

VERMONT SUPERIOR COURT  
Environmental Division  
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Docket No. 127-10-16 Vtec

KCS, LLC CU & PUD Appeal

### ENTRY ORDER

Title: Motion to Determine the Status of the Settlement Agreement[,] to Validate-Invalidate, Define, and Order Appropriate Actions (Motion: 1)

Filer: Jim Carroll

Date: July 3, 2024

Memorandum in Opposition to Motion, filed on July 17, 2024, by Claudine C. Safar, Esq.  
Reply in Support of Motion, filed on August 26, 2024, by Jim Carroll.<sup>1</sup>

#### **The motion is DENIED.**

Before the Court is a motion for post-judgment relief from the terms of a settlement agreement (the Agreement) entered into by the Town of Jericho (Town) and KCS, LLC to resolve an appeal of decision of the Town Development Review Board (DRB) denying KCS's application for a six-unit planned unit development (PUD) at 20 Morgan Road, Jericho, Vermont (the Property). The Agreement was incorporated into a stipulated judgment order entered by the Court to resolve the then-pending dispute. A zoning permit was subsequently issued for the Project as modified by the Agreement (the 2017 Permit). The Agreement contained terms requiring two of the six proposed units to be affordable. KCS and its successor/assignee CF Trust (together, Applicant) seeks an order of the Court relieving it of the affordable unit requirement.<sup>2</sup> The Town opposes the motion.

On October 14, 2024, this Court held a hearing on the motion via the WebEx platform. The Town attended through counsel. Applicant attended through representative Jim Carroll.<sup>3</sup>

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<sup>1</sup> On August 2, 2024, Mr. Carroll moved for an extension of time to file a reply to the Town of Jericho's opposition to the pending motion. The Court did not rule upon the motion prior to the time for Mr. Carroll to respond and he ultimately filed his response on August 26, 2024. While untimely, the Court accepts the late filing for completeness and **GRANTS** the motion for extension of time to file.

<sup>2</sup> Applicant seeks additional relief through its motion, though the crux of the motion is relief from the requirement that two units be affordable.

<sup>3</sup> Mr. Carroll is not an attorney and has not been granted permission to represent either of the applicant entities. Based on the substance of the hearing and the outcome set forth herein, the Court does not address his ability to represent KCS and/or CF Trust.

First, to the extent that the motion seeks relief from the Agreement, which was entered by the Court, the motion would functionally be a Rule 60(b) motion. See In re Purvis Nonconforming Use, No. 45-5-15 Vtec, slip op. at 2 (Vt. Super. Ct. Envtl. Div. Sept. 25, 2018) (Durkin, J.) *aff'd by* 2019 VT 60. The pending motion, filed approximately seven years after the Agreement was entered by the Court, has not been filed within a reasonable time. See Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc., 149 Vt. 365, 368—69 (1988) (citing V.R.C.P. 60(b)) (noting that the Court has discretion to determine whether a motion was filed within a reasonable time); see also V.R.C.P. 60(b) (noting that motions made pursuant to subsections (1), (2), and (3) must be made within one year after the order was entered or taken). Further, Applicant has not presented sufficient grounds for relief from the Agreement as set forth in Rule 60(b). See Merchs. Nat'l Bank of New Bedford v. Considine, 135 Vt. 416, 418 (1977) (“The burden of proof in a Rule 60(b) motion is upon the moving party.”).

Further, while presented as a motion for post-judgment relief, the motion is functionally one to amend a condition of a zoning permit. As presented, the Court lacks the ability to grant the relief requested. As discussed at the October 14, 2024 hearing, there is a process by which Applicant may seek amendment of the 2017 Permit through an application for an amendment that addresses all necessary standards and regulations. See e.g., In re Hildebrand, 2007 VT 5, ¶ 12, 181 Vt. 568. Applicant has begun the process by seeking sketch plan review.<sup>4</sup> Applicant represented that it will be moving forward with the amendment process before the Town and apply for preliminary plat approval. This Court may address the merits of Applicant’s attempt to amend the 2017 Permit if appropriate appeals are taken from final decisions rendered by the DRB on the application. Thus, the present motion is not the proper means to address the relief requested and the motion is **DENIED**.

Electronically signed this 15<sup>th</sup> day of October 2024 pursuant to V.R.E.F. 9(D).

A handwritten signature in black ink that reads "Tom Walsh". The signature is stylized and cursive.

Thomas G. Walsh, Judge  
Superior Court, Environmental Division

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<sup>4</sup> Applicant appealed the memorandum written by the DRB in response to his sketch plan application in Docket No. 24-ENV-00057. The Town has moved to dismiss the appeal.