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,
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> 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)**
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> 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

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[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,

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[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

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[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. Go.*, 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.

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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.

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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