene of any noted historical event or the residence of any noted personage." The court rejected this argument out of hand.

> While relevant, this is not determinative. If the preservation of landmarks were limited to only that which has extraordinary distinction or enjoys popular appeal, much of what is precious in our architectural and historical heritage would soon disappear. It is the function of the Landmarks Preservation Commission to ensure the continued existence of those landmarks which lack the widespread appeal to preserve themselves.[FN4]

The Maryland Court of Appeals expressed similar views in rejecting an argument that local commissions cannot regulate buildings around landmarks:

> [T]he whole concept of historic zoning "would be about as futile as shoveling smoke" if, e.g., ... because a building being demolished had no architectural significance a historic district commission was powerless to prevent its demolition and the construction in its stead of a modernistic drive-in restaurant immediately adjacent to the State House in Annapolis.[FN5]

Other courts have recognized the importance of maintaining the scene or setting around landmark structures:

2 Rathkopf's The Law of Zoning and Planning § 19:11 (4th ed.)

It is widely recognized that preservation of the historic aspects of a district requires more than simply the preservation of those buildings of historical and architectural significance within the district.... "(J)ust as important is the preservation and protection of the setting and scene in which structures of architectural and historical significance are situated."[FN6]

[FN*] Christopher Duerksen is an attorney and land development consultant with Clarion Associates based in Denver, Colorado. He has long been active in the preservation movement, and is the editor of the definitive volume on this subject. *A Handbook on Historic Preservation Law,* published by The Conservation Foundation and The National Center for Preservation Law. He would like to thank Prof. Edward Ziegler of the University of Denver Law School, Ian Spatz, formerly of the National Trust for Historic Preservation, and John Fowler, General Counsel to the Advisory Council on Historic Preservation for their advice and assistance in preparing this chapter. Updated in June 1997 by Gail Gudder of the Colorado bar.

[FN1] Conn. Gen. Stat. § 7-147(d)(a); Ind. Code § 36-7-11(10)(2)(b).

[FN2] See Thurber & Moyer, State Enabling Legislation for Local Preservation Commissions (Washington, D.C., The National Trust for Historic Preservation 1984) at 25.

[FN3] Society for Ethical Culture in City of New York v. Spatt, 68 A.D.2d 112, 416 N.Y.S.2d 246 (1st Dep't 1979), order aff'd, 51 N.Y.2d 449, 434 N.Y.S.2d 932, 415 N.E.2d 922 (1980).

[FN4] 416 N.Y.S.2d at 250.

[FN5] Faulkner v. Town of Chestertown, 290 Md. 214, 428 A.2d 879 (1981).

[FN6] A-S-P Associates v. City of Raleigh, 298 N.C. 207, 258 S.E.2d 444, 451 (1979). Similar language can be found in City of New Orleans v. Pergament, 198 La. 852, 5 So. 2d 129 (1941), and Figarsky v. Historic Dist. Commission of City of Norwich, 171 Conn. 198, 368 A.2d 163, 6 Envtl. L. Rep. 20654 (1976). See also Petersen v. Dane County, 136 Wis. 2d 501, 402 N.W.2d 376 (Ct. App. 1987) (denial of rezoning to protect agricultural character of town upheld); Coscan Washington, Inc. v. Maryland-National Capital Park and Planning Com'n, 87 Md. App. 602, 590 A.2d 1080 (1991) (rejecting argument that planning commission did not have authority to consider the historical significance of adjacent land and surrounding area in evaluating development proposal).

See also Globe Newspaper Co. v. Beacon Hill Architectural Com'n, 100 F.3d 175, 24 Media L. Rep. (BNA) 2537 (1st Cir. 1996). The First Circuit upheld a Boston regulation that effectively bans newspaper distribution boxes from the public streets of the Historic Beacon Hill District. The ban is the result of a "Street Furniture Guideline" enacted by the Beacon Hill Architectural Commission. The court found that the regulation is not a content-based regulation of newspapers, but rather is a content-neutral restriction on distribution. Applying "intermediate scrutiny," the court determined that the city's aesthetic concerns are a significant government interest, that the restriction was narrowly tailored to serve the government's interest, and that newspapers have ample alternative channels for distribution. The court therefore concluded that the regulation does not violate the First Amendment.

New York. But cf. Trustees of Union College in Town of Schenectady in State of N.Y. v. Members of Schenectady City Council, 91 N.Y.2d 161, 667 N.Y.S.2d 978, 690 N.E.2d 862, 123 Ed. Law Rep. 1247

2 Rathkopf's The Law of Zoning and Planning § 19:11 (4th ed.)

> (1997). The New York Court of Appeals struck down a municipal law that denied educational institutions the opportunity to apply for special use permits in a single-family historic district.
> The presumption of constitutionality enjoyed by a legislative enactment, such as the zoning ordinance at issue here, is formidable but not conclusive. ... The preservation of structures and areas with special historic, architectural or cultural significance is surely an important governmental objective. But the public interest in historical preservation does not as a matter of law override competing education interests, which by their very nature also are "clearly in furtherance of the public morals and general welfare." ... As a general rule, "the total exclusion of [educational] institutions from a residential district serves no end that is reasonably related to the morals, health, welfare and safety of the community."

RLZPN § 19:11

END OF DOCUMENT

9A N.Y.Prac., Environmental Law and Regulation in New York § 14:19 (2d ed.)

New York Practice Series - Environmental Law and Regulation in New York October 2016 Update
Philip Weinberg, et al.

Chapter 14. Historic Preservation
Katherine Ridley and Mark Silberman

§ 14:19. Definition of historic properties

Summary

West's Key Number Digest

- West's Key Number Digest, Environmental Law ⇐90

Any property meeting the criteria for listing on the State Register of Historic Places is considered a "historic property" for purposes of triggering the Section 14.09 review requirement. The criteria for listing duplicate those for National Register listing. [1]

The criteria revolve around the concept of significance, whether in American history, architecture, archeology or culture. To be considered significant, properties must possess integrity of location (they are still on their original sites), design (they have not been inappropriately altered), setting (their surroundings facilitate appreciation of the property), materials (original building materials are still present), workmanship, feeling and association. In addition, properties must be associated with historic events or significant persons, or must represent a historic architectural style. In the case of archeological sites, they must have yielded or be likely to yield information important in prehistory or history. [2]

Assessing whether a particular property meets these criteria requires some professional judgment. Consequently, an undertaking agency usually relies heavily on the architectural historians, architects and members of other relevant professional disciplines represented on OPRHP's staff.

A common misconception concerns the degree of significance required to render a property eligible for listing on the Register. Properties need not be of national significance, nor must they be 200 or even 100 years old. It is enough if they are of state or local significance. In general, they should be at least 50 years old. [3] Underestimating a property's significance, and consequently failing to realize the need for Section 14.09 review until late in the planning process, is an all too common mistake, particularly when judgments are made without the benefit of professional opinion. Practitioners would be well advised to consult OPRHP staff if any properties 50 years or older are within the project site or will be affected by it. If the property is not already listed in the State or National Register, they should request a determination of its eligibility. [4] Properties less than 50 years old are occasionally eligible for the Register, although they must be of paramount significance. Examples include the Whitney Museum of American Art, Lever House, and the Marine Air Terminal at La Guardia Airport, all in New York City.

Another area of confusion lies in the difference between a property that is individually listed on the Register and one that is included within a listed historic district. The question often arises as to whether properties within districts are of less importance, and hence merit less protection, than those individually listed. They do not. Whether a property is included as part of a district or is individually listed is more a reflection of administrative convenience than of the property's merit. In the early days of Register listings, more properties were individually listed. During the last decade, however, surveying and researching entire neighborhoods of historic properties has proven more efficient. In addition, the superior ability of districts to preserve a sense of place has come to be recognized. When districts are listed, any properties that are modern or lacking in architectural significance are indicated as "non-contributing" properties. All others are said to contribute to the district's significance and thus to merit protection. [5] While non-contributing property is less apt to be adversely affected by projects within the district, projects occurring on its site (such as demolition and new construction) may still harm or adversely impact adjacent or neighboring historic properties. Thus, non-contributing properties are still subject to the review process.

Footnotes

1 PRHPL § 14.07(1)(b).

2 PRHPL § 14.07(1)(b)(D).

3 9 N.Y.C.R.R. § 427.3(b).

4 9 N.Y.C.R.R. § 428.4(c); 427.6.

5 For a discussion of the procedure for listing properties on the Register or for obtaining eligibility determinations, *see* § 14:6.

2 Am. Law. Zoning § 13:16 (5th ed.)

American Law of Zoning May 2017 Update
Patricia E. Salkin

Chapter 13. Variances

§ 13:16. Variance factors—Self-created **hardship**

References

In most states, **hardships** that are self-created will not support the grant of a variance.[1] As noted in a Maryland case: "Were we to hold that self-inflicted **hardships** in and of themselves justified variances, we would, effectively not only generate a plethora of such **hardships** but we would also emasculate zoning ordinances. Zoning would become meaningless."[2]

Self-created **hardships** are those that result from affirmative acts of the property owner and which could have been avoided through a different course of action. The quintessential self-created **hardship** arises when a property owner establishes a structure or use not permitted under the zoning ordinance and then seeks a variance after the fact to legitimize the property use. Known as "after the fact" variances, self-created **hardship** is almost always a bar to relief in such cases.[3] As a Pennsylvania court remarked: "The burden of zoning compliance is upon the landowner; his failure to determine the zoning requirements applicable to the construction of a building on his property cannot be the basis for establishing an unnecessary **hardship**."[4]

Hardship is not self-created if it is caused by subsequent events beyond the property owner's control. This includes cases where reasonable use of the property becomes untenable due to zoning changes,[5] condemnation of a portion of the property,[6] previously unknown problems on the property,[7] or due to changes in the surrounding neighborhood.[8]

Where a property owner is unable to build an additon or accessory structure due to the size and placement of previously constructed buildings, the inability to comply with dimensional requirements is self-created if the property owner was responsible for the original construction.[9] "The difficulty," a Delaware court explained, "results from the Applicants' preferred use of the land, and not the particular features of the property."[10] For similar reasons, a self-created **hardship** may also be found where a property owner conveys an easement over the property that later interferes with development of the parcel.[11]

Hardship may be considered self-created even where it is caused by errors committed by the property owner's architects or contractors, rather than by the property owner herself.[12] Variances that are requested in order to accommodate self-created business growth may also be barred due to the rule against self-created **hardships**.[13]

Economic **hardship** caused by a property owner's preliminary investments in the development, prior to obtaining required zoning approvals, is also self-inflicted and will not support the grant of a variance.[14] This rule may also apply in cases where investments are made in reliance on a variance or permit, but while the time period for appeals is still pending. As a Wyoming court explained, "Actions taken in reliance on a variance or permit while the time for appeal is pending are

inherently unreasonable. Rather than protected activity, the commitment and expenditures under these circumstances are considered to be a calculated risk." [15]

Some courts hold that the failure to pursue development under an expired variance constitutes self-created **hardship**, resulting in the property owner becoming ineligible for subsequent variances. [16] Other courts disagree. [17]

A self-created **hardship** will be found by some courts where the property owner purchased the property with knowledge of the need for the variance. [18] In most jurisdictions, however, purchase with knowledge is not a per se bar to obtaining a variance. It nevertheless remains relevant to the decision of whether to grant a variance. [19] As a Massachusetts court explained:

> Most other jurisdictions have held that purchase of a nonconforming property, even where the purchase occurs with actual knowledge of the nonconformity, does not by itself preclude zoning relief; a purchaser does not acquire less right to a variance than a seller. To hold otherwise would discourage the free alienability of real property and the efficient use of land. Although some jurisdictions have taken the countervailing view, we believe the majority view to be more sound. To hold otherwise would foreclose purchasers of nonconforming property from obtaining variances, regardless of other circumstances, if they knew of the nonconformity at the time of purchase. Put another way, only existing owners of nonconforming lots would be entitled to obtain variances. Although variances are to be granted sparingly, we see nothing ... to establish a per se rule excluding those who knowledgeably purchase nonconforming properties from zoning relief. [20]

If a property owner has established a use or built a structure in violation of the zoning ordinances, she may be able to defeat allegations of self-created **hardship** by showing good faith, reasonable reliance on some type of government approval. [21] Reliance on an invalid permit will not suffice in all cases, however. [22] As a Texas court noted, although equitable considerations permit relief where the landowner acted in good faith and with reasonable reliance, "[t]he mere issuance of a building permit does not render a city's zoning ordinance unenforceable, nor does the fact that a permit was issued in error entitle the property owner to a variance in every case." [23]

Footnotes

* Special thanks to Amy Lavine, Esq. for contributing the 2015 chapter update.

1 See, e.g.,
Alaska: Alaska Stat. § 29.40.040.
Arizona: Ariz. Rev. Stat. § 9-462.06.
Kansas: Kan. Stat. Ann. § 12-759.
Kentucky: Ky. Rev. Stat. Ann. § 100.243.
Minnesota: Minn. Stat. § 462.357.
North Carolina: N.C. Gen. Stat. Ann. § 160A-388.
Utah: Utah Code Ann. § 10-9a-702.
West Virginia: W. Va. Code Ann. § 8A-7-11.
Wyoming: Wyo. Stat. Ann. § 15-1-608.

2 Cromwell v. Ward, 102 Md. App. 691, 651 A.2d 424 (1995).

3 See, e.g.,

Arizona: Rivera v. City of Phoenix, 186 Ariz. 600, 925 P.2d 741 (Ct. App. Div. 1 1996) ("Assuming, arguendo, that all of the other conditions for a variance were met, Rivera did not meet the second condition because he created his own problem by providing the City with an erroneous site plan.").
Florida: Blount v. City of Coral Gables, 312 So. 2d 208 (Fla. 3d DCA 1975) (holding that where landowners inadvertently constructed a detached masonry sign not covered by the building permit, the **hardship** was self-created).
Indiana: Board of Zoning Appeals of Evansville and Vanderburgh County v. Kempf, 656 N.E.2d 1201 (Ind. Ct. App. 1995) ("The Plan Commission approved the plat on the condition that the green space requirement be met. Kempf understood and expressly accepted the green space requirement without reservation. Yet, after obtaining his permit from the zoning authorities to begin construction, Kempf violated the green space requirement by paving over it .... The Board concluded that Kempf was not entitled to the requested variance because he himself had created the need for the variance by paving over the area in question. We hold this requirement advances a legitimate governmental interest in preventing the type of 'end run' around the zoning ordinances and procedures employed in the present case.").
Louisiana: Katz v. Board of Zoning Adjustments for City of New Orleans, 232 So. 2d 546 (La. Ct. App. 4th Cir. 1970) (holding that where the applicant knew of the zoning ordinance that limited the height of fences and constructed a fence in violation of the ordinance before obtaining a variance, he was not entitled to a variance on the basis of the self-created **hardship**); Parish of Jefferson v. Davis, 716 So. 2d 428 (La. Ct. App. 5th Cir. 1998), writ denied, 730 So. 2d 460 (La. 1998) (holding that the **hardship** was self-created where the appellant consciously and intentionally built his building in disregard of the modified permit).
Massachusetts: Steamboat Realty, LLC v. Zoning Bd. of Appeal of Boston, 70 Mass. App. Ct. 601, 875 N.E.2d 521 (2007) (declining to issue an after the fact variance for a height difference of four feet, despite the fact that the violation was minimal, was made innocently, and would require substantial cost to fix, based on the board's longheld policy of taking a tough stance on requests for building height variances in order to protect the architectural integrity of the Back Bay neighborhood).
Montana: Virginia City v. Estate of Olsen, 2009 MT 3, 348 Mont. 279, 201 P.3d 115 (2009) ("Defendants contend that the City should have granted them a variance excusing the building violations, rather than seeking an injunction, or that the District Court should have held a hearing to determine whether the City should grant Defendants such a variance. However, as the City points out, Defendants never requested that the City grant a variance or otherwise amend the permits to conform to the building Mason actually constructed, and Defendants provide no authority for the concept that the City was obligated to consider a variance on its own initiative.").
New York: Merlotto v. Town of Patterson Zoning Bd. of Appeals, 43 A.D.3d 926, 841 N.Y.S.2d 650 (2d Dep't 2007) ("It must be stressed that the petitioner completed the framing of his 1,546 square foot house and sought approval of the ZBA after the framing of the structure was completed. In so doing, he may be regarded as the quintessential example of self-created difficulties."); Becvar v. Scheyer, 250 A.D.2d 842, 673 N.Y.S.2d 210 (2d Dep't 1998) ("The petitioners added a second story to their house without obtaining a building permit, and later sought the necessary area variances in connection with the sale of the house as illegally restructured. In light of the self-created nature of the **hardship** which the petitioners now confront, and in light of the substantial nature of the multiple variances they request, we cannot conclude that the Zoning Board of Appeals acted irrationally or capriciously in denying the application"); Switzgable v. Board of Zoning Appeals of Town of Brookhaven, 78 A.D.3d 842, 911 N.Y.S.2d 391 (2d Dep't 2010) ("In light of the fact that Lewis was a member of the Pines Zoning Advisory Committee, and did not deny that, over a period of years, he built illegally on his property with complete disregard for the zoning laws, his **hardship** was entirely self-created and supported denial of the variances.").
North Carolina: Robertson v. Zoning Bd. of Adjustment for City of Charlotte, 167 N.C. App. 531, 605 S.E.2d 723 (2004) (upholding the board's denial of a fence variance because petitioners created their own **hardship** by not applying for a variance before building their fence).

Oklahoma: Matter of Schrader, 1983 OK 19, 660 P.2d 135 (Okla. 1983) (holding that a landowner who constructed a carport without a building permit and in violation of yard restrictions of the zoning ordinance did not suffer unnecessary **hardship** that entitled him to a variance).

4 *Pennsylvania:* Doris Terry Revocable Living Trust v. Zoning Bd. of Adjustment of City of Pittsburgh, 873 A.2d 57 (Pa. Commw. Ct. 2005) (holding that the fact that the property owners might be required to tear down their illegal garage was not a **hardship** because the entire situation was of their own making).

5 See, e.g.,

Connecticut: Coppola v. Zoning Bd. of Appeals of Town of Fairfield, 2014 WL 2055635 (Conn. Super. Ct. 2014) ("A **hardship** created for the owners of a lot, by the enactment of a zoning ordinance, does not result from the voluntary act of an applicant, and relief from the strict terms of the ordinance or regulation is appropriate.").

Maryland: Mueller v. People's Counsel for Baltimore County, 177 Md. App. 43, 934 A.2d 974 (2007) ("To the extent that the circuit court determined that appellants had an adjacent parcel to enable them to satisfy current zoning requirements, it erred .... As we see it... appellants' use of Lot 66 does not give rise to a claim of self-inflicted **hardship** with regard to Lot 67 .... This case is unlike those in which the landowner took an affirmative action that resulted in the **hardship**. Here, the elder Muellers acquired Lot 67 several years after their residence was constructed on Lot 66. And, when they acquired Lot 67, it was a buildable lot. Neither Lot 66 nor Lot 67 was rendered nonconforming by virtue of actions taken by the elder Muellers, or appellants, *after* the zoning law in issue was enacted .... Rather, the adjoining parcel, Lot 66, was improved before the change in the zoning law. Thus, appellants could not 'borrow' land from Lot 66 to enlarge Lot 67 without making Lot 66 more substandard than it already is.").

Louisiana: Freeman v. Kenner Bd. of Zoning Adjustments, 40 So. 3d 207 (La. Ct. App. 5th Cir. 2010) ("As the board noted, this is a neighborhood in transition. When Mr. Herrera purchased the property, it was residential. Now, it is neighborhood commercial. The zoning change was not from Mr. Herrera's actions and therefore not a self-induced **hardship**.").

New York: Swan v. Depew, 167 A.D.2d 835, 561 N.Y.S.2d 940 (4th Dep't 1990) ("Petitioner owned a lot of record exempt from minimum area standards under the ordinance as originally enacted, and he could have constructed a residence thereon at that time. The need for a variance was created by subsequent amendments to the ordinance, not by any conduct of petitioner. An applicant's **hardship** is not self-imposed where the need for a variance is created by restrictive amendments to the zoning ordinance made subsequent to purchase of the property").

6 See, e.g.,

Pennsylvania: POA Co. v. Findlay Tp. Zoning Hearing Bd., 551 Pa. 689, 713 A.2d 70 (1998) (holding that the property owner's failure to acquire greater access to its property at the time it was purchased was not a self created **hardship** where a portion of the property was subsequently condemned and the property owner sought a variance to continue using the remainder of the property).

7 See, e.g.,

New York: Douglaston Civic Ass'n, Inc. v. Klein, 67 A.D.2d 54, 414 N.Y.S.2d 358 (2d Dep't 1979), order aff'd, 51 N.Y.2d 963, 435 N.Y.S.2d 705, 416 N.E.2d 1040 (1980) (agreeing with the zoning board that the **hardship** was not self-created where the owner incurred financial difficulties in developing the property in accordance with the zoning because of previously undiscovered soil conditions); Citizens Savings Bank v. Board of Zoning Appeals of the Village of Lansing, 238 A.D.2d 874, 657 N.Y.S.2d 108 (3d Dep't 1997) ("In our view, the record simply does not support a finding that the **hardship** identified by respondent, to wit, petitioner's inability to sustain the grandfathered use of the parcel as a restaurant due to problems with the septic system, was self-created .... Although petitioner acquired the property knowing that the parcel was grandfathered for use as a restaurant and, further, that there were problems with the existing septic system, the record plainly establishes that petitioner was not aware of the full extent of the problems with the septic system prior to foreclosure in April 1993. Indeed, the record indicates that petitioner subsequently endeavored to market the parcel as a restaurant and explored various options in an attempt to resolve the septic system issue in such a fashion as to permit the parcel to be utilized for that purpose. The record further reflects that the alternatives explored by petitioner, which included acquiring neighboring properties and hooking

up to the municipal sewer, were not feasible and, as such, the property simply cannot be used as a restaurant. Under these circumstances, respondent's finding that the **hardship** was self-created is irrational and not supported by the record as a whole.").

Pennsylvania: Tancredi v. Zoning Hearing Board of Lower Milford Township, 2016 WL 4699433 (Pa. Commw. Ct. 2016) ("Appellant sought the variances in order to build an access driveway along an easement leading to his property .... Here, it is clear that in order to make any use of his property the Property Owner must have *meaningful* access and that he does not .... In spite of this, the ZHB did not grant Appellant's variance application because it essentially determined that Appellant had created his own **hardship**. In this regard, the ZHB reasoned that 'Applicant purchased the property without access to a public road and acknowledged at [the] hearing that he has used the landlocked property for hunting and recreation only.' Aside from the fact that Appellant did not acknowledge any such hunting and recreation use, it is undisputed that the property was burdened by a lack of genuine ability to be accessed and, therefore used, long before it was purchased by Appellant. Accordingly, he did nothing to create the **hardship**.").

8 See, e.g.,

Michigan: Janssen v. Holland Charter Tp. Zoning Bd. of Appeals, 252 Mich. App. 197, 651 N.W.2d 464 (2002) ("The increasing taxable value of the property and the comparatively low rental income derived are not 'self-created' burdens.").

New York: Kontogiannis v. Fritts, 131 A.D.2d 944, 516 N.Y.S.2d 536 (3d Dep't 1987) (finding the applicant did not self-create the **hardship** where the property was developed in accordance to the zoning at the time of construction and the use the property was intended for subsequently became obsolete).

9 See, e.g.,

Delaware: Board of Adjustment of Sussex County v. Verleysen, 36 A.3d 326 (Del. 2012) ("[L]ack of space for a barbecue area or shed—in part because other space is used for a pool—is a self-created difficulty under Delaware law.").

Louisiana: Pierce v. Parish of Jefferson, 668 So. 2d 1153 (La. Ct. App. 5th Cir. 1996) ("the evidence shows that the reason he could not build the carport elsewhere on the property was due to his own actions of building other structures. Thus, there is no circumstance special to the property").

Maryland: Montgomery County v. Rotwein, 169 Md. App. 716, 906 A.2d 959 (2006) ("Rotwein contends that the requested location for her garage is the only feasible location. But that is so only because of the location of the other improvements to the property, and the decision whether to build those improvements and where to place them was Rotwein's."); Chesley v. City of Annapolis, 176 Md. App. 413, 933 A.2d 475 (2007) ("The record supports the Board's finding that the Chesleys created the need for the variance by developing the property before obtaining the garage variance. When they built their house and pool, the Chesleys eliminated the possibility of locating a garage where no variance would be required. Among the options the Chesleys chose not to pursue was designing a smaller house that would permit a detached garage on the side of the property ... that would not require a setback variance. Alternatively, the Chesleys could have waited for a ruling on their garage variance application before proceeding with construction of the larger house and pool.").

New Hampshire: Ryan v. City of Manchester Zoning Bd. of Adjustment, 123 N.H. 170, 459 A.2d 244 (1983) (holding that if the owner's **hardship** is due to improvements made to the land by the applicant, such **hardship** is self-created and does not warrant relief).

Pennsylvania: Larsen v. Zoning Bd. of Adjustment of City of Pittsburgh, 543 Pa. 415, 672 A.2d 286 (1996) ("To the extent that the **hardship** found by the zoning board was the result of the fact that appellants' first addition to their residence covered 75% of the property, thereby precluding any additional building absent a variance, appellants themselves created the complained of **hardship**. When appellants purchased the property, the house had a seventy-six foot setback from the rear property line. It was appellants themselves who built the forty-four foot deep addition which left them with insufficient space to erect an outside deck that would have complied with the ordinance at issue without the need for a variance.").

10 Board of Adjustment of Sussex County v. Verleysen, 36 A.3d 326 (Del. 2012).

11 See, e.g.,

Delaware: Jenney v. Durham, 707 A.2d 752 (Del. Super. Ct. 1997), judgment aff'd, 696 A.2d 396 (Del. 1997) (finding insufficient evidence of **hardship** where the property owner could have gone forward with the proposal without needing a variance from the steep slopes ordinance if he had chosen not to convey an easement to the county over level portions of the property).

12 See, e.g.,
Connecticut: Morikawa v. Zoning Bd. of Appeals of Town of Weston, 126 Conn. App. 400, 11 A.3d 735 (2011) ("The defendants maintain that because the **hardship** was created by the error of the contractor and/or the architect, the defendants did not create the **hardship**. We disagree .... the errors of the architect and/or general contractor that resulted in the roof exceeding the thirty-five foot height requirement are attributable to the defendants because the voluntary acts of those persons were *on behalf of* the ones whom the variance would benefit. Thus, the **hardship** claimed is self-created.").
Louisiana: Cerminaro v. Jefferson Parish Zoning Appeals Bd., 838 So. 2d 193 (La. Ct. App. 5th Cir. 2003) (where the plaintiff hired a contractor to build a fence and the contractor failed to obtain a permit, the board had discretion in its decision denying an after the fact variance to determine that allowing the fence would create an undesirable precedent).

13 See, e.g.,
Kansas: Hacker v. Sedgwick County, 48 Kan. App. 2d 164, 286 P.3d 222 (2012), review denied, (Oct. 1, 2013) ("As to whether the **hardship** was self-created, the Heins acknowledged to the Board that the requested variances were made necessary as a result of their self-created business growth .... Given that the main purpose underlying self-created business growth is generally to maximize a business' profits, and given that Kansas courts have indicated that mere economic advantage or disadvantage to a landowner is not a sufficient basis for a finding of unnecessary **hardship**, we conclude as a matter of law that self-created business growth is not an exception to the general rule that unnecessary **hardship** may not be self-created.").

14 See, e.g.,
Alabama: Board of Zoning Adjustment for City of Fultondale v. Summers, 814 So. 2d 851 (Ala. 2001) ("[T]he fact that Summers had expended a significant amount of money to purchase equipment in anticipation of the construction of the mini-warehouse facility was an insufficient basis on which to grant an area variance."); Thompson, Weinman & Co. v. Board of Adjustment of City of Sylacauga, 275 Ala. 278, 154 So. 2d 36 (1963) (finding that no variance could be granted to assist the owner of a quarry who invested large sums of money to develop the property, which lay in a residential district in which quarrying was prohibited).
Illinois: Kimball Dawson, LLC v. City of Chicago Dept. of Zoning, 369 Ill. App. 3d 780, 308 Ill. Dec. 151, 861 N.E.2d 216 (1st Dist. 2006) ("[A]t least a portion of plaintiff's plight was self-created. The fact that construction began before plaintiff received building permits certainly weighs against its argument that its plight is unique and necessitates granting variances.").
Pennsylvania: Smolow v. City of Philadelphia Zoning Bd. of Adjustment, 391 Pa. 71, 137 A.2d 251 (1958) (finding a variance was properly denied to an applicant who sought to establish a real-estate office in his home in a residentially zoned district where the applicant claimed a right to a variance on the grounds that he had spent money remodeling his basement and would incur financial loss if the variance was not granted).
Wisconsin: Barbian v. Board of Zoning Appeals of City of Milwaukee, 2007 WI App 251, 306 Wis. 2d 448, 742 N.W.2d 75 (Ct. App. 2007) (upholding the denial of a variance, because, among other things, the **hardship** was self-imposed by the applicant's $750,000 investment in building protective berms around the property prior to obtaining a variance for the prohibited concrete-crushing business).

15 Ebzery v. City of Sheridan, 982 P.2d 1251 (Wyo. 1999) ("Owners knew that the Board's decision was hotly contested and subject to appeal for 30 days after the time the Board rendered its final decision. Nonetheless, Owners state that before the time for appeal had passed, they executed a contract and paid a non-refundable deposit for materials, tore down substantial portions of the hedge, and paved a driveway, providing for the placement of fence posts. Owners further submit that they continued to substantially complete the construction after the appeal was filed despite the fact the petitioners had concurrently filed a motion for stay of the administrative order. *Snake River* does not stand for the proposition that one who knows a variance is subject to appeal may render that appeal moot if only

they act quickly. Owners' affirmative statements demonstrate that they were well aware of the risks associated with proceeding with the fence during the time allowed for appeal. The theory of vested rights does not apply here.").

16 See, e.g.,
Michigan: Norman Corp. v. City Of East Tawas, 263 Mich. App. 194, 687 N.W.2d 861 (2004) (where property owners obtained a variance from the sign code's maximum size restriction under the previous ordinance, which allowed a maximum of 200 square feet, their failure to pursue that variance resulted in a self-created **hardship** precluding them from seeking a variance from the 100 square foot maximum included in the amendments to the sign code).

17 See, e.g.,
Maine: Phaiah v. Town of Fayette, 2005 ME 20, 866 A.2d 863 (Me. 2005) ("the Board committed an error of law in concluding that Phaiah's failure to build on Lot 41 pursuant to the 1991 permit constituted a self-created **hardship** precluding the grant of Phaiah's 2003 variance application").

18 See, e.g.,
Alabama: Town of Orrville v. S & H Mobile Homes, Inc., 872 So. 2d 856 (Ala. Civ. App. 2003) ("It is undisputed that Powell knew of the zoning restriction before she purchased the mobile home. Nevertheless, Powell purchased the mobile home without first seeking and securing a variance .... Regardless of the alleged futility in applying for a variance, Powell was aware of the zoning restriction but proceeded to place a mobile home on the property. Clearly, Powell created the **hardship** that she alleged existed, and, therefore, she may not be permitted to take advantage of it.").
Florida: Thompson v. Planning Com'n of City of Jacksonville, 464 So. 2d 1231 (Fla. 1st DCA 1985) (finding that the applicants' **hardship** was self-created where they purchased the land with the knowledge that their intended use of the land for an office building was prohibited by the zoning ordinance).
New York: Qing Dong v. Mammina, 84 A.D.3d 820, 922 N.Y.S.2d 198 (2d Dep't 2011) (upholding the denial of the variance and noting, among other things, that the petitioner's difficulty was self-created as she was on notice of the zoning ordinance that had been enacted two years before she purchased the property); Christian Airmen, Inc. v. Town of Newstead Zoning Bd. of Appeals, 115 A.D.3d 1319, 983 N.Y.S.2d 173 (4th Dep't 2014) ("[T]he deeds proffered by the ZBA demonstrate that petitioner did not acquire portions of the subject property from the former owners until nearly a decade after enactment of the ordinance. We therefore conclude that the alleged **hardship** is self-created and, thus, petitioner failed to establish the fourth component of unnecessary **hardship**."); 194 Main, Inc. v. Board of Zoning Appeals for Town of North Hempstead, 71 A.D.3d 1028, 897 N.Y.S.2d 208 (2d Dep't 2010) (petitioner created his own **hardship** by purchasing the property with the knowledge that the land was not zoned for commercial use; the fact that the prior owner was granted a use variance did not mean that the petitioner would be granted the same); Rogers v. Baum, 234 A.D.2d 685, 650 N.Y.S.2d 452 (3d Dep't 1996) ("[T]he ZBA's finding that the difficulty was self-created is supported by evidence that the lot was substandard at the time petitioner purchased it."); Rehabilitation Support Services, Inc. v. City of Albany Bd. of Zoning Appeals, 140 A.D.3d 1424, 34 N.Y.S.3d 256 (3d Dep't 2016) ("petitioner applied to respondent for, among other things, a use variance allowing it to raze both the school building and house on the adjacent lot in order to construct a 24-bed community residence for alcohol and substance abuse rehabilitation .... At the time that petitioner acquired the property, it was aware that its project would be a nonconforming use. Respondent rationally decided that petitioner's **hardship** was self-created.").

19 See, e.g.,
California: Committee to Save Hollywoodland Specific Plan v. City of Los Angeles, 161 Cal. App. 4th 1168, 74 Cal. Rptr. 3d 665 (2d Dist. 2008), as modified, (Apr. 2, 2008) ("Here, the **hardship** is not self-inflicted because the **hardship** inheres in the topography of the property, and this circumstance does not change with ownership.").
Delaware: CCS Investors, LLC v. Brown, 977 A.2d 301 (Del. 2009), as corrected, (Aug. 10, 2009) ("[W]e reaffirm our holding that an applicant's awareness of an existing zoning restriction or conservation easement does not preclude a variance *per se*. Instead, a self-imposed **hardship** is a factor for the regulatory authority to consider when deciding whether or not to grant the variance.").

Indiana: Reinking v. Metropolitan Bd. of Zoning Appeals of Marion County, 671 N.E.2d 137 (Ind. Ct. App. 1996) ("[T]he purchase of property with knowledge of use restrictions does not prohibit a purchaser from claiming a special or unnecessary **hardship**, regardless of who owned the property at the time it was burdened.").

Maine: Twigg v. Town of Kennebunk, 662 A.2d 914 (Me. 1995) (holding that a board of zoning appeals must consider as a factor any self-imposed **hardship** that may result from actual or constructive knowledge of the ordinances before the purchase of the property, but that factor is not determinative of the application).

Maryland: McLean v. Soley, 270 Md. 208, 310 A.2d 783 (1973) (noting that prior knowledge of zoning restrictions "has less significance where we are concerned with 'practical difficulty' than it does in the event of '**hardship**' which usually characterizes the 'use variance' cases"); Assateague Coastal Trust, Inc. v. Schwalbach, 223 Md. App. 631, 117 A.3d 606 (2015), cert. granted, 445 Md. 19, 123 A.3d 1005 (2015) ("Schwalbach's knowledge that he purchased a property subject to critical area restrictions does not prevent him from receiving a variance here.").

Nebraska: Eastroads, L.L.C. v. Omaha Zoning Bd. of Appeals, 261 Neb. 969, 628 N.W.2d 677 (2001) ("While the zoning restrictions in place at the time [the landowner] purchased the property may be considered by the board in deciding whether the variance should be granted, such restrictions do not remove the board's discretion, in an appropriate case, to relax the 'strict letter' of the zoning code by granting a variance."); Rousseau v. Zoning Bd. of Appeals of Omaha, 17 Neb. App. 469, 764 N.W.2d 130 (2009) ("[A] previously passed zoning ordinance does not automatically preclude a new owner from being able to seek a variance.").

New Jersey: Wilson v. Borough of Mountainside, 42 N.J. 426, 201 A.2d 540 (1964) ("We wish to make it clear that if a private owner would be entitled to such relief, that right is not lost to a purchaser simply because he bought with knowledge of the zoning regulation involved. This situation is not within the realm of the self-created **hardship** which will generally bar relief.").

Ohio: Beerman v. City of Kettering, 14 Ohio Misc. 149, 43 Ohio Op. 2d 354, 237 N.E.2d 644 (C.P. 1965), judgment aff'd, 13 Ohio St. 2d 149, 42 Ohio Op. 2d 371, 235 N.E.2d 231 (1968) (holding that purchase with knowledge of zoning restrictions may be considered, but is not decisive of an application for a variance).

Pennsylvania: Vacca v. Zoning Hearing Bd. of Borough of Dormont, 82 Pa. Commw. 192, 475 A.2d 1329 (1984) (holding that even if is shown that the applicant was aware of the property's zoning classification, the variance need not be denied on the basis of self-inflicted **hardship**); Wilson v. Plumstead Tp. Zoning Hearing Bd., 594 Pa. 416, 936 A.2d 1061 (2007) ("With respect to a landowner who purchases with knowledge of the property's condition and existing zoning restrictions, the **hardship** is deemed self-inflicted only where he has paid an unduly high price because he assumed the anticipated variance would justify the price, or where the size and shape of the parcel was affected by the transaction itself .... To hold that a property owner cannot obtain a variance because he created the **hardship** when the **hardship** is due to the nature of the land or surrounding uses would mean that only the owner of the property owning it at the time the **hardship** was created can seek a variance."); Mitchell v. Zoning Hearing Bd. of the Borough of Mount Penn, 838 A.2d 819, 184 Ed. Law Rep. 420 (Pa. Commw. Ct. 2003) ("[T]he mere fact that the School District may have known the zoning restrictions at the time of the repurchase of the subject property, without more, cannot support a finding that the **hardship** was self-inflicted.").

Texas: Ferris v. City of Austin, 150 S.W.3d 514 (Tex. App. Austin 2004) ("There is no evidence that the City was the original developer of the property or that it was responsible for subdividing the lots into their present non-conforming shapes. In the absence of evidence the substandard lot configuration was the product of deliberate conduct of the City, the City's **hardship** was not self-imposed.").

Virginia: Spence v. Board of Zoning Appeals for City of Virginia Beach, 255 Va. 116, 496 S.E.2d 61 (1998) (holding that a landowner's knowledge that he needed a variance to use the property in the manner he intended prior to purchase did not constitute self-created **hardship** that would bar him from obtaining a variance).

Washington: Buechel v. State Dept. of Ecology, 125 Wash. 2d 196, 884 P.2d 910 (1994) ("To some extent the reasonable use of property depends on the expectations of the landowner at the time of

purchase of the property. If existing land regulations limit the permissible uses of the property at the time of acquisition, a purchaser usually cannot reasonably expect to use the land for prohibited purposes. Although not necessarily determinative, courts may look to the zoning regulations in effect at the time of purchase as a factor to determine what is reasonable use of the land."); Hoberg v. City of Bellevue, 76 Wash. App. 357, 884 P.2d 1339 (Div. 1 1994) ("[T]he mere fact that a purchaser buys with actual or constructive knowledge of area restrictions does not, without more, justify the denial of a variance. A subsequent purchaser can stand in the shoes of the original owner with respect to a variance, so long as the claimed **hardship** does not arise out of the purchase itself.").

20 Lamb v. Zoning Bd. of Appeals of Taunton, 76 Mass. App. Ct. 513, 923 N.E.2d 1078 (2010).

21 See, e.g.,

District of Columbia: Oakland Condominium v. District of Columbia Bd. of Zoning Adjustment, 22 A.3d 748 (D.C. 2011) ("The BZA continued, '... the Board does not find that they had the requisite knowledge that the use of the subject property for a 12-unit rooming house would violate the Zoning Regulations.' Even though the Rosans proceeded with their renovation for twelve units 'after receiving a Certificate of Occupancy for only eight, the BZA decline[d] to find this created a self-imposed **hardship**,' because the Rosans 'could not have renovated the building for 12 units without the implicit agreement and permission of the District government in issuing the building permits and building inspection approvals.' The BZA emphasizes that the city took no enforcement action against the Rosans until the Zoning Administrator's October 15, 2008 letter.").

Indiana: Caddyshack Looper, LLC v. Long Beach Advisory Bd. of Zoning Appeals, 22 N.E.3d 694 (Ind. Ct. App. 2014) ("we recognize that Caddyshack is charged with knowledge of the applicable setback requirements and that Caddyshack and McCormick did not seek and obtain a variance from the BZA to the setback requirements prior to installing the seawall. However, prior to the issuance of the building permit and at the request of Clerk-Treasurer Heywood, McCormick identified on a survey the proposed location of the seawall Caddyshack wished to install, and the building permit was then issued. During construction, Building Inspector Owens visited the site several times and, while he discussed the height of the piles at one point, he did not at any time raise the issue of the location of the seawall with McCormick .... The factor of whether any injury was self-created does not weigh heavily in favor of a finding that compliance with the setback requirement will or will not result in practical difficulties in the use of the property.").

Minnesota: In re Stadsvold, 754 N.W.2d 323 (Minn. 2008) ("First, we note that, because circumstances involved in before-the-fact variance requests and after-the-fact variance requests are fundamentally different, treating them the same can produce unfair results .... But we also note that the Board here had the authority to consider the facts as they existed at the time of the Stadsvolds' request .... Here, there is nothing in this record to suggest ... the Stadsvolds acted in bad faith, engaged in a willful and intentional encroachment, proceeded without a permit, or otherwise intentionally violated the ordinance. In fact, the record suggests that the Stadsvolds made a good-faith mistake that resulted in an unintentional violation of the ordinance .... Therefore, on remand, we urge the Board to treat the Stadsvolds' variance application as an application for an after-the-fact variance and consider the equitable factors we set out in *Kenney*.").

New York: Schaeffer v. Zoning Bd. of Appeals of Town of Esopus, 142 A.D.2d 848, 531 N.Y.S.2d 56 (3d Dep't 1988) (holding that petitioner's reliance on assurances of building inspector precluded a finding of self-created **hardship**); Jones v. Zoning Bd. of Appeals of Town of Oneonta, 90 A.D.3d 1280, 934 N.Y.S.2d 599 (3d Dep't 2011) (finding no self-created **hardship** where, at the time the property was purchased, the previous owner had a valid use variance to operate the sand and gravel mine; and although the transaction occurred while an appeal of the issuance of that variance was pending, the zoning board could have rationally concluded that this fact alone did not render the **hardship** self-imposed); La Dirot Associates v. Smith, 169 A.D.2d 896, 564 N.Y.S.2d 620 (3d Dep't 1991) (holding that expenditures made in good faith reliance on an invalid building permit may be considered as proof of **hardship**).

North Carolina: Turik v. Town of Surf City, 182 N.C. App. 427, 642 S.E.2d 251 (2007) ("Only after the construction permit was granted and construction had begun were the Hunters notified that there was a possible discrepancy between the property lines indicated by their survey and the property lines

indicated by Ms. Tucker's survey. Because of the conflicting surveys and because the Hunters and Ms. Tucker were unable to reach a compromise, the Hunters requested a variance of approximately 7.2 inches. This variance would allow the Hunters to continue their construction project that was started only after obtaining a legitimate construction permit. Further, there was no indication that granting the variance would harm neighboring properties or structures, neither would the variance give any special privileges to the Hunters.").

Texas: Town of South Padre Island Texas ex rel. Bd. of Adjustment v. Cantu, 52 S.W.3d 287 (Tex. App. Corpus Christi 2001) ("In the present situation, the uncontroverted evidence reveals that the Cantus' property was subjected to a unique, oppressive condition, caused by the Town's acquiescence to the building plans. Substantial permanent improvements were made to the property, with the Town's knowledge and under its supervision, which altered the nature of the property. At the point in time when the Town withdrew their authorization to continue the construction in accordance with the plans, the undisputed evidence reveals that the real property was subject to a unique, oppressive condition because the house could no longer be completed as designed without a variance. Therefore, the only decision which the Board could have arrived at was that enforcement of the ordinance would result in an unnecessary **hardship** to the Cantus.").

Wisconsin: Accent Developers, LLC v. City of Menomonie Board of Zoning Appeals, 2007 WI App 48, 300 Wis. 2d 561, 730 N.W.2d 194 (Ct. App. 2007) ("Timber Ridge's faulty measurements were a substantial cause of the duplexes construction within the front setback. However, the board recognized during its hearing that the City bore some responsibility because its building inspector inspected and approved the footings, and he did not detect the setback violation. At least one member of the board stated that the City might have some culpability for not discovering the violation before approving the inspection. Timber Ridge, through its agent, testified that it relied on the inspection and approval to continue the building process .... Accent argues it was inappropriate for the board to have considered the role its official played when evaluating the unnecessary **hardship** .... The cases Accent relies upon hold a municipality cannot be estopped from enforcing its zoning laws based on the mistaken representations of its officers. These cases do not hold a board may not consider the role its officials played in the zoning violation, when deciding whether to grant a variance. Therefore, we hold the board appropriately considered the role its official played in Timber Ridge's zoning violation.").

22 See, e.g.,

Alaska: Fields v. Kodiak City Council, 628 P.2d 927 (Alaska 1981) ("The parties have argued at length about whether the board of adjustment was estopped from denying Fields a variance for the setback violation. Fields' estoppel claim is premised upon his detrimental reliance on the validity of the building permit, and on the inspector's written statement on the permit that no variance was required. In the present posture of this case, however, estoppel is not an issue. In the zoning context, estoppel is a defensive claim raised to prevent enforcement of a zoning ordinance .... But 'it is not the function of .... [the board of adjustment] to consider matters such as estoppel .... in determining whether a variance should be granted.' Nor is the board to decide equitable questions of 'clean hands.' Rather, the board's power is restricted to that provided by the zoning ordinance and its enabling legislation .... The only proper issue on appeal is whether the board's denial of the variance is supported by substantial evidence.").

Connecticut: Durkin Village Plainville, LLC v. Zoning Bd. of Appeals of Town of Plainville, 107 Conn. App. 861, 946 A.2d 916 (2008) ("The claimed **hardship** arises from the improperly granted building permit in 1994 that was based on the inaccurate mortgage survey presented by Bartiss-Earley's predecessor in title. Our courts have never held that such an administrative error creates a legal **hardship** ...."); Bloom v. Zoning Bd. of Appeals of City of Norwalk, 233 Conn. 198, 658 A.2d 559 (1995) ("[T]he only existent **hardship** resulted exclusively from the owners' reliance on the improperly granted building permit. We have never held that such an administrative error creates a legal **hardship**, and the owners are unable to point to any case extending the definition of **hardship** for the purposes of obtaining a variance to such circumstances. By arguing that reliance on an improperly granted building permit constitutes a legally cognizable **hardship**, the owners are merely attempting to bootstrap the principles of equitable estoppel onto the definition of a legally cognizable **hardship** ....").

Maryland: Cromwell v. Ward, 102 Md. App. 691, 651 A.2d 424 (1995) ("[I]t appears clear that the mistake of a county official cannot be the 'practical difficulty' unique to the subject property required in order to authorize the grant of the variance sought and obtained by Ward.").

23 City of Dallas v. Vanesko, 189 S.W.3d 769 (Tex. 2006).

End of Document

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

PIERCE MCDOWELL AND
BARBARA MCDOWELL,

Plaintiffs/Appellees,

vs.

JOSEPH SAPIENZA AND SARAH JONES SAPIENZA, M.D.,

Defendants/Appellants,

CITY OF SIOUX FALLS,

Defendant/Appellee.

Appeal No. 28234
City of Sioux Falls Notice of Review No. 28239
Pierce and Barbara McDowell Notice of Review No. 28252

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA
The Honorable John Pekas, Circuit Court Judge

REPLY BRIEF OF APPELLANTS

Richard L. Travis
Adam R. Hoier
May & Johnson, P.C.
6805 S. Minnesota Ave.
P.O. Box 88738
Sioux Falls, SD 57109
Attorneys for Appellants Joseph and Sarah Sapienza

Steven M. Johnson
Scott A. Abdallah
Ronald A. Parsons
Shannon R. Fallon
Johnson, Janklow, Abdallah, Reiter & Parson, L.L.P.
P.O. Box 2348
Sioux Falls, SD 57101
Attorneys for Appellees Pierce & Barbara McDowell

William C. Garry
Melissa R. Jelen
Cadwell, Sanford, Deibert & Garry, L.L.P.
P.O. Box 2498
Sioux Falls, SD 57101
bgarry@cadlaw.com
mjelen@cadlaw.com
Attorneys for Appellee City of Sioux Falls

Marty J. Jackley
Attorney General
Paul S. Swedlund
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501
Attorneys for Amicus Curiae

NOTICE OF APPEAL FILED APRIL 19, 2017 – #28234
NOTICE OF REVIEW OF APPELLEE CITY OF SIOUX FALLS
FILED MAY 1, 2017 – #28239
NOTICE OF REVIEW OF APPELLEES PIERCE AND BARBARA MCDOWELL
FILED MAY 8, 2017 – #28252

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

SOUTH DAKOTA CASE LAW

SOUTH DAKOTA STATUTES AND REGULATIONS

OTHER CASE LAW

OTHER AUTHORITIES

INTRODUCTORY STATEMENT

References to the Settled Record from the Circuit Court file shall be denoted by "SR", followed by the appropriate page number(s). References to the Trial Transcript shall be denoted by "TT", followed by the appropriate date and page number(s). Appellants Joseph and Sarah Jones Sapienza shall be referred to collectively as "Sapienzas." Appellees Pierce and Barbara McDowell shall be referred to collectively as "McDowells" and Appellee City of Sioux Falls shall be referred to as "City."

LEGAL ARGUMENT

I. ARSD 24:52:07:04 only applies to properties listed on the state or national registers of historic properties.

ARSD 24:52:07:01, the applicability provision of ARSD Ch. 24:52:07, provides that, "[t]he rules in this chapter apply to historic properties listed on the state register or the national register, or both." Notably, McDowells do not dispute that neither the Sapienza home, nor the home that was previously located on the property, were listed on either the state or national registers of historic properties. (McDowell Brief at 19-22.) Rather, McDowells argue that the limitations set forth in ARSD 24:52:07:01 were "clearly . . . not intended to apply to ARSD 24:52:07:04, because the latter regulation was drafted specifically to govern new construction." (*Id.* at 20.) Essentially, McDowells argue that ARSD 24:52:07:04 supersedes ARSD 24:52:07:01 because it uses the phrase "new construction." This simply is not the case.

This Court has long held that "it is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Expungement of Oliver*, 2012 S.D. 9, ¶ 9, 810 N.W.2d 350, 352 (citations and quotations omitted). "[S]tatutes [are] governed by one spirit and

policy, and [are] intended to be consistent and harmonious in their several parts and provision." *Lewis & Clark Rural Water Sys., Inc. v. Seeba*, 2006 S.D. 7, ¶ 12, 709 N.W.2d 824, 831 (citations omitted). Thus, where statutes and administrative rules can be read consistently and harmoniously with one another, such a reading should control. Rather than abide by this rule, however, McDowells attempt to create a conflict between ARSD 24:52:07:01 and ARSD 24:52:07:04 to better serve their position on appeal. Such an interpretation is contrary to this Court's holdings in *Oliver* and *Seeba*, and should not be allowed.

As noted in Sapienzas' opening brief, ARSD 24:52:07:01 and ARSD 24:52:07:04 can be applied in such a way that the provisions of each rule can be given full effect without impacting the other, *i.e.*, the regulations can be read consistently and harmoniously. ARSD 24:52:07:01 provides that regulations within the chapter apply only to "historic properties listed on the state register or the national register, or both." ARSD 24:52:07:04, in turn, states that it applies to "[n]ew construction or additions within a historic district." Therefore, read together, ARSD 24:52:07:04 applies to "new construction or additions" to "historic properties listed on the state or the national register, or both," and located "within a historic district." This is a reasonable reading of the regulations, and complies with this Court's long-standing position that "[S]tatutes [are] governed by one spirit and policy, and [are] intended to be consistent and harmonious in their several parts and provisions." *Seeba*, 2006 S.D. 7, ¶ 12, 709 N.W.2d at 831 (citations omitted). Moreover, contrary to McDowells' claims, this reading of ARSD 24:52:07:01 and 24:52:07:04 does not render ARSD 24:52:07:04 meaningless as it would still apply to new construction on historic properties, such as the addition

McDowells recently built onto their home. Likewise, this reading is consistent with The Secretary of Interiors Standards for Rehabilitation, upon which ARSD Ch. 24:52:07 is based, as those standards deal with "[n]ew additions, exterior alterations, and related new construction" to historic properties, not new ground up construction as argued by McDowells. (Trial Exhibit 27) (emphasis added).

II. IRC § R1003.9 is a chimney height regulation, not a setback requirement.

SDCL § 11-4-6 provides that, where there is a conflict between zoning ordinances/regulations regarding issues, such as setbacks, the ordinance/regulation that imposes the higher standard applies. The parties dispute if, and to what extent, SDCL § 11-4-6 applies to SFZO § 160.094 and IRC § R1003.9. SFZO § 160.094 requires a setback of 5 feet for side yards in the McKennan Park district, while IRC § R1003.9 provides that "[c]himneys shall extend at least 2 feet (610 mm) higher than any portion of a building within 10 feet (3048 mm), but shall not be less than 3 feet (914 mm) above the highest point where the chimney passes through the roof." (Trial Exhibit 42.) McDowells incorrectly argue that both of these regulations concern setbacks between homes, and, therefore, the greater "setback requirement" found in IRC § R1003.9 should control.

IRC § R1003.9 is not a setback requirement. IRC § R1003.9 simply requires that chimneys on homes be constructed to a certain height depending on their proximity to other structures. Thus, a home with a chimney can be constructed within inches of another structure, so long as the chimney is at least 2 feet higher than any portion of the neighboring structure within 10 feet. IRC § R1003.9.

McDowells, however, attempt to flip the language of IRC § R1003.9 by arguing that the regulation requires homes built within 10 feet of a chimney to be at least 2 feet shorter

than the chimney. This reading of IRC § R1003.9 significantly alters the nature of the regulation by changing the regulation from a chimney height requirement to a home construction requirement. Furthermore, this reading runs contrary to this Court's holding in *Salzer* that "[w]hen the language of a statute is clear and unambiguous, [this Court's] interpretation is confined to declaring the meaning as plainly expressed." 2010 S.D. 96, ¶ 5, 792 N.W.2d at 179 (citing *Perdue*, 2010 S.D. 38, ¶ 7 n. 2, 782 N.W.2d at 377 n. 2).

Finally, McDowells' reading of *30 E. 33rd St. Realty LLC v. PPF Off Two Park Ave. Owner, LLC*, 963 N.Y.S.2d 106 (N.Y. App. Div. 2013) misses the point. In that case, the defendant's predecessor in interest had "built a taller building on property adjoining plaintiff's building," causing plaintiff's building to fall out of compliance with an ordinance similar to IRC § R1003.9. *Id.* at 107. To remedy this issue, defendant's predecessor in interest extended the chimney on plaintiff's building to meet the height requirements of the building code, even though there was no requirement that it do so. *Id.* Several years later, the building code was amended "and, for the first time, required the owner of a taller, later-built building, not only to extend the height of any chimneys in adjoining buildings to conform to Code requirements, but also to maintain and repair the chimney." *Id.* Plaintiff sued the defendant arguing that "the defendant is responsible, pursuant to the 1968 Building Code of the City of New York . . . § 27-860(f)(4), to repair the chimney on its property." *Id.* In holding that no such duty existed, as there was no indication that the amendment was meant to be retroactive, the court also noted that "an owner's 'responsibility to alter the chimney of [adjoining properties] to conform to height requirements . . . , and to maintain and repair them . . . , is clearly imposed by statute and *did not exist at common law*.'" *Id.* (citations omitted) (emphasis added).

McDowells focus on the holding that 1968 Building Code of the City of New York § 27-860(f)(4) was not meant to be retroactive. This reading of the case misses the greater point being made by the court, *i.e.*, that unless there is a specific statute or ordinance providing to the contrary, in jurisdictions with regulations similar to IRC § R1003.9, a landowner has no duty to ensure that his/her neighbor's chimney complies with the regulated height requirements.

III. Injunctive relief is not appropriate in this case.

A. McDowells do not satisfy the requirements of SDCL § 21-8-14.

SDCL § 21-8-14 controls when a permanent injunction may be granted.

> 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; (2) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief; (3) Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or (4) Where the obligation arises from a trust.

SDCL § 21-8-14. In their brief, McDowells argue that "the Sapienzas have offered almost no argument that an injunction was not statutorily authorized." (McDowell Brief at 24.) This statement is flat out wrong.

In their opening brief, Sapienzas specifically argued that pecuniary compensation will afford adequate relief in this case, and, therefore, SDCL § 21-8-14 has not been satisfied. (Sapienza Brief at 21-22.) In support of this position, Sapienzas pointed to the trial court's holding that "[t]he value of the McDowells' residence declined and they lost the use of their wood burning fireplace." (SR 1322.) This holding was based on the testimony of one of McDowells' neighbors, Lisa Nykamp. Nykamp testified that she wanted to purchase the McDowell home at one point, but after construction of the

Sapienza home, she would only purchase the home if the price was greatly reduced. (SR 1325.) If the value of the McDowell home was impacted by the construction of the Sapienza home, there is no reason that pecuniary compensation cannot afford adequate relief.

Moreover, every witness who was questioned on the subject, including McDowells' expert, admitted that the issue with the McDowell fireplace could easily be resolved by converting the wood-burning fireplace to a gas fireplace. (See TT 6/28/16 at 80:2-12 (Spencer Ruff); TT 6/29/16 at 77:16-80:3 (Brad Sorum); TT 6/29/16 231:7-10 (Pierce McDowell); TT 6/30/16 at 78:7-22 (Adam Nyhaug).) Additionally, Mr. McDowell admitted that converting the fireplace to a gas fireplace was a "viable" option. (TT 6/29/16 231:7-10.) Therefore, because the conversion process can be assigned a monetary value, *i.e.*, the cost of changing the fireplace from a wood-burning fireplace to a gas fireplace, SDCL § 21-8-14 does not apply and injunctive relief is not appropriate

B. McDowells have not demonstrated irreparable harm.

"'Harm is . . . irreparable where … it cannot be readily, adequately, and completely compensated with money.'" *Strong*, 2014 S.D. 69, ¶ 17, 855 N.W.2d at 140 (quoting *Knodel v. Kassel Twp.*, 1998 S.D. 73, ¶ 13, 581 N.W.2d 504, 509 (internal quotations and citations omitted)). Thus, for the same reasons that pecuniary compensation will afford adequate relief in this case, McDowells have failed to demonstrate irreparable harm. Diminution in market value and the cost to convert a wood-burning fireplace to a gas fireplace can each be assigned a monetary value.

Additionally, contrary to McDowells' claims, the Sapienza home has not negatively impacted the desired tone and attractiveness of the McKennan Park Historic

District. The only argument offered in support of this position is that the Sapienza home violates IRC § R1003.9 and ARSD 24:52:07:04. As stated above, neither IRC § R1003.9 nor ARSD 24:52:07:04 apply to the Sapienza home. Therefore, irreparable harm cannot result from their violation.

Nor does lack of sunlight to the McDowell home satisfy the irreparable harm requirement. *See Kruger v. Shramek*, 565 N.W.2d 742, 747 (Neb. Ct. App. 1997) (stating that this is the majority rule); *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357, 359 (Fla. Dist. Ct. App. 1959) (holding that "[n]o American decision has . . . held that . . . a landowner has a legal right to the free flow of light and air across the adjoining land of his neighbor.").

Finally, McDowells have offered no evidence that having windows in one home that face directly into a neighboring home equates to irreparable harm. In fact, common sense dictates that this is likely a normal occurrence. However, while most people would solve this issue by installing blinds, McDowells ask this Court to force Sapienzas to tear down their entire home. This request is unreasonable and should be denied.

C. Sapienzas acted in good faith.

McDowells argue that Sapienzas acted in bad faith by, among other things:

1. Failing to show the Sioux Falls Board of Historic Preservation (the "Board") "the architectural drawing by Natz showing the proximity of the new construction to the McDowell property;"

2. Failing to show the Board "any picture showing what [they] intended the house to look like;"

3. Obtaining Board approval through false pretenses;

4. Failing to resubmit the plans to the Board for approval once certain changes were made to the plans by the Sorums; and

5. Continuing to construct their home after receiving a cease and desist letter from the McDowells' attorney.

(McDowell Brief at 28-30.) For the reasons set forth below, each of these arguments is without merit.

First, McDowells failed to identify any requirement that an applicant present the Board with architectural drawings "showing the proximity of the new construction" to neighboring homes. In fact, the City Liaison Officer to the Board and each of the Board members who testified indicated that they do not normally request or receive information regarding the proximity of neighboring homes. (TT 6/30/16 at 62:6-18 (Debra Gaikowski testifying the information regarding proximity is not typically submitted); TT 6/30/16 at 75:25-76:3 (Adam Nyhaug testifying same); TT 6/30/16 at 88:4-11 (Kevin Ganz testifying same); TT 6/30/16 106:5-17 (Dixie Hieb testifying same); TT 6/29/16 15:21-16:8 (Keith Thompson testifying same).)

Regardless, McDowells argue that Sapienzas had a drawing depicting the proximity of their proposed home to the McDowell home and should have produced it to the Board. This argument is based on testimony from Natz, wherein he stated that he sent a drawing to Mr. Sapienza prior to the meeting showing the proximity of the proposed home to the McDowell home. Mr. Sapienza testified, however, that he does not remember receiving said drawing from Natz. (TT 6/30/16 at 29:10-30:5.) Thus, at best, any failure to present the drawing to the Board was an innocent mistake, not intentional. Additionally, as Mr. Sapienza pointed out during his testimony, the drawing showing the McDowell home was not meant to be representative of the location of the home, but, rather, how the windows of the two homes would line up with each other. (*Id.*; *see also* TT 6/29/16 204:3-205:13 (Natz confirming that no drawing regarding proximity existed).) Therefore, even if the

drawing had been presented to the Board, it would not have been reliable for determining proximity.

Second, Sapienzas did present the Board with drawings showing the intended look of the home. In fact, Ruff testified that the dimensions, visual appearance, and height of the Sapienza home as built are consistent with the plans submitted to, and unanimously approved by, the Board on May 14, 2014. (TT 6/28/16 at 69:10-71:9.) Moreover, to the extent that the plans presented to the Board were to differ from the final product, Mr. Sapienza disclosed those potential changes to the Board, including a change in the siding from cedar shake shingles to lapboard, and the fact that the home's size would be larger than the previous home. (TT 6/29/16 at 254:12-257:17.) As a result, McDowells' allegation that Sapienzas obtained approval of their building plan under false pretenses is, quite simply, false.

Third, Sapienzas were not required to resubmit their building plans to the Board based on the changes that were made to those plans. McDowells argue that Sapienzas had a duty to report what they refer to as eleven "substantial changes" to the Board for reapproval before moving forward with construction. (Trial Exhibit 58.) Six of the eleven "substantial changes" deal with the change from cedar shake siding to lapboard siding. (*Id.*; *see also* TT 6/28/16 at 64:12-16.) This change was specifically brought up before the Board on May 14, 2014, and approved as part of the project as a whole. (See TT 6/29/16 at 254:12-25; TT 6/30/16 at 17:21-24; TT 6/30/16 at 59:9-12; TT 6/29/16 at 255:1-256:15.) Moreover, when questioned about these alleged "substantial changes," each Board member that testified at the trial admitted that none of the changes would merit resubmitting the plans to the Board for reapproval. (TT 6/29/16 at 25:7-29:2 (Keith

Thompson); TT 6/30/16 72:14-25:13 (Adam Nyhaug); TT 6/30/16 at 88:20-92:14 (Kevin Ganz); TT 6/30/16 109:21-114:2 (Dixie Hieb).)

Finally, contrary to McDowells' claims, when Sapienzas received the cease and desist letter from McDowells' attorney, construction of the home was "three-quarters" complete, and Sapienzas had already invested more than $650,000 in the home. (TT 6/28/16 at 101:10-13 and 101:20-102:3; TT 6/29/16 at 60:2-6 and 95:24-96:1.) Additionally, contrary to McDowells' assertions, Sapienzas did consider slowing or stopping construction when they received the cease and desist letter. (TT 6/28/16 at 100:11-101:2.) In doing so, Sapienzas discussed the cease and desist letter with their contractor, and may have consulted with an attorney. (*Id.*) In the end, Sapienzas chose not to stop construction, partially because the home was already "three-quarters" complete, and partially because, after consulting with experts they hired to assist them in building their home, they did not believe they were in violation of any zoning ordinances or regulations, which, as it turns out, was true. (TT 6/30/16 at 21:6-22:2; TT 6/28/16 at 212:22-214:8 and 216:4-11 (referring to numerous passed inspections).) Sapienzas did not simply ignore the letter from McDowells' attorney. Rather, they considered the letter in good faith, and determined that McDowells' claims were unfounded and that stopping construction was not warranted.

Moreover, it is worth noting that the receipt of the cease and desist letter was not the first time that McDowells had threatened to sue the Sapienzas. As Mr. Sapienza testified:

> A. [The McDowells] had been threatening to sue us long before we even started building. It was a problem from before we even purchased the property, so I wasn't surprised there was an issue. I was surprised, however, that they were trying to say there was an

> issue with our adhering to any codes or rules or laws; historic board of preservation or other.

(TT 6/30/16 at 20:23-21:5.) Thus, the fact that McDowells were unhappy with the construction, and were looking for a way to prevent it from moving forward, was nothing new to Sapienzas. Sapienzas had been dealing with complaints from McDowells for some time, and, therefore, understandably viewed any claims by McDowells with a grain of salt.

Simply put, Sapienzas did everything that a reasonable, prudent person would do under the same or similar circumstances. (*See* Sapienza Brief at 22-24.) They acted in the utmost good faith, and injunctive relief is not appropriate.

D. The balancing of the equities weighs in favor of Sapienzas.

In addressing the balancing of the equities factor, McDowells cite to several cases, which they argue support the conclusion that injunctive relief may be granted where the remedy imposed "is necessarily harsh." (McDowell Brief at 30-34.) A review of those cases and their holdings, however, demonstrates that they are not analogous to the current dispute, and, in most cases, actually caution against granting injunctive relief under the present circumstances.

For instance, McDowells point to *Ladson v. BPM Corp*, where, McDowells contend, this Court affirmed the grant of a permanent injunction "that had the effect of dissolving the defendant's ranching operation because there were no lesser available sanctions." 2004 S.D. 74, 681 N.W.2d 863. That, however, is not what the Court held. Rather, the Court specifically pointed out that the trial court denied a permanent injunction "prohibiting BPM from keeping livestock on any of its property," because "hardship [suffered by BPM would be] disproportionate to the benefit gained by Ladson." *Id.* at ¶ 19, 681 N.W.2d at 868. As a

result, the injunction was limited to "land adjacent to Ladson's property." *Id.* Thus, applying the same reasoning to this case, where a lesser sanction is available, *i.e.* money damages for diminution in value or converting the fireplace from wood-burning to gas, a permanent injunction that would result in hardship disproportionate to the benefit received by McDowells should be denied.

McDowells' reliance on *Spring Brook Acres Water Users Ass'n, Inc. v. George*, 505 N.W.2d 778 (S.D. 1993) and *City of Madison v. Clarke*, 288 N.W.2d 312 (S.D. 1980) is similarly misplaced. In *Spring Brook Acres*, the defendant knowingly built a structure in violation of a covenant contained in an easement. 505 N.W.2d at 779. In *City of Madison*, the defendant built a carport without obtaining a building permit from the City. 288 N.W.2d at 313. Thus, both cases are easily distinguishable from the present dispute. There is no evidence that Sapienzas knowingly violated the subject ordinances and regulations. Likewise, unlike the defendant in *City of Madison*, Sapienzas obtained all of the necessary approvals prior to building their home, and relied on the knowledge of experts in the construction industry to make sure that the home was built properly. Additionally, no citations were issued to Sapienzas throughout the entire construction process. (TT 6/28/16 at 212:22-214:8 and 216:4-11.) It is also worth noting that the burden imposed on the defendant in *City of Madison* was only $8,500 as compared to the hundreds of thousands of dollars it would cost Sapienzas to comply with the injunction issued in this case. 288 N.W.2d at 314.

McDowells also attempt to twist this Court's holding in *Harksen v. Peska*, 1998 S.D. 70, 581 N.W.2d 170 to support their position. A plain reading of the case, however, demonstrates that it actually supports Sapienzas' position. In *Harksen*, the trial court

ordered the removal of a home built on land in violation of a restrictive covenant. 1998 S.D. 70, ¶ 10, 581 N.W.2d at 172-73. On appeal, this Court reversed, holding that ordering removal of the home, worth approximately $100,000, was not reasonable where the harm suffered by the plaintiffs was comparably minimal. *Id.* at ¶¶ 32-4, 581 N.W.2d at 176. Applying this reasoning to the present case, issuing an injunction that, in all actuality, will require Sapienzas to tear down their home and rebuild from scratch at a cost of hundreds of thousands of dollars, if not more, is not reasonable where the benefit to be received by McDowells is comparatively minimal, *i.e.*, the ability to continue using their wood-burning fireplace. As a result, injunctive relief is not appropriate.

Notably, McDowells' brief makes absolutely no mention of this Court's recent decision in *Hoffman v. Bob Law, Inc.*, 2016 S.D. 94, 888 N.W.2d 569, a significant case regarding injunctive relief. *Hoffman* involved a physical encroachment, but looked to the same four factor test employed in all injunctive relief cases. This Court held that "the fourth factor[, the balancing of the equities,] plays the dominant role in encroachment cases." 2016 S.D. 94, ¶ 15, 888 N.W.2d at 574. This Court also stated, while "no one should be permitted to take land of another merely because he is willing to pay a market price for it . . . requiring removal of an encroachment may constitute economic waste if the encroaching structure must be destroyed." *Id.* (internal citations and quotations omitted). Therefore, injunctive relief should be denied "where the expense or hardship to be suffered by the [trespasser] is disproportionate to the small benefit to be gained by the injured party." *Id.*

Applying this test, this Court denied the injunction holding that the cost to remove a leach field ($150,000) and obtain an easement for a septic tank ($25,000) knowingly built on the wrong property, was disproportionate to any benefit that would be received by the

property owner. *Id.* at ¶ 16, 888 N.W.2d at 574-75. "In this case, removal of the remaining encroachments may be unlike the removal of an entire building or structure at an enormous and disproportionate expense." *Id.* at ¶ 18, 888 N.W.2d at 575–76 (citing *Amkco, Ltd. v. Welborn*, 130 N.M. 155, 21 P.3d 24, 29 (2001) (denying removal when removal would result in loss of $188,837 in expenses, plus annual profits, and a $1,250,000 project when value of encroached land was $14,700); *Graven v. Backus*, 163 N.W.2d 320, 326 (N.D. 1968) (denying removal when cost to remove and rebuild was $5,300 and value of the land encroached on was $9.00)).

Given this Court's unwillingness to order the removal of a septic system at a cost of $175,000, certainly the ability to continue using a single wood-burning fireplace, to see additional sunlight on one side of a home, or to see smoke rising from a chimney, is outweighed by the hundreds of thousands of dollars, or more, that would be required to remodel or rebuild the Sapienza home.

IV. The trial court did not enter sufficient findings of fact or conclusions of law to allow for a meaningful review on appeal.

The trial court's Memorandum Decision does not contain specific findings of fact in accordance with SDCL § 15-6-52(a). Addressing McDowells' negligence claim, the court stated, "A reasonable fact finder may find that the Sapienzas are therefore in violation of a city zoning ordinance, which gives rise to the McDowells' claim for negligence on this matter." (SR 1318.) Likewise, on McDowells' nuisance claim the court stated, "The court finds that a reasonable fact finder could conclude that negligent or reckless conduct of allegedly violating specific regulations result[ed] in "'an invasion of [the McDowells'] interest in the private use and enjoyment of land[.]'" (SR 1321.) These statements are not findings of fact. These statements are nothing more than the court recognizing that a claim

for negligence or nuisance may exist. Without a specific finding of negligence or nuisance, the remedy of injunctive relief is not appropriate.

Moreover, McDowells' argument regarding the court's rejection of Sapienzas' and City's proposed findings of fact as "contrary to the Memorandum Decision" is of no consequence. The fact that the trial court believes something is contrary to what is expressed in its decision, does not mean that it actually is. Stated differently, simply stating that the Memorandum Decision contains findings of fact does not make it so.

V. McDowells' claims are barred by the doctrine of laches.

Mr. McDowell's text from August 2014 directly refutes McDowells' claim that they did not "ha[ve] full knowledge of the facts upon which th[is] action is based." (McDowell Brief at 35.) In that text, Mr. McDowell stated, "[I] have to forewarn you that my wife is really suffering about all of this. [T]he home is just way too big for the lot. [Y]ou will move in five years and we [will] live with it forever. [T]ough gig for us. [N]ot your problem or fault . . . just a tough gig for us." (TT 6/29/16 at 234:17-235:23, Trial Exhibit 35.) This message proves Mr. McDowell was aware of the large size of the home, the primary basis for this lawsuit, back in August 2014 before construction began. Additionally, Ruff testified that the dimensions, visual appearance, and height of the Sapienza home as built are consistent with the plans submitted to, and unanimously approved by, the Board on May 14, 2014. (TT 6/28/16 at 69:10-71:9.) Thus, McDowells' assertion that they were not aware of changes made to the size and massing of the Sapienza home between May 14, 2014, the date of the Board meeting, and May 14, 2015, the date of the cease and desist letter, is without merit.

VI. McDowells assumed the risk of harm in this case.

Contrary to McDowells' assertions, the evidence at trial demonstrated that McDowells were aware that their home was only two feet off the property line, and, therefore, the "harm" they have suffered in this case was always a possibility. (TT 6/28/16 at 171:4-12.) As such, they assumed the risk of harm and their claims should be barred.

VII. The arguments of the Amicus Curiae are unpersuasive and should be disregarded.

The South Dakota Attorney General's Office filed an Amicus Brief arguing for application of ARSD 24:52:07:04 consistent with McDowells' position at trial. The arguments contained in the Amicus Brief, while informative, should be disregarded for two very important reasons.

First, the arguments regarding the purpose of South Dakota's historic preservation laws were not raised at trial, and have not been raised by any of the parties on appeal. This Court has long held that failure to raise an argument at the trial level waives that argument on appeal. *Rush v. U.S. Bancorp Equipment Finance, Inc.*, 2007 S.D. 119, ¶ 8 n. 1,742 N.W.2d 266, 269 n. 1 (citations omitted). Thus, the arguments regarding the purpose of South Dakota's historic preservation laws, and the need to apply those laws in a manner to properly effect that purpose, cannot be considered in this appeal.

Second, the arguments regarding the application of ARSD 24:52:07:04 to the Sapienza home all rely upon cases from other jurisdictions. Each of these cases is distinguishable from the present case because there is nothing to show that the jurisdictions from which these cases are taken have an applicability regulation similar to ARSD 24:52:07:01. Therefore, while it may be common practice in other jurisdictions

for regulations similar to ARSD 24:52:07:04 to be applied to non-historic homes in historic districts, South Dakota has specifically limited the application of ARSD 24:52:07:04 to "historic properties listed on the state register or the national register, or both." ARSD 24:52:07:01. As a result, the decisions from those other jurisdictions are not controlling.

Because ARSD 24:52:07:04 does not apply to the Sapienza home, the arguments in the Amicus Brief regarding the appropriateness of injunctive relief do not need to be considered. Without a violation of law, there is no need to address the proper remedy. Regardless, the cases cited in the Amicus Brief are all from other jurisdictions. While those jurisdictions may hold that injunctive relief is appropriate under similar circumstances, this Court has taken the position that, where the burden suffered by the enjoined party is disproportionate to the benefit gained by the complaining party, injunctive relief should not be granted. *Hoffman*, 2016 S.D. 94, ¶¶ 19-20, 888 N.W.2d at 576-77.

CONCLUSION

For the reasons set forth above, as well as the reasons set forth in Sapienzas' opening brief, Sapienzas respectfully request that this Court grant relief consistent with their request for relief in their opening brief.

Respectfully submitted this ___ day of September, 2017.

MAY & JOHNSON, P.C.

BY_____
Richard L. Travis
Adam R. Hoier
6805 S. Minnesota Ave.
P.O. Box 88738
Sioux Falls, SD 57109-8738
(605) 336-2565; Fax: (605) 336-2604
dtravis@mayjohnson.com
ahoier@mayjohnson.com
Attorneys for Defendants/Appellants Joseph Sapienza and Sarah Jones Sapienza, M.D.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two true and correct copies of the foregoing Brief of Appellants were served on each of the following by United States mail, first class, postage prepaid thereon, and via e-mail this ___ day of September, 2017:

Steven M. Johnson
Scott A. Abdallah
Ronald A. Parsons, Jr.
Shannon R. Fallon
Johnson, Janklow, Abdallah,
Reiter & Parsons, LLP
P.O. Box 2348
Sioux Falls, SD 57101-2348
steve@johnsonabdallah.com
scott@johnsonabdallah.com
ron@johnsonabdallah.com
shannon@johnsonabdallah.com
Attorneys for Plaintiffs Pierce McDowell and Barbara McDowell

William C. Garry
Melissa R. Jelen
Cadwell, Sanford, Deibert & Garry, LLP
P.O. Box 2498
Sioux Falls, SD 57101
bgarry@cadlaw.com
mjelen@cadlaw.com
Attorneys for Defendant
City of Sioux Falls

Marty J. Jackley
Attorney General
Paul S. Swedlund
Assistant Attorney General
1302 E. Highway 14, Suite 1
Pierre, SD 57501
Attorneys for Amicus Curiae

_____
Adam R. Hoier

CERTIFICATE OF COMPLIANCE

The undersigned, attorney for the Appellants, hereby certifies that this Brief complies with the type volume limitations as stated in SDCL § 15-26A-66(b)(2). The number of words in the Brief totals 4,943 and the number of characters for the same totals 25,764.

_____

Adam R. Hoier

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28234

City of Sioux Falls Notice of Review No. 28239

Pierce and Barbara McDowell Notice of Review No. 28252

PIERCE MCDOWELL AND BARBARA MCDOWELL,

Plaintiffs/Appellees,

vs.

JOSEPH SAPIENZA AND SARAH JONES SAPIENZA, MD,

Defendants/Appellants,

and

CITY OF SIOUX FALLS,

Defendant/Appellee.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

The Honorable John Pekas, Presiding Judge

REPLY BRIEF OF APPELLEE CITY OF SIOUX FALLS

William C. Garry
Melissa R. Jelen
Cadwell Sanford Deibert & Garry LLP
200 E. 10th St., Suite 200
PO Box 2498
Sioux Falls, SD 57101-2498
Attorneys for Appellee City of Sioux Falls

Steven M. Johnson
Shannon R. Falon
Scott Abdallah
Ronald A. Parsons, Jr.
Johnson, Janklow, Abdallah,
Reiter & Parsons, LLP
101 S. Main Ave. #100
PO Box 2348
Sioux Falls, SD 57101-2348
Attorneys for Appellees Pierce McDowell and Barbara McDowell

Richard L. Travis
Adam R. Hoier
May & Johnson, PC
6805 S. Minnesota Ave. #100
PO Box 88738
Sioux Falls, SD 57109
Attorneys for Appellants Joshua Sapienza and Sarah Jones Sapienza, MD

Marty J. Jackley
Attorney General
Paul S. Swedlund
Assistant Attorney General
1302 East Highway 14, Suite 1
Pierre SD 57501-8501
Attorneys for Amicus Curiae South Dakota State Historical Society

---

NOTICE OF APPEAL FILED APRIL 19, 2017

NOTICE OF REVIEW OF APPELLEE CITY OF SIOUX FALLS FILED MAY 1, 2017

NOTICE OF REVIEW OF APPELLEES PIERCE AND BARBARA MCDOWELL FILED MAY 8, 2017

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page #

Cases

Statutes

Other Authorities

PRELIMINARY STATEMENT

The following record citations and references will be used in this brief. Citations to the certified record will be denoted "R.", followed by the appropriate page number(s). Citations to the Trial Transcript will be denoted "TT", followed by the date of trial and appropriate page number(s). Citations to trial exhibits will be denoted "Ex. ___". Appellees Pierce and Barbara McDowell will be referred to collectively as "McDowells," Appellants Joseph and Sarah Jones Sapeinza, MD will be referred to collectively as "Sapienzas," and Appellee City of Sioux Falls will be referred to as "City."

ARGUMENT

I. The McDowells have waived their Notice of Review.

The Brief of Appellees Pierce and Barbara McDowell devotes a mere paragraph comprised of nine (9) sentences to their Notice of Review. Therein, the McDowells failed to cite any authority to support their argument that the circuit court committed reversible error because it did not enter Judgment against the City for negligence. Notably, the McDowells failed to cite a single authority to support their argument that the City owed them a duty. Nor did the McDowells cite any authority to support their argument that the City's conduct in issuing a building permit to the Sapienzas constituted a breach of a legally recognized duty that was owed to the McDowells. "The failure to cite supporting authority is a violation of SDCL 15-26A-60(6) and the issue is thereby deemed waived." *State v. Pellegrino*, 1998 SD 39, ¶ 22, 577 N.W.2d 590, 599 (failure to cite supporting authority is violation of appellate procedure rule governing briefing and issue is thereby deemed waived on appeal); SDCL 15-26A-61 ("The brief of the appellee shall conform to the requirements of § 15-26A-60."); SDCL 15-26A-60(6) ("The argument shall contain the contentions of the party with respect to the issues presented,

the reasons therefore, and the citations to the authorities relied on.") (emphasis added); *Hart v. Miller*, 2000 SD 53, ¶ 42, 609 N.W.2d 138, 148 (failure to cite authority for an argument on appeal waives the argument).

II. The McDowells abandoned their theory that the City was negligent in failing to follow its historic codes.

On page 38 of the Brief of Appellees Pierce and Barbara McDowell, the McDowells baldly assert that the "[City] had an obligation to follow the historic codes." That assertion must be disregarded. The McDowells did not submit any proposed findings of fact or conclusions of law mentioning a claim or theory that the City was somehow negligent in failing to follow historic codes.[1] (R. 1866-1927). Consequently, that theory was abandoned by the McDowells and cannot be considered by this Court. *Stemper v. Stemper*, 415 N.W.2d 159, 160 (SD 1987) ("A claim or theory not mentioned in the proposed findings of fact and conclusions of law is deemed abandoned.").

III. The trial court was correct in not entering a judgment against the City on the negligence claim.

The trial court did not enter judgment against the City on the McDowells negligence claim. The trial court was correct not to do so. The trial court did not find that the City was negligent. In its Memorandum Decision, which the trial court adopted as its findings of fact and conclusions of law, the trial court did not render any specific or ultimate findings of fact or conclusions of law regarding the McDowells' negligence claim against the City. (R. 1303-1331, 1733-36, 1740-45). Instead, the trial court found that "[t]his factual question is not a determination for the court at this time given the

[1] Indeed, the McDowells' proposed findings of fact and conclusions of law with respect to the City only mentioned a claim and theory that the City was negligent in failing to issue a building permit to the Sapienzas that allowed the Sapienzas to construct their home in violation of IRC R1003.9 and SDCL 11-4-6. (R. 1866-1927).

order on bifurcation and the granting of the injunction." (R. 1303-1331, 1733-36, 1740-45). More tellingly, the trial court rejected the McDowells' proposed findings of fact and conclusions of law on this very issue. (R. 1303-1331, 1733-36, 1740-45). Absent the entry of specific and ultimate findings of fact and conclusions of law by the trial court, the trial court was correct in not entering judgment against the City on the McDowells' negligence claim. *See* SDCL 15-6-52(a); *Wiswell v. Wiswell*, 2010 SD 32, 781 N.W.2d 479 (trial court's entry of inconsistent findings of fact, conclusions of law, memorandum decision and judgment is reversible error because it prevents meaningful review).

Moreover, "[i]n order to prevail in a suit based on negligence, a plaintiff must prove duty, breach of that duty, proximate and factual causation, and actual injury." *Bernie v. Catholic Diocese of Sioux Falls,* 2012 SD 63, ¶ 15, 821 N.W.2d 232, 240. There has been no trial on the necessary negligence elements of factual and proximate causation and injury. (R. 565-66). Therefore, it would have been premature and improper for the trial court to enter a judgment against the City on the negligence claim.

IV. The trial court erred by not entering judgment in favor of the City on the negligence claim.

Conversely, the trial court did err as a matter of law in failing to enter judgment in the City's favor on the negligence claim. A court trial was held on the negligence elements of duty and breach only. The McDowells failed to establish either of those necessary elements. As set forth at length in Sections I and II of the Brief of Appellee City of Sioux Falls, the City was entitled to judgment in its favor on the McDowells' negligence claim for three reasons:

(1) The City did not owe any duty to the McDowells under the public duty doctrine;[2]

(2) Even if the public duty doctrine was not applicable (which it is), the City did not owe any duty to the McDowells when it issued a building permit to the Sapienzas; and

(3) The McDowells failed to establish that the City acted negligently when it issued a building permit to the Sapienzas.

For all of the reasons set forth in the Brief of Appellee City of Sioux Falls, which will not be repeated herein, this matter should be reversed with direction to the trial court to enter judgment in favor of the City on the negligence claim.

CONCLUSION

This matter should be reversed with direction to the trial court to enter Judgment in favor of the City. Alternatively, this matter should be remanded so that the trial court may enter sufficient findings of fact and conclusions of law that will allow this Court to conduct a meaningful review on appeal.

[2] Notably, the South Dakota State Historical Society argues on pages 11 through 15 of its Brief of *Amicus Curiae* that the land use regulations at issue were enacted "for the general welfare" and "for the promotion and protection of the health and welfare of the community," lending further support for the application of the public duty doctrine in this case. *E.P. v. Riley*, 1999 SD 163, ¶ 15, 604 N.W.2d 7, 12 (public duty doctrine "declares that the 'government owes a duty of protection to the public, not to particular persons or classes'" and "acknowledges that many 'enactments and regulations are intended only for the purpose of securing to individuals the enjoyment of rights and privileges to which they are entitled as members of the public, rather than for the purpose of protecting any individual from harm.'").

Date: September 5, 2017.

CADWELL SANFORD DEIBERT & GARRY LLP

By /s/ *William C. Garry*

William C. Garry
Melissa R. Jelen
PO Box 2498
Sioux Falls SD 57101-2498
(605) 336-0828
E-mail: bgarry@cadlaw.com
mjelen@cadlaw.com
Attorneys for Defendant/Appellee
City of Sioux Falls

CERTIFICATE OF COMPLIANCE

I hereby certify that the Reply Brief of Appellee City of Sioux Falls complies with the Type-Volume requirements of SDCL 15-26A-66 in the following manner: The Reply Brief is 5 pages and was prepared using Microsoft Word and uses proportionally spaced font [Times New Roman] in 12-point type. Based on the word-count feature of the MS Word processing system, the Reply Brief contains 1,420 words and 7,099 characters.

Dated: September 5, 2017.

/s/ *William C. Garry*
William C. Garry

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that the foregoing Reply Brief of Appellee City of Sioux Falls was sent by e-mail for electronic filing and service to:

Ms. Shirley Jameson-Fergel, South Dakota Supreme Court Clerk
E-mail: scclerkbriefs@ujs.state.sd.us

Steven M. Johnson
Shannon R. Falon
Scott Abdallah
Ronald Parson, Jr.
Johnson, Janklow, Abdallah,
Reiter & Parsons, LLP
steve@janklowabdallah.com
shannon@janklowabdallah.com
sabdallah@janklowabdallah.com
ron@janklowabdallah.com

Richard L. Travis
Adam Hoier
May & Johnson, PC
dtravis@mayjohnson.com
ahoier@mayjohnson.com

Paul S. Swedlund
Assistant Attorney General
Paul.Swedlund@state.sd.us

on September 5, 2017.

The original and two copies of the Reply Brief of Appellee City of Sioux Falls were mailed, by U.S. mail, postage prepaid, to:

Ms. Shirley Jameson-Fergel
Clerk of the Supreme Court
500 East Capitol Avenue
Pierre SD 57501-5070

all on September 5, 2017.

/s/ William C. Garry
William C. Garry

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NOS. 28234, 28239, 28252

PIERCE MCDOWELL and BARBARA MCDOWELL,

Plaintiffs and Appellees,

vs.

JOSEPH SAPIENZA and SARAH JONES SAPIENZA, M.D.,

Defendants and Appellants; and

CITY OF SIOUX FALLS,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE JOHN R. PEKAS
CIRCUIT COURT JUDGE

REPLY BRIEF OF APPELLEES PIERCE AND BARBARA MCDOWELL

Steven M. Johnson
Ronald A. Parsons, Jr.
Shannon R. Falon
JOHNSON JANKLOW ABDALLAH
REITER & PARSONS LLP
101 S. Main Ave, Suite 100
Sioux Falls, SD 57104

Attorneys for Appellees
Pierce and Barbara McDowell

Notice of appeal filed April 19, 2017
Notices of review filed May 1 and 8, 2017

Attorneys for Defendants and Appellants:

Richard L. Travis
Adam R. Hoier
MAY & JOHNSON P.C.
6805 S. Minnesota Ave
Sioux Falls, SD 57109

Attorneys for Appellee City of Sioux Falls:

William C. Garry
Melissa R. Jelen
CADWELL SANFORD DEIBERT & GARRY LLP
P.O. Box 2498
Sioux Falls, SD 57101-2498

Attorney for Amicus Curiae South Dakota State Historical Society:

MARTY J. JACKLEY
ATTORNEY GENERAL

Paul S. Swedlund
ASSISTANT ATTORNEY GENERAL
1302 East Highway 14, Suite 1
Pierre, SD 57501-8501
(605) 773-3215

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

South Dakota Cases:

Other Cases:

Statutes:

Other Authorities:

REPLY ARGUMENT

I. The circuit court correctly held that the public duty doctrine is inapplicable to the McDowells' claims against the City.

In its brief, the City of Sioux Falls contends that the negligence claim brought against it is barred by the public duty doctrine and, as result, the circuit court erred in declining to grant judgment in the City's favor on that claim. The McDowells respectfully suggest that the circuit court correctly held that the public duty doctrine does not apply to this case and the circuit court thus properly found in the McDowells' favor on the issue of liability on their negligence claim against the City.

The South Dakota Legislature has determined that "[t]o the extent that any public entity … participates in a risk sharing pool or purchases liability insurance … the public entity shall be deemed to have waived the common law doctrine of sovereign immunity…" SDCL 21-32A-1. Here, the City stipulated to the fact that it participates in such a risk sharing pool. (R. 1185).

Despite this legislative mandate, South Dakota decisional law has continued to recognize the public duty doctrine, not as a form of immunity, but rather as a limitation on the concept of duty. *See E.P. v. Riley,* 1999 S.D. 163, ¶ 15, 604 N.W.2d 7, 12. As recognized by the North Dakota Supreme Court, the national trend has been to abolish the public duty rule because of its harsh effect on injured citizens seeking relief from governmental negligence, the needless confusion it creates in the law resulting in uneven and inequitable results in practice, and because it resurrects governmental immunities that have been abrogated or limited in most jurisdictions. *See Ficek v. Morken,* 685 N.W.2d 98, 104-106 (N.D. 2004) (citing cases).

Rather than abolishing it altogether, this Court has dramatically limited the reach of the public duty doctrine to extend only to law enforcement and public safety functions of government as those terms are traditionally understood. *See Riley,* 1999 S.D. 163, ¶¶ 22-23, 604 N.W.2d at 13-14. In *Riley*, this Court used the opportunity presented by the case to "specifically clarify that the public duty rule extends only to issues involving law enforcement or public safety." *Id.* at ¶ 22.

This Court went on to hold that placement of a child in foster care by social workers employed by the Department of Social Services did not fall within the ambit of law enforcement or public safety even though the claim alleged in the case was that the child placed by DSS had sexually abused another child. *See id.* at ¶ 23. This Court found the public duty doctrine inapplicable and found that the DSS employees owed a duty to the injured child. *See id.* at ¶¶ 23 & 29.

This Court's rationale for expressly anchoring any continuing application of the public duty doctrine to law enforcement functions was examined in *Tipton v. Town of Tabor,* 1997 S.D. 96, ¶¶ 9-10, 567 N.W.2d 351, 355-56, where it explained that:

> Furnishing public safety always involves allocation limited resources. Law enforcement entails more than simply reacting to violations; it encompasses the art of keeping the peace. Deploying finite resources to achieve these goals is a legislative and executive policy function. To allow individuals to influence through private litigation how resources must be disposed would render government administration chaotic and enfeebled. Unrestricted liability might discourage communities from acting at all or encourage action merely to avoid suit, without regard to the common good. The rule promotes accountability for offenders, rather than police who through mistake fail to thwart offenses. Otherwise lawbreaker culpability becomes increasingly irrelevant with liability focused not on the true malefactors but on local governments.

Id. And surely it makes perfect sense that if a criminal injures someone, the victim should seek to hold the criminal responsible, not the police or other law enforcement personnel for any alleged failure to respond appropriately. It is understandable that precious resources such as our law enforcement personnel, fire fighters, and first responders should not be selectively dispatched to those neighborhoods in our communities where our citizens have the resources to sue the City if they believe that they received bad service in response to their calls for help.

This, however, is not such a case. The public duty rule does not apply here. The art of keeping the peace is not at issue. This case is about building codes and zoning codes. It about the *administration* of those codes; not law enforcement or public safety. No one was physically injured in this case. There is no personal injury claim. The police were not called. First responders were not dispatched.

This case is simply about whether the City fulfilled its obligations to follow its own laws when issuing a building permit to the Sapienzas. The question is whether the City fulfilled its obligation to review the plans and follow the law in issuing the permit and allowing the home to be built. While certainly there are aspects of the building and zoning codes aimed at safety, the *City's* function in reviewing the plans and issuing the permit is not a safety function of government but rather an *administrative* one. And it is clear from this Court's precedent that administrative functions are beyond the limited reach of the public duty doctrine.

In its briefing, the City has relied on *Hagen v. City of Sioux Falls,* 464 N.W.2d 396 (S.D. 1990) for the proposition that building codes are designed to protect the

public as a whole. The *Hagen* reasoning, however, was rejected by this Court in *Tipton,* 538 N.W.2d at 787.

> We reject the bright-line test developed in *Hagen* and employed by the trial court in this case. Sole reliance on statutory language in determining whether a duty exists is needlessly restrictive and arbitrary. A statutory reference to a particular class of persons could very well be inadvertent rather than the result of any reasoned analysis of municipal or county responsibility. We require an analytical framework that more accurately measures a public entity's culpability for the harm suffered.

Id. Moreover, *Hagen's* general statements that building codes protecting the public does not mean that the case would be decided the same way today under the much more narrow reading of the public duty rule as applied only to strictly law enforcement and public safety functions announced by this Court in *Riley*.

Moreover, this is not a case like *Pray v. City of Flandreau*, 2011 S.D. 43, ¶ 3, 801 N.W.2d 451, 453, involving an alleged duty to control the conduct of third persons. The duty violated here was the duty to properly administer and enforce the applicable codes and regulations in question. And it was violated by the City when it issued a building permit for new construction despite the code and regulation violations.

If building and zoning codes qualify as law enforcement and public safety functions, as the City contends, then the public duty rule would have broad and seemingly limitless application. Virtually every aspect of government has some impact on public safety and requires some level of enforcement, and therefore, the public duty rule would swallow up the waiver of sovereign immunity that our legislature has enacted. That is precisely the approach rejected by this Court in *Riley*. The common law public duty doctrine survives in a limited fashion, but only in a case

where its application is necessary, and only when truly invoked in the context of law enforcement and public safety. This case qualifies as neither.

The City contends that public safety is implicated in this case because IRC R1003.9 is a fire protection ordinance and thus gives rise to a public safety issue. That argument is unpersuasive. This is not a case in which someone built an unsafe chimney in violation of the code and the City is somehow involved with permitting an unsafe fireplace. The McDowell chimney has been in place and safely used since the home was built in 1924. It has never been a safety hazard. The construction of the home next door at an illegal distance produced the code violation.

The City should not benefit from the public duty doctrine simply because its administrative negligence involved the enforcement of a chimney ordinance as opposed to some other code provision. This is not a case involving damages caused by a fire. This is a case about an administrative failure in which the City breached its legal duty by failing to follow its own law regarding enforcement of the most restrictive ordinance and the result was a violation of the residential code. At bottom, this is not a public safety case, but one of purely administrative negligence. The circuit court correctly held that the public duty doctrine did not bar the McDowells' claims brought against the City.

II. The circuit court correctly held in favor of the McDowells on the issue of liability on their negligence claim against the City.

Like the Sapienzas, the City is liable in negligence to the McDowells for failing to follow the dictates of IRC R1003.9 and SDCL 11-4-6. The City also had an obligation to follow the historic codes. (Exs. 27 & 28; R. 1566-69).

The City has adopted a zoning code requiring certain setbacks and has also adopted the IRC requiring, among other things, certain clearances on chimneys. In this situation, those two code provisions, both enforced by the City of Sioux Falls, came into conflict. Under SDCL 11-4-6, the chimney provision must govern because it requires more space, and that did not occur. As the City's Chief Building Official, Ron Bell admitted that he knew that the more stringent requirement must be applied in circumstances covered by more than one governing ordinance or regulation. (R. 764). And it was the City that issued the citation regarding IRC R1003.9, demonstrating that it was well aware of the ten-foot chimney clearance requirement. (Ex. 23; R. 1561). Instead of enforcing the code, the City wrongfully permitted the Sapienzas to build their home in compliance with only the more lenient zoning setback. In the context of the historic regulations regarding the maximum permissible height, mass, and scale of a home, the City also had a duty to enforce more stringent code provision, and it failed to do so. The City violated the duties established by the governing ordinances, regulations, and SDCL 11-4-6, constituting negligence, as the circuit court correctly recognized, and entitling the McDowells to judgment against the City on the issue of liability.

The City also owed a common law duty to the McDowells. As this Court has explained, "[w]hen a duty is alleged based on the common law, its existence depends on the foreseeability of injury." *McGuire v. Curry*, 2009 S.D. 40, ¶ 9, 766 N.W.2d 501, 505; *see also Luke v. Deal*, 2005 S.D. 6, ¶ 19, 692 N.W.2d 165, 170. The City contends that it has no common law duty to the McDowells because it was not foreseeable to

the City that issuing a building permit to the Sapienzas would cause harm to the McDowells. The law is contrary to the City's position. In the context of duty, this Court has made clear that "[l]iability is not contingent upon foreseeability of the 'extent of the harm or the manner in which it occurred.' This means that the *exact harm* need not be foreseeable. Rather the harm need only be *within the class* of reasonable foreseeable hazards that the duty exists to prevent." *Kirlin v. Halverson*, 2008 S.D. 107, ¶ 38, 758 N.W.2d 436. 451 (quoting *State Auto Ins. Companies v. B.N.C.*, 2005 S.D. 89, ¶ 25, 702 N.W.2d 379, 388-89); *see also Thompson v. Summers*, 1997 S.D. 103, ¶ 13, 567 N.W.2d 387, 392 (explaining that "it is *foreseeability* of injury to another, not a *relationship* with another, which is a prerequisite to establishing a duty necessary to sustain a negligence cause of action").

Here, as the circuit court recognized, the City failed to follow IRC R1003.9 regarding chimney setbacks needing a ten-foot clearance when it issued a building permit to the Sapienzas and in failing to follow the dictates of the historic preservation requirements for building in historic districts. This failure resulted in the City informing the McDowells that they could no longer use their fireplace and in the Sapienzas being permitted to build a non-conforming structure. It was certainly foreseeable to the City that failure to follow the code when issuing a building permit to the Sapienzas would harm the McDowells in this fashion. The City negligently abdicated its responsibility for code compliance and blindly issued a building permit to the Sapienzas, having no regard for code issues that might result for the neighboring historic homeowners. Accordingly, the circuit court properly entered

findings of fact and conclusions of law against the City and the McDowells are, pursuant to their notice of review, entitled to correct the judgment correspondingly to include that finding against the City on the issue of liability.

III. The circuit court entered sufficient findings of fact and conclusions of law to allow for meaningful appellate review.

Finally, the City contends that the circuit court did not enter sufficient findings or conclusions to allow for meaningful review on appeal. The court's findings and conclusions are set forth in its memorandum decision as permitted under SDCL 15-6-52(a). In addition, the court expressly rejected numerous findings and conclusions proposed by the City, finding them "contrary to the Memorandum Decision." (R. 1727-28).

The circuit court's references to "a reasonable fact finder" and "reasonable jury" in its memorandum decision plainly are scrivener's errors that inadvertently survived a previous incarnation of the decision when the case was at the summary judgment stage. The circuit court rejected the City's interpretation of the governing code and provisions, held that the injury to the McDowells was foreseeable, and held that the City owed a duty for which it was answerable in negligence. (R. 1327). It rejected the City's affirmative defenses of the public duty doctrine, laches, and assumption of risk. (R. 1328-29). It entered judgment in favor of the City *only* on the inverse condemnation claim, and expressly declined to grant a legal remedy to the McDowells on their negligence claim against the City only because of the grant of permanent injunctive relief against the Sapienzas. (R. 1330-31).

There is no need for a remand in this case for additional fact-finding unless the circuit court's grant of permanent injunctive relief against the Sapienzas is for some reason reversed. (R. 1732). Rather, as set forth in the McDowells' notice of review, the formal judgment simply should be amended to include the circuit court's finding against the City on the issue of liability. (R. 1732).

CONCLUSION

WHEREFORE, Pierce and Barbara McDowell respectfully request that this Honorable Court affirm the grant of injunctive relief against the Sapienzas in its entirety, affirm the finding of liability against the City on the negligence claim, and remand with instructions to the circuit court to amend the formal judgment to include the finding of liability against the City.

Dated this 5th day of September, 2017.

JOHNSON JANKLOW ABDALLAH REITER & PARSONS LLP

BY */s/ Ronald A. Parsons, Jr.*
Steven M. Johnson
Ronald A. Parsons, Jr.
Shannon R. Falon
101 S. Main Ave, Suite 100
Sioux Falls, SD 57104
(605) 338-4304

Attorneys for Appellees
Pierce and Barbara McDowell

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing brief was served electronically upon:

Attorneys for Appellants
Richard Travis - May & Johnson, PC
dtravis@mayjohnson.com

Attorneys for City of Sioux Falls
William Garry - Cadwell, Sanford, Deibert & Garry, L.L.P.
bgarry@cadlaw.com

Attorneys for *Amicus Curiae* South Dakota State Historical Society
Paul S. Swedlund – South Dakota Attorney General's Office
Paul.Swedlund@state.sd.us.gov

On this 5th day of September, 2017.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

CERTIFICATE OF COMPLIANCE

Under SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements of the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 2,509 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.