STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: June 10, 2014]

GARY FERNANDES	:	
	:	
v.	:	**C.A. No. PC 12-5459**
	:	
THOMAS BRUCE, *in his capacity as Finance Director of the City of Woonsocket***;**	:	
ALAN LECLAIRE, NORMAN FRECHETTE, KATHRYN DUMAIS, RICHARD FAGNANT, RICHARD MASSE, *and* **ALLEN RIVERS,** *in their capacities as Members of the City of Woonsocket Zoning Board of Review*	:	

DECISION

PROCACCINI, J. Before this Court is Thomas Bruce, in his capacity as Finance Director of the City of Woonsocket, and the City of Woonsocket Zoning Board of Review's (Zoning Board) (collectively Appellees) Motion to Vacate Decision. Appellees ask this Court to vacate its Decision pursuant to Super. R. Civ. P. 60(b) in order to permit settlement of this matter. For the reasons set forth below, this Court grants Appellees' Motion.

I

Facts and Travel

In 2010, Woonsocket city officials met with Gary Fernandes (Appellant) to negotiate Appellant's purchase of property located at 167 Blackstone Street in Woonsocket, Rhode Island. The property, known as St. Francis House, was a 22,300 square foot assisted living facility located on a 34,978 square foot lot owned by the Roman Catholic Diocese of Providence (Diocese). In 2009, the Diocese closed the facility and put the property up for sale. Over time, the lot had fallen off the city's tax rolls and into a state of disrepair. To encourage the Appellant

to purchase and revitalize the building, city officials drafted a tax agreement whereby the property taxes would be reduced until 2020 to help offset the cost of rehabilitating the building, including fire code compliance. The Town Council voted to pass this tax agreement on September 20, 2010.

At the time, this lot was located in an R4 zone that allowed multi-family dwelling units but limited the number of units by lot area. The Woonsocket Zoning Ordinances stated the "[m]inimum required lot area shall be six thousand (6,000) square feet for single–family dwelling, plus four thousand (4,000) square feet for each additional dwelling unit on the same lot." Woonsocket, R.I. Zoning Ordinances § 7.5-1 (1994). This provision allowed eight units to be constructed on a 34,978 square foot lot.

On July 9 and July 23, 2012, the Zoning Board held hearings regarding Appellant's third application for a dimensional variance for an additional ten units. The Zoning Board denied the application, and the Appellant appealed the Zoning Board's decision. Subsequently, a hearing was held before the Superior Court, Carnes, J., on November 21, 2012, regarding Appellant's motion to remand this matter to the Zoning Board. Justice Carnes remanded the matter to consider Allen Rivers' (Rivers), a Zoning Board member, alleged conflict of interest and for further proceedings to review and to refine any findings of fact. After nearly two months had passed without a hearing on these issues, Appellant filed a motion to adjudge the Appellees in contempt for failure to comply with Judge Carnes's order and requested enforcement of the prior order. A hearing was then held before the Superior Court, Procaccini, J., on January 24, 2013. At the conclusion of the hearing, the parties agreed to speak with Rivers to ask if he would recuse himself. (Hr'g Tr. 18:22-19:16, Jan. 24, 2013.)

In February 2013, the Rhode Island Ethics Commission (Ethics Commission) issued an opinion regarding the specific question of "whether the Code of Ethics prohibit[ed] [Rivers'] participation in the Zoning Board's reconsideration of [the] variance application . . . ." Op. R.I. Ethics Commission No. 2013-9 (Feb. 2013). The Ethics Commission concluded that:

> "a member of the Woonsocket Zoning Board of Review, a municipal appointed position, is not prohibited by the Code of Ethics from participating in the Zoning Board's reconsideration of a variance application, notwithstanding his business associate's past appearance as a remonstrant in that matter and the possibility that his business associate may appear again during the public comment portion of the variance hearing."

Id. The opinion, however, was "strictly limited to the Code of Ethics and provide[d] no opinion as to whether the Woonsocket City Charter, the Woonsocket Code of Ordinances or any other statutes, regulations, rulings or policies prohibit[ed] his participation in this matter." Id. The Ethics Commission also "provide[d] no opinion regarding whether [Rivers], in his quasi-judicial capacity as a member of the Zoning Board, should be disqualified from participating because of bias or prejudice." Id. (citing Champlin's Realty Assocs. v. Tikoian, 989 A.2d 427 (R.I. 2010)).

The Zoning Board eventually held a hearing on March 11, 2013, to consider whether Rivers should recuse himself due to a conflict of interest. (Hr'g Tr. 5:1-6:5, Mar. 11, 2013.) At that hearing, the Zoning Board concluded that Rivers did not need to recuse himself. Rivers then stated his findings of fact in support of the denial of Appellant's application on the record. Id. at 16:18-22:15.

Following the Zoning Board's decision, Appellant filed a timely appeal. On October 21, 2013, this Court issued a Decision holding that Appellant did not receive a fair trial and an unbiased hearing, as guaranteed by the Due Process clause, at the hearing. The Decision was based, in part, on alleged prehearing statements Rivers made indicating that he had prejudged

Appellant's zoning application and intended to vote against it. Accordingly, this Court remanded the Zoning Board's decision for a new hearing on Plaintiff's zoning application de novo.

Following this Decision, this Court was flooded with filings, including Defendant Rivers' Motion for Relief from the Decision and Order Filed on October 21, 2013 and for Sanctions, filed on his behalf by his attorney representing him in his individual capacity, and Plaintiff's objection to this Motion for Relief.[1] On December 12, 2013, Joseph Carroll, the city solicitor representing the Woonsocket Zoning Board, entered a withdrawal of appearance and a different city solicitor, Michael Marcello, began representing the Zoning Board.

On December 13, 2013, this Court entertained oral argument by the parties. The thrust of Appellees' argument in briefs and at oral argument was that this Court should vacate the October 21, 2013 Decision because Rivers had contested those prehearing statements in affidavits submitted to this Court in January and February of 2013. Appellees stated that the Decision was widely reported in the media and "had a devastating effect on Mr. Rivers' reputation." Subsequently, the parties informed this Court that they agreed to a settlement where the City of Woonsocket, as authorized by the Woonsocket Budget Commission, would approve the zoning variances asked by Plaintiff in his initial zoning application and issue all necessary building permits. The settlement agreement was subject to the condition that the October 21, 2013 Decision be vacated. Appellees then filed this Motion to Vacate Decision.

[1] This Court also received a letter on February 10, 2014 from James Cournoyer, an objector to Appellant's zoning application, asking this Court to reconsider the October 21, 2013 Decision. Mr. Cournoyer is not a party to this action nor has he formally filed this letter in accordance with Rhode Island's Rules of Civil Procedure and Evidence. See Greensleeves, Inc. v. Smiley, 68 A.3d 425, 435 (R.I. 2013) ("It is well settled that error inheres in the action of a trial justice who relies either in whole or in part on matters not in evidence."). As such, his letter and attached documents hold no weight with this Court. See id.

II

Standard of Review

The Rhode Island Supreme Court has held that the Superior Court Rules of Civil Procedure, consistent with the nature of an appellate proceeding, apply to zoning board appeals. Carbone v. Planning Bd. of Appeal of S. Kingstown, 702 A.2d 386, 388-89 (R.I. 1997). Rule 60(b) of the Rhode Island Rules of Civil Procedure states that "[o]n motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for . . . (6) any other reason justifying relief from the operation of the judgment."

Rule 60(b)(6) vests the Superior Court with broad power to vacate judgments whenever appropriate to accomplish justice. Casa DiMario, Inc. v. Richardson, 763 A.2d 607, 612 (R.I. 2000); Brown v. Amaral, 460 A.2d 7, 11 (R.I. 1983) (citing Bendix Corp. v. Norberg, 122 R.I. 155, 156-57, 404 A.2d 505, 506 (1979)). "It is well settled that courts have inherent power to amend or vacate their judgments" and that "a motion to vacate a judgment is left to the sound discretion of the Superior Court justice . . . ." Esposito v. Esposito, 38 A.3d 1, 4 (R.I. 2012) (citing Ryan v. Roman Catholic Bishop of Providence, 941 A.2d 174, 187 (R.I. 2008); O'Hearn v. O'Hearn, 506 A.2d 78, 79 (R.I. 1986). This rule, however, "is not intended to constitute a catchall" and applies only in extraordinary circumstances that would justify relief and prevent "manifest injustice." In re Markese T., 701 A.2d 1028 (R.I. 1997); Bendix Corp., 122 R.I. at 158, 404 A.2d at 506; Vitale v. Elliott, 120 R.I. 328, 331, 387 A.2d 1379, 1382 (1978).

The moving party bears the burden of showing that relief should be granted from a final judgment. McBurney v. Roszkowski, 875 A.2d 428, 439 (R.I. 2005); Iddings v. McBurney, 657

A.2d 550, 553 (R.I. 1995). Specifically, the moving party must show "'by appropriate evidence of circumstances that would establish a uniqueness that puts the case outside of the normal and usual circumstances accompanying failures to comply with the rules.'" McDermott v. Terreault, 659 A.2d 119, 120 (R.I. 1995) (quoting Bendix Corp., 122 R.I. at 158, 404 A.2d at 506).

III

Discussion

Appellees ask this Court to vacate the Decision on two grounds. First, Appellees argue that the Decision was based on disputed facts and that the Decision adversely affected the reputation of an individual Zoning Board member. Specifically, Appellees argue that the Decision accepted as fact that Rivers made pre-hearing statements, prejudging the zoning case. Appellees maintain that Rivers denied making those statements in an affidavit, which this Court notes was not disclosed to the Court at the time of the Decision. Second, Appellees argue that vacating the Decision will settle the case and conserve judicial and public resources.

As an initial matter, this Court is confounded by Appellees' argument that the level of publicity and public interest that accompanied this published judicial Decision, which is a public record, constitutes a legal basis which a Court may consider in vacating its decision. Appellees cite no legal authority for such a proposition, and this argument does not fall within the ambit of an "exceptional circumstance" that would justify relief. See generally McDermott, 659 A.2d at 120 (explaining that Rule 60(b)(6) may afford relief from judgment when a case does not fall within the "normal and usual circumstances").

Moreover, the October 21, 2013 Decision was made based upon the record submitted to the Court at that time. It is well settled that "a party has a duty 'to spell out its arguments squarely and distinctly . . . [rather than being] allowed to defeat the system by seeding the record

with mysterious references . . . hoping to set the stage for an ambush should the ensuing ruling fail to suit.'" McCoy v. Mass. Inst. of Tech., 950 F.2d 13, 22 (1st Cir. 1991) (citing Paterson–Leitch Co. v. Mass. Mun. Wholesale Elec. Co., 840 F.2d 985, 990 (1st Cir. 1988); see also Kensington Rock Island Ltd. P'ship v. Am. Eagle Historic Partners, 921 F.2d 122, 124–25 (7th Cir. 1990) ("Arguments raised in [court] in a perfunctory and underdeveloped . . . manner are waived on appeal."). Here, the city solicitor who represented Rivers at the time of the Decision, Joseph Carroll, did not argue or offer any evidence that Rivers disputed the allegation that he had prejudged the zoning application before the hearing, and this Court will not speculate as to why the city solicitor did not raise this argument. Therefore, this Court concludes that Appellees waived the argument that the comments made by Rivers were in dispute. See McCoy, 950 F.2d at 22.

This Court also notes that the former city solicitor representing the Zoning Board at the time of the Decision did not participate in the proceedings following the issuance of the October 21, 2013 Decision. The Court had many questions related to the development and submission of the record that accompanied the original zoning appeal. Consequently, these questions remain unanswered.

This Court, however, does recognize Rhode Island's long standing policy of encouraging settlement of disputes. See Ryan, 941 A.2d at 186 ("It is very much an important part of the policy of the courts of Rhode Island (and courts in general) to encourage the amicable settlement of disputes, whether by mediation or otherwise."); Homar, Inc. v. N. Farm Assocs., 445 A.2d 288, 290 (R.I. 1982) ("Our policy is always to encourage settlement. Voluntary settlement of disputes has long been favored by the courts."); Arruda v. Sears, Roebuck & Co., 273 B.R. 332, 345 (D.R.I. 2002) ("[I]n Rhode Island, courts favor the settlement of litigation disputes."); see

also Fed. Data Corp. v. SMS Data Prods. Grp., Inc., 819 F.2d 277, 279 (Fed. Cir. 1987) ("It is long established that courts favor dispute resolution through voluntary settlements.") (citing Williams v. First Nat. Bank of Pauls Valley, 216 U.S. 582 (1910).

Here, the parties have assured this Court that vacating the Decision will effectuate settlement of this matter. All of the parties have agreed to the settlement terms and have presented this Court with a proposed consent judgment. According to the proposed consent judgment, the City of Woonsocket, as authorized by the Woonsocket Budget Commission, would approve all necessary zoning variances and issue building permits so that Appellant can proceed with the construction of the seventeen apartments on his property at 167 Blackstone Street in Woonsocket. The tax pilot program that was approved by the City Council on September 20, 2010 would also be placed back into effect. This proposed consent judgment is consistent with the goals set forth in this Court's original Decision and brings a vigorously contested matter to a conclusion. Moreover, ending this litigation would save one of Rhode Island's most distressed municipalities time, resources, and money. See generally, Ryan, 941 A.2d at 186. Therefore, this Court finds that ending this contested matter and saving a distressed municipality valuable resources constitutes an "extraordinary circumstance" that justifies vacating the prior Decision. See generally Brown, 460 A.2d at 11.

Such actions to vacate a published judicial decision when a case is settled are not unprecedented. See In re GTE Reinsurance Co. Ltd., No. PB-10-3777 (R.I. Super. Ct. Jan. 12, 2012) (unpublished); see also, Fed. Data Corp., 819 F.2d at 280 (stating that "[w]hen the parties have settled their differences, then the appropriate course of action is for the appellate court to dismiss the action and to vacate the judgment below"). For example, in Wal-Mart Stores Inc., the First Circuit considered whether to vacate a district court order when the parties had settled

the case on appeal. Wal-Mart Stores, Inc. v. Rodriguez, 322 F.3d 747, 748 (1st Cir. 2003). In that case, the federal district court granted a preliminary injunction, prohibiting the Secretary of Justice of Puerto Rico from pursuing an antitrust action filed against Wal-Mart Stores. Id. After the Secretary of Justice appealed, the parties jointly filed a motion to vacate the preliminary injunction. Id. at 748-49. The First Circuit agreed to remand the case to the district court to vacate the preliminary injunction, reasoning that "[i]t would be inequitable here to require the Secretary [of Justice] to choose between the strong public interest in settling the case amicably and her interest as chief enforcement officer in removing adverse precedent." Id. at 750. The First Circuit also stated that Wal-Mart had an interest in ending litigation, which "frustrated its need for business certainty." Id.

Similarly, in Fed. Data Corp., the Federal Circuit held that the General Services Board of Contract Appeals (Board) abused its discretion in not dismissing its decision when the parties had reached a settlement. Fed. Data Corp., 819 F.2d at 280. In that case, the parties entered into a settlement agreement, which was conditioned upon the Board dismissing its decision. Id. at 278. In holding that the Board should have dismissed its decision, the Federal Circuit Court explained that "to require the parties who have settled their differences to continue to litigate (including further proceedings in this court) is unjust not only to the parties, but is wasteful of the resources of the judiciary." Id. at 280; see also Arevalo v. Ashcroft, 386 F.3d 19, 20-21 (1st Cir. 2004) (remanding the case to the district court for vacatur because equitable considerations favored vacatur); Jackson v. Norman, 91 F. App'x 696, 697 (1st Cir. 2003) (granting the request to vacate a district court order where "[t]he request to vacate [was] not sought for strategic reasons or to unfairly advantage either side . . . but rather to avoid unnecessary litigation and to preserve the rights of the parties should the matter not be resolved").

Furthermore, unlike appellate courts, trial courts do not make precedent upon which the public relies, and therefore, vacatur would not undermine the integrity of the judicial process.[2] See Impulse Packaging, Inc. v. Sicajan, 869 A.2d 593, 600 n.14 (R.I. 2005) (stating that "lower court decisions are neither binding on [the Supreme Court], nor do they establish precedent"); Univ. of R.I. v. Dep't of Emp't & Training, 691 A.2d 552, 555 (R.I. 1997) (explaining that the Supreme Court "declares the law in Rhode Island and that law must be followed by the lower courts of our judicial system"); McCann v. McCann, 121 R.I. 173, 176, 396 A.2d 942, 944 (1979) (stating that "[s]ubject to constitutional limitations, it is the prerogative of [the Supreme Court] to determine the law . . . [and its] decisions become mandatory precedent for all other tribunals"); see also State of Cal. ex rel. State Lands Comm'n v. Super. Ct., 900 P.2d 648, 654 (Cal. 1995) (stating that "a trial court judgment does not establish precedent"). Moreover, "the judicial economies achieved by settlement at the [trial] court level are ordinarily much more extensive than those achieved by settlement on appeal." U.S. Bancorp Mortgage Co. v. Bonner Mall P'ship, 513 U.S. 18, 28 (1994); see generally Richard A. Rosen, Settlement Agreements in Commercial Disputes § 21.04 (2013) (stating that courts have maintained that trial courts may vacate their decisions more freely than appellate courts upon settlement). As one court explained, "a stipulated reversal does not trivialize or render meaningless a trial court's work . . . [T]he paramount purpose of litigation is to resolve disputes. If that goal is achieved, even after judgment, the trial court's essential function has been fulfilled." Neary v. Regents of Univ. of

[2] Although this Court recognizes that it is sitting in an appellate capacity when reviewing a zoning board decision, its function is more similar to that of a trial court in that its decision is not precedent upon which the general public relies. See generally Sicajan, 869 A.2d at 600 n.14 (stating that lower court decisions do not establish precedent).

California, 834 P.2d 119, 124 (Cal. 1992). For these reasons, this Court vacates its October 21, 2013 Decision. See Casa DiMario, Inc., 763 A.2d at 612.

IV

Conclusion

As this Court exercises its inherent power to vacate its Decision in this matter, let there be no misunderstanding as to its reasons for taking this extraordinary action. Those reasons are: it brings a protracted and vigorously contested matter to a finite conclusion; the settlement of this matter will undoubtedly avoid the financially distressed City of Woonsocket from devoting significant additional resources in time and money in litigating this matter; and lastly, and most importantly, the Court's action recognizes and respects our Supreme Court's long standing policy of encouraging the voluntary settlement of disputes whenever possible.

Vacating the previous Decision should not be construed as a retraction, correction or acknowledgement of any error or omission regarding its original Decision. The October 21, 2013 Decision was made based upon the record submitted to the Court at that time. This Court further recognizes that the lengthy and extensive negotiations and settlement of this matter have accomplished what its Decision sought to accomplish—a fair and unbiased review of the merits of Appellant's zoning application.

In conclusion, the October 21, 2013 Decision of this Court is vacated pursuant to and conditioned upon the terms of the settlement presented to this Court. Counsel shall submit an appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Addendum Sheet

TITLE OF CASE:	Gary Fernandes v. Thomas Bruce, et al.
CASE NO:	PC 12-5459
COURT:	Providence County Superior Court
DATE DECISION FILED:	June 10, 2014
JUSTICE/MAGISTRATE:	Procaccini, J.
ATTORNEYS:	
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