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February 10, 2022

BY EMAIL

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Re: Appeal of Land Court Denial of the Town's Motion to Vacate Stipulation of Dismissal and Town Meeting Vote

Dear Attorneys Durning and Riley:

Following our letter dated February 3, 2022 and the hearing before Judge Goodwin in the Superior Court, we write to (1) bring to your attention further legal support for the Town's appeal of the denial of its Motion to Vacate the Stipulation of Dismissal; and (2) convey the Hopedale Citizens'¹ understanding of the status of the litigations, including that the Board of Selectmen may feel it necessary to schedule a vote at Town Meeting to seek authorization to purchase the lesser portion of the Forestland as set forth in the Settlement Agreement. In the event the Board moves forward with the Town Meeting vote, it is critical that the Town seek an injunction against the imminent land clearing activities of the Railroad Defendants until such Town Meeting vote is held. Including that the request for an injunction is also pending appeal of the Land Court's order, which turned in part on the lack of the Town Meeting vote, provides the Land Court with the jurisdiction to enter such injunction. The Hopedale Citizens will join and support the Town in any such request to the Land Court.

At the hearing before Judge Goodwin on February 9, 2022, the Court ruled from the bench and followed that ruling with a docket order this morning that the Court felt it no longer has jurisdiction over the matter and denied further extension of its injunction against land clearing activities by the Railroad Defendants. The Railroad Defendants have further indicated that as of February 14, 2022, it will not longer agree to maintain the status quo and that the Railroad Defendants will resume clearing the c. 61 Forestland that remains in dispute.

¹ The Hopedale Citizens include, without limitation, Elizabeth Reilly, Carol J. Hall, Hilary Smith, David Smith, Donald Hall, Megan Fleming, Stephanie A. McCallum, Jason A. Beard, Amy Beard, Shannon W. Fleming, and Janice Doyle.

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With that, it is of the utmost importance that the Town return to the Land Court and seek an injunction pending appeal. As previously stated, we are of the strong opinion that the Land Court's denial of the Town's Motion to Vacate is clear reversible error of law. In fact, we are even more confident in that opinion now. As mentioned previously, while Rule 60(b) motions "have elements that call for the exercise of judicial discretion," when the record leaves no room for discretion the Appeals Court "would rule that discretion was abused." Paresky v. Bd. of Zoning Appeal of Cambridge, 19 Mass. App. Ct. 612, 616 (1985). Paresky provides yet another clear example of the Appeals Court, under Rule 60(b), vacating judgment that was entered without the necessary municipal authority – there the attorney lacked the authority to act on behalf of the board. Here, the Board lacked the authority to act on behalf of the Town to purchase the portion of the land. The Appeals Court also noted that the nature of the action matters: "It should not escape attention that the action, defended by a public agency, affects public rights." Paresky, 19 Mass. App. Ct. at 616.

We have also obtained and enclosed herein a copy of the Massachusetts Appeals Court 1:28 Order reversing the denial of the City of Salem's Motion to Vacate Judgment in the previously cited Salem Highland Dev. Corp. v. City of Salem, 27 Mass. App. Ct. 1423 (unpublished 1:28 memorandum) (1989). The Order provides further support for the proposition that it is reversible error to deny a Rule 60(b)(6) motion to vacate judgment where judgment entered by an agreement that lacks municipal authority. In Salem, the Appeals Court vacated judgment because the underlying settlement agreement divesting the city of land was entered into without the necessary approval from the city council. The Appeals Court ordered that "the motion judge should have vacated the consent judgment as unauthorized." Order at 7. It is important to note that the judgment was reversed solely on the ground that the agreement was unauthorized, and the Court did not need to look any further into the settlement agreement, its other terms, consideration or severability. This provides solid grounds for renewal of the Town's Motion to Vacate and/or appeal of the Land Court's Order here.

It matters not that the Land Court's judgment entered by way of a stipulation of dismissal. See, e.g., Reznik v. Dist. Ct. Dep't of Trial Ct., 456 Mass. 1001 (2010) (Supreme Judicial Court held that the order denying the motion for relief from judgment was appealable, even though the underlying judgment was entered by stipulation); see also, Tuite & Sons, Inc. v. Shawmut Bank, N.A., 43 Mass. App. Ct. 751, 755 (1997) (Mass. R. Civ. P. 60(b)(6) is proper avenue to seek relief from a stipulation of dismissal with prejudice).

Finally, we appreciate that both the Land Court, in denying the Town's Motion to Vacate, and the Superior Court, in allowing the Hopedale Citizens' Motion for Judgment on the Pleadings on Count I, refer to the open question that the ineffective Settlement Agreement could potentially be ratified through Town Meeting authorization. While we maintain that the potential for the ratification at Town Meeting is not a valid ground to deny the Town's Motion to Vacate and is reversible error, we recognize the untenable position in which it places the Board. We understand that the Board may feel it necessary to hold the Town Meeting vote to, at a minimum,

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put that open question to bed. As observed by Judge Goodwin in her orders, in the event that the Town Meeting vote fails, the Town will retain its funds and its ability to pursue enforcement of its exercised and recorded c. 61 Option. For this reason, in the event the Board does schedule a Town Meeting vote, the Hopedale Citizens request that it be scheduled and held expeditiously and that the Board move in the Land Court immediately to enjoin the impending Railroad activity and alteration of the Forestland pending the Town Meeting Vote and pending appeal of the Land Court's Order. In the event the Board is unable to obtain authorization from Town Meeting, the Board can then renew its Motion to Vacate and/or present that issue through its appeal.

We stand ready to support the Board moving forward and are happy to discuss these important issues with you.

Very truly yours,



Harley C. Racer
David E. Lurie

Enclosure

cc: Diana Schindler, Hopedale Town Administrator
Town of Hopedale Board of Selectmen
Client

11/27
COMMONWEALTH OF MASSACHUSETTS.

27
87-2852

APPEALS COURT FOR THE COMMONWEALTH,

At Boston, October 30, 1989.

IN THE CASE OF

SALEM HIGHLAND DEVELOPMENT CORPORATION

vs.

CITY OF SALEM & another

pending in the SUPERIOR

Court for the County of ESSEX

ORDERED, that the following entry be made in the docket; viz.,—

**The order denying relief from judgment is reversed.
The judgment is vacated.**

By the Court,

Nancy Truck Foley, **CLERK.**

October 30, 1989.

OVER

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

89-P-144

SALEM HIGHLAND DEVELOPMENT CORP.

vs.

CITY OF SALEM & another. ¹✓

MEMORANDUM AND ORDER UNDER RULE 1:28

Mike Stasinos is the president and treasurer of the plaintiff development corporation. (A. 19) In March, 1986, Stasinos filed an application with the Salem Board of Appeal ("board") for a variance to permit construction of 163 residential condominium units on land owned by Stasinos. On May 27, 1986, the board denied Stasinos' application; Stasinos appealed to the Superior Court. G. L. c. 40A, § 17. On August 27, 1986, an amended consent judgment entered by which the board granted Stasinos a variance to construct 140 condominium units in exchange for Stasinos' agreement to "grant to the City of Salem a parcel of land totalling 3.95 acres . . . for soccer fields," and to comply with several other conditions. (A. 12-16, 18) The land was duly deeded to Salem and the deed recorded. (A. 36-37)

In February, 1987, Salem's building inspector ordered work on the condominium project halted and refused to issue further building permits. (A. 21) On April 1, 1987, Stasinos filed a verified complaint for

¹✓ Salem Board of Appeal.

civil contempt against Salem and the board, seeking damages, attorney's fees and an order that the remaining building permits be issued. (A. 26-27) On December 28, 1987, the plaintiff filed this action against Salem and the board seeking damages for Salem's alleged taking of 3.95 acres without compensation. (A. 35-38) On July 5, 1988, in settlement of both actions, attorneys for all parties agreed to amend the August 27, 1986, consent judgment to provide that Stasinov, rather than deed 3.95 acres to Salem, would limit use of the 3.95 acres to a 40,000 square foot two story retail and office building, and would pay the Salem City Trust Fund Commission \$75,000 for "the use of Youth Soccer or other non-private athletic organizations"; Salem agreed to issue a building permit. (A. 42-43) Pursuant to Mass.R.Civ.P. 70, 365 Mass. 836 (1974), judgment entered on July 14, 1988, ordering "that the City of Salem is divested of title to the [3.95 acres] and title thereto is hereby vested in [the plaintiff], a Massachusetts corporation with a usual place of business in Lynn, Massachusetts." (A. 46)

On August 12, 1988, the plaintiff conveyed the 3.95 acre tract to The Olde Village Mall, Inc. (Supp. A. 91-92) That same day, Eastern Savings Bank granted The Olde Village Mall, Inc. a \$2,800,000 construction loan secured by the 3.95 acre tract (A. 67); to date, \$751,109 has been advanced to The Olde Village Mall, Inc.

On October 26, 1988, Salem moved for relief from the

judgment because Salem's city solicitor failed to obtain the consents of various city officials prior to entering into the July 14, 1988, consent judgment, and because the city council did not approve transfer of the property to the plaintiff. (A. 84) ^{3/} The plaintiff responded with minutes of a January 27, 1988, board meeting authorizing the city solicitor to settle its litigation with Stasinos and the plaintiff (A. 68-81), and the affidavit of the city solicitor attesting that he twice notified the finance committee chairman of the July 14, 1988, consent judgment. (A. 82) A motion judge denied Salem's motion for relief from judgment; Salem appeals.

Massachusetts Rules of Civil Procedure 60 (b)(6), 365 Mass. 828 (1974), allows a court, "[o]n motion and upon such terms as are just," to relieve a party from final judgment for "reason[s] justifying relief." The ruling on a motion for relief from judgment is committed to the sound discretion of the trial judge. Berube v. McKesson Wine & Spirits Co., 7 Mass. App. Ct. 426, 429 (1979). Rule 60 (b)(6) motions for relief from judgment must be brought within a reasonable time after the entry of judgment, see Parrell v. Keenan, 389 Mass. 809, 815 (1983), and must demonstrate extraordinary circumstances justifying relief. Thibbitts v. Crowley, 405 Mass. 222,

^{2/} We treat the affidavits of city officials, dated September, 1988, as before the judge on Salem's October motion for relief from judgment. The plaintiff has not argued otherwise.

226 (1989). Salem, relying on Bowers v. Board of Appeals of Marshfield, 16 Mass. App. Ct. 29 (1983), argues that this case presents such extraordinary circumstances because the board exceeded its authority in agreeing to transfer title to the 3.95 acre lot to the plaintiff. We agree.

In Bowers v. Board of Appeals of Marshfield, Marshfield's public works department sought a site plan approval to build a wastewater treatment plant and sewage pumping station. The board of appeals granted the site plan approval, but abutters appealed. In an effort to settle the appeal quickly, town selectmen, in exchange for the abutters' agreement to withdraw their appeal, intervened and agreed to entry of a consent judgment permanently enjoining use of lots next to the treatment plant for parking. Four years after judgment entered, the town selectmen moved for relief from judgment under rule 60(b)(4); the trial court denied relief. We reversed, holding that the selectmen's agreement to a restriction that only the inhabitants of Marshfield could impose (i.e., perpetual encumbrance of town land amounting to disposal or alienation), constituted exceptional circumstances justifying relief from judgment under rule 60(b)(6). Id. at 32-35. Here, as in Bowers, the Salem board of appeal, in an effort to resolve its litigation, agreed to transfer 3.95 acres to the plaintiff. (A. 70-81) However, the power to alienate and

dispose of city real estate is vested in the Salem city council. G. L. cc. 39, § 1, and 40, § 3. Sancta Maria Hosp. v. Cambridge, 369 Mass. 586, 592 (1976).

Affidavits of Salem's city council president and the city clerk demonstrate that the city council did not approve the land transfer; the plaintiff does not argue otherwise. Therefore, as the board could not agree to transfer the land to the plaintiff, Salem's motion for relief from judgment should have been allowed. Bowers v. Board of Appeals of Marshfield, supra. The plaintiff's argument that the judgment vesting title to 3.95 acres in it was merely correcting an original consent judgment which was made in excess of the board's authority is unavailing. That original judgment is final; the plaintiff has not sought relief from the judgment pursuant to Mass.R.Civ.P. 60(b), or by appeal. See Pavlik v. Dmytryck, 6 Mass. App. Ct. 915, 916 (1978); Huntington v. Zoning Board of Appeals of Hadley, 12 Mass. App. Ct. 710, 711 (1981). Indeed, Stasinos sought to convey the land to Salem in order to obtain a zoning variance. Under these circumstances, the plaintiff may be estopped to deny the validity of that consent judgment. See Selectmen of Stockbridge v. Monument Inn, Inc., 14 Mass. App. Ct. 957, 958-959 (1982).

Furthermore, a consent judgment may be vacated when that judgment was entered without the authority of a party. Parrell v. Keenan, 389 Mass. at 813-816. See

also Paresky v. Board of Zoning Appeal of Cambridge, 19 Mass. App. Ct. 612, 613-615 (1985). While "[i]n practice the assumed authority of attorneys of record to agree upon the amount of judgment to be entered, or to any other disposition of the suit, must be recognized by the court, and when entered of record such agreements are binding upon the parties, . . . when the court is informed that they have been made against the express prohibition of the client, and the parties can be put in statu quo; . . . the court has the power to vacate any judgment founded upon them." Medford v. Corbett, 302 Mass. 573, 574 (1939), quoting from Dalton v. West End Street Ry., 159 Mass. 221, 223 (1893). See also Precious v. O'Rourke, 270 Mass. 305, 307-308 (1930). A Salem city ordinance provides that the city solicitor "may settle any [law]suit against the city upon approval of the mayor, the president of the city council and the chairman of the finance committee." (A. 64) It is undisputed that neither the mayor nor Salem's city council president approved the settlement agreement divesting the city of the land. (A. 62, 85) Moreover, the city solicitor's averment that he notified the finance committee chairman of the settlement agreement does not contradict the chairman's sworn statement that he did not approve the

settlement. Therefore, the motion judge should have vacated the consent judgment as unauthorized.³

The order denying relief from judgment is reversed. The judgment is vacated.

By the Court (Brown, Perretta & Warner, JJ.),

Nancy Truck Saley
Clerk

Entered: October 30, 1989.

³ In light of our ruling on Salem's first two justifications for relief from judgment, we find it unnecessary to rule on Salem's contention that G. L. c. 44, § 53A (conditioning sale of city owned real estate upon payment of an amount in lieu of taxes) requires relief.