

The Order of the Court is stated below:

Dated: May 24, 2023  
02:39:18 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**

<p>MUSTANG DEVELOPMENT, LLC, a Utah limited liability company, and PARK CITY MOUNTAIN BUILDERS, LLC, individually and on behalf of all others similarly situated,</p> <p style="text-align: center;">Plaintiffs,</p> <p>vs.</p> <p>TOWN OF HIDEOUT, a Utah municipality,</p> <p style="text-align: center;">Defendant.</p>	<p><b><u>MODIFIED BY THE COURT</u></b></p> <p><b>ORDER REGARDING SECOND TEMPORARY RESTRAINING ORDER</b></p> <p>Case No. 220500009</p> <p>Judge Jennifer A. Mabey</p>
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Before the Court for decision is Plaintiffs’ Second Motion for Temporary Restraining Order (“Motion”). Based on the submissions of the parties, and argument before the Court, and good cause appearing therefore, the Court has determined that Plaintiffs have demonstrated the required elements for the issuance of a Temporary Restraining Order against the Town of

Hideout (“Defendant” or “Town”) and their affiliates, agents, assigns, and any other person(s) acting for or on their behalf.

In particular, the Court hereby GRANTS Plaintiffs’ Motion, in part, on the grounds set forth herein. Plaintiffs filed a motion for temporary restraining order and preliminary injunction, seeking an order from this Court that the Town may not refuse to issue building permits based upon 5 discreet reasons: 1) lack of provision of a storm drain; 2) additional pressure testing of pipes; 3) failure to construct gravel shoulders along interior roads; 4) the condition of the access road; and 5) failure to provide an improvement completion assurance.

As a preliminary matter, Defendant opposes the motion on the basis that Motion may not be properly before the court because Plaintiffs have not exhausted their administrative remedies. As to this issue, the Court finds that it has jurisdiction to address the claims, and agrees with Plaintiffs that while there are statutory implications and general procedures that might normally be in place in terms of applying for building permits, Plaintiffs’ claims are largely related to contractual issues. The parties have attended mediation, which was a contractual requirement, and as such the issues are now properly before the Court. Having considered this threshold issue, and having ruled that the Court has jurisdiction, the Court considered the Motion on its merits and rules as set forth below.

Before addressing the merits of the Motion, the Court notes that after the first request for a temporary restraining order or injunction in this matter, Rule 65A of the Utah Rules of Civil Procedure has been amended and the Court finds that it is the amended version that applies to Plaintiffs’ request. Specifically, under Rule 65A as it is now effective, Plaintiffs are required to

show that there is: 1) a substantial likelihood that Plaintiffs would prevail on the merits of the underlying claim; 2) that Plaintiffs would suffer irreparable harm unless the order or injunction issues; 3) that the threatened injury to Plaintiffs outweighs whatever damage the proposed order or injunction may cause the Town of Hideout; and 4) that the order or injunction, if issued, would not be adverse to the public interest.

In the context of the Plaintiffs' First Motion for TRO, the Court determined that a refusal to issue building permits based upon pretextual reasons, in order to hide a true motive of punishing Plaintiffs for pursuing litigation against the Town, would meet all of the requirements of Rule 65A. In that analysis, the Court didn't necessarily find specific reasons that may or may not be pretextual. The Court found that as it was styled, Plaintiffs' First Motion for TRO was seeking a temporary restraining order and injunction preventing the Town from refusing to issue building permits as a result of the litigation that Plaintiffs were involved in with the Town. Obviously, there was an underlying email that indicated that that was the Town's position. The Court has indicated previously that it is not convinced about the explanation for that email, and so the Court found that it was appropriate to enter an injunction prohibiting the Town from refusing to issue building permits for some reason that was not legitimate or not punitive – in other words acting in an arbitrary and capricious manner, which is prohibited by law. The Court found that in that circumstance, that the Plaintiffs had met their burden of showing the need for a preliminary injunction.

Plaintiffs are now seeking an injunction which has required the Court to specifically evaluate the five discrete ~~discreet~~ bases upon which the Town continues to deny the issuance of

building permits. This ruling will address each of those in turn, specifically with regard to the element in Rule 65A(e)(1), which is whether there is a substantial likelihood that the Plaintiffs will prevail on the merits of the underlying claims. The Court does not need to go into a new analysis of the prongs listed in 65A(e)(2), 65A(e)(3), and 65A(e)(4) because it finds that those would still be met under the circumstances alleged by the Plaintiffs, and Plaintiffs need only demonstrate a substantial likelihood that they will prevail on the merits of the underlying claims for the five specific discrete ~~discreet~~ issues.

The Court is cognizant and sensitive to the fact that there are many nuances and requirements for issuing building permits, and this Court is uncomfortable entering a blanket order requiring that the Town of Hideout issue permits. Plaintiffs understood that, and styled their Motion in such a way that this Court is still not making an Order that the Town of Hideout is required to issue permits, but the Court is making orders as to whether there are certain conditions that the Town of Hideout can use to deny the issuance of the permits. Having considered the evidence, the Court is persuaded that there are certain conditions that the Town of Hideout continues to impose upon Plaintiff that are either unduly restrictive, unsupported by controlling agreements and or statutes, or inconsistent with prior positions taken by the Town.

Given the history and context of this case, the Court finds that four of the requirements identified by Plaintiffs are not appropriate bases that the Town can use to avoid issuing building permits within Plaintiffs' development of Golden Eagle.

The first issue is whether there must be additional pressure testing of pipes. As an initial matter, the Court notes that this requirement does appear to be a new one imposed by the Town.

The pressure testing of pipes was discussed very early on, and prior testing was performed and approved by the Town's appointed water operator. The Court finds that this additional pressure testing requirement is something that wasn't initially identified by the Town as a reason to deny building permits. The Court previously indicated that the Town be meticulous and thorough in its review of the requests for building permits, and explained that identifying new requirements once Plaintiffs have satisfied the initial list of requirements is a bit akin to moving the goalposts – or in this context gives more of an appearance that the Town of Hideout is simply seeking to avoid issuing the building permits and coming up with new reasons to do so, as the previously identified bases are resolved. But largely, because of the fact that it was the Town's own appointed water operator that was involved in the original pressure testing, this Court finds that this is a requirement that the Town cannot impose as a reason for the denial of a building permit.

The second issue is whether gravel shoulders must be installed along the 24-foot interior roads prior to the issuance of building permits. As a predicate matter, the Court finds that the Town cannot impose the requirements of Appendix D to the International Fire Code to Plaintiffs' development of Golden Eagle. Appendix D existed at the time that the subdivision was approved, but the Town had not adopted it. While the Court finds that changes or updates to the International Building Code, for example to reflect updated guidelines related to safety, are different than the Town deciding to adopt standards that already existed, the Town hadn't seen fit to incorporate Appendix D into its building requirements until after Plaintiffs obtained the vested rights that accompanied the acceptance of the plat for the Golden Eagle subdivision. Accordingly, the Court orders that the lack of gravel shoulders is not an acceptable basis for

denying the issuance of building permits. For purposes of issuing building permits, the road should be evaluated pursuant to the 20-foot requirement set forth in the Wildland Urban Interface Code.

The third issue is the status and condition of the access road. The Court finds that a paved road is not required by the fire code prior to the issuance of building permits, but that a road with an appropriate all-weather surface that supports the weight of a fire control apparatus is sufficient. The Court further finds that the road has been shown to be an appropriate all-weather surface that is sufficient for the issuance of building permits by virtue of the report from a geotechnical engineer. The Court understands that there was at least one instance where this road appeared to not be in a condition to allow for access without putting major ruts in the road, but has not had any information to rebut the inspection that was performed by a licensed geotechnical engineer that the road was an appropriate all-weather surface and sufficient for fire suppression apparatus. So accordingly, the Town may not deny building permits based upon the condition of the access road, so long as the access road is maintained in a sufficient condition to meet the inspection standards applied by a licensed geotechnical engineer or similar professional.

The fourth issue is the improvement completion assurance. The imposition of this requirement now, after the plat was recorded, is not consistent with Utah Code, or the Town Code applicable to Golden Eagle, which indicates that the Town would have needed to impose the performance bond prior to the recording of the subdivision plat for Golden Eagle. The Court finds that the Code section relied upon by the Town actually applies to warranty bonds for completed improvements, and that the Code section relied upon by Plaintiffs is the one that most

currently applies to the current status of the project. Accordingly, the Court finds that the Town cannot continue to refuse to issue building permits based upon an alleged failure to post a form of improvement completion assurance.

The fifth and last issue before the Court is the storm drain plan. The Court is very cognizant of the fact that this type of plan can be very critical to the appropriate planning of a subdivision. The Court can take judicial notice of the fact that as a state right now, we are very concerned about water flows, snow melt, and the impact that excess water can have upon our developments. There is a state of emergency in our state, regarding the expected flood waters that we are going to be experiencing because of snowmelt, and so this is something that the Court is taking very seriously. On the one hand, a storm drain plan obviously needs to be in place, and the Court believes that there is evidence that indicates that there is one. What the Court is unclear about even after having gone back and trying to trace through affidavits and transcripts and things that have occurred, is the procedure by which this particular storm drain plan needs to be submitted. Whether it becomes the condition of the issuance of a permit, or whether it is something that has a different process by which it would not impact the issuance of a permit. And, regarding the language that was included about a storm drain plan prior to the issuance of permits, the Court is still not clear as to whether that's dicta or whether it has some impact upon being a condition for the issuance of permits here. The Court requests the benefit of additional evidence, or at least evidence that is focused and presented in a cohesive way, so that it can actually make a decision on that condition. For that reason, the Court will delay making a ruling as to that condition, until after a further hearing on the matter.

In making this ruling, the Court is not making a ruling as to that condition. The Court believes a further hearing is necessary for the Court to make an informed decision and the Court is not willing to make it without being very sure of what is required and what has been done because the Court would not want to make a decision where the Court requires building permits to be issued and then we don't have a sufficient plan in place to protect those units as they're being built and being faced potentially with runoff water that could damage a lot of peoples' homes.

In making this ruling, the Court is not making any finding as to what requirements may *be* imposed by the Town of Hideout prior to the issuance of Certificates of Occupancy. The Court has made its determination based upon a standard that both parties have acknowledged, and that is that issuing building permits is different and at a lower standard than issuing a Certificate of Occupancy. This ruling is focused on issues related to fire suppression, which is the existence of the roads, and the fact that there are hydrants and that there is sufficient pressure that existed at the time of the testing to support fire suppression measures.

This ruling is also not intended to supplant the secondary access agreement between the parties, which limits the total number of building permits to 30 until such time as the second access road is completed. The Court knows that Plaintiffs have foreshadowed their claim that the Town may now be attempting to prevent construction of the secondary access as a way to block the issuance of more building permits, but that is an issue for another day.



For the reasons set forth herein, Plaintiffs motion is GRANTED as to the four issues identified, and the remaining item of the storm drain plan is deferred until the Court can receive additional evidence.

-----END OF ORDER-----

*Pursuant to Rule 10(e) of the Utah Rules of Civil Procedure, the Court's entry of this Order is evidenced at the top of the first page.*

APPROVED AS TO FORM:

PARSONS BEHLE & LATIMER

*/s/ Scott A. DuBois*

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*/s/ Robert C. Keller (signed with permission)*

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