

IN THE CIRCUIT COURT OF CASS COUNTY, MISSOURI

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STOPAQUILA.ORG, et al.,

Plaintiffs,

v.

AQUILA, INC.

Defendant.

FILED
CIRCUIT CLERK
CASS COUNTY, MO.

CASS COUNTY CIRCUIT CLERK

Case No. CV104-1380CC

CONSOLIDATED WITH

CASS COUNTY, MISSOURI,

Plaintiff,

v.

AQUILA, INC.,

Defendant.

Case No. CV104-1443CC

FINAL JUDGMENT

CASE NO. CV104-1443CC

(SEVERED FROM CASE NO. CV104-1380CC)

This Court convenes on January 5-6, 2005, for an evidentiary hearing on the Applications for Preliminary Injunctions filed by Plaintiff Cass County, Missouri and by Plaintiffs StopAquila.org, et al. against Aquila, Inc. These two actions were consolidated by previous order of this Court pursuant to Rule 66.01(b).

Plaintiff Cass County, Missouri appears by and through counsel of record Cindy Reams Martin of Cindy Reams Martin, P.C., and Debra L. Moore, Cass County Counselor. Plaintiff StopAquila.org, et al. appears by and through counsel of record Gerard Eftink. Defendant Aquila, Inc. appears by and through counsel of record Karl Zobrist, J. Dale Youngs, and Andrew Bailey of Blackwell Sanders Peper Martin, LLP. The Missouri Public Service Commission was,

on its Motion, granted leave to intervene in this case at the beginning of the hearing for the limited purpose of addressing possible conflict between Section 393.170 of the Revised Statutes of Missouri and Section 64.235 of the Revised Statutes of Missouri, and appears through General Counsel Dana K. Joyce, and through attorneys Steven Dottheim and Lera Shemwell.

On the pleadings and evidence adduced, and based upon the arguments of counsel, the Court makes the following findings and orders:

1. The Court, having previously consolidated these actions for hearing on the respective Plaintiffs' Applications for Preliminary Injunction, now severs Case No. CV104-1380CC from Case No. CV104-1443CC from this point forward, and for all purposes, pursuant to its discretion under Rule 66.01(b). All findings and orders hereinafter set forth relate to Case No. CV104-1443CC.

2. The Court adopts as its findings of fact all of the Joint Stipulated Findings of Fact entered into by the parties as reflected in the record.

3. The Missouri Public Service Commission was granted leave to intervene at the beginning of the hearing for the limited purpose herein described. At the conclusion of the hearing, the Court removes the Missouri Public Service Commission as a party to these proceedings with the consent of the Missouri Public Service Commission.

4. Because the Court has now severed Case No. CV104-1443CC from Case No. CV104-1380CC, and because Plaintiff Cass County, Missouri and Defendant Aquila, Inc. have rested with respect to their evidence on Plaintiff Cass County, Missouri's Application for Preliminary Injunction, the Court grants Plaintiff Cass County, Missouri's pending Motion to Advance Trial of the Action on the Merits with the hearing on Plaintiff Cass County, Missouri's

Application for Preliminary Injunction pursuant to this Court's discretion under Rule 92.02(c)(3).

5. The Court finds that the reference in Section 64.235 of the Revised Statutes of Missouri to "such" development is either vague or constructively meaningless and likely was intended by the legislature to mean "a" or "any" development. However, this Court specifically makes no conclusions of law regarding interpretation of the word "such" as used in Section 64.235. The Court bases its conclusions of law in this case as follows:

THE COURT FINDS that either Aquila's Cass County Franchise must give Aquila the specific authority to build a power plant within Aquila's certificated area or service territory, and that Aquila's 1917 Franchise with Cass County does not; or that Aquila must obtain a "specific authorization" in its certificate of public convenience and necessity, pursuant to the provisions of Section 64.235 of the Revised Statutes of Missouri, to build a power plant within its certificated area or service territory from the Missouri Public Service Commission, and that Aquila has not.

THE COURT FURTHER FINDS that to rule otherwise would give privately owned public utilities the unfettered power to be held unaccountable to anyone other than the Department of Natural Resources, the almighty dollar, or supply and demand regarding the location of power plants. No one else has such unfettered power; not landfills, bedrock quarries, and not processing plants. Although not any of these are exactly on point, even the Missouri Highway and Transportation Commission has to go through the condemnation process before a circuit court regarding roads. Roads and landfills, at least, arguably have as much to do with the public good and welfare as power plants. The Court simply does not believe that such unfettered power was intended by the legislature to be granted to public utilities.

THE COURT FURTHER FINDS that irreparable harm to Plaintiff Cass County is both actual as it concerns potential damage to county roads and presumed by law as the Defendant's proposed actions violate existing County Ordinances.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Count I of Plaintiff Cass County, Missouri's First Amended Petition requesting a Declaratory Judgment is dismissed without prejudice at Plaintiff's request as effectively duplicative of the relief hereinafter granted under Count II.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Judgment is hereby entered in favor of Plaintiff Cass County, Missouri, and against Defendant Aquila, Inc. on Count II of Plaintiff Cass County, Missouri's First Amended Petition. Plaintiff's request for a temporary restraining order and for a preliminary injunction restraining construction of the Peculiar Substation and the South Harper Power Plant are, therefore, granted. Further, this Court, having advanced the hearing and cause and determination and judgment and order of this Court to a final judgment, hereby enters a mandatory permanent injunction against Aquila, Inc. as prayed by Plaintiff Cass County, Missouri in Count II of its First Amended Petition, as follows:

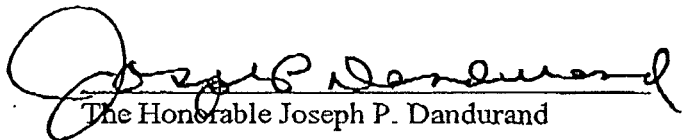
Aquila, Inc., and all others acting in concert with, at the direction of, on behalf of, under contract with, or otherwise in collaboration with Aquila, Inc., are mandatorily and permanently enjoined from constructing and operating the South Harper Plant, and from constructing and operating the Peculiar Substation, and are ordered to remove, at Aquila, Inc.'s expense, all improvements, fixtures, attachments, equipment or apparatus of any kind or nature inconsistent with an agricultural zoning classification placed, affixed or constructed at anytime, whether

before or after this Judgment, upon the South Harper Power Plant or Peculiar Substation sites described in the evidence.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the permanent injunction herein entered against Aquila, Inc. will be suspended, pursuant to this Court's discretion under Rule 92.03, during the pendency of any appeal by Aquila, Inc. from this Court's Judgment, subject to and conditioned upon Aquila, Inc. posting a \$350,000.00 cash or surety appeal bond in form satisfactory to the Court for the security of the rights of Cass County, Missouri. The bond shall reflect that Aquila, Inc. is held and firmly bound unto Plaintiff Cass County, Missouri in the sum of \$350,000.00 for the payment of which Aquila, Inc. and its surety, if applicable, bind themselves, on the condition that in the event the permanent injunction herein granted becomes a final non-appealable judgment, and/or is affirmed on appeal, then the bond shall be available to satisfy such damages, if any, deemed by the Court to have been incurred by Plaintiff Cass County, Missouri; otherwise the obligation shall be void. The Court finds that Plaintiff Cass County, Missouri has stipulated to a waiver of its rights under Rule 92.04 to seek from the Court of Appeals relief inconsistent with this Court's suspension of the injunction pending appeal.

IT IS SO ORDERED AND JUDGMENT IS HEREBY ENTERED, EACH PARTY TO BEAR ITS OWN COSTS.

Dated: Jan. 11, 2005


The Honorable Joseph P. Dandurand