

February 15, 2006

FILED

FEB 15 2006

CLERK, SUPREME COURT

**VIA FEDERAL EXPRESS**  
Clerk of the Supreme Court  
State of Missouri  
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Jefferson City, Missouri 65102

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Re: *StopAquila.org v. City of Peculiar*, No. SC87302

Dear Clerk of the Supreme Court:

On February 1, 2006, the Court requested the parties submit letter briefs addressing the impact of *StopAquila.Org v. Aquila, Inc.*, 180 S.W.3d 24 (Mo. App. 2005) (the “Zoning Case”), on the City of Peculiar’s Application for Transfer in the above-referenced case (the “Bond Issuance Dispute”). In short, the Zoning Case does not affect the Bond Issuance Dispute in any way—the law governing land use is completely independent from the law governing revenue bond financing, and a genuine controversy still exists in the Bond Issuance Dispute regardless of the final outcome in the Zoning Case.

The City’s Application for Transfer in the Bond Issuance Dispute is premised on the court of appeals’ incorrect holding that Article VI, Section 27 of the Missouri Constitution required a public vote before the City could issue revenue bonds used to finance Aquila’s construction of a power plant and a transmission substation and its improvement of related transmission lines. As explained in the Application for Transfer, Section 27 requires a public vote only if a city will assume financial risks associated with owning and operating a project, and Section 27(b) allowed the City to issue revenue bonds without a public vote to finance Aquila’s private development.

The court of appeals’ decision in the Zoning Case is premised on Aquila’s lack of authority to construct the plant and the substation. The court of appeals affirmed the circuit court’s judgment enjoining Aquila from constructing the facilities, finding Aquila violated Cass County zoning law by failing to get approval for the construction from either the county or the Missouri Public Service Commission. Whether the City had the authority to issue the revenue bonds that financed the project was simply not at issue in the Zoning Case. Similarly, Aquila’s authority to construct the facilities has absolutely no bearing on whether the City properly issued the bonds to finance their construction. Thus, the Zoning Case has no impact on the Bond Issuance Dispute, and it certainly does not moot the Application for Transfer.

On appeal, a case can become moot “when circumstances change so as to alter the position of the parties or subject matter so that the controversy ceases and a decision can grant no relief.” *State ex rel. Monsanto Co. v. Pub. Serv. Comm’n*, 716 S.W.2d 791, 793 (Mo. banc 1986). The Court can consider matters outside the record when deciding

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whether a case is moot. *Id.*; *State v. Reed*, 41 S.W.3d 470, 473 (Mo. banc 2001). Nothing in the Zoning Case altered the position of the parties or the subject matter in this case. And a decision reversing the court of appeals and affirming the validity of the bonds would clarify the propriety of the actions taken pursuant to the bond transaction to date. But if the bonds were void from the beginning, the entire transaction is cast into doubt.

After the Board of Aldermen of the City authorized the issuance of the revenue bonds in December 2004, the 30-year bonds were purchased by Aquila. Affidavit of Michael J. Fisher (attached as Exhibit A) at ¶¶ 3, 5. Under the bond transaction, Aquila makes rental payments equal to the debt service on the bonds to a trustee pursuant to Aquila's lease of the project from the City, and the trustee makes payments of debt service on the bonds to the bondholder. *Id.* at ¶ 6. Bonds are often issued for projects prior to obtaining all necessary permits for the project. Some permits or approvals cannot be obtained until appropriate stages of construction and long after the project has been financed. The fact that the City issued the bonds before Aquila obtained the approval of Cass County or the Missouri Public Service Commission for construction of the project is consistent with normal business practices. Thus, if the bonds were validly issued, they could remain outstanding for 30 years from the date of issuance regardless of whether the project remains standing or is demolished. The appropriateness of the City's issuance of the bonds is very much a live issue.

A genuine dispute also exists, regardless of the outcome in the Zoning Case, because Aquila has made other payments as a result of the issuance of the bonds. First, Aquila paid the City an issuance fee of \$700,000 on the date of the issuance of the bonds in December 2004. *Id.* at ¶ 4. Second, Aquila has made payments in lieu of taxes totaling approximately \$500,000 to four entities: Cass County, the Raymore-Peculiar School District, the Cass County Library District, and the West Peculiar Fire Protection District. *Id.* at ¶ 7. These May 2005 and December 2005 payments were made pursuant to the economic development agreement that is part of the bond transaction. *Id.* at ¶¶ 7, 8. If the City did not have legal title to the property and had not issued the bonds to finance the construction of the facilities, Aquila would have owed property taxes resulting from the project to all Missouri counties in which Aquila has transmission lines. *See* §§ 151.080, 153.030, 153.034, RSMo. Instead, the property is tax-exempt, and the Chapter 100 bond transaction requires Aquila to make the payments in lieu of taxes to the four entities listed above. *See generally* § 100.050, RSMo. If the bonds were void at their inception, as the court of appeals held in this case, the validity of these payments, as well as the status of Aquila's payment to the City, would be subject to question.

Finally, even if the Court were to find that the Zoning Case could have some impact on the Bond Issuance Dispute, nothing has changed since the court of appeals' decision. Aquila had already constructed the plant and the substation before the court of appeals

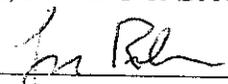
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rendered its decision. Thus, the court of appeals stated that it “did not intend to suggest that Aquila is precluded from attempting at this late date to secure the necessary authority that would allow the plant and substation...to continue operating, albeit with whatever conditions are deemed appropriate.” Zoning Case, 180 S.W.3d at 41. To allow it time to seek this authority, Aquila asked the Circuit Court of Cass County to stay the order affirmed by the court of appeals that required Aquila to remove any construction inconsistent with an agricultural zoning classification. Exhibit B, Transcript at 4:22-5:3. On January 27, 2006, the circuit court ruled that Aquila must commence dismantling the facilities on May 31, 2006 if it does not obtain the necessary authority to allow the plant and substation to continue operating. *See id.* at 80:7-9. Aquila’s request for approval of the facilities is currently pending before the Missouri Public Service Commission. *Id.* at 16:21-17:13.

Regardless of the outcome of the Missouri Public Service Commission proceedings, the Bond Issuance Dispute presents a live controversy—one that is of great importance to the parties and to the financing of future private development in the state of Missouri. The City urges the Court to accept its Application for Transfer.

Respectfully submitted,

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**IN THE SUPREME COURT OF MISSOURI**

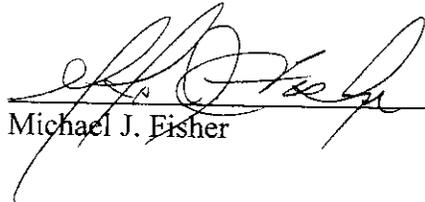
STOPAQUILA.ORG, et al.	)	
	)	
Plaintiffs-	)	
Appellants,	)	
	)	Supreme Court No. SC87302
vs.	)	
	)	
CITY OF PECULIAR, MISSOURI	)	
	)	
Respondent.	)	
	)	

**AFFIDAVIT OF MICHAEL J. FISHER**

I, Michael J. Fisher, upon being sworn by an officer authorized to administer oaths, hereby swear under penalty of perjury that the following is true and correct:

1. I have personal knowledge of the facts stated in this affidavit.
2. I am the City Administrator for the City of Peculiar, Missouri (the "City").
3. In December 2004, the Board of Aldermen of the City authorized the issuance of 30-year revenue bonds to finance Aquila, Inc.'s construction of a power plant and a transmission substation and its improvement of related transmission lines.
4. Aquila paid the City an issuance fee of \$700,000 on the date of the issuance of the revenue bonds in December 2004.
5. Aquila purchased the revenue bonds.
6. Under the bond transaction, Aquila makes rental payments equal to the debt service on the revenue bonds to a trustee pursuant to Aquila's lease of the project from the City, and the trustee makes payments of debt service on the revenue bonds to the bondholder.
7. In May 2005 and December 2005, Aquila made payments in lieu of taxes totaling approximately \$500,000 to four entities: Cass County, the Raymore-Peculiar School District, the Cass County Library District, and the West Peculiar Fire Protection District.

8. Aquila made these payments in lieu of taxes pursuant to the economic development agreement that is part of the bond transaction.

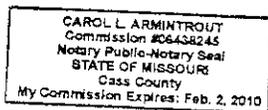
  
\_\_\_\_\_  
Michael J. Fisher

STATE OF Missouri )  
COUNTY OF Cass ) ss.

Subscribed and sworn to before me, a notary public, this 14 day of February, 2006.

  
\_\_\_\_\_  
NOTARY PUBLIC

My Commission Expires:



IN THE CIRCUIT COURT OF CASS COUNTY, MISSOURI  
SEVENTEENTH JUDICIAL CIRCUIT, DIVISION NO. II  
Honorable Joseph P. Dandurand, Judge

CASS COUNTY, MISSOURI, )  
 )  
 ) Plaintiff, )  
 ) ) Cass County  
vs. ) ) Case No. 17V010401443  
 ) )  
AQUILA, INC., )  
 ) )  
 ) Defendant. )

**ORIGINAL**

TRANSCRIPT

On Friday, the 27th day of January, 2006, the above cause came on for hearing at 9:55 a.m. before the Honorable Joseph P. Dandurand, Judge of Division No. II of the 17th Judicial Circuit, at Warrensburg, Missouri.

A P P E A R A N C E S

ATTORNEYS FOR CASS COUNTY: ATTORNEY CINDY REAMS MARTIN

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ATTORNEY FOR DEFENDANT:

ATTORNEY J. DALE YOUNGS  
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Kansas City, MO 64112

JODI R. QUELLE, CCR  
Official Court Reporter, Division No. II  
Johnson County Circuit Court  
(660) 422-7407

1 know that we have got other people here today, and  
2 I know that we have scheduled this for argument,  
3 but we are prepared to do whatever you want to do.  
4 I have got witnesses here who will be happy, not  
5 only answer my questions, but answer your  
6 questions about some of the concerns that you may  
7 very well have with regard to this motion. We  
8 recognize that the relief we are asking for today  
9 is not insignificant, and so I want you to know  
10 that.

11 Keith Stamm, who is the chief operating  
12 officer of the company, who I think you know from  
13 his prior testimony in the trial, is here. Norma  
14 Dunn, senior vice president of Aquila. We have  
15 Terry Hedrick, Andy Quardy {phonetic}, Carl  
16 Huslig, other people who can speak to some of the

17 issues that up to this point have only been  
18 presented by me and Mr. Reitz as lawyers for the  
19 company. They are here to talk to you.

20 But there are essentially two parts to our  
21 motion today. The first part is that the Court  
22 has the power to grant Aquila the relief that we  
23 are asking for today, to grant us a stay from the  
24 terms of your January 11, 2005, order so that we  
25 can obtain the authority that the Court of Appeals

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has held is necessary for us to operate the South Harper Peaking Facility and Peculiar Substation that are at issue in the case, and then under the particular circumstances of this case, the Court should exercise that power and do so.

I want to talk to you about the first part of that primarily. Mr. Reitz wants to talk to you about the second part of that and, also, hopefully, address by means of some proposals that might address the Court's concern in granting our relief but still trying to protect the public interest, and I think it's important to note that from our perspective today, it's important for us, not only to ask you and to talk to you about what we want you to do.

But I think it's equally and probably even of more importance for you to understand what we are not asking you to do today. We are not asking to be forever relieved from the obligations of that January 2005 judgment, and we are not asking for a free pass from the judgment. What we are asking for is what I believe is an extraordinary circumstance in a case that's resulted by the Court of Appeals own opinion in the undoing of a quarter century of Public Service Commission

1 laws before we can accept it, but --

2 THE COURT: They are free to take whatever  
3 position they want to take.

4 MR. YOUNGS: I understand.

5 THE COURT: And I agree with you 100 percent.  
6 You still, no matter what you believe their  
7 position to be or what the basis for it was, had  
8 the obligation to do what you did. That's not --  
9 that's not --

10 MR. YOUNGS: So we did that.

11 THE COURT: If that's brinkmanship, that  
12 wasn't --

13 MR. YOUNGS: Didn't feel like brinkmanship.

14 THE COURT: You had to do it. You had to ask  
15 them, and you had to get their answer.

16 MR. YOUNGS: I think we have got their  
17 answer --

18 THE COURT: I think so, too.

19 MR. YOUNGS: -- in no uncertain terms.

20 THE COURT: I think so, too.

21 MR. YOUNGS: So where that leaves us, then,  
22 is to go to the PSC, and we filed that application  
23 on Wednesday. We have asked that they immediately  
24 set a procedural schedule, and they have done it.  
25 They set an intervention deadline of, I believe,

1 February 27th. So I have no doubt that the County  
2 will intervene. I have no doubt that Mr. Eftink's  
3 clients will intervene, and those issues, those  
4 land use issues, to the extent the Public Service  
5 Commission feels that they need to take those up  
6 consistent with the Court of Appeals' decision,  
7 those issues will be taken up then.

8 The only point I want to make is at the end  
9 of that process, if the Public Service Commission  
10 grants our application and issues us specific  
11 authority for the South Harper plant and Peculiar  
12 Substation, subject to whatever review comes after  
13 that, that disposes of the matter. There's been  
14 an argument by the County that no, no, we need  
15 zoning approval to deal with the land use issues  
16 from us and you need PSC approval. The only point

17 I want to make is --

18 THE COURT: I don't think the Court of  
19 Appeals said that.

20 MR. YOUNGS: Okay. I agree. So that's all I  
21 have to say about that.

22 THE COURT: All right.

23 MR. YOUNGS: At that point, then, what I  
24 would do is ask the Court's accommodation and  
25 allow Mr. Reitz to come speak to you.

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This will be the Order of the Court that I would request counsel for the County to fashion and circulate for approval as to content -- excuse me -- as to form, not as to content, and you can probably work on my language a little better, but the Order of the Court is:

That Aquila is directed to dismantle the plant in its entirety commencing May 31st of 2006 under penalty of contempt of court; that they are to immediately cease operations of the plant in its entirety regardless of emergencies; that the substations will be allowed to continue to operate; that they will post a \$20 million bond with the Court as security for compliance with this Court's Order.

Is there any need for clarification?

MR. YOUNGS: We understand the ruling of the Court.

MS. MARTIN: No need. Thank you, Your Honor.

THE COURT: Very well.

(The hearing concluded Friday, January 27, 2006, at 11:17 a.m.)