

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

KENT, SC.

SUPERIOR COURT

(FILED: May 9, 2016)

TOWN OF COVENTRY; :
WESTWOOD ESTATES I & II, INC.; :
W.W. III DEVELOPMENT, INC.; :
“WE” HOMEOWNERS :
ASSOCIATION; and SANDRA E. :
BEAUCHAMP :
V. :
T. MIOZZI, INC. :

C.A. No. KC 10-1574

DECISION

“It takes less time to do a thing right, than it does to explain why you did it wrong.”
- Henry Wadsworth Longfellow

PROCACCINI, J. This matter is before the Court on the Town of Coventry’s (the Town or Coventry) motion to vacate a consent judgment entered on April 18, 2011 (the Consent Judgment). The Town moves to vacate the Consent Judgment pursuant to Rules 60(b)(4) and (6) of the Superior Court Rules of Civil Procedure.1 The Consent Judgment resolved a dispute between the Town and T. Miozzi, Inc. (T. Miozzi or Defendant) that arose between the parties in 2010. That dispute concerned the operation and effect of T. Miozzi’s asphalt plant, which is in close proximity to a residential community in Coventry. For the reasons set forth herein, the Consent Judgment is hereby vacated.

1 A motion under Rule 60(b) is technically called a motion for “Relief from Judgment or Order.” Since both parties refer to the present motion as a “Motion to Vacate,” the Court will do the same.

I

Facts and Travel

T. Miozzi has owned and operated an asphalt plant in Coventry since 2004. While the plant is located in an industrial park, it is also in close proximity to a residential neighborhood, Westwood Estates I & II (the Neighborhood). In 2010, the Town and the Neighborhood (collectively, Plaintiffs) filed a three-count Amended Complaint against T. Miozzi seeking to declare that T. Miozzi was operating at night in violation of a noise ordinance. See Am. Compl. ¶¶ 20-26. The Town and the Neighborhood also sought damages under a theory of private nuisance, as well as injunctive relief. See id. at ¶¶ 27-36.

Plaintiffs moved for a preliminary injunction to enjoin T. Miozzi from operating during certain hours. Following an evidentiary hearing, the Superior Court denied the motion. The Court found that there was not a substantial likelihood that the Plaintiffs would be successful at trial and that the balancing of equities favored T. Miozzi's position. See generally Prelim. Inj. Decision Tr., Nov. 17, 2010. On April 18, 2011, the Court entered a Consent Judgment that declared the parties' respective rights concerning T. Miozzi's operations.² The Consent Judgment was signed by Frederick G. Tobin, then Town Solicitor for Coventry (Solicitor Tobin), and John A. Pagliarini, Jr., attorney for T. Miozzi.

Both the Town and T. Miozzi operated and abided by the Consent Judgment without opposition until late 2015. For example, T. Miozzi was cited numerous times for failing to give

² The Consent Judgment gave T. Miozzi the right to operate the plant from 7:00 a.m. to 7:00 p.m. Consent Judgment ¶¶ 3-4 (Apr. 18, 2011). Additionally, T. Miozzi could operate during the hours of 7:00 p.m. to 7:00 a.m. (nighttime operations) from April 1 to December 15. Id. at ¶ 4. However, such nighttime operations were regulated by two conditions: (1) T. Miozzi was required to provide at least eight hours of notice to the Coventry Police Department; and (2) T. Miozzi could only conduct nighttime operations on thirty occasions a year. Id.

adequate notice prior to commencing nighttime operations as required under the Consent Judgment. See Def.'s Mem., Exs. 5-6, 10. In January 2015, the parties debated whether the overnight storage of hot liquid asphalt in silos amounted to operating the plant under the Consent Judgment. See Def.'s Mem., Exs. 8, 10. Furthermore, in May 2013, the Coventry Town Council (Town Council) discussed the relationship between an amended ordinance, one that regulates the closing hours for asphalt plants, and the Consent Judgment. See Town Council Mins. at 6-8, May 13, 2013. The amended ordinance does not permit nighttime operations. Coventry, R.I., Code of Ordinances § 153-4(A) (2013). However, a member of the Town Council concluded, “[t]hese hours of operation will clearly work with regard to the second plant, and the first plant will be limited by the consent order.” Town Council Mins. at 8, May 13, 2013.

At some point in 2015, it was brought to the Town's attention that the Consent Judgment may have been entered into without proper authorization from the Town Council. As a result, a closed session was held on November 23, 2015 to discuss the effects of the unauthorized Consent Judgment. T. Miozzi was notified on November 24, 2015 that the Consent Judgment had not been authorized by the Town Council. See Def.'s Mem., Ex. 12. On December 7, 2015, the Town Council considered a motion to adopt or reject the Consent Judgment. The Consent Judgment was ultimately rejected 4-1.³ Town Council Meeting Tr., 49:20-50:22, Dec. 7, 2015.⁴

On December 22, 2015, the Town moved to vacate the Consent Judgment under Rules 60(b)(4) and (6) of the Superior Court Rules of Civil Procedure. Plaintiffs argue that the Town Council did not give Solicitor Tobin the authority to enter into the Consent Judgment. Likewise,

³ Notably, Councilman Kerry McGee (Councilman McGee) was the only member of the Town Council that voted to adopt the Consent Judgment. Town Council Meeting Tr., 50:3-22, Dec. 7, 2015. Councilman McGee is also the only member of the current Town Council to have served on the Town Council in 2011.

⁴ All references to the transcript of the December 7, 2015 hearing before the Town Council are referenced as T1.

Plaintiffs posit that the Town Council never voted to adopt the Consent Judgment after it was entered and actually rejected it in December 2015. As a result, Plaintiffs maintain, the Consent Judgment is not binding on the Town.

In opposition, Defendant first contends that the Court should not consider the Town's motion to vacate as the motion was not brought within a reasonable period of time, as required under Super. R. Civ. P. 60(b)(6). Second, Defendant argues that even if the motion is considered timely, the Consent Judgment is binding on the Town. Defendant maintains that it is clear from the testimony of Councilman McGee and former Council President Gary Cote (former President Cote) at the December 7, 2015 meeting that the Town Council gave Solicitor Tobin the express authority to enter into the Consent Judgment. In the alternative, Defendant claims that the Town Council ratified the Consent Judgment by abiding and enforcing such for almost five years without opposition.⁵

II

Standard of Review

Rule 60(b) of the Superior Court Rules of Civil Procedure (Rule 60(b)) provides, 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: . . . (4) the judgment is void; . . . or (6) any other reason justifying relief from

⁵ Westwood Estates (Westwood) also submitted a memorandum in support of the motion to vacate. Westwood argues that Solicitor Tobin did not have express authority to enter into the Consent Judgment because, under the Town's Charter, the Town Council can only give express authority during an open meeting. It further contends that a review of the minutes do not indicate that such authority was ever discussed, let alone given. Westwood also maintains that T. Miozzi was charged with having the knowledge of Solicitor Tobin's authority. Finally, Westwood posits that the doctrine of equitable estoppel is not applicable as estoppel is only available against a municipality when the agent acted within his or her actual authority.

the operation of the judgment. The motion shall be made within a reasonable time . . .”

The moving party bears the “burden of convincing the trial court that legally sufficient grounds, as specified under Rule 60(b), existed to warrant vacating the judgment.” DeFusco v. Giorgio, 440 A.2d 727, 730 (R.I. 1982). The Rhode Island Supreme Court has “long recognized the sanctity of final judgments entered by the various courts in this state and, in particular, consent judgments . . . [A]bsent fraud, mutual mistake, or actual absence of consent, a judgment entered by consent cannot be [set aside] . . .” Mansolillo v. Emp. Ret. Bd. of Providence, 668 A.2d 313, 316 (R.I. 1995). “Although a consent judgment receives a court’s imprimatur, the judgment is in essence a contract between the parties to the litigation . . .” In re McBurney Law Servs., Inc., 798 A.2d 877, 882 (R.I. 2002) (quoting Trahan v. Trahan, 455 A.2d 1307, 1310 (R.I. 1983)) (internal quotation marks omitted).

III

Analysis

As a threshold matter, the Court must first consider whether the motion to vacate is timely under Rule 60(b). Defendant argues that approximately five years have passed since the Consent Judgment was entered. Plaintiffs contend that they brought the motion to vacate almost immediately after the Town Council voted to reject the Consent Judgment. Moreover, in relying on authority in the context of laches, Plaintiffs argue that courts are reluctant to bar a suit on timeliness when the matter concerns issues of public interest.

Rule 60(b) states that a motion must be brought within a “reasonable time.” In interpreting this standard, the Rhode Island Supreme Court has found guidance in federal case law. See In re Quigley, 21 A.3d 393, 401 (R.I. 2001). In In re Quigley, the Court acknowledged that “what is reasonable ‘depends upon the circumstances of the particular case.’” Id. at 401-02

(quoting Farm Credit Bank of Balt. v. Ferrera-Goitia, 316 F.3d 62, 66 (1st Cir. 2003)). The Court should be sure to consider “the length of the delay, the justification for it, and the prejudice (if any) associated with the granting of relief.” Id. at 402 (quoting Farm Credit Bank, 316 F.3d at 66) (internal quotation marks omitted).

Approximately four and a half years had passed before the Town filed the present motion to vacate the Consent Judgment. Present Town Solicitor, Nicholas Gorham (Solicitor Gorham), stated at the Town Council meeting on December 7, 2015 that he was prompted to review all of the consent judgments entered into on the Town’s behalf after discovering that another consent judgment was entered without authority. See T1 at 11:5-22. He further stated that he plans on bringing additional unauthorized consent judgments to the Town Council’s attention in the future. Id. at 11:17-22. While Solicitor Gorham does not state the precise date he discovered that the present Consent Judgment may have been entered into without proper authority, the Court is cognizant of the fact that Solicitor Gorham was not appointed Town Solicitor until 2014. Furthermore, a review of the record indicates that the members of the 2011 Town Council believed that Solicitor Tobin had proper authority, thus explaining why the issue was never investigated by the past Town Council members. See id. at 11:24-12:9; 17:23-19:14.

One can reasonably assume that sifting through three years of Town Council minutes would take some time. From the time the issue was discussed in closed session—November 23, 2015—to the date the motion was filed—December 22, 2015—only one month passed. Consequently, it appears to the Court that the Town Council worked diligently to address the issue once discovered. Compare with In re Quigley, 21 A.3d at 402 (finding the timing of the motion unreasonable when the moving party filed the motion more than two years after having notice that he should have received a portion of a trust share); and Farm Credit Bank, 316 F.3d at

65-67 (finding the same when the moving party filed two and a half years after they became aware of the action against them).

The Court does note that vacating the Consent Judgment rewinds the tape back to April 2011, placing the parties in the same situation they were in prior to entering into the Consent Judgment. However, the Consent Judgment only permitted T. Miozzi to operate at nighttime a total of thirty times a year, see Consent Judgment ¶ 4, and a slew of neighbors still complain about the negative effects of nighttime operations, see Town Council Mins. at 6-7, May 13, 2013. The Court finds any possible prejudice to T. Miozzi to be minimal when compared to the negative effect of binding a municipality to an unauthorized agreement. Accordingly, the Court chooses to exercise its discretion and consider the motion to vacate the Consent Judgment.

A

Rule 60(b)(4)

Plaintiffs cursorily state that the Consent Judgment is void under Rule 60(b)(4). “[R]elief is available under Rule 60(b)(4) only when the court entering the judgment lacked jurisdiction, or the court’s actions amounted to ‘a plain usurpation of power constituting a violation of due process.’” Labossiere v. Berstein, 810 A.2d 210, 215 (R.I. 2002) (quoting Allstate Ins. Co. v. Lombardi, 773 A.2d 864, 869 (R.I. 2001)). The record is devoid of any evidence that indicates that the Superior Court lacked jurisdiction to enter the Consent Judgment back in April 2011. Furthermore, there is no indication that the Superior Court acted in violation of due process in doing the same.

Plaintiffs’ main argument centers on the fact that Solicitor Tobin allegedly did not have actual authority to enter into the Consent Judgment. In Casa DiMario v. Richardson, 763 A.2d 607, 611-13 (R.I. 2000), a case dealing with a similar issue, the Supreme Court vacated a prior

unauthorized consent judgment entered into by a town solicitor pursuant to Rule 60(b)(6). There, the Court cited Richardson v. Smith, 691 A.2d 543, 546 (R.I. 1997) for the proposition that “lack of consent” is an “extraordinary circumstance” that a court can consider when ruling on a motion to vacate under Rule 60(b). Casa DiMario, 763 A.2d at 612-13. Rule 60(b)(6) is the proper avenue to afford relief in extraordinary circumstances. See Bendix Corp. v. Norberg, 122 R.I. 155, 158, 404 A.2d 505, 506 (1979).

B

Rule 60(b)(6)

A Rule 60(b)(6) motion should only be granted in “unique circumstances to prevent manifest injustice.” Bailey v. Algonquin Gas Transmission Co., 788 A.2d 478, 482 (R.I. 2002) (quoting Vitale v. Elliott, 120 R.I. 328, 332, 387 A.2d 1379, 1382 (1978)) (internal quotation marks omitted). The Supreme Court has further recognized that the ground was not intended as a “catchall” and relief should only be afforded in extraordinary circumstances. See Bendix Corp., 122 R.I. at 158, 404 A.2d at 506 (quoting 1 Kent, R.I. Civ. Prac. § 60.08 at 456 (1969)). Plaintiffs urge this Court to vacate the Consent Judgment, arguing that Solicitor Tobin entered into the Consent Judgment without actual authority from the Town Council. Defendant, on the other hand, maintains that the Town Council gave Solicitor Tobin express and unlimited authority to enter into the Consent Judgment during an executive session. In the alternative, Defendant argues that the Town Council ratified the Consent Judgment by abiding and enforcing such for almost five years without opposition.

The Supreme Court has repeatedly held that “the authority of a public agent to bind a municipality must be actual.” Warwick Teachers’ Union Local No. 915 v. Warwick Sch. Comm., 624 A.2d 849, 850-51 (R.I. 1993). Therefore, any actions or representations by an agent

without actual authority are not binding on a municipality. See Sch. Comm. of Providence v. Bd. of Regents for Educ., 429 A.2d 1297, 1302 (R.I. 1981). In Casa DiMario, the Supreme Court made clear that “a municipal attorney may not compromise claims or consent to judgments against the municipality” without actual authority to do so. 763 A.2d at 610 (citing 10 Eugene McQuillin, The Law of Municipal Corporations § 29.15 at 308 (3d ed. 1999)).

Section 7.03 of the Coventry Town Charter outlines the duties of the Town Solicitor:

“The Town Solicitor shall serve as chief legal advisor to the Town Council and to the Town Manager. The Town Solicitor shall appear for and protect the rights of the town in all actions, suits, or proceedings, civil or criminal, in law or equity, brought by or against it, or for or against any of its departments, offices or agencies, including the Town Council, the Town Manager and the School Committee. The Town Solicitor shall also perform such other duties, appropriate to the office, as the Town Council and the Town Manager may require. The Town Solicitor shall examine and approve the form of all ordinances and resolutions and of all invitations to bid, contracts, and other legal documents issued by any department, office or agency of the town.”

The express language of this provision does not give the Town Solicitor the authority to settle pending litigation.⁶ Therefore, in order to gain the required authority, the Town Council would have to vest the Town Solicitor with such. Coventry Home Rule Charter § 3.14 (Coventry Charter) (“All powers of the town shall be vested in the Town Council, except as otherwise provided by law or by the provisions of this Charter.”). According to § 3.15 of the Town Charter, “[t]he Town Council may act by rule, resolution or ordinance.” The Town Clerk is required to “[m]ake a permanent record of all proceedings . . .” Id. at § 9.11. To this Court’s knowledge, a review of the Town Council’s minutes of any meeting on or before April 18, 2011

⁶ This provision is extremely similar to a provision in the Johnston Town Charter that defines the Johnston Town Solicitor’s duties. See Johnston Home Rule Charter § 6-4. The Court in Casa DiMario found that no provision in the Johnston Town Charter authorized the Town Solicitor to settle a case. 763 A.2d at 611.

(the date which the Consent Judgment was entered) reveals no record of the Town Council granting Solicitor Tobin actual authority to enter into the Consent Judgment. See Casa DiMario, 763 A.2d at 611 (“Without a properly convened meeting at which council members vote on the record in their official capacity, the council cannot be deemed to have exercised or delegated to the solicitor its powers to compromise Mario’s lawsuit against the town.”).

Still, Defendant maintains that Solicitor Tobin did have express authority to enter into the Consent Judgment, citing testimony from Councilman McGee and former President Cote at the December 7, 2015 meeting. While it does appear that both Councilman McGee and former President Cote believe that Solicitor Tobin had unfettered authority to enter into the Consent Judgment, both also agree that such authority was given during an executive session. See T1 at 11:24-12:9; 17:23-19:14. Section 15.04 of the Town Charter states: “No final action shall be taken on any matter by the Town Council . . . in executive session, but shall be voted upon in open meeting.” Consequently, it is irrelevant whether the Town Council gave Solicitor Tobin actual authority during an executive session, as the Town Council was required to hold an open meeting and conduct a vote on the issue. As stated, there is no evidence before the Court that the Town Council complied with this open meeting requirement.

“The provisions of a town charter are the organic law of the town with respect to municipal affairs.” Borromeo v. Personnel Bd. of Bristol, 117 R.I. 382, 385, 367 A.2d 711, 713 (1977). Coventry’s charter is clear and unambiguous. See Felkner v. Chariho Reg’l Sch. Comm., 968 A.2d 865, 870 (R.I. 2009). The Town Council can take action via rule, resolution, or ordinance. Coventry Charter § 3.15. Additionally, such action must occur during an open meeting. Id. at § 15.04. While unfortunate, the Town Council did not follow Coventry’s

fundamental law. As a result, it failed to effectively give Solicitor Tobin the requisite actual authority to enter into the Consent Judgment.

Nevertheless, the Court is mindful of the fact that both the Town and T. Miozzi peacefully and willingly operated under the Consent Judgment for approximately four and a half years. A consent judgment is, in essence, a contract between the parties. See In re McBurney Law Servs., Inc., 798 A.2d at 882. “The ratification of a contract by [a] municipal corporation may be made by the affirmative action of the proper officials, or by any action or nonaction which in the circumstances amount to an approval of the contract.” 10A Eugene McQuillin, The Law of Municipal Corporations § 29.110 at 121 (3d ed. 2009).⁷ In Newport Oil Corp. v. Viti Bros., Inc., 454 A.2d 706, 707-08 (R.I. 1983), the Supreme Court recognized that “a principal who retains the benefit of an agreement made by an agent, even though unauthorized, may be held to have ratified or affirmed such agreement by implication.” The Court goes on to explain that “[a]ffirmance or ratification may be established by any conduct of the purported principal manifesting that he consents to be a party to the transaction or by conduct, justifiable only if there is ratification.” Id. at 708 (citing Restatement (Second) Agency § 93 at 240 (1957)).

Although the Supreme Court has not explicitly adopted the doctrine of ratification in the municipal context, some time ago the Court did touch upon the topic in Newport Hosp. v. Ward,

⁷ Courts are generally reluctant to estop a government entity. See Lerner v. Gill, 463 A.2d 1352, 1362 (R.I. 1983) (recognized in the context of equitable estoppel). This Court is aware of the general blur between estoppel and ratification. See 10A McQuillin The Law of Municipal Corporations § 29.104 at 81. Nevertheless, the two doctrines are in fact different. The split is actually seen in the case of Casa DiMario, 763 A.2d 607. There, ratification was not an option for the moving party as the Johnston Town Council had actually rejected the unauthorized settlement agreement via resolution shortly after the agreement was entered into. Id. at 611. Estoppel, on the other hand, was a possible argument as the moving party claimed that he detrimentally relied on the fact that he would be awarded “grandfather” status. Id. at 612-13. Westwood is correct that estoppel is not a successful argument here as the inducing party must still act within its authority, which Solicitor Tobin did not. See id.

56 R.I. 45, 183 A. 571, 577 (1936).⁸ In Newport Hosp., the Court acknowledged the difference between ultra vires acts and those which are within municipal powers but executed improperly:

“[There is a] distinction between a case where a municipality is acting within its general corporate powers, but the particular act is void on account of some defect in the execution of the power and a case where the act in question is void because it is entirely beyond its corporate powers under any circumstances. In cases of the former class, the municipality is generally held liable for such benefits as it may have received in the course of the transaction, while, in cases of the later class, no recovery is permitted from the municipality for the value of benefits received.” Id. at 577.

There is no question that it was within the Town Council’s power to give Solicitor Tobin the authority to settle the pending litigation.⁹ Instead, it appears from what is before the Court that the Town Council executed its powers defectively—namely, giving Solicitor Tobin the authority to settle the dispute in a closed, executive session and never publically voting on the issue in an open meeting.

Plaintiffs argue that even under this categorization, the doctrine of ratification is impermissible as T. Miozzi was charged with the knowledge of Solicitor Tobin’s capacity. This Court disagrees. It is true that a contracting party is “bound at his own peril to know the extent of [a government agent’s] capacity.” Casa DiMario, 763 A.2d at 612; see also Potter v. Crawford, 797 A.2d 489, 493 (R.I. 2002); Romano v. Ret. Bd. of Emps.’ Ret. Sys. of R.I., 767

⁸ In the Superior Court context, the doctrine of ratification was applied in Tocco v. Richardson, No. Civ.A PC96-1004, 2004 WL 2075174, at *5 (R.I. Super. July 23, 2004). In Tocco, the Johnston Town Solicitor acted without actual authority when he entered into a consent judgment on behalf of the Town of Johnston. Id. at *1-3. However, the Court found that the Johnston Town Council later ratified the consent judgment by approving a bond issue to fund the settlement and including monthly settlement payments as part of its annual budget. Id. at *5. The Court also noted that the Town Council did not immediately vote to reject the settlement but acted consistent with such for seven years. Id.

⁹ This Court is not convinced that permitting a theory of ratification would essentially limit the Town’s police power. The doctrine of ratification does not provide an avenue for an agent to divest the state or a municipality of its police power. Rather, ratification is merely a means for the entity to execute its own power.

A.2d 35, 43 (R.I. 2001). However, this notion explains why theories of apparent authority have been rejected in the municipal context. See, e.g., Bellsite Dev., LLC v. Town of Monroe, 122 A.3d 640, 651 (Conn. App. Ct. 2015) (“Apparent authority is th[e] semblance of authority which a principal, through his own acts or inadvertences, causes or allows third persons to believe his agent possesses. It logically follows that, when charged with knowledge of a municipal officer’s actual power, a party cannot then argue that they believed the officer’s power to be something different.” (alteration in original) (citation omitted) (internal quotation marks omitted)).

Plaintiffs cite to case law throughout the United States and, more importantly, sections of the Restatement on Agency to support their proposition. See Restatement (Third) Agency § 6.11(b) (2006); Restatement (Second) Agency § 166. Reliance on these sections, however, is misplaced as both sections are in the context of an undisclosed principal. Restatement (Third) Agency § 6.11(b) (“A representation by an agent made incident to a contract or conveyance is attributed to a disclosed or unidentified principal . . .”); Restatement (Second) Agency § 166 (listed under the heading “Disclosed or Partially Disclosed Principal”). Restatement (Second) and (Third) include provisions that outline the doctrine of ratification. See Restatement (Third) Agency §§ 4.01–4.08; Restatement (Second) Agency §§ 82-104. Absent from all sections pertaining to ratification is any indication that the doctrine is unavailable if the third party has actual or constructive knowledge of the agent’s capacity. In fact, if such was universally true, the doctrine of ratification would almost never be permissible in the municipal context since it is a general rule that third parties are charged with the knowledge of a municipal agent’s capacity. See 56 Am. Jur. 2d Municipal Corporations, Etc. § 238 (2016). There would be no need for lengthy treatise sections which detail the mode of ratification in the municipal context—sections that do in fact exist. See, e.g., 10A McQuillin, The Law of Municipal Corporations § 29.110 at

121-32. Our Supreme Court has reiterated the necessary elements for ratification of an agent's actions by a principal. See Newport Oil Corp., 454 A.2d at 707-08. This list does not require that a third party be unaware of the agent's actual capacity. This Court declines to expand the elements of ratification to include ignorance on behalf of the third party.¹⁰

The Court must now consider whether the above-discussed doctrine of ratification can be applied to salvage the present Consent Judgment. Plaintiffs posit that the Consent Judgment cannot continue in perpetuity because "any contract made by a governmental authority involving the performance of a governmental function that extends beyond the unexpired terms of the governmental officials executing the contract is void because such an agreement improperly ties the hands of subsequent officials." Chopmist Hill Fire Dep't v. Town of Scituate, 780 F. Supp. 2d 179, 187 (D.R.I. 2011) (emphasis in original). While the Court declines to hold that the Consent Judgment regulates a governmental function,¹¹ the Court does agree that the only members who could have ratified the unauthorized Consent Judgment were those that served when the Consent Judgment was actually entered. It is clear that an unauthorized act can only be approved by the "purported principal, with knowledge of the facts." Newport Oil Corp., 454 A.2d at 708 (quoting Restatement (Second) Agency § 98 at 252). It then follows that the subsequent members of the Town Council did not have the requisite knowledge to ratify the

¹⁰ In essence, a third party who contracts with an agent to which he knows is unauthorized does so at his peril. He either tries his hand at ratification or sits empty handed with a void agreement.

¹¹ The Court is not convinced that the hours of operation for an asphalt company fall within the parameters of governmental function. Coventry does have an ordinance that regulates the activity of asphalt operations, but a municipality is permitted to adopt ordinances for the general welfare of the community. See State ex rel. Town of Westerly v. Bradley, 877 A.2d 601, 607-08 (R.I. 2005). Under this line of thinking, the Town could essentially categorize next to everything as a governmental function by merely enacting an ordinance that regulates the activity. Furthermore, the case cited by the Plaintiffs is distinguishable from the present case. See Chopmist Hill Fire Dep't, 780 F. Supp. 2d at 187 (leasing property exclusively for town fire and rescue services).

unauthorized Consent Judgment; those members, to the Court's knowledge, believed that the Consent Judgment was authorized. One cannot ratify an action to which he believes is authorized and never in need of ratification in the first place.

On April 18, 2011, four members served on the Town Council:¹² Raymond Spear (District 1; serving until November 19, 2012); Councilman McGee (District 3; presently serving); former President Cote (District 4; serving until November 24, 2014); and Thaddeus Jendzejec (Councilman Jendzejec) (District 5, serving until February 28, 2014) (collectively, 2011 Town Council). It is the conduct of only these four members that is pertinent to the Court's inquiry. Consequently, there are only two pieces of evidence before the Court that are relevant to whether the 2011 Town Council subsequently ratified the Consent Judgment via their conduct: (1) Chief of the Coventry Police Department (Police Department), Bryan J. Volpe, regularly ensured that T. Miozzi complied with the Consent Judgment, see Def.'s Mem., Exs. 5-6, 10, without opposition from the Town Council; and (2) three of the four members of the 2011 Town Council (Councilman McGee, former President Cote, and Councilman Jendzejec) discussed the relationship between an amended ordinance, one that regulates the closing hours for asphalt plants, and the Consent Judgment, see Town Council Mins. at 6-8, May 13, 2013.

Starting with the former, the 2011 Town Council itself was not actually regulating T. Miozzi's activity and enforcing the Consent Judgment; rather, the Police Department was doing so. Mere silence or acquiescence has been deemed enough to ratify an unauthorized act in some circumstances. See, e.g., Union Water Meter Co. v. Town of New Martinsville, 98 S.E. 516, 517 (W. Va. 1919) ("[A] municipality may ratify an unauthorized contract just as an individual or a private corporation may do; and ratification may be inferred from acquiescence

¹² On April 18, 2011, the seat from District 2 was vacant. Laura Flanagan resigned on January 10, 2011. Her successor, Carl Mattson, was not sworn in until April 25, 2011.

after knowledge of the facts or from conduct inconsistent with any other supposition.”). Nevertheless, the majority of cases in this line of reasoning are both antique and scarce in analysis.¹³ Without more, this Court declines to find that the mere acquiescence alone is enough to find ratification. Permitting acquiescence alone could create a slippery slope for municipal procedure. Town solicitors could potentially do as they please, hoping that their town councils are aware just enough to remain silent. The Consent Judgment was enforced by the Police Department, and there is no evidence before the Court that the Police Department was directed to do so by the 2011 Town Council.

In May 2013, the Consent Judgment was discussed at a Town Council meeting. The following exchange ensued:

“Councilman Laboissonniere asked how this ordinance differs from the court order with Miozzi. Councilman Jendzejec replied that it keeps the hours of operation that the court order has and Manager Hoover added that the court order allows Mr. Miozzi’s operation 30 times per year to operate past the hours. [sic] once they get approval from the police chief.

“Chief Volpe agreed that it does give them 30 days per calendar year to operate with additional hours. [sic] with advance notification. They have been cited in the past. [sic] but for the most part were compliant when they were going to do this. My understanding was that Mr. Miozzi bid on Route 95 work. [sic] during evening hours. [sic] and the court allowed him to work nights on a limited basis.

“Solicitor Tobin recalled that there was a suit brought by the town to enjoin the operation of the Miozzi plant. It went before Judge Proccacini [sic] and he ruled that they were entitled to continue to

¹³ See, e.g., Norwalk Gaslight Co. v. Borough of Norwalk, 28 A. 32, 37 (Conn. 1893) (“Failure then to dissent, silence when it became a duty to speak, constituted assent. Retaining, then, the benefit of the contract, the borough must be held thereby to have ratified it, and to be estopped from afterwards denying its liability under the arrangement made with the plaintiff.”); Judevine v. Town of Hardwick, 49 Vt. 180, 185 (Vt. 1876) (“[W]e think the long acquiescence of the town after the facts became known, without notice or complaint, should be held as an adoption and ratification of the contract . . .”).

operate at that particular site. As a result, there was a consent order put into place to define it. He wasn't granted the right to operate through the entire year whenever he wanted. [sic] but was limited to the number of days with advance notice to the Police Chief. I believe the number was 30 days. Now there is a second plant in there that is not subject to that particular consent order. These hours of operation will clearly work with regard to the second plant. [sic] and the first plant will be limited by the consent order." Town Council Mins. at 7-8, May 13, 2013.

The Town Council then continued to discuss the proposed amendment. Id. at 8-10. No member of the Town Council objected to the summary, validity, or effect of the Consent Judgment, including the three members that were present on the 2011 Town Council.

While it does appear that the 2011 Town Council members were aware of the Consent Judgment, the evidence before the Court—acquiescence and discussion—is not enough to indicate that the 2011 Town Council ratified the unauthorized Consent Judgment.¹⁴ Defendant discusses two main cases, JRP Old Riverhead Ltd. v. Town of Southampton, 844 N.Y.S.2d 132 (N.Y. App. Div. 2007) and Tocco, 2004 WL 2075174. In both cases, however, the respective town council members' conduct was more deliberate. In Tocco, the Town Council approved a bond to fund the unauthorized settlement and included monthly settlement payments in its approved annual budget. 2004 WL 2075174, at *5. In JRP Old Riverhead, the court found that the town council ratified the equitable portion of a stipulation. 844 N.Y.S.2d at 135-36. The town council did so by properly approving the monetary portion of the settlement and paying such, as well as paying the costs of an engineering study as required by the stipulation. Id. Other cases that have used the doctrine of ratification in similar circumstances also discuss a greater level of action by the town council members. See, e.g., City of Kenai v. Filler, 566 P.2d 670, 676 (Alaska 1977) ("The record shows that the City knew of the enlarged scope of the

¹⁴ The Court also notes that only three of the four members of the 2011 Town Council were still on the Town Council in May 2013.

project, directed its City Manager to let the bid on the enlarged Scheme II project, partially paid Filler's fee based on a \$2.1 million project . . . the City also accepted the benefits of the enlarged project by asking bids while utilizing Filler's plans . . ."); City of Panama City, Fla. v. T & A Utils. Contractors, 606 So. 2d 744, 747 (Fla. Dist. Ct. App. 1992) (finding that the town council ratified the termination of a contract by awarding the contract to someone else). Without more, this Court is unable to find that the 2011 Town Council effectively ratified the Consent Judgment.¹⁵ Our Supreme Court has not yet set the bounds for the doctrine of ratification in the municipal context. This Court is hesitant to not only further develop the theory, but to also stretch the facts in order to satisfy the requirements of such.

C

Additional Discovery

Finally, Defendant requests permission to conduct additional discovery in order to prove the validity of the Consent Judgment. Specifically, Defendant claims that it should be permitted to explore the memories of the 2011 Town Council members and Solicitor Tobin through depositions, as well as obtain any notes taken during the executive session when the authority was allegedly given. Nevertheless, this evidence would not advance Defendant's case as it would only further prove that the 2011 Town Council improperly gave Solicitor Tobin authority to enter into the Consent Judgment. Defendant additionally claims that it should be permitted to conduct discovery from April 2011 to the present in order to investigate the Town Council's awareness. In its discretion, the Court declines to grant Defendant's discovery request.

¹⁵ Since this Court was unable to find that the Consent Judgment was ratified based on the conduct of the 2011 Town Council, the Court refrains from deciding whether the Consent Judgment was executory in nature, a categorization that may have required a heightened standard for ratification.

Both parties submitted memorandums in support and opposition of the motion to vacate. In addition, at the Court's request, both parties submitted supplemental memorandums specifically on the issue of ratification. There is no evidence that Defendant attempted to obtain further documents and was unable to do so. In its discretion, this Court respectfully declines to grant Defendant's request to conduct additional discovery. This Court is satisfied that there is no record of a vote in an open meeting of the Town Council authorizing Solicitor Tobin to enter into the Consent Judgment at issue, and the subsequent facts and circumstances do not support ratification of the Consent Judgment. The Court is satisfied that additional discovery will not cure these fatal defects.

IV

Conclusion

For the reasons discussed herein, the Consent Judgment entered on April 18, 2011 is hereby vacated pursuant to Rule 60(b)(6). Counsel shall submit an appropriate order and judgment for entry consistent with this Decision.



RHODE ISLAND SUPERIOR COURT
Decision Addendum Sheet

TITLE OF CASE: **Town of Coventry v. T. Miozzi, Inc.**

CASE NO: **KC 10-1574**

COURT: **Kent County Superior Court**

DATE DECISION FILED: **May 9, 2016**

JUSTICE/MAGISTRATE: **Procaccini, J.**

ATTORNEYS:

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Nicholas Gorham, Esq.; Maurene Souza, Esq.**

For Defendant: **Brian Laplante, Esq.; Michael J. Jacobs, Esq.**