

The Order of the Court is stated below:

Dated: February 15, 2023
03:23:34 PM

/s/ JENNIFER A MABEY
District Court Judge



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**IN THE FOURTH JUDICIAL DISTRICT COURT
IN AND FOR WASATCH COUNTY, STATE OF UTAH**

MUSTANG DEVELOPMENT, LLC, a Utah
limited liability company, and PARK CITY
MOUNTAIN BUILDERS, LLC, individually
and on behalf of all others similarly situated,

Plaintiffs,

vs.

TOWN OF HIDEOUT, a Utah municipality,

Defendant.

**ORDER DENYING MOTION TO
ENFORCE ORDER AND FOR
SANCTIONS**

Case No. 220500009

Judge Jennifer A. Mabey

The Motion to Enforce and for Sanctions (the Motion) of Mustang Development, LLC (“Mustang”) came before the Court for an evidentiary hearing on November 18, 2022, after which closing arguments were held on December 2, 2022. The Court took the matter under advisement and issued an oral ruling on January 13, 2023. For the reasons set out below and during the oral ruling, Mustang’s Motion is **DENIED**.

Background

Mustang filed its Motion seeking to enforce the Court's July 2022 Order, in which the Court precluded the Town of Hideout ("Hideout") from proceeding under a blanket policy of denying building permits due to the pending litigation between Mustang and Hideout. Significantly, part of the relief Mustang seeks in its Motion is an order from this Court requiring Hideout to issue building permits for all applications the Town has received for building permits in the Golden Eagle Subdivision.

The Court notes, as discussed at the hearing on Mustang's Motion, that in issuing the July 2022 Order, the Court did not intend to order Hideout to issue specific building permits, but rather to preclude Hideout from refusing to issue permits without a valid basis, and simply out of retaliation for the litigation filed by Mustang against Hideout. The reason the Court took this position in its ruling is that there are any number of reasons why a building permit application may properly be rejected. The July 2022 Order's provision that Hideout was required to "articulate with specificity its reasons" any building permit application was denied (July 2022 Order, at 5) was intended to provide a way to assess whether Hideout rejected building permit applications for valid reasons, or if it did so for pretextual reasons in order to improperly deny building permits for impermissible reasons.

Now, Mustang argues that the process used by Hideout, and the letter it sent to applicants in denying the pending applications, demonstrate that Hideout did not consider each application on its merits and that Hideout is continuing to manufacture pretextual reasons to deny building permits. A significant basis for Mustang's claim is that Hideout has previously issued two building permits in the Golden Eagle Subdivision. It argues that the reasons now asserted for

denying the pending applications must be pretextual because Hideout would not have issued the two permits if the requirements for building permits were not satisfied.

In addition, Mustang asserts that there are really only two items that are necessary for the issuance of building permits: (1) ingress and egress for fire protection, which requires only the minimum width required for fire protection, 20 feet wide, and not the full width identified on the plans for the project; and (2) minimum fire flow, which can be from fire hydrants or some other source, including a fire truck.

Hideout argues that its review of the building permit applications was extensive, and that its responses were intended to comply with the July 2022 Order. Hideout asserts that the reasons it has identified in response to each application are specific to that particular application and constitute valid reasons that the building permits cannot and should not be issued. Hideout also rejects Mustang's argument that the two previous permits demonstrate that the requirements are met for the new applications, pointing to the unique nature of Lot 1 under the terms of the Master Development Agreement, and acknowledging that the issuance of the permit for the second home was an error on the part of Hideout, in part due to the nature of the lot owners' persistence. Finally, Hideout argues Mustang has not met the standard for the relief it requests—namely, holding Hideout in contempt for violating the July 2022 Order, and ordering that it issue building permits for all pending applications.

Analysis

As Hideout noted during the hearing, “in order to prove contempt for failure to comply with a court order it must be shown that the person cited for contempt knew what was required, had the ability to comply, and intentionally failed or refused to do so.” *Von Hake v. Thomas*, 759

P.2d 1162, 1172 (Utah 1988). “These three elements must be proven . . . by clear and convincing evidence in a civil contempt proceeding.” *Id.*

Having considered the evidence elicited at the evidentiary hearing and the parties’ arguments, the Court agrees with Hideout that Mustang has not met its burden at this point.

First, as the Court indicated during the argument held in this matter, the “smoking gun” identified by Mustang—Hideout’s use of a form letter, modified for the various applications—is not clearly an attempt to manufacture baseless reasons, nor is it a blanket denial of all permit applications. An effort to identify standard language to use when a particular condition exists that needs to be remedied is nothing more than an efficient way of dealing with all permit applications consistently, provided the condition or reason itself is a valid one.

Had the denial letters Hideout issued been truly identical, Mustang’s argument would have been more persuasive. But they weren’t. They also included items specific to each application, such as landscape plans that were necessary due to a particular lot’s location or zoning. While the letters did include some of the very same language and reasons for the denials, this is not necessarily problematic from the Court’s perspective either. For example, if each of the applications was for a lot that used a particular road for access, and that road did not meet the necessary requirements, then that condition would clearly apply to each of the applications, and its inclusion in each of the letters makes sense.

Second, the Court has revisited its prior order because Mustang appears, through its Motion and argument, to assert that this Court made a finding that the road and fire flow conditions cannot be valid reasons to deny building permit applications. However, this Court stopped short of making that finding. In the July 2022 Order, the Court indicated that, based

upon the information it had before it when making the decision whether to issue the requested temporary restraining order and preliminary injunction, those issues “appeared to be” pretextual. Most importantly, however, the Court was comfortable granting the requested temporary restraining order and preliminary injunction because it was a prohibition against Hideout doing something that was clearly inappropriate and against public policy—that of refusing to consider building permit applications on their merits and instituting a policy that no permits would be issued at all based on the existence of litigation. The Court made clear even when issuing the requested temporary restraining order and preliminary injunction that if Mustang *had* been asking this Court to order that Hideout issue building permits (as Hideout had argued was the case and Mustang is now doing), the Court would have rejected that request.

The additional evidence elicited at the evidentiary hearing on the Motion is a good example of the reasons why the Court would have rejected such a request. The additional testimony that the Court did not have previously more fully explains that the approval of the road existing at the time that one of the previous building permits was issued was for one home, but not approved for “more than that.” In addition, the testimony regarding fire flow testing being done before the full water system was in place more fully explains the requirement that Hideout has imposed for the development as a whole. And, while storm drain plans may not be a standard requirement for building permits to be issued, it was clearly a condition for building permits to be issued in this particular development.

These are some examples of conditions relied upon by Hideout in denying the building permit applications that the Court does not find to be pretextual at this point, based upon the additional evidence now available to the Court.

Because the Court must be able to conclude that Hideout intentionally violated the July 2022 Order, and cannot do so based upon the evidence, the Court **DENIES** the Motion.

However, the Court notes that one purpose of the July 2022 Order has most certainly been effectuated. The Court agrees with Mustang that Hideout should not be allowed to continue to identify new conditions in order to forestall the issuance of building permits. Each of the lots that had submitted building permit applications and received denial letters prior to Mustang's Motion now has clearly identified conditions that, once met, should result in building permits being issued. If that were not to occur, the Court would reevaluate the intent of Hideout in not having identified all applicable conditions in its initial review of the applications as required under the July 2022 Order.

Mustang now has a complete list of conditions that once met should allow for the issuance of building permits. The Court encourages the parties to work together on resolving those conditions. If those conditions are resolved and building permits still do not issue, then the Court will take a much closer look and make a determination whether its initial view of the evidence presented in connection with Mustang's motion is actually colored by the fact that Hideout would have continued to forestall the issuance of building permits for new reasons not identified, even though it was ordered to list them all in any response to the building permit applications.

**THE COURT'S ELECTRONIC SIGNATURE APPEARS AT THE TOP
OF THE FIRST PAGE OF THIS DOCUMENT**

Approved as to Form:

PARSONS BEHLE & LATIMER

/s/ Scott DuBois _____

Scott A. DuBois

Christian A. Vanderhooft

Attorneys for Plaintiffs

(signed with permission given via email on 2/3/2023)