IN THE CIRCUIT COURT OF CASS COUNTY, MISSOURI

CASS COUNTY, MISSOURI, Plaintiff,	)	
v.	)	Case No. CV104-1443CC
AQUILA, INC., Defendant.	)	

PLAINTIFF CASS COUNTY, MISSOURI'S SUPPLEMENTAL SUGGESTIONS IN OPPOSITION TO DEFENDANT AQUILA, INC.'S MOTION TO EXTEND STAY OF INJUNCTION

COMES NOW Plaintiff, Cass County, Missouri ("County"), by and through its counsel of record, Cindy Reams Martin, P.C. and Debra L. Moore, Cass County Counselor, and for its Supplemental Suggestions in Opposition to Defendant Aquila, Inc.'s ("Aquila") Motion to Extend Stay of Injunction ("Motion"), states as follows:

INTRODUCTION

The County's previously filed Suggestions in Opposition to Aquila's Motion address several issues. The County argues this Court does not have jurisdiction generally, or under the "changed circumstances rule," to grant Aquila's Motion. The County also argues that even if this Court has jurisdiction to consider Aquila's Motion, it should not grant the Motion. Since the filing of its Suggestions in Opposition, County has located additional authority which it feels obliged to bring to this Court's attention, and which supports the arguments advanced by County in its initial Suggestions in Opposition.

ARGUMENT

The premise underlying Aquila's Motion is that it would be unfair, and/or an undue hardship, to require Aquila to remove the Plant and Substation, both of which were illegally constructed by Aquila. Aquila asks that this Court's January 11, 2005 Judgment ("Judgment") requiring removal of the Plant and Substation remain stayed, despite the absence of any pending appeal, while Aquila attempts to secure rezoning and/or a special use permit from the County for the Plant and Substation, and while Aquila attempts to secure approval for the Plant and Substation from the Public Service Commission ("Commission"). The Judgment found Aquila did not have legal authority to construct the Plant and Substation, and ordered the removal of any improvements constructed by Aquila before or after the Judgment. Thus, Aquila knowingly undertook the risk of constructing the Plant and Substation pending its appeal from this Court's Judgment. The County argues Aquila is not entitled to the relief it asks of the Court because, among other things, the "hardship" Aquila offers up in support of its Motion was "self-created."

Under similar circumstances, Courts and commentators have rejected attempts by landowners to secure "after the fact" variances to authorize illegal uses of property, when the landowner's argued hardship has been self-created. 101A C.J.S. Zoning and Land Planning § 316 notes that "one who continues the construction of a building after it has been seriously questioned whether the plan of construction complies with the zoning ordinance ordinarily cannot secure a variance. In other words, a property owner cannot benefit from a knowing violation or disregard of the law, by making an illegal alteration to the property and then claiming it would be unfair hardship to deprive him or her of the improvement." In support of these principals, the commentators cite several cases. In Application of Julian, 3 Storey 175, 167 A.2d 21 (Del. Super Ct. 1960), the court held that a builder who proceeded to construct a

building which he knew to be in violation of a zoning code was not allowed to use the existence of the building as a basis for an application for variance from requirements of the zoning code. Id. at 26-27. The court found that the existence of a partially built structure does not constitute such "extraordinary and exceptional situation or condition" as to legally justify granting a variance where the building had been constructed invalidly. Id. at 27. In fact, the court noted that "[i]f the existence of a new building being the subject of a variance not authorized by the Board is grounds for authorizing that very variance, the work of the Board and indeed the Zoning Code itself means little or nothing." Id. Similarly, in Doull v. Wohlschlager, 141 Mont. 354, 377 P.2d 758 (1962), the court held that a landowner was not entitled to rely on a claim of "hardship" to maintain a building which did not conform to uses provided in regulations of the planning and zoning commission where the owner, knowing full well that an appeal was going to be taken from the decision of commissioners granting a variance to allow the building, deliberately went ahead with construction in order to forestall adverse decision on appeal by presenting the court with a *fait accomplie*. Id. at 765.

In both Doull and Application of Julian, the offending structure was built by a landowner after the landowner received permission from the local authorities to do so, albeit permission later ruled by a court to have been improvidently extended. Despite the fact the landowners had permission of the applicable local authority to proceed with construction, the courts in both of these cases held the landowner proceeded with construction at its peril, knowing the risks of an appeal taken from the grant of permission.

Similarly, 83 Am.Jur.2d Zoning and Planning § 826 notes that "a landowner who negligently improves his land in violation of a . . . restriction creates his own hardship and may not obtain relief . . . . Hardship is self-created and not curable . . . where a landowner

commences or continues construction of an improvement which violates the zoning regulations without a permit. The same is true of construction which is carried out during the pendency of an appeal." [Emphasis added] In support of these principals, the commentators cite McGavin v. Zoning Board of Appeals of the Town of Westport, 26 Conn.Supp. 251, 217 A.2d 229 (1965). In McGavin, the court held that a landowner who began construction of a third story on his home pursuant to a granted variance that was later rejected on appeal could not argue "hardship" where the homeowner began construction prior to the end of the appeal, and was aware that the granted variance could be rejected on appeal. Id. at 232. According to the court "[t]his was reckless conduct . . . and the Board cannot grant . . . a variance for such conduct." Id.

Aquila's case is even more egregious than Doull, Application of Julian, and McGavin. Here, the County never authorized Aquila to construct the Plant and Substation in violation of the Zoning Ordinance, and was forced to seek and secure a permanent injunction barring same. The permanent injunction carried with it the directive that improvements constructed by Aquila either before or after the Judgment be removed. Aquila proceeded with construction of the Plant and Substation pending appeal despite having been advised by both the County and this Court that it had no authority to do so. Aquila thus constructed the Plant and Substation at its peril. Aquila cannot rely on a claim of hardship that has been self-created to argue a *fait accomplie* with respect to its Motion.

Though these cases and the commentator's summaries relate to landowners who requested a variance in an attempt to maintain illegal improvements, the legal analysis regarding self-created hardships is equally persuasive and applicable to Aquila's Motion to Extend the Stay of Injunction. As noted in Doull, "No one can take advantage of his own wrongs. . . . To rule

otherwise would be to permit mass avoidance of zoning laws." Doull, 377 P.2d at 765. This Court should deny Aquila's Motion.

CONCLUSION

County respectfully submits these Supplemental Suggestions in Opposition to Aquila's Motion for the Court's consideration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that a copy of the above and foregoing was served, via facsimile, this 26th day of January, 2006, to:

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