

**IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION**

Civil Action No.:
THE SUNDANCE GROUP, INC.,

Plaintiff,

v.

CITY OF SIOUX FALLS, Minnehaha County, South Dakota; PAUL J. TENHAKEN, Mayor of the City of Sioux Falls; AARON J. FAGERNESS, Principal Engineer for the City of Sioux Falls; and KURT A. PEPPEL, Assistant City Engineer for the City of Sioux Falls,

Defendants.

CASE NO.: 4:24-cv-4124

VERIFIED COMPLAINT

COMES NOW, the Plaintiff, by and through its attorneys of record, OGBORN MIHM QUAINANCE, PLLC, and for its Complaint against the above-named Defendant, states and alleges as follows:

PARTIES, JURISDICTION, AND VENUE

1. Plaintiff, the Sundance Group, Inc. (“Sundance”) is a corporation organized and existing under the laws of the State of South Dakota, having its principal place of business in Sioux Falls, Minnehaha County, South Dakota.

2. Defendant, the City of Sioux Falls (“City”), is a Title IX municipality, organized under the Constitution of the State of South Dakota, § 2 Home Rule in the County of Minnehaha.

3. Defendant, Paul J. TenHaken (“TenHaken”), is the Mayor of the City of Sioux Falls.

4. TenHaken is a citizen and resident of South Dakota.

5. Defendant, Aaron J. Fagerness (“Fagerness”), is the Principal Engineer for the City of Sioux Falls.

6. Fagerness is a citizen and resident of South Dakota.

7. Defendant, Kurt A. Peppel (“Peppel”), is the Assistant City Engineer for the City of Sioux Falls.

8. Peppel is a citizen and resident of South Dakota.

9. Personal jurisdiction and venue are proper with this Court as all the Defendants are citizens or residents of South Dakota.

10. Subject matter jurisdiction is proper because there are claims for relief for Regulatory Takings pursuant to the Fourteenth Amendment 42 U.S.C. §§ 1983 and 1988, and for Violations of Due Process pursuant to the Fourteenth Amendment 42 U.S.C. §§ 1983 and 1988.

11. Venue is proper over all Defendants as they all reside in this district.

GENERAL ALLEGATIONS

12. In July of 2020, Al Roettger from the Housing Department with the City of Sioux Falls (the “City”) called Sundance to determine its interest in partnering with the City to help meet the goals of the City for affordable housing.

13. Mr. Roettger initially approached Sundance about this opportunity to partner with the City to help the City meet its affordable housing goals because Sundance had previously assisted in completing a prior city project after the original builder abandoned that project. Sundance never asked for payment, nor was Sundance paid for the work in completing this prior project.

14. In August of 2020, Sundance met with the City’s Housing Manager, Chellee Unruh, and others from the City Engineering Department to explore possible projects on properties that

Sundance owned. Projects along N. St. Paul Avenue and Walnut Street in the Riverside Community District were discussed at this meeting, as well as how funding would be provided by the City.

15. At a subsequent meeting, the City agreed that funding was to be provided for water and sewer, land acquisition, and for Walnut and N. St. Paul Street construction.

16. In October 2020, Sundance began projects on N. St. Paul Ave. by building three single-family homes under the program agreed upon by the City and which the City had agreed to fund using available City funds. However, due to the COVID-19 pandemic, material costs skyrocketed, requiring the City to provide an additional \$25,000 per home to offset these costs. The construction and sale of these three homes and construction of related road, water, and sewer improvements were completed with no issues.

17. On February 3, 2021, the City entered into a subsequent agreement with Sundance for the development and construction of twenty Community Development Block Grant (“CDGB”) assisted twin homes (the “Units”) to be completed by June 30, 2022, whereby Sundance agreed to sell the Units to eligible buyers at a sale price not to exceed \$200,000 by September 30, 2022 (the “Original Agreement”). Pursuant to the Original Agreement, the City provided to Sundance \$126,000 of CDBG funds for acquisition of real property commonly known as 2100 East Walnut Street, Sioux Falls, South Dakota (“the Property”), and \$112,000 of General Funds for the design and construction of the Units and supporting infrastructure, including, but not limited to, road improvements and utilities (the “Project”).

18. Sundance’s intent for the Project was not to make a profit, but rather, to assist the City’s public housing initiatives without incurring a financial loss. In other words, Sundance’s aim was to simply recoup its costs and not lose money on the Project. As such, Sundance instructed all potential subcontractors and suppliers for the Project to keep their bids low and minimize any

profit charges for their respective scopes of work, and Sundance selected the lowest bidder that was qualified.

19. In February 2021, the Dove Ridge Project (the “Project”) began with the land development and construction of 10 twin homes under the same program.

20. In July 2021, the City amended the Original Agreement to reduce the scope of the Project from twenty twin homes to sixteen twin homes so that a sediment trap would be placed on the lost lot even though the runoff was going into a floodplain.

21. On March 16, 2022, the Parties entered into a second amendment to the Original Agreement, which, among other things, extended the time for Sundance to complete and sell the Units. This extension was necessitated by unforeseen delays in Sundance’s ability to procure materials from vendors due to supply chain issues that arose in connection with the COVID-19 pandemic. Pursuant to this second amendment, Sundance was required to complete the Units by October 1, 2022, and sell the Units to eligible buyers by March 1, 2023.

22. During the Project, numerous potential buyers were directed by Sundance to the City’s Housing Division to determine if they qualified for the program. No buyers ever called back to notify Sundance’s broker that they qualified for the program. However, one realtor called Sundance’s broker to ask why her client’s financial information was provided to another company building affordable housing.

23. Upon information and belief, the Housing Division had been directing the qualified buyers for the Dove Ridge homes to a former City Housing employee, who worked for a different builder. Additionally, Sundance’s information was not listed on the City’s housing website alongside other affordable housing developers despite numerous requests to be added by the Broker for Sundance. When confronted, the City’s response was apathetic.

24. In or around the fall of 2022, due to the rise in interest rates making it difficult for buyers to qualify for the program, Sundance personnel met with new City Housing Manager, Logan Penfield to negotiate a new contract with the City for the Project. In this meeting, Mr. Penfield agreed to amend the Contract to reduce the terms for buyers to qualify for funding and to provide additional funds of \$49,000 to Sundance Builders at closing to meet the costs of each home.

25. When representatives of Sundance asked Mr. Penfield where the money would come from, he stated, “We will find them from other City funds.”

26. On November 4, 2022, the Parties entered into an Amendment and Restatement Agreement incorporating all of the prior amendments to the Original Agreement, and, among other things, further extended Sundance’s time to complete and sell the Units to May 15, 2023, and increased the maximum sale price of the CDBG-assisted Units to \$226,000 (the “Restatement Agreement”).

27. The first closing on one of the CDBG-assisted Units was scheduled to occur on December 20, 2022.

28. Upon review of the closing documents for the first closing, Sundance determined that the closing documents did not reflect the agreement of the Parties. Specifically, among other things, Sundance alleged that the representations of the City, along with the Restatement Agreement, created an agreement where the maximum sale price of \$226,000 only related to the qualifying buyer’s purchase paperwork, and that the City would supplement the sale by \$49,000 to result in a sale price of \$275,000 as to Sundance’s side of the transaction.

29. At the time of the closings for the first two Units of the Project that were sold, 1801 and 1808 N. Oberg Circle, the City refused to pay Sundance Builders the additional funds agreed to in the fall of 2022.

30. Sundance honored the sale price for those two closings to the buyers at a loss of approximately \$60,000.

31. Subsequently, Sundance served the City with a Notice of Claim Under SDCL § 3-21-2 (the “3-21-2 Notice”), which was officially received by the City on January 4, 2023. In the 3-21-2 Notice, Sundance proposed, among other things, that it be allowed to return to the City the \$238,000 of funding provided to it in early 2021 and terminate the agreement, thus allowing Sundance to market and sell all homes in the Property privately and not as low-income housing.

32. In February 2023, Sundance and the City entered a Settlement Agreement and Release (the “Settlement Agreement”), whereby the Parties agreed to terminate the Restatement Agreement and its successor agreement(s) (*i.e.*, the Original Agreement and the amendments thereto).

33. Pursuant to the Settlement Agreement, the City agreed, in relevant part, to “release any and all mortgages, notes, liens, and encumbrances it currently has on the Property pursuant to the Restatement Agreement, allowing Sundance to proceed with developing and selling the Property as a private project without any associated buyer income restrictions or requirements.”

34. Pursuant to the Settlement Agreement, Sundance agreed to reimburse the City for the \$238,000 of funding the City previously provided to Sundance for the Project. On February 15, 2023, the same day the Settlement Agreement was executed, Sundance paid this amount to the City in full.

35. The Settlement Agreement did not terminate the separate Subdivision Construction Agreements relating to the “Dove Ridge Addition,” executed by Sundance on October 22, 2021, and by the City on January 4, 2022 (the “Dove Ridge SCA”) or relating to the “St. Paul Ave.-Mulberry St. to Walnut St. Addition,” executed by Sundance on December 3, 2020, and by the City on January 4, 2021 (“St. Paul SCA”).

36. Before the Settlement Agreement was executed, Sundance had substantially completed construction of eight of the Units required by the Restatement Agreement.

37. The City did not raise any concerns with the construction means and methods employed by Sundance in constructing any Units and related improvements before, or during, the parties’ negotiations of the Settlement Agreement (aside from minor landscape and drainage items that needed to be completed in the spring, once the snow melted and Sundance could resume construction).

38. In negotiating the Settlement Agreement, Sundance provided a draft to the City which incorporated a proposed resolution of final issues concerning the Dove Ridge SCA. Specifically, Sundance’s position was that, since the “Public Improvements” (*i.e.*, the streets and utilities) were finished, the plat was finalized, twin home sales were in the closing process, and because there were only minor landscape and drainage items to wrap up, the City was obligated to release the \$120,000 letter of credit, which was 10% of the estimated costs of the Public improvements). Sundance further proposed that the City and Sundance agree upon a final list of items to be completed in the spring.

39. Ultimately, the City refused to work with Sundance on settling these final items related to the Dove Ridge SCA, despite Sundance’s efforts to cooperate and work in good faith to conclude all remaining, pending, unresolved matters at once.

40. After executing the Settlement Agreement, Sundance quickly began efforts sell the Units on the open market for an approximate, average price of \$260,000 to recoup costs for the Project and to reduce interest being paid for development and construction costs.

41. In or around March 2023, less than a month after executing the Settlement Agreement, the City suddenly suspended all inspections and issuance of occupancy permitting and began demanding additional requirements for the completion of the Project.

42. The City demanded, for example, that Sundance add a new retaining wall, add more streetlights, add more sidewalks, add a water flow engineering study, remove trees, install additional fabric and riprap in the west drainage area, and so on.

43. Prior to suspending all inspections and issuance of occupancy permitting in March 2023, the City had previously issued occupancy permits for four of the Units, despite the issues with the Public Improvements that the City was now claiming.

44. The City's suspension of inspections and issuance of occupancy permits immediately caused financial harm to Sundance because it could no longer enter into purchase agreements and represent to prospective purchasers that the Unit will be allowed occupancy. At the time, real estate agents had begun actively showing the Units to prospective purchasers, and Sundance received five separate offers for the purchase of the Units, which totaled over \$1 million, but Sundance was no longer able to respond to these offers. As such, Sundance was unable to mitigate its losses, close the sales, and pay down its multi-million-dollar line of credit. Considering the Project had now been ongoing for three years, this was financially devastating to Sundance.

45. On March 17, 2023, Sundance met with Defendants Kurt Peppel and Aaron Fagerness with the City Engineering Department at the development site to discuss these issues. Peppel and Fagerness represented to Sundance that they would investigate whether inspections

would resume as normal and get back to Sundance. However, upon information and belief, on March 14, 2023, the City had already made the decision to suspend all inspections indefinitely by placing an Engineering Hold on the Building Permits without informing Sundance.

46. Many of the changes demanded by the City had either already been completed by Sundance or addressed in prior agreements. For example, the City's directive to Sundance to remove trees on the west side of the Property was in direct conflict with prior action and agreement by the City, as the City's Department of Housing and Urban Development ("HUD") had previously raised concerns about removal of these trees due to a certain bat species being disturbed, which led to Sundance agreeing to (1) delay construction until after the bat nesting season in late fall (at significant expense to Sundance); and (2) work around the trees once construction resumed and avoid removing these trees unless absolutely necessary (also at significant expense to Sundance) as a condition of HUD providing funds for the Project.

47. Upon information and belief, City Engineering Department personnel, including Defendants Aaron Fagerness and Kurt Peppel, instructed the City Building Service Department not to issue Certificates of Occupancy for the Project as retaliation against Sundance for seeking termination of the Restatement Agreement, despite the City having previously agreed to such termination and Sundance's fulfillment of all obligations under the Settlement Agreement.

48. Upon information and belief, Defendant Paul TenHaken, the Mayor of the City, and/or one of his staffers, had previously directed Fagerness, Peppel, and other City Engineering Department Personnel to instruct the City Building Service Department not to issue Certificates of Occupancy in connection with the Project. Regardless of who gave this directive to City Engineering Department Personnel, upon information and belief, this directive originated from the executive suite of the City, which is led by TenHaken.

49. Upon information and belief, Mayor TenHaken sought retaliation against Sundance for seeking termination of the Restatement Agreement because accessible housing was a key tenet of TenHaken's "2026 Housing Action Plan," which was central to TenHaken's 2022 reelection campaign. Originally pitched in 2019 as a \$1 million fund that would help neighborhoods become or remain affordable, the City had yet to get money into the fund as of May 2021, with TenHaken saying the plan had missed its mark.

50. In or around July of 2021, Matt Tobias, the city's development services manager, told a local publication that the City was now hoping to use the fund to begin purchasing land for housing—as opposed to using the fund to subsidize private development of affordable housing projects, as it had originally agreed to do with Sundance and the Project. Upon information and belief, TenHaken directed City officials to prevent Sundance from selling the Units in order to force Sundance into default with its lenders, so that the City could purchase the Project at a price well below the cost Sundance had incurred to develop the Project; thus allowing the City to sell the Units as part of its affordable housing program, and allowing TenHaken to claim the sale of the Units towards the public housing benchmarks he had campaigned on.

51. Under the City's Code of Ordinances § 160.727, a Certificate of Occupancy must be issued if, after final inspection, it is found that the building, structure, or land complies with the provisions of the City's Ordinances, applicable building codes, and other laws enacted by the City.

52. To address various issues cited by the City as reason for denying Sundance's requests to issue Certificates of Occupancy, Sundance hired engineers to conduct site visits and determine whether the City's concerns were valid. These engineers reported to Sundance that the City's concerns were invalid, as the work was compliant with Project plans and applicable building codes and municipal ordinances.

53. Under the City's Code of Ordinances § 160.727, "If the director finds that no hazard or public nuisance will result from the occupancy of any building, structure, land, or portion thereof, before the same is completed, he or she may issue a temporary certificate of occupancy for the use of a portion or portions of a building, structure or land prior to completion of all the required improvements. The director may require in writing assurances necessary to protect the health, safety, and welfare of the public."

54. None of the issues raised by the City in connection with the City's denial of either permanent or temporary Certificates of Occupancy presented life-safety issues or otherwise provided any valid justification for the City to refuse issuance of either permanent or temporary Certificates of Occupancy for the remaining Units. For example, the City demanded that Sundance remove a grouping of mature trees on the west side of the Property before it would issue occupancy permits, which is clearly not a life-safety issue or public nuisance within the scope or intent of the City's Code of Ordinances § 160.727. Sundance's purported failure to remove these trees was not even in violation of City codes or ordinances, as the City ordinances only prohibited the planting of *new* trees in public drainage rights of way, which was not the case here.

55. Moreover, many of the issues raised by the City related to the same scopes of work, at the same locations, that had previously passed inspection by the City. For example, the City began claiming in or around March of 2023 that the west drainage channel along with riprap and geotextile fabric for property located at 2100 E Walnut St. (the "Property") were not constructed in accordance with the approved plans. However, almost a year earlier, on August 5, 2022, the City issued an Inspection Worksheet for "PWEnv Erosion Settlement Control" for the Property, indicating the City inspector's approval of the construction of the erosion and settlement control improvements for the Property.

56. After Sundance complied with the City Engineers' new demands regarding the drainage channel in spring of 2023—including installing a costly new berm and retaining wall—the City then demanded that Sundance commission a new, and unnecessary, flow analysis and submit revised Development Engineering Plans (“DEPs”) for the Project, once again significantly increasing Sundance’s costs to complete the Project.

57. The City had approved all DEPs for the Project in May of 2021, and Sundance had relied on the approved DEPs for almost two years. The City had never previously demanded any changes to the DEPs or required Sundance complete additional work for the Project to obtain the City’s approval to sell the Units until April 2023—approximately two months after the Restatement Agreement was terminated by mutual agreement pursuant to the February 2023 Settlement Agreement.

58. In another meeting to resolve the ongoing dispute regarding the City’s refusal to issue Certificates of Occupancy for the remaining unsold Units, the City required Sundance to obtain an additional Bond to be able to receive temporary Certificates of Occupancy for the buyers at closings.

59. In September 2023, the City Engineering Department sent an email to Sundance threatening that if Sundance did not complete the extra work demanded by the City, the City would take the Bonds and Irrevocable Letter of Credit (ILOC) from Sundance’s lender, which would result in the financial ruin of Sundance.

60. In addition, the City notified Sundance that it would not issue Certificates of Occupancy for the Units unless and until Sundance obtained a security bond, estimated at approximately \$170,783.00, to cover the cost of remaining, additional Public Improvements the City was now requiring Sundance to complete.

61. Each time Sundance completed work in connection with the City's requested changes to the DEP's and addressed other purported construction issues raised by the City, the City imposed new requirements on Sundance. For example, the City issued a "Revised Street Lighting Plan" to Sundance on November 16, 2023, which required Sundance to replace street lighting on property that was not owned by Sundance or covered in Sundance's agreements with the City. Similarly, the City required Sundance to install new sidewalks on property that was not owned by Sundance, even though Sundance had previously installed, and the City had approved, all necessary sidewalks for the Property.

62. When Sundance requested materials to install the new streetlights required under the "Revised Lighting Plan," the City initially refused.

63. Due to the City's refusal to provide Sundance a fair review and assessment of the Property and related facilities, Sundance proposed that the City select a third-party engineering firm to complete the final inspection(s), which the City refused.

64. The City continued to impose new requirements on Sundance to obtain Certificates of Occupancy into January of 2024—over a year after construction had been substantially completed and nearly a year after the execution of the Settlement Agreement.

65. The City also denied Sundance's request for reimbursement in excess of \$25,000 expended by Sundance to comply with heightened drainage requirements imposed by the City. The City was required to pay Sundance all costs associated with installing drainage and other public utilities under the Dove Ridge SCA, which remained effective following execution of the Settlement Agreement.

66. When Sundance called the City Finance Department to inquire about the status of the requested reimbursement funds, a representative from the Finance Department represented that

the City's Engineering Department had instructed the Finance Department not to issue a check for the requested funds due to pending litigation with Sundance.

67. During the winter of 2023 and early 2024, when Sundance's request for reimbursement of these funds was submitted to the City and denied, there was no pending litigation between the City and Sundance.

68. As of the date of the filing of this Complaint, the City has now issued Temporary Certificates of Occupancy for all the Units. However, the City still refuses to issue Permanent Certificates of Occupancy for ten Units that have still only received a Temporary Certificate of Occupancy. In addition, the City has imposed arbitrary timelines for the expiration of such Temporary Certificates of Occupancy, as opposed to the standard two-year expiration period provided by applicable law.

69. The City further maintains pending holds on the Permanent Certificates of Occupancy that were previously issued on six of the Units—effectively converting those Permanent Certificates of Occupancy to Temporary Certificates of Occupancy, in the sense that the City has claimed it now has the right to revoke these Permanent Certificates of Occupancy if Sundance does not comply with the various additional requirements imposed by the City.

70. At the time of the filing of this Complaint, all Units have either not received a Permanent Certificate of Occupancy or have pending holds on their Permanent Certificates of Occupancy.

FIRST CLAIM FOR RELIEF

**(Regulatory Taking under the Laws of the United States and the State of South Dakota –
All Defendants)**

71. Plaintiff incorporates and realleges all allegations of the paragraphs above.

72. The City seized, without compensation, the property of Sundance by preventing the sale of the Units, as detailed elsewhere in this Complaint.

73. These uncompensated seizures violated the Takings Clause of the Fifth Amendment, made applicable to the States through the Fourteenth Amendment, and well-established notions of Substantive and Procedural Due Process.

74. Without extending constitutionally required just compensation to Plaintiff, the City's deliberate and unjustified refusal to issue Certificates of Occupancy for the Units jeopardized the sustainability of Plaintiff's business and Plaintiff's rights with respect to ownership of the affected real property.

75. The Takings Clause of the Fifth Amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. Amend. V.

76. Similarly, Article VI, § 13, of the South Dakota Constitution provides, "Private property shall not be taken for public use, or damaged, without just compensation." In addition, SDCL 11-7-22.1 states that "[n]o county, municipality, or housing and redevelopment commission...may acquire property by the use of domain...[f]or transfer to any private person, nongovernmental entity, or other public-private business entity...."

77. The Supreme Court of the United States has recognized, in more than one case, that "the government may elect to abandon its intrusion or discontinue regulations." *First Eng. Evangelical Lutheran Church of Glendale v. Los Angeles Cnty., Cal.*, 107 S. Ct. 2378, 2387 (1987) (citing, e.g., *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 5, 104 S.Ct. 2187, 81 L.Ed.2d 1 (1984), and *United States v. Dow*, 357 U.S. 17, 26, 78 S.Ct. 1039, 2 L.Ed.2d 1109 (1958)). Nevertheless, even such temporary takings are not "different in kind from permanent takings, for which the Constitution clearly requires compensation." *Id.*

78. The Takings Clause also bars government actors “from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

79. The City forced Sundance to bear burdens that should be borne by the public-at-large by unreasonably, and unjustifiably, requiring Sundance to bear the cost of constructing public improvements (such as drainage improvements and public streetlights, in contravention of Sundance’s various agreements with the City) to secure Certificates of Occupancy for the Units. The additional requirements imposed by the City with respect to such public improvements bore no reasonable relation to the habitability of the Units in question.

80. “Under the Civil Rights Act of 1871 (42 USC § 1983), a party may recover damages for the ‘deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States caused by any person acting under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory.’” *Swedlund v. Foster*, 2003 SD 8, ¶ 14, 657 N.W.2d. 39, 46 (citing *Tri County Landfill Ass’n, Inc. v. Brule County*, 2000 SD 148 at ¶ 11, 619 N.W.2d. 663, 667). “A claim for violation of civil rights under 42 U.S.C. § 1983 can be brought in either federal or state court.” *Id.*

81. Under 42 U.S.C. § 1988, in any action or proceeding pursuant to 42 U.S.C. § 1983, “the court, in its discretion, may allow the prevailing party...a reasonable attorney’s fee as part of the costs....”

82. Plaintiff respectfully requests that this Court (i) declare the City’s actions were unconstitutional, and (ii) order the payment of just compensation, including, but not limited to, Sundance’s reasonable attorney’s fees.

SECOND CLAIM FOR RELIEF

(Violation of Due Process under U.S. Const. Amend. XIV – all Defendants)

83. Plaintiff incorporates and realleges all allegations of the paragraphs above.

84. The fourteenth amendment guarantees that no state shall “deprive any person of life, liberty, or property, without due process of law.” U.S. Const. Amend. XIV.

85. The Fourteenth Amendment’s Due Process Clause imposes the same procedural due process limitations on the states as the Fifth Amendment does on the Federal Government. *See Arnett v. Kennedy*, 416 U.S. 134 (1974).

86. The due process clause provides both procedural due process and substantive due process protection. Procedural due process is commonly understood to require notice of the deprivation and an opportunity to be heard, though the opportunity to be heard need not always precede the deprivation. *See North Am. Cold Storage Co. v. City of Chicago*, 211 U.S. 306, 29 S.Ct. 101, 53 L.Ed. 195 (1908).

87. When a protected interest is at stake, due process generally requires that the procedures by which laws are applied must be evenhanded, so that individuals are not subjected to the arbitrary exercise of government power. *See Marchant v. Pa. R.R.*, 153 U.S. 380, 386 (1894).

88. Beginning in March of 2023, the City refused to issue Certificates of Occupancy for the remaining, unsold Units, by continuing to impose new and unsubstantiated requirements for the issuance of such Certificates of Occupancy.

89. The City’s authority, under the City’s Ordinances, to deny issuance of Certificates of Occupancy was limited to situations where the City had identified a legitimate life-safety hazard, public nuisance, or violation of the City’s Ordinances or Building Codes at the subject property.

90. However, as detailed elsewhere in this Complaint, the City refused to issue Certificates of Occupancy as a means of retaliation against Sundance for terminating one or more agreements with the City and to force Sundance into completing public improvements on property it did not own at Sundance's expense.

91. At all relevant times, Sundance had a protected property interest in the Property and Units.

92. Consequently, Sundance had a right under the United States Constitution to due process in the City's process for inspections and issuance of occupancy permits.

93. Defendants violated Sundance's due process rights, as described above.

94. The actions of the individual Defendants were made under the color of law.

95. Prior to filing this Complaint, Sundance pursued and exhausted all available remedies under law to seek issuance of the occupancy permits for the Units.

96. The City and the individual Defendants subjected Sundance to the deprivation of its rights to sell and utilize its property.

THIRD CLAIM FOR RELIEF

(Writ of Mandamus under S.D. Codified Laws § 21-29-1 – All Defendants)

97. Plaintiff incorporates and realleges all allegations of the paragraphs above.

98. "The writ of mandamus may be issued by the Supreme and circuit courts, to any inferior tribunal, corporation, board, or person, to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station; or to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded by such inferior tribunal, corporation, board, or person." SDCL § 21-29-1.

99. The purpose of SDCL § 21-29-1 is "to compel the performance of an act which the law specially enjoins as a duty resulting from an office...or to compel the admission of a party to

the use and enjoyment of a right...to which he is entitled, and from which he is unlawfully precluded....” *Anderson v. City of Sioux Falls, Minnehaha Cnty.*, 384 N.W.2d 666, 668 (S.D. 1986) (quoting SDCL § 21–29–1).

100. Under the City’s Code of Ordinances § 160.727, a Certificate of Occupancy must be issued if, after final inspection, it is found that the building, structure, or land complies with the provisions of the City’s Ordinances, applicable building codes, and other laws enacted by the City.

101. None of the issues raised by the City in connection with the City’s refusal to issue, or lift its pending holds on, the Permanent Certificates of Occupancy for the Units provide legal justification for the City refusing to take such action.

102. To address various issues cited by the City as reason for denying Sundance’s requests to issue Certificates of Occupancy (and thereafter, the City’s placing of holds on the Certificates of Occupancy and refusal to release such holds), Sundance hired engineers to conduct site visits and determine whether the City’s concerns were valid. These engineers reported to Sundance that the City’s concerns were invalid, as the work was compliant with Project plans and applicable building codes and municipal ordinances.

103. As such, Defendants’ issuance of Permanent Certificates of Occupancy for those Units that have still only received a Temporary Certificate of Occupancy, and release of its holds on the Permanent Certificates of Occupancy for the remaining Units, constitutes a “performance of an act which the law specially enjoins as a duty” and a “right...to which [Sundance] is entitled,” and therefore, may be compelled by the Court under SDCL § 21-29-1.

104. Pursuant to SDCL § 21-29-1 and the City’s Code of Ordinances § 160.727, Plaintiff, respectfully, requests that the Court compel Defendants to forthwith issue a Certificate of

Occupancy and enjoin Defendants from taking any further action to unlawfully prevent Plaintiff from selling the remaining unsold Project Units.

FOURTH CLAIM FOR RELIEF
(Tortious Interference with Business Relationship or Expectancy under the laws of the State of South Dakota – All Defendants)

105. Plaintiff incorporates and realleges all allegations of the paragraphs above.

106. The South Dakota Supreme Court recognized a cause of action exists under South Dakota law for tortious interference with business relationships or expectancies in *Tibke v. McDougall*, 479 N.W.2d 898 (S.D. 1992). *Landstrom v. Shaver*, 561 N.W.2d 1, 16 (S.D. 1997); see also *Communication Tech. Sys., Inc. v. Densmore*, 1998 SD 87, 583 N.W.2d 125 (S.D. 1998).

107. “This cause of action is the recognition that valid business relationships and expectancies are entitled to protection from unjustified interference.” *Landstrom*, N.W.2d at 18. The tort also protects a party’s interest in stable economic relationships. *Hayes v. N. Hills Gen. Hosp.*, 590 N.W.2d 243, 248 (S.D. 1999) (citing *Maltz v. Union Carbide Chemicals & Plastics Co., Inc.*, 992 F. Supp 286, 312 (SDNY 1998)).

108. “For this tort to occur, the business relationship, if in existence, need not be cemented by written or verbal contract and, whether or not it is in existence, it need not be intended that there be a contract.” *Hayes*, 590 N.W.2d at 248 (citing 45 AmJur2d *Interference* §50 (1969)).

109. As set forth by the South Dakota Supreme Court, the elements for this cause of action are: 1) the existence of a valid business relationship or expectancy; 2) knowledge by the interferer of the relationship or expectancy; 3) an intentional and unjustified act of interference on the part of the interferer; 4) proof that the interference cause the harm sustained; and 5) damage to the party whose relationship or expectancy was disrupted. *Id.*

110. As detailed elsewhere in this Complaint, the City unjustifiably suspended the process for inspecting and issuing occupancy permits for the Units in March of 2023 and,

thereafter, continued imposing a series of new, unnecessary requirements on Sundance before the City would consider issuing occupancy permits.

111. At the time, Sundance had received five offers on the remaining, unsold Units, and Sundance was in the process of showing the Units to other prospective purchasers.

112. The City was aware that Sundance had received multiple offers to purchase the Units, given that Sundance had informed the City of the pending offers at the time the City refused to issue Certificates of Occupancy.

113. Due to the City's refusal to resume the normal process for inspections and issuance of occupancy permits, Sundance could not accept the pending purchase offers, causing significant financial harm to Sundance, as described elsewhere in this Complaint.

FIFTH CLAIM FOR RELIEF
**(Breach of Settlement Agreement under the laws of the State of South Dakota – Defendant,
the City of Sioux Falls)**

114. Plaintiff incorporates and realleges all allegations of the paragraphs above.

115. Pursuant to the Settlement Agreement, the City agreed, in relevant part, to “allow[] Sundance to proceed with developing and selling the Property as a private project without any associated buyer income restrictions or requirements.”

116. As detailed elsewhere in this Complaint, the City has breached its obligations under the Settlement Agreement by hindering and delaying the sale of the Units by refusing, without any reasonable justification, to issue Temporary Certificates of Occupancy for the Units and, thereafter, refusing to issue Permanent Certificates of Occupancy and/or placing holds on the Permanent Certificates of Occupancy for the Units without reasonable justification.

117. Alternatively, the City breached the implied covenant of good faith and fair dealing by failing to exercise its discretionary authority in a reasonable manner in connection with the City Engineering Department's inspection and approval process with respect to the Property.

118. Upon information and belief, City Engineering Department personnel instructed the City Building Service Department not to issue Certificates of Occupancy for the closings as retaliation against Sundance for seeking termination of the Restatement Agreement, despite the City having previously agreed, as part of the Settlement Agreement, to such termination and Sundance's fulfillment of all obligations under the Restatement Agreement.

119. Sundance substantially performed its obligations under the terms of the Settlement Agreement, including, but not limited to, reimbursing the City for the \$238,000 of funding the City previously provided to Sundance for the Project.

120. Sundance has been damaged by the City's breaches of the Settlement Agreement in an amount to be proven at trial.

SIXTH CLAIM FOR RELIEF

(Declaratory Judgment under the laws of the State of South Dakota – Defendant, the City of Sioux Falls)

121. Plaintiff incorporates and realleges all allegations of the paragraphs above.

122. Under the Declaratory Judgment Act, Sundance is entitled to a declaratory judgment holding that the City breached its obligations under the Settlement Agreement.

123. Under SDCL Chapter 21-9, Sundance is entitled to the equitable remedy of specific performance and an Order compelling the City to release its holds on the Certificates of Occupancy for the Units, issue Permanent Certificates of Occupancy for those Units that have still only received a Temporary Certificate of Occupancy, and prohibiting the City from taking any further action to prevent the sale of the Units by Sundance, as contemplated by the Settlement Agreement and the promises the City made therein.

124. Alternatively, Sundance requests that the Court order the City retain third-party engineers to complete any and all remaining inspections in connection with the City's inspection

and approval process and immediately release its holds on the Certificates of Occupancies for the Units upon such inspectors issuing the necessary approvals.

SEVENTH CLAIM FOR RELIEF

(Breach of Contract under the laws of the State of South Dakota – the City)

125. Plaintiff incorporates and realleges all allegations of the paragraphs above.

126. In or around the fall of 2022, due to the rise in interest rates making it difficult for buyers to qualify for the program, Sundance personnel met with new City Housing Manager, Logan Penfield, to negotiate a new contract with the City for the Project. In this meeting, Mr. Penfield agreed to amend the Contract to reduce the terms for buyers to qualify for funding and to provide additional funds of \$49,000 to Sundance Builders at closing to meet the costs of each home.

127. At the time of the closings for the first two Units that were sold, 1801 and 1808 N. Oberg Circle, the City refused to pay Sundance Builders the additional funds agreed to in the fall of 2022.

128. Although the Settlement Agreement that Sundance entered into with the City in February of 2023 purports to release Sundance's claims against the City for the unpaid, additional funds that the City promised, and then refused, to provide after the closing of the first two Units, this release is ineffective because Sundance is entitled to rescission of the Settlement Agreement, as set forth below.

129. Rescission of settlement agreements is an equitable remedy, which should only be granted in extraordinary circumstances. *Sejnoha v. City of Yankton*, 622 N.W.2d 735, 739 (S.D. 2001). Additionally, a party seeking equity must have clean hands, and if not, the party "should be left in the position in which the court finds him." *Id.* (citing *Talley v. Talley*, 1997 SD 88, ¶ 29, 566 N.W.2d 846, 852).

130. A party to a settlement agreement may also be entitled to rescission under SDCL § 53-4-5 and SDCL § 53-4-6 if the other party to the agreement fraudulently induced the party seeking rescission to agree to the settlement. *See id.*

131. Under SDCL § 53-4-5, “Actual fraud” is defined to include, in relevant part, “the following acts committed by a party to the contract, or with his connivance, with intent to deceive another party thereto or to induce him to enter into the contract”: (a) “A promise made without any intention of performing it”; and (b) “Any other act fitted to deceive.” SDCL § 53-4-5.

132. Upon information and belief, and as detailed elsewhere in the Complaint, the City entered the Settlement Agreement with no intention of performing its obligation under the Agreement to allow Sundance to freely sell the Units without being subject to the price controls previously imposed the by the City following Sundance’s timely reimbursement of public housing funds provided by the City to Sundance for the Project.

133. As such, Sundance is entitled to rescission of the Settlement Agreement, and therefore, may pursue claims against the City for its breaches of the Restatement Agreement. *See Sejnoha*, 622 N.W.2d at 739.

134. Moreover, the City breached the Dove Ridge SCA and/or St. Paul SCA for failing to reimburse Sundance for certain cost increases in connection with the City requesting changes to the DEPs and/or other plans, as detailed elsewhere in the Complaint.

135. At all relevant times, Sundance substantially complied with its obligations under its agreements with the City.

136. The breaches of the City’s agreements with Sundance have damaged Sundance in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief as follows:

a. Preliminary and injunctive relief enjoining Defendants, and their officers, agents, servants, employees, and attorneys, from taking any further action to hinder, or prevent, the issuance and/or recognition of Permanent Certificates of Occupancy for all Units, including, but not limited to, requiring Sundance to complete any additional improvements, or modify existing improvements, in connection with the Project;

b. Permanent injunctive relief requiring Defendants, and their officers, agents, servants, employees, and attorneys, to release the holds placed on the Certificates of Occupancy for all the Units and requiring the City to issue Permanent Certificates of Occupancy for all such Units that have yet to receive a Permanent Certificate of Occupancy;

c. Actual and consequential damages against Defendants in an amount to be proven at trial;

d. Attorney's fees and costs;

e. Prejudgment and post-judgment interest; and

f. For such other, further and different relief as the Court may deem just and equitable.

PLAINTIFF REQUESTS A JURY ON ALL MATTERS SO TRIABLE.

VERIFICATION

I declare pursuant to 28 U.S.C. § 1746 and under the penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Jeff Shotkoski, Owner
The Sundance Group, Inc.

Respectfully submitted this 28th day of June, 2024.

OGBORN MIHM QUAINANCE, PLLC,

/s/ Michael J. Ogborn (original signature on file)

Michael J. Ogborn, Esq.

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Counsel for Plaintiff

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

The Sundance Group, Inc.

(b) County of Residence of First Listed Plaintiff Minnehaha (EXCEPT IN U.S. PLAINTIFF CASES)

(c) Attorneys (Firm Name, Address, and Telephone Number)

Ogborn Mihn Quaintance, PLLC
140 N. Phillips Ave, Suite 203, Sioux Falls, SD, 57104

DEFENDANTS

City of Sioux Falls; Paul J. TenHaken; Aaron J. Fagerness; Kurt A. Pennel

County of Residence of First Listed Defendant Minnehaha (IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
2 U.S. Government Defendant
3 Federal Question (U.S. Government Not a Party)
4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

Table with columns for Plaintiff (PTF) and Defendant (DEF) citizenship options: Citizen of This State, Citizen of Another State, Citizen or Subject of a Foreign Country, Incorporated or Principal Place of Business In This State, Incorporated and Principal Place of Business In Another State, Foreign Nation.

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Click here for: Nature of Suit Code Descriptions.

Large table with categories: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, TORTS, PRISONER PETITIONS, FORFEITURE/PENALTY, LABOR, IMMIGRATION, BANKRUPTCY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES. Includes various legal codes and descriptions.

V. ORIGIN (Place an "X" in One Box Only)

- 1 Original Proceeding
2 Removed from State Court
3 Remanded from Appellate Court
4 Reinstated or Reopened
5 Transferred from Another District (specify)
6 Multidistrict Litigation - Transfer
8 Multidistrict Litigation - Direct File

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity): 42 U.S.C. §§ 1983 and 42 U.S.C. §§ 1988
Brief description of cause: Violation of Due Process and Regulatory Takings pursuant to the Fourteenth Amendment

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P. DEMAND \$ 1,500,000 CHECK YES only if demanded in complaint: JURY DEMAND: [X] Yes [] No

VIII. RELATED CASE(S) IF ANY

(See instructions): JUDGE DOCKET NUMBER

DATE SIGNATURE OF ATTORNEY OF RECORD

6/28/24 /s/ Mike Ogborn

FOR OFFICE USE ONLY

RECEIPT # AMOUNT APPLYING IFP JUDGE MAG. JUDGE