STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

[FILED: August 22, 2019]

THE CLAMBAKE CLUB OF NEWPORT	**:**	
	:	
v.	**:**	**C.A. No. PC-2014-3111**
	:	
JANET COIT, in her capacity as DIRECTOR of the DEPARTMENT OF ENVIRONMENTAL MANAGEMENT	**:**	

DECISION

MCGUIRL, J. The Clambake Club of Newport (the Club) asks this Court to reconsider a narrow portion of its decision filed on January 12, 2017. Specifically, the Club asks this Court to reconsider its ruling which held that permissive language within the Department of Environmental Management (DEM) rules did not require DEM to reopen or extend the public comment period if substantial new questions arose during the original public comment period prior to denial of a draft permit. The issue came before the Court on appeal by the Club from a final decision of the DEM, denying the Club's application for a Rhode Island Pollutant Discharge Elimination System permit (RIPDES). Jurisdiction is pursuant to G.L. 1956 § 42-35-15 and Super. R. Civ. P. 60(b)(6).

I

Agency Appeal

Previously before this Court, the Club argued that DEM violated RIPDES Rule 45(a) in its proceedings on the Club's RIPDES permit application, because it failed to reopen the comment period pursuant to subsection (3) of the rule. In addition, the Club argued that DEM was erroneous in its belief that it could essentially bypass RIPDES Rule 45(a) due to its permissive language and

summarily deny a draft permit based upon substantial new questions presented. Moreover, the Club contended that DEM was prescribed limited discretion in applying *only* one or more of three enumerated actions within RIPDES Rule 45(a) if substantial new questions were presented during the public comment period yet summarily denied its permit without additional opportunity for the Club to respond to newly submitted evidence. The rule in question before this Court was RIPDES Rule 45(a), which provides in pertinent part:

> "If any data, information or arguments submitted during the public comment period . . . appear to raise substantial new questions concerning a permit, the Department may take one or more of the following actions:
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> (1) Prepare a new draft permit appropriately modified under Rule 36;
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> (2) Prepare a revised statement of basis under Rule 38, a fact sheet or revised fact sheet under Rule 39 and reopen the comment period; or
>
> (3) Reopen or extend the comment period under Rule 41 to give interested persons an opportunity to comment on the information or arguments submitted." RIPDES Rule 45(a).

After extensive briefing, the Court held that the term "may" is a discretionary provision, which indicated that DEM was not obligated to reopen the comment period prior to denial as posited by the Club. RIPDES Rule 45(a) states that DEM "may take one or more of the following actions[,]" one of which is the reopening of the comment period if it determines that substantial new questions have been raised. However, the Court found no language indicating mandatory imposition of one of the three enumerated actions prescribed in RIPDES Rule 45(a).

Moreover, the Court cited the General Assembly's contraposition of the term "shall" in the subsequent section of the same rule which evidenced the General Assembly's intent to allow DEM to choose how it should handle substantial new questions that may arise. *See* RIPDES Rule 45(b)

(stating "[c]omments filed during the reopened comment period shall be limited to the substantial new questions that caused its reopening" and the accompanying public notice "shall define the scope of the reopening"). The Court concluded that in light of the fact that RIPDES Rule 45(a) is discretionary rather than mandatory, DEM did not err in deciding not to reopen the public comment period, even if, as the Club contends, substantial new questions were raised during the regular comment period.

II

Motion for Reconsideration

Before this Court, on the Motion for Reconsideration, the Club now argues that the Court "misperceived" the Club's argument regarding RIPDES Rule 45(a). (Mot. Recons. at 2). Conversely, DEM objects to the motion before the Court, arguing that Superior Court Rules of Civil Procedure 60 is not the appropriate avenue to reargue issues already presented to the Court absent mistake, inadvertence, newly discovered evidence or other reasons as set forth in Rule 60. The Club filed its Motion for Reconsideration on January 24, 2017, and a hearing was held on October 11, 2018, with counsel for the Club, DEM, and Amicus Russell Dulac present.

The Club now argues that it did not contend that DEM is required in all cases to reopen the comment period under RIPDES Rule 45(a)(3). Rather, the Club submits that DEM availed itself of RIPDES Rule 45 but then failed to adhere to one or more of the provided options which must follow when substantial new questions concerning a permit are raised during the public comment period. Here, the Club argues that DEM and the Court erred in construing RIPDES Rule 45(a) as not requiring either a new draft permit be issued under Rule 46, a revised statement of basis under Rule 38 and/or reopening of the public comment period. Further, the Club argues that if the Court had construed RIPDES Rule 45(a) as mandatory, a new draft decision with an explanation of

changes should have been issued and the Club should have been permitted to reply to new questions raised during an extended public comment period.

Conversely, DEM argues that this Motion for Reconsideration is not within the procedural bounds of Rule 60 of the Superior Court Rules of Civil Procedure, and such motions will not act as an avenue for parties to reargue issues already presented to the Court during the course of the proceedings. Furthermore, DEM argues that the Club has not brought forth any extraordinary circumstances or new evidence which would warrant a review of the Court's Decision. However, DEM did address the Club's substantive claim in its Reply Memorandum arguing that RIPDES Rule 45(a) is not the only means to address comments received during the public comment period. RIPDES Rule 46, rather than RIPDES Rule 45, may be applied—either granting or denying a permit—if DEM determines that action is appropriate based on comments received. Moreover, DEM avers that the Club's insistence on amendment and reissuing of draft permits as the only resultant mechanism for denial based on public comments would create a perpetual cycle with eventual granting of the permit as the only possible end result.

The Rhode Island Superior Court Rules of Civil Procedure do not explicitly recognize a motion for reconsideration. *Flanagan v. Blair*, 882 A.2d 569, 574 (R.I. 2005). Rather, the Supreme Court "treat[s] motions for 'reconsideration' . . . as the equivalent of motions to vacate under Rule 60(b)." *Id.* at 574 (citing *Keystone Elevator Co., Inc. v. Johnson & Wales University*, 850 A.2d 912, 916 (R.I. 2004)). Specifically, Rule 60(b) states, in pertinent part:

> "On 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 the following reasons:
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> "(1) Mistake, inadvertence, surprise, or excusable neglect;

> "(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
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> "(3) Fraud, misrepresentation, or other misconduct of an adverse party;
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> "(4) The judgment is void;
>
> "(5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which the judgment is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or
>
> "(6) Any other reason justifying relief from the operation of the judgment." Super. R. Civ. P. 60(b).

The Supreme Court has recognized that "[i]t is perhaps an understatement to say that Rule 60(b)(6) rarely is invoked with success." *McLaughlin v. Zoning Bd. of Review of Town of Tiverton*, 186 A.3d 597, 609 (R.I. 2018) (explaining that there is a dearth of cases in Supreme Court jurisprudence finding vacation of judgment proper under this subsection of the rule). Indeed, Rule 60(b)(6) "does not function as a 'catchall' provision or as a substitute for a timely appeal but rather requires that circumstances be extraordinary to justify relief." 1 Robert B. Kent et al., *Rhode Island Civil and Appellate Procedure* § 60.8 (2018-19 ed.). Significantly, courts may only grant motions pursuant to Rule 60(b)(6) under "unique circumstances to prevent manifest injustice." *Id*. "It is the burden of the moving party to convince the trial justice that legally sufficient grounds exist to warrant the vacation of judgment under Rule 60(b)." *McBurney v. Roszkowski*, 875 A.2d 428, 439 (R.I. 2005) (citing *DeFusco v. Giorgio*, 440 A.2d 727, 730 (R.I. 1982)).

This Court finds the arguments brought forth by the Club in furtherance of its Motion for Reconsideration repetitive and unpersuasive. Additionally, the Court recognizes its authority under Rule 60 of the Superior Court Rules of Civil Procedure to entertain a motion to reconsider, and

that such motion is addressed to the '"trial justice's sound discretion."' *Allen ex rel. Allen v. South County Hospital*, 945 A.2d 289, 293 (R.I. 2008) (quoting *Keystone Elevator Co.*, 850 A.2d at 916). However, the Court is still bound by the parameters of Rule 60 and cannot grant such a motion based strictly upon the Club's disagreement with the Court's previous Decision. Moreover, the Club has not provided this Court with any evidence of mistake, newly discovered evidence, fraud, or any other reason justifying relief from the operation of the judgment. *See* Super. R. Civ. P. 60(b). Furthermore, the Club has failed to direct the Court's attention to any extraordinary circumstances which would justify relief. *See Archetto v. Smith*, 179 A.3d 144, 146 (Mem) (R.I. 2018). Rather, the Club has rehashed arguments which were extensively briefed and reviewed prior to this Court's initial Decision affirming DEM's interpretation of the rule.

Additionally, this Court notes that the Club had the opportunity to submit additional comments on the record regarding the "mixing zone issue" raised during the initial public comment period. Moreover, the initial comment period was extended for an additional fifteen days after the DEM hearing, precisely so the Club and community at large had an opportunity to respond to comments received. Consequently, the Club did not respond during the fifteen-day extension, nor did it request a further extension of the public comment period as was its right according to the rules. As such, the Club's argument—that it did not have an opportunity to review and rebut substantial evidence brought forth by the Friends of Easton's Point, Inc. on the final day of the extended comment period—is of no moment, as the Club had ample opportunity to submit its own evidence or request an extension but chose not to do so.

III

Conclusion

For the reasons stated, the Court denies the Club's Motion for Reconsideration which it has treated as a Motion to Vacate Judgment. Counsel shall submit the appropriate order for entry.

RHODE ISLAND SUPERIOR COURT

Decision Cover Sheet

TITLE OF CASE:	The Clambake Club of Newport v. Janet Coit, et al.
CASE NO:	PC-2014-3111
COURT:	Providence County Superior Court
DATE DECISION FILED:	August 22, 2019
JUSTICE/MAGISTRATE:	McGuirl, J.
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