FIRM I.D. NO. 42297

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, CHANCERY DIVISION

TOWNSHIP TRUSTEES OF SCHOOLS, TOWNSHIP 38 NORTH, RANGE 12 EAST, Plaintiff, v. LYONS TOWNSHIP HIGH SCHOOL DISTRICT 204, Defendants.	No. 13 CH 23386 Hon. Sophia H. Hall

REPLY IN FURTHER SUPPORT OF MOTION TO DISMISS

In reading Plaintiff's response brief, one could be forgiven for assuming that Plaintiff is the only governmental entity involved in this litigation. Plaintiff repeatedly fails to acknowledge that District 204 is also a governmental entity. As such, there is no need for the Court to hesitate before applying the doctrine of *laches* against Plaintiff based on its affirmative conduct and its utter failure to enforce its supposed rights over a period of nearly two decades. Even if special governmental considerations did apply, the law equally requires a party to bring all claims against a governmental entity promptly, and presumes the existence of prejudice where a party fails to exercise diligence in asserting claims against the government. The Court can and should find that *laches* applies here to bar Plaintiffs' stale claims.

Moreover, the five-year catchall limitations period applies to bar all of Plaintiff's claims in existence prior to October 17, 2008, including Plaintiff's alleged overpayment of interest, payment of auditing fees, and District 204's alleged failure to pay its proportionate share of the TTO's annual operating expenses. Plaintiff's complaint also makes clear that its claims for specific amounts owed are based on written invoices the TTO supposedly submitted to District

204. Plaintiff's heavy reliance on those invoices necessitates attaching them to the complaint. For those reasons, and as further discussed below, the Court should dismiss Plaintiff's complaint with prejudice.

I. THE DOCTRINE OF *LACHES* APPLIES TO PLAINTIFF'S STALE CLAIMS AGAINST DISTRICT 204.

A. Plaintiff Is Not Entitled to any Special Consideration Because Both Plaintiff and District 204 Are Governmental Entities.

Plaintiff argues that the doctrine of *laches* does not apply because it is a "governmental entity," and laches can only apply against such entities in "compelling circumstances." *See* Resp. at 3. Plaintiff's argument might be valid were District 204 a non-governmental entity. Indeed, the cases plaintiff cites for the proposition that laches does not apply related to suits involving individual or private citizens and a governmental entity. *Van Milligan v. Bd. of Fire and Police Comm'rs*, 158 Ill. 2d 85, 90, 630 N.E.2d 830 (1994); *City of Chic. v. Alessia*, 348 Ill. App. 3d 218, 807 N.E.2d 1150 (1st Dist. 2004); *Madigan ex rel., Dep't of Healthcare & Family Servs. v. Yballe*, 397 Ill. App. 3d 481, 920 N.E.2d 1112 (1st Dist. 2009); *In re Sharena H.*, 366 Ill. App. 3d 405, 852 N.E.2d 474 (1st Dist. 2006).

As a fellow governmental entity (*see* 745 ILCS 10/1-206), District 204 is *also* entitled to the same protections afforded governmental entities under which plaintiff seeks cover. Plaintiff's argument assumes that laches can never apply when a governmental entity is involved because of the special interests implicated in suits involving public bodies. But that is not the law in Illinois or elsewhere. This much is clear from the court's opinion in *Wabash County v. Ill. Mun. Ret. Fund*, 408 Ill. App. 3d 924, 946 N.E.2d 907 (2d Dist. 2011), a case cited by and relied on by plaintiff where the propriety of *laches* as between two public bodies was considered. *Wabash County*, 408 Ill. App. 3d at 926; 932.

Sister states presented with the assertion of *laches* between two governmental entities recognize that "[a] case between two public bodies does not present the same concerns of protecting public interest as does a case between a public body and a private citizen or private entity." *See State ex rel. Doran v. Preble County Bd. of Comm'rs*, 995 N.E.2d 239, 245 (Ohio Ct. App. 2013), copy attached as **Exhibit A**. The "doctrine of laches may be imputed upon a unit of government serving one public constituency which is suing another unit of government serving a different public constituency, as both parties have a duty to enforce the law and preserve the public rights, revenues, and property from injury and loss." *Id. See also State ex rel. City of Monett v. Lawrence County*, 407 S.W.3d 635, 639-40 (Mo. Ct. App. 2013) (noting that while courts show "reluctance" to apply estoppel and *laches* to a public entity regarding a private claim, "[t]here is little or no concern in this dispute *between* public bodies"), copy attached as **Exhibit B**. Because both Plaintiff and District 204 are public entities, no special concern exists regarding imposing *laches* to bar Plaintiff's claims.

Plaintiff offers no support for any finding that the protections afforded District 204 as a public entity are not equally important to those afforded Plaintiff. One such protection District 204 enjoys is a presumption that prejudice exists for purposes of *laches* due to Plaintiff's failure to bring known claims in a timely fashion. *See, e.g., Ashley v. Pierson*, 339 Ill. App. 3d 733, 739, 791 N.E.2d 666 (4th Dist. 2003) ("As to the prejudice prong [of *laches*], although a party asserting *laches* generally must prove that he was prejudiced by the other party's delay, in cases 'where a detriment or inconvenience to the public will result,' prejudice is inherent."). *See also Shakman v. Democratic Org. of Cook County*, 549 F. Supp. 801, 802 (N.D. Ill. 1982) (holding that claims against a government entity must be promptly asserted so that "the government service may be disturbed as little as possible . . . ."). Such protections are equally as important as

those protections the law affords Plaintiff. Even if the special governmental considerations applied here, Plaintiff had an obligation to bring all known claims against District 204 in a prompt fashion. The Court may presume as a matter of law that Plaintiff's act of sitting on its rights for nearly two decades prejudiced District 204, and should find that *laches* applies.

B. The Complaint Also Illustrates Affirmative Acts by Plaintiff that Prompted Detrimental Reliance and Caused District 204 Severe Prejudice.

The touchstone of *laches* against a governmental entity is the undertaking of an affirmative act. *Wabash County*, 408 Ill. App. 3d at 935; *City of Marengo v. Pollack*, 335 Ill. App. 3d 981, 989, 782 N.E.2d 913 (2002). Plaintiff sat on its rights for nearly two decades to District 204's detriment. The complaint alleges the TTO apportioned interest payments to District 204 over a period of seventeen years. *See* Compl. at ¶14. In other words, the TTO, under Plaintiff's supervision, analyzed funds under its control and independently determined the amount of interest each school district was owed. The TTO calculated the interest due to District 204 and allegedly made payments over a course of seventeen years. *See* Compl. at ¶14. The complaint does not allege that District 204 had any involvement in the calculation of interest owed. Instead, the complaint admits that the TTO's incompetence led to imprecise interest overpayments to District 204 totaling nearly $1.4 million. The complaint does not allege that: (1) Plaintiff ever told District 204 of any purported overpayment; (2) District 204 had knowledge of any overpayment; or (3) Plaintiff informed District 204 that interest paid would need to be reimbursed in the event the TTO failed to perform its duties competently regardless of how many years had passed since any particular payment was made.

The complaint further alleges that "between 2000 through 2012, the TTO determined the amount of District 204's *pro rata* billings and submitted an invoice to District 204 on an annual

basis," but District 204 supposedly failed to pay "in excess of $2,500,000.00" it owed to the TTO. *See* Compl. at ¶¶9-13. District 204 allegedly made payments during certain of those years, which payments allegedly did not satisfy the full amount of the invoices. *Id.* The complaint does not allege that Plaintiff at any time notified District 204 of any supposed underpayment. Nor does the complaint allege that Plaintiff undertook *any* effort to collect the purported underpayments. Rather, the complaint makes clear that, for more than a decade, the TTO continually issued annual invoices to District 204, affirmatively accepted payments from District 204 in some years and none in other years, and gave no indication to District 204 that its payments were insufficient or improper.

The Court can take judicial notice of the fact that, during the same time frame, the School Code required District 204 to examine its finances and pass at least seventeen separate budgets. *See* 105 ILCS 5/17-1, *et seq*. In reliance on Plaintiff's affirmative acts of continuing to send annual invoices, accepting payments from District 204, not asserting the existence of any underpayment, and making interest payments to District 204 based on the TTO's own calculations, all of which are established by the complaint, District 204 implemented budgets allocating limited resources for the services effecting thousands of students, staff, faculty, and community members. That annual process, like all budgeting processes, necessarily required District 204 to account for all moneys owed to and from other entities, including the TTO. Plaintiff's actions and inaction induced District 204 to change its position to its detriment during the annual budgeting process by not accounting for funds the TTO secretly believed District 204 owed. Plaintiff then suddenly filed suit in 2013 seeking reimbursement of payments dating back nearly two decades and asserting that District 204 owed the TTO millions in fees for a period covering more than twelve prior years. In all, Plaintiff seeks funds from at least seventeen past

budgetary years. In light of Plaintiff's conduct, coupled with its inaction in asserting any right to payment, the doctrine of *laches* squarely bars Plaintiff's claims.

C. In Any Event, Unusual, Compelling, or Extraordinary Circumstances Exist Supporting the Application of *Laches* to Plaintiff's Claims.

As discussed above, Plaintiff is not entitled to any presumption that *laches* does not apply here given that both Plaintiff and District 204 are governmental entities to which the law provides protections aimed at preserving taxpayer money. Even if the circumstances were different, and District 204 could not assert *laches* absent "unusual," "extraordinary," *or* "compelling" circumstances (see Response at 4, citing *City of Chicago v. Alessia*, 348 Ill. App. 3d 218, 229, 807 N.E.2d 1150 (1st Dist. 2004)), such circumstances exist here. "[T]he reluctance of courts to hold governmental bodies estopped to assert their claims is particularly apparent when the governmental unit is the *State*." *Hickey v. Ill. R.R. Co.*, 35 Ill. 2d 427, 447, 220 N.E.2d 415 (1966) (emphasis added). Notwithstanding this heightened reluctance with regard to barring state claims (as opposed to local governmental entity claims such as Plaintiff's), the Illinois Supreme Court in *Hickey* applied *laches* because the state sat on certain property rights for decades before asserting its claims. *Id.* at 449. During the period when the state failed to enforce its rights, others relied on the state's "overt action and passive acquiescence" to their detriment. *Id.* In applying *laches*, the *Hickey* court stated that doing so comported with "basic concepts of right and justice." *Id.* at 449.

Similarly, as discussed in detail above, the complaint makes clear that Plaintiff engaged in both overt action and passive acquiescence for nearly two decades, all to the detriment of District 204. Plaintiff's claims present an unusual, extraordinary, or compelling circumstance supporting application of *laches*. Tellingly, Plaintiff makes no effort to assert that the

circumstances here are not unusual, extraordinary, or compelling. Plaintiff should not be permitted to proceed with its claims against District 204 after sitting on its rights for seventeen years while District 204 allocated precious resources in seventeen or more budgets. Plaintiff seeks to impose severe hardship on District 204 and its constituencies without offering any excuse for its failure to assert its rights in any fashion of over the past two decades. The doctrine of *laches* applies, and the Court should dismiss the complaint.

II. THE FIVE-YEAR CATCHALL STATUTE OF LIMITATIONS APPLIES TO PLAINTIFF'S CLAIMS.

Plaintiff next claims that it is asserting purely "public rights," and that no statute of limitations could ever apply to bar its claims. *See* Resp. at 6. Plaintiff is mistaken.

A. Plaintiff's Interest-Payment and Auditor-Payment Claims In Existence Prior to October 17, 2008 Are Time-Barred.

The five-year catchall statute of limitations applies to bar Plaintiff's claims that the TTO miscalculated and overpaid interest to District 204. The *School Directors* case is instructive. As Plaintiff acknowledges, *School Directors* involved a township treasurer who paid public funds to a school district that the school district was allegedly not entitled to receive. *See* Resp. at 9, *Sch. Dirs. of Dist. No. 5. v. Sch. Dirs. of Dist. No. 1*, 105 Ill. 653, 655-56 (1883). The Illinois Supreme Court held that once those funds left the treasurer's hands, they could no longer be considered "a trust fund in appellee's hands which would exclude the operation of the Statute of Limitations." *Id.* at 656. As such, the court held the five-year statute of limitations applied to bar recovery of those allegedly improperly-paid funds. *Id.*

That holding is equally applicable here. The TTO allegedly paid funds to District 204 over a period of seventeen years. Plaintiff now claims that District 204 was not entitled to certain of those payments, and argues in its response brief that those funds rightfully belonged to other

school districts. *See* Compl. at ¶14; Resp. at 7. Because those funds were already paid out to District 204, there can be no claim that they now qualify as any sort of "trust fund." *See Sch. Dirs.*, 108 Ill. at 656. Plaintiff's own case law acknowledges this same proposition. *See* Resp. at 10; *Trs. of Sch. v. Arnold*, 58 Ill. App. 103, 108 (4th Dist. 1895) (noting that the statute of limitations applies once funding is "paid out to the beneficiaries," when the funding has "reached its ultimate agent for appropriation."). Plaintiff makes no meaningful attempt to refute this argument. The five-year statute of limitations applies, and Plaintiff's claims regarding any overpayment that occurred prior to October 17, 2008 are forever barred. *Id.*[1]

Similarly, any claim that Plaintiff distributed public funds to an auditor who performed services for District 204 (*see* Response at ¶¶15-16) is subject to the five-year statute of limitations. One again, when those funds left the treasurer's hands, they could not be considered "a trust fund in appellee's hands which would exclude the operation of the Statute of Limitations." *See Sch. Dirs.*, 105 Ill. at 656. Any purportedly improper payment Plaintiff made to an auditor on District 204's behalf that predated October 17, 2008 is barred by the five-year statute of limitations.

B. Plaintiff's Claims that District 204 Failed to Pay Its Alleged *Pro Rata* Share Prior to October 17, 2008 Are Time-Barred.

Plaintiff next contends that no statute of limitations applies to its claims that District 204 failed to pay its *pro rata* share of the TTO's expenses because those expenses involve "public rather than private rights." *See* Resp. at 6-7. As an initial matter, the Complaint does not allege facts establishing that any funds District 204 allegedly owed toward the TTO's expenses

[1] To qualify as a trust that could even be exempt from the statute of limitations, the trust "must-*First*, be a direct trust; *second*, it must be of the kind belonging exclusively to a court of equity; and, *third*, the question must arise between the trustee and the *cestui que trust*." *See People v. Town of Oran*, 121 Ill. 650, 655 (1887). Plaintiff cannot meet its burden of establishing the existence of these factors.

impacted public rights. Instead, the complaint asserts only that District 204 had a statutory obligation to pay certain of the TTO's expenses and failed to do so. *See* Compl. at ¶¶6-13. Illinois is a fact-pleading state, such that Plaintiff must plead facts in order to state a plausible claim under Illinois law. *Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 426-27, 430 N.E.2d 976 (1982) ("[A] motion to dismiss admits only facts well pleaded and not conclusions, [and] . . . must be granted regardless of how many conclusions the count may contain and regardless of whether or not they inform the defendant in a general way of the nature of the claim against him."). Plaintiff has not pled facts establishing that the funds District 204 purportedly underpaid had any impact on a public interest, and cannot remedy the lack of factual allegations through mere argument in a response brief. Plaintiff's claim fails in the absence of such facts.

Furthermore, Illinois courts have held that not all rights a governmental entity asserts qualify as "public rights." *See, e.g., Brown v. Trs. of Sch.*, 224 Ill. 184, 79 N.E. 579 (1906). "The rule that statutes of limitations [d]o not run against the State also extends to minor municipalities created by it as local government, *in respect to governmental affairs affecting the general public*." *Id.* at 186 (emphasis added). "[T]here is a well founded distinction between cases where the municipality is seeking to enforce a right in which the public in general have an interest in common with the people of such municipality, and cases where the public have no such interest . . . ." *Id.* at 187 (citing *County of Piatt v. Goodell*, 97 Ill. 84 (1880)). The *Brown* court observed, for example, a public interest exists in streets and highways because they "are not for the use of inhabitants of any municipality or locality alone, but for the free and unobstructed use of all the people in the State. Such rights are clearly distinguishable from the rights or interests of the inhabitants of a locality in property acquired for mere local use, such as city offices, a library site or the use of a fire department. *Such property is held and used for strictly local purposes.*" *Id.* at

188. The *Brown* court held that "[t]he people of the State in general have no interest, in common with the inhabitants of a school district, in the [subject] school house site or the proceeds of it. The use and right are confined to the particular local district," such that the statute of limitations applied. *Id.* at 189.

Similarly, Plaintiffs here have failed to allege that the public generally has any interest in the activities of the TTO. The Complaint is so devoid of facts that it does not even describe with any specificity the various activities of the TTO beyond allocating interest payments to a handful of local school districts. *See* Compl. at ¶14. Plaintiff pleads no facts establishing that the public, as opposed to a certain locality, has any interest in District 204's financial relationship with the TTO. Nor could Plaintiffs ever plead such facts, which circumstance distinguishes this case from those cases on which Plaintiff relies in its response brief.

For example, in *Shelbyville v. Shelbyville Restorium, Inc.*, 96 Ill. 2d 457, 464, 451 N.E.2d 874 (1983) (see Response at 6-7), the court held that a lawsuit relating to the "workmanlike construction and maintenance" of streets "for the use of the public" was "sufficient to render the city's interest in bringing this lawsuit 'public.'" As the court in *Brown* also noted, streets are for the use of everyone and not simply local residents. Similarly, in *Board of Education v. A, C & S, Inc.*, 131 Ill. 2d 428, 475, 546 N.E.2d 580 (1989) (see Response at 6-7), the court recognized that the state legislature had expressed a "special concern" in abating asbestos by passing the Asbestos Abatement Act. The court found the general "health concern" relating to asbestos was a "sufficient general concern for the people of the State and that the school districts are acting to promote that concern." *Id.* at 474-75. Once again, in declining to apply the statute of limitations, the court first found the existence of a broad state interest in the subject matter of the lawsuit.

In *Board of Supervisors v. City of Lincoln*, 81 Ill. 156 (1876) (see Response at 8-10), a

case that predated *Brown* by thirty years, is also readily distinguishable. The dispute in *City of Lincoln* centered on tax revenues that, by statute, were to be formulaically divided between a city and county (*i.e.*, two municipal corporations). The court held that those direct tax dollars were "in the nature of trust funds, held by the county for a specific object, defined by a public law, and hence the Statute of Limitations is not available as a defense to the action." *Id.* at 158-59. The reason for that holding was that "as respects property held for public use, *upon trusts*, *municipal corporations* are not within the Statute of Limitations . . . ." *Id.* at 158.

Here, Plaintiff is a local public entity and not a municipal corporation. Further, the complaint does not allege that District 204 is holding the funds plaintiff seeks in *trust* for the Plaintiff. The complaint also does not allege that District 204 is holding any tax dollars subject to a statutory formula requiring precise distribution to the TTO. In fact, the Complaint does not allege anything about tax dollars at all. Instead, the complaint merely alleges that District 204 was obligated to cover certain operating expenses of the TTO and failed to do so. *See* Compl. at ¶¶6-13. There are no facts alleged that District 204 is holding funds in trust for Plaintiff or that District 204 and the TTO are statutorily obligated to split any source of tax revenue, which renders *City of Lincoln* irrelevant. Neither does *Clare v. Bell*, 378 Ill. 128, 131-32 (1941) (see Response at 10), offer Plaintiff support. *Clare* addressed a private taxpayer's objections to penalties on property taxes, and addressed the role of a county "connected with the administration of State government." These facts are not present here, and *Clare* did not overrule or modify the case law permitting imposition of the statute of limitations against governmental entities in appropriate circumstances, as discussed above.

Finally, *Trustees of Schools v. Arnold*, 58 Ill. App. 103, 105-06 (4th Dist. 1895) (see Response at 10), which also long predated *Brown*, has no application here. *Brown* involved a suit

against a school treasurer relating to a bond on which he allegedly failed to make payment. The court held that a statute transformed the bond funds being held by the treasurer into a "specific trust." *Id.* at 107. The court held that those bond funds, when actually in the hands of the treasurer, were not subject to the statute of limitations. *Id.* at 109. Unlike in *Arnold*, Plaintiff is not suing for recovery of bond funds or similar moneys that District 204 is purportedly holding for the interest of Plaintiff. Instead, Plaintiff generically asserts that District 204 has not fully paid some invoices covering the TTO's expenses over a period of more than twelve years. District 204 is not holding any funds in trust for Plaintiff, notwithstanding any disagreement over whether District 204 is required to pay all amounts the TTO invoices without dispute. *Arnold* does not alter the fact that Plaintiff's interest in receiving payments for the work its employees supposedly conduct on behalf of a handful of unnamed school districts is not a sufficient public interest that would shield Plaintiff from any statute of limitations, whether it sued a school after seventeen or seventy years. *See Brown*, 224 Ill. 187-89. The five-year statute of limitations applies to Plaintiff's claims, and the Court should dismiss any and all of Plaintiff's claims in existence prior to October 17, 2008.

III. PLAINTIFF MUST ATTACH THE INVOICES ON WHICH IT RELIES OR MUST PROVIDE A MORE DEFINITE STATEMENT OF ITS CLAIMS.

Plaintiff next asserts that the invoices on which it relies extensively in the complaint need not be attached to the complaint because they are merely "evidentiary," and do not form the basis of its claims. *See* Resp. at 11. Rather, Plaintiff argues that the School Code provides the basis for its claim. *Id.* at 12. Plaintiff's argument would potentially have merit if the School Code provided a formula whereby amounts owed could be determined, such as what was seen in *City of Lincoln* where the county and city were to split tax revenues. *City of Lincoln*, 81 Ill. at 158-59.

In that case, the amounts owed could be determined by reviewing tax receipts and dividing the total in accordance with the statute. By contrast, Plaintiff is not splitting tax revenues with District 204, but rather presumably is asserting that District 204 and twelve other school districts (see Response at 7) must pay for the TTO's annual costs relating to personnel, office supplies, utilities, software, attorneys' fees, discretionary spending, and other subjective expenses that are not specifically delineated in the School Code.[2] As such, Plaintiff is in fact relying on the invoices, which detail the amounts owed, as the basis for its claims. The invoices must be attached to the complaint in accordance with section 2-606 of the Code of Civil Procedure.

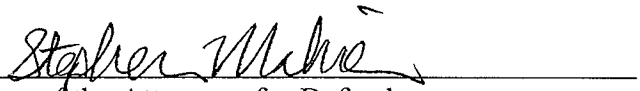
Finally, rather than respond to the substance of District 204's arguments that Plaintiff must provide a more definite statement, Plaintiff simply resorts to calling those arguments "half hearted," and asserts that "[b]ased on the face of the Complaint, District 204 can frame an answer to the Verified Complaint . . . " or obtain any necessary detail "through discovery." *See* Resp. at 12. In other words, Plaintiff is seeking millions of dollars in damages from District 204, yet does not believe it needs to plead any factual detail in support of its claims. Plaintiff simply throws out amounts allegedly due without providing any basis for how they were calculated, what services the amounts include, or how those services related to the tasks the School Code specifically requires the TTO to perform. In addition, Plaintiff alleges District 204 received improper interest payments, but does not allege the basis for that claim. Indeed, nowhere does the complaint allege how the amount of interest the TTO paid out was determined or precisely

[2] The School Code requires Plaintiff to cover the expenses of the TTO using "the permanent township fund," and only "[i]f the income of the permanent township fund is not sufficient," Plaintiff may seek payments from member school districts covering only: (1) the compensation of the treasurer; (2) the cost of publishing the annual statement; (3) the cost of a record book, if any; and (4) the cost of dividing school lands and making plats. *See* 105 ILCS 5/5-17. The complaint does not plead that the payments Plaintiff seeks are limited to these allowable claims or that Plaintiff's permanent township fund was insufficient to cover the TTO's expenses.

when District 204 received any overpayment. Nor does the complaint provide any factual support for Plaintiff's claim that District 204 owes nearly half a million dollars in auditing expenses. Such substantial claims cannot be supported through mere conclusory allegations. The court should order Plaintiff to file a more definite statement of its claims pursuant to section 2-615(a) of the Code of Civil Procedure, or should otherwise dismiss the complaint for its failure to allege sufficient facts.

WHEREFORE, defendant, LYONS TOWNSHIP HIGH SCHOOL DISTRICT 204, respectfully requests that this Court enter an order: (1) dismissing the Complaint, with prejudice; or (2) dismissing all of Plaintiff's claims predating October 16, 2008, with prejudice; and/or (3) dismissing the Complaint for failing to attach necessary exhibits or ordering Plaintiff to supply a more definite statement of its claims; and (4) granting such further relief as the Court deems just and reasonable.

Dated: March 11, 2014

By: 
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995 N.E.2d 239
Court of Appeals of Ohio,
Twelfth District, Preble County.

STATE ex rel. Kelly DORAN,
Taxpayer, et al., Plaintiffs–Appellants,
v.
PREBLE COUNTY BOARD OF
COMMISSIONERS, et al., Defendants–Appellees.

No. CA2012–11–015. | Aug. 19, 2013.

Synopsis

Background: Village and county taxpayer brought action against county board of commissioners, private residential community, and sewer line contractor alleging violation of Ohio's competitive bidding and ethics statutes. The Court of Common Pleas, Preble County, No. 12CV29351, granted board's motion to dismiss. Plaintiffs appealed.

Holdings: The Court of Appeals, Ringland, P.J., held that:

[1] county board of commissioners did not act with unclean hands so as to preclude county from asserting doctrine of laches, and

[2] suit was precluded by doctrine of laches.

Affirmed.

West Headnotes (12)

[1] **Equity**
⇐ Nature and elements in general

Equity
⇐ Following Statute of Limitations

"Laches" is an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party; it signifies delay independent of limitations in statutes.

[2] **Equity**
⇐ Prejudice from Delay in General

In order to successfully invoke the equitable doctrine of laches, it must be shown that the person for whose benefit the doctrine will operate has been materially prejudiced by the delay of the person asserting his claim.

[3] **Municipal Corporations**
⇐ Nature and scope in general

A "taxpayer suit" is a unique type of derivative action, created by statute, that is brought on behalf of the municipality to ensure that its officers comply with the law, do not misapply funds, or do not abuse the municipality's corporate powers. R.C. § 309.13.

[4] **Municipal Corporations**
⇐ Abatement or dismissal of action and defenses

The doctrine of laches may be used as a defense in a taxpayer lawsuit where it is shown that the person for whose benefit the doctrine will operate has been materially prejudiced by the delay of the person asserting his claim. R.C. §§ 309.12, 309.13.

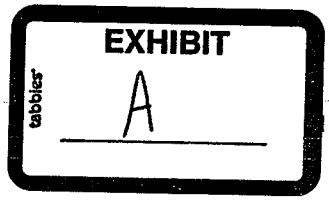
[5] **Equity**
⇐ Rights of public

Laches is generally no defense to a suit by the government to enforce a public right or to protect a public interest.

[6] **Equity**
⇐ Rights of public

Estoppel
⇐ Estoppel Against Public, Government, or Public Officers

The doctrine of laches may be imputed upon a unit of government serving one public constituency which is suing another unit of government serving a different public



constituency, as both parties have a duty to enforce the law and preserve the public rights, revenues, and property from injury and loss; while estoppel and laches rarely lie against government bodies due to the principle that public rights generally should not yield to those of private parties, there is little or no such concern in a dispute between public bodies.

[7] **Equity**
⇐ He Who Comes Into Equity Must Come with Clean Hands

In order to have any standing to successfully assert an equitable defense, i.e., laches, one must come with clean hands, and if he has violated conscience or good faith or has acted fraudulently, equitable release in defenses are not available to him; unclean hands are not to be lightly inferred, but must be established by clear, unequivocal and convincing evidence.

[8] **Counties**
⇐ Proposals or Bids

Equity
⇐ Nature of unconscionable conduct

County board of commissioners did not act with unclean hands in regards to project to dispose of leachate generated at county's landfill so as to preclude county from asserting doctrine of laches in action by village challenging bidding process for project; board's negotiations with the village to use village's collection system and the subsequent appointment of a selection committee after the negotiations broke down were not done in bad faith, without good conscience, or were fraudulent in nature.

[9] **Counties**
⇐ Proposals or Bids

Suit by taxpayer and village against county board of commissioners challenging the bidding process for project to dispose of leachate generated at county's landfill was precluded by the doctrine of laches; at the time of suit, 79 percent of the sewer main construction was complete and county had already expended $240,125 such that requiring the board to rebid the leachate project would have resulted in a substantial waste of taxpayer funds, and village offered no just reason for the delay in filing suit.

[10] **Equity**
⇐ Nature and elements in general

Equity
⇐ Application of doctrine in general

The party invoking the doctrine of laches must establish, by a preponderance of the evidence, the following four elements: (1) unreasonable delay or lapse of time in asserting a right; (2) absence of an excuse for the delay; (3) knowledge, actual or constructive, of the injury or wrong; and (4) prejudice to the other party.

[11] **Equity**
⇐ Prejudice from Delay in General

What constitutes material prejudice for purposes of laches is primarily a question of fact to be resolved through a consideration of the special circumstances of each case.

[12] **Appeal and Error**
⇐ Allowance of remedy and matters of procedure in general

An appellate court will not reverse the decision of a trial court regarding the application of the doctrine of laches unless there is a showing of an abuse of discretion.

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Opinion

OPINION

RINGLAND, P.J.

{¶ 1} Plaintiffs-appellants, Preble County taxpayer Kelly Doran and the village of ***241** Camden (the "Village"), [1] appeal a decision of the Preble County Common Pleas Court awarding judgment to defendants-appellants, the Preble County Board of Commissioners (the "Board"), Lakengren Water Authority ("Lakengren"), and Brumbaugh Construction Company ("Brumbaugh") after a trial on the issues of Ohio's competitive bidding and ethics statutes. [2] For the reasons set forth below, we affirm the decision of the trial court.

{¶ 2} In early 2008, the Board began exploring options for disposing of leachate generated at the county's landfill (the "leachate project"). [3] Thus, the Board entered into negotiations with the Village to discuss the option of transporting leachate through a force main sewer line from the landfill to the Village's collection system. In a "cooperative agreement" entered into by the Board and the Village in October 2008, the parties agreed to share in the funding of the leachate project with the Board assuming responsibility for 70 percent of the funding and the Village responsible for 30 percent. However, in March 2009, the Board terminated discussions with the Village regarding the leachate project and subsequently published a Request for Proposals ("RFPs") that invited interested entities to bid for the award of a 20–year contract to dispose of the leachate (the "leachate contract"). The RFPs indicated that interested offerors could obtain a "project description" from the Board, which consisted of a written project description, a written scope of work, and a written list factors and criteria to be used in the evaluation of the submitted proposals.

{¶ 3} In order to review the submitted proposals, the Board appointed an RFP selection committee. The responsibility of the committee was to evaluate and score proposals, then submit recommendations to the Board regarding an award of the leachate contract. The RFP selection committee, comprised of five total members, included County Engineer Steve Simmons and Chief Deputy County Engineer Kyle Cross. Both Simmons and Cross were residents of Lakengren, a private residential community whose residents formed their own sewer utility for sewer collection and treatment.

{¶ 4} Both the Village and Lakengren submitted proposals to the Board that were reviewed by the selection committee in October 2009. After the proposals had been submitted and opened for review, the selection committee prepared a detailed scoring sheet and scored the proposals before concluding that Lakengren's proposal scored higher than the Village's. Thus, the selection committee voted to recommend to the Board that Lakengren be awarded the leachate contract. The Board adopted the recommendation and entered into a contract with Lakengren on January 25, 2010.

{¶ 5} In December 2010, 11 months after the award of the contract to Lakengren, the Village filed a federal lawsuit in the United States District Court for the Southern District of Ohio. The suit alleged a Section 1983 federal civil rights claim arising from the Board's award of the ***242** leachate contract to Lakengren. The suit also sought supplemental federal jurisdiction over state law claims including alleged violations of Ohio's competitive bidding statutes under R.C. 307.86, et seq. However, the lawsuit was dismissed in April 2011 for lack of federal jurisdiction.

{¶ 6} Following dismissal of the federal suit, the Board requested public bids for a contract to construct a pressure force main sewer line and appurtenances from Preble County's landfill to Lakengren. In November 2011, Brumbaugh was awarded the contract to construct the sewer line and construction of the line began in January 2012.

{¶ 7} On March 19, 2012, approximately 27 months after the leachate contract had been awarded to Lakengren, the Village, along with taxpayer Kelly Doran (collectively, "appellants"), filed suit in the Preble County Common Pleas Court against the Board, Lakengren, and Brumbaugh. The complaint alleged violations of Ohio's competitive bidding statutes (R.C. 307.86 and R.C. 307.862), Ohio's conflict of interest and public ethics statutes (R.C. 305.27 and R.C. 102.03), and Ohio's taxpayer statutes (R.C. 309.12 and R.C.

209.13), as well as a claim that the Village was entitled to a writ of mandamus pursuant to R.C. 2731.02, asserting a clear legal right to the award of the leachate contract to the Village.

{¶ 8} By the time the present suit was initiated, 79 percent of the force main sewer line construction had been completed and $240,125 had already been spent by Preble County on the sewer line alone, as distinguished from the construction of the pumping and retention facilities. In addition, $871,167.85 of the $1,490,670.50 contract had been submitted to Preble County by Brumbaugh for payment.

{¶ 9} A trial was held May 7, 2012, at which point the force main had been completed, pressure-tested, and was ready for service, $333,799 had been spent by Preble County on the force main portion of the project, and the contract with Brumbaugh was within one month of completion. Testimony at trial revealed that awarding the contract to the Village at this time would cost Preble County taxpayers, at minimum, an additional $381,355 in the construction of a new sewer line to the Village. On October 30, 2012, based upon these facts, the trial court issued a decision granting the Board's motion to dismiss appellants' claims under Ohio's competitive bidding statutes and ruling that appellants' remaining claims were barred by the equitable doctrine of laches.

{¶ 10} From the trial court's decision, appellants appeal, raising two assignments of error. Appellants do not appeal the trial court's dismissal of their claims under Ohio's competitive bidding statutes but appeal those claims barred by the doctrine of laches.

{¶ 11} Assignment of Error No. 1:

{¶ 12} THE TRIAL COURT ERRED BY HOLDING THAT THE EQUITABLE DOCTRINE OF LACHES BARRED PLAINTIFFS–APPELLANTS' CLAIMS.

{¶ 13} In their first assignment of error, appellants raise several issues: (1) laches does not apply to a taxpayer suit under R.C. 309.12 or R.C. 309.13; (2) laches does not apply to the claims of a local government against another local government for violation of the public's rights; (3) laches does not apply when the party asserting the defense has unclean hands; and (4) even if laches applied, the Board failed to introduce evidence to support a finding of laches. In essence, appellants contend the trial court improperly found that their claims were barred by the doctrine of laches.

*243 [1] [2] {¶ 14} " 'Laches is an omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party. It signifies delay independent of limitations in statutes.' " *Merchants Bank & Trust Co. v. Kelly,* 12th Dist. Butler No. CA2003–09–229, 2004-Ohio-3913, 2004 WL 1662288, ¶ 20, quoting *Connin v. Bailey,* 15 Ohio St.3d 34, 35, 472 N.E.2d 328 (1984); *Smith v. Smith,* 107 Ohio App. 440, 443–444, 146 N.E.2d 454 (8th Dist.1957). In order to successfully invoke the equitable doctrine of laches, "it must be shown that the person for whose benefit the doctrine will operate has been materially prejudiced by the delay of the person asserting his claim." *Id.,* citing *Connin* at 35–36, 472 N.E.2d 328; *Smith v. Smith,* 168 Ohio St. 447, 156 N.E.2d 113 (1959), paragraph three of the syllabus.

Taxpayer Claims

{¶ 15} Appellants first argue that Doran's claims under R.C. 309.12 and R.C. 309.13 cannot be barred by the doctrine of laches. Specifically, appellants contend that, because taxpayer suits serve a vital interest to guard against improper public expenditures, Ohio courts have consistently held that taxpayer suits cannot be barred by laches. The issue is whether Ohio law permits the equitable application of the doctrine of laches to claims regarding the rights of taxpayers. As this is a question of law, we review appellants' contention under a de novo standard of review. *Wilson v. AC & S, Inc.,* 169 Ohio App.3d 720, 2006-Ohio-6704, 864 N.E.2d 682, ¶ 61 (12th Dist.) ("Questions of law are reviewed de novo, independently, and without deference to the trial court's decision"); *Chirco v. Crosswinds Communities, Inc.,* 474 F.3d 227, 231 (6th Cir.2007) ("[W]hen a reviewing court is presented with a threshold question of law as to whether the laches doctrine is even applicable in a particular situation, as we are here, our review is *de novo* ").

[3] {¶ 16} A taxpayer suit is a unique type of "derivative action, created by statute, that is brought on behalf of the municipality to ensure that its officers comply with the law, do not misapply funds, or do not abuse the municipality's corporate powers." *Cincinnati ex rel. Ritter v. Cincinnati Reds, L.L.C.,* 150 Ohio App.3d 728, 2002-Ohio-7078, 782 N.E.2d 1225, ¶ 20 (1st Dist.), citing *Columbus ex rel. Willits v. Cremean,* 27 Ohio App.2d 137, 149, 273 N.E.2d 324 (10th Dist.1971).

{¶ 17} There is extremely limited case law on the application of laches to a taxpayer lawsuit and the majority of these cases date back to 1980 or earlier. Nevertheless, in reviewing the cases relied upon by appellants, we find there is no outright "maxim" declaring that the doctrine of laches cannot be applied to bar the suit of an Ohio taxpayer. *See State ex rel. Scobie v. Cass,* 22 Ohio C.D. 208, 213, 32 Ohio C.C. 208, 1910 WL 639 (Oct. 28, 1910) (holding that laches did not apply due to the plaintiff's reasonable diligence and finding that the court "would hardly be warranted, in a suit begun on behalf of the taxpayers of the county, to protect their interests against the illegal expenditure of public funds, in finding that the plaintiff was guilty of laches, *unless such clearly appeared to be the case* "); *Pincelli v. The Ohio Bridge Corp.,* 5 Ohio St.2d 41, 213 N.E.2d 356 (1966) (addressing injunctive relief under R.C. 309.13 rather than laches); *Yoder v. Williams Cty.,* 48 Ohio App.2d 36, 42, 354 N.E.2d 923 (6th Dist.1976) (finding the doctrine of laches inapplicable *in this case* "where the plaintiff used reasonable diligence in prosecuting the action"); ***244** *State of Ohio ex rel. Crown Controls Corp. v. Reinhart,* 3d Dist. Auglaize No. 2–78–6, 1978 WL 215789, *4 (July 25, 1978) (finding that the doctrine of laches may apply in certain cases but is inapplicable *in the case at hand,* where the action was "not personal but on behalf of the public, is barred by no specific statute of limitations and involves a void contract, not simply voidable"); *Takacs v. City of Euclid, Ohio,* 8th Dist. Cuyahoga Nos. 40978 & 41113, 1980 WL 354795, *5 (Aug. 14, 1980) (holding that laches did not apply due to the plaintiff's reasonable diligence and quoting *Scobie* for the proposition that application of the doctrine of laches is not applicable in a suit brought by a taxpayer to protect the public "*unless such clearly appeared to be the case* ").

[4] {¶ 18} Thus, Ohio case law does not prohibit the application of laches as a defense to a taxpayer suit under R.C. 309.12 and R.C. 309.13. Rather, the application of the doctrine of laches in a taxpayer suit brought to protect the public's interest is permissible where it "clearly appear[s] to be the case." *Scobie* at 213; *Takacs* at *5. As such, we find that the doctrine of laches may be used as a defense in a taxpayer lawsuit where it is shown "that the person for whose benefit the doctrine will operate has been materially prejudiced by the delay of the person asserting his claim." *Kelly,* 2004-Ohio-3913, 2004 WL 1662288, at ¶ 20.

Local Government v. Local Government

{¶ 19} Appellants next argue that the doctrine of laches cannot be applied to claims of a local government (the Village) against another local government (Preble County) for violations of public rights. Specifically, appellants contend the trial court erred as a matter of law in applying the doctrine of laches to the case at hand, as "courts across Ohio have continued to apply the deeply-rooted maxim that laches does not apply to state and local governments when they bring claims to protect the public's rights." We review appellants' argument that application of the doctrine of laches is impermissible to all lawsuits involving local government de novo. *Wilson,* 169 Ohio App.3d 720, 2006-Ohio-6704, 864 N.E.2d 682, at ¶ 61; *Chirco,* 474 F.3d at 231.

[5] {¶ 20} Appellants are correct that "laches is *generally* no defense to a suit by the government to enforce a public right or to protect a public interest." (Emphasis added.) *Ohio State Bd. of Pharmacy v. Frantz,* 51 Ohio St.3d 143, 555 N.E.2d 630 (1990), paragraph three of the syllabus; *Ohio Dept. of Transp. v. Sullivan,* 38 Ohio St.3d 137, 139, 527 N.E.2d 798 (1988); *Portage Cty. Bd. of Commrs. v. Akron,* 109 Ohio St.3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶ 82. "The rationale behind this rule is one of public policy; the public should not suffer due to the inaction of public officials." *Still v. Hayman,* 153 Ohio App.3d 487, 2003-Ohio-4113, 794 N.E.2d 751, ¶ 11 (7th Dist.); *Frantz* at 146, 555 N.E.2d 630, citing *Lee v. Sturges,* 46 Ohio St. 153, 176, 19 N.E. 560 (1889). "To impute laches to the government would be to erroneously impede it in the exercise of its duty to enforce the law and protect the public interest." *Frantz* at 146, 555 N.E.2d 630.

{¶ 21} Despite this general principle, "the imposition of an absolute bar to the availability of laches as a legal defense against the state has never been held by the Ohio Supreme Court." *Still* at ¶ 8, citing *Adams Cty. Child Support Enforcement Agency v. Osborne,* 4th Dist. Adams No. 95CA592, 1996 WL 230038 (May 3, 1996). The "true reason [behind this general rule] is to be found in the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers." *Sullivan* at 138, 527 N.E.2d 798.

***245** [6] {¶ 22} A case between two public bodies does not present the same concerns of protecting the public interest as does a case between a public body and a private citizen or private entity. Therefore, we find the doctrine of laches may be imputed upon a unit of government serving one public constituency which is suing another unit of government serving a different public constituency, as both parties have

a duty to enforce the law and preserve the public rights, revenues, and property from injury and loss. While "estoppel and laches rarely lie against government bodies" due to the "principle that public rights generally should not yield to those of private parties," there is "little or no such concern in this dispute *between* public bodies." *State ex rel. City of Monett v. Lawrence Cty.*, Mo.App. No. SD31500, 2013 WL 1952537, *4 (May 13, 2013); *see also Munn v. Horvitz Co.*, 175 Ohio St. 521, 529, 196 N.E.2d 764 (1964). Accordingly, laches may be applied in cases involving disputes between public bodies.

Unclean Hands

{¶ 23} Appellants additionally argue the doctrine of laches cannot apply specifically to this case because the Board does not have clean hands. Appellants argue the Board cannot assert laches because it failed to act in good faith when it executed a cooperative agreement with the Village, used the agreement to obtain a loan from the Ohio Public Works Commission ("OPWC"), and then ignored the agreement and awarded the leachate contract to Lakengren. Additionally, appellants argue the Board has unclean hands because it allowed Simmons and Cross, both residents of Lakengren, to organize and sit on the RFP selection committee and recommend to the Board that Lakengren be given the leachate contract.

[7] {¶ 24} "The most memorable equitable maxim learned by every first year law student is 'he who comes seeking equity must come with clean hands.' " *City of Kettering v. Berger*, 4 Ohio App.3d 254, 261, 448 N.E.2d 458 (2d Dist.1982). "In order to have any standing to successfully assert an equitable defense, *i.e.*, laches, one must come with clean hands, and if he has violated conscience or good faith or has acted fraudulently, equitable release in defenses are not available to him." *Id.* at 261–262, 448 N.E.2d 458. "[U]nclean hands are not to be lightly inferred. They must be established by clear, unequivocal and convincing evidence." *Hoover Transp. Services, Inc. v. Frye*, 77 Fed.Appx. 776, 784 (6th Cir.2003), quoting *Kearney & Trecker Corp. v. Cincinnati Milacron, Inc.*, 562 F.2d 365, 371 (6th Cir.1977). Appellants' allegations of unclean hands are supported by little, if any, evidence.

[8] {¶ 25} Testimony at trial revealed that Simmons, on behalf of the Board, began exclusive negotiations with the Village regarding the leachate project in 2008. Based, in part, upon these negotiations, Simmons prepared an OPWC loan application listing the Village as the destination of the force main sewer line where the leachate would be treated. As part of the loan application, Simmons included the October 2008 "cooperative agreement" entered into by the Village and the Board. Doran admits that the cooperative agreement was not a contract and Simmons explained that attaching the cooperative agreement to the loan application was "kind of moot," as the OPWC "couldn't spend [loan money] fast enough" and had not turned down a loan in the last 20 years. OPWC eventually approved the loan including the Village as the end location of the force main sewer line. Simmons explained, however, that negotiations *246 between the Village and the Board ultimately broke down over the issue of cost and, therefore, the Board sought bids elsewhere. After Lakengren secured the leachate project contract, the Board amended the OPWC application to list Lakengren as the destination of the force main.

{¶ 26} Furthermore, Simmons and Doran testified regarding the Board's earnest desire to partner with the Village regarding the leachate project. Though Simmons is a resident of Lakengren, Doran testified about Simmons's repeated statements that the Board "always" had an intent to use the Village for the leachate project and that the Board showed "goodwill" and "interest" in entering into a leachate contract with the Village.

{¶ 27} The Village has failed to present evidence that the Board's negotiations with the Village and appointment of the selection committee were done in bad faith, without good conscience, or were fraudulent in nature. No contract was agreed to by the Board and the Village and, thus, no breach of contract has occurred. Furthermore, negotiations break down between parties regularly and, without more, we do not find that the Board's eventual decision to request bids from other entities was an indication of unclean hands. Finally, even had Simmons or Cross sought to influence the selection committee to side in favor of Lakengren, the Board made the final decision as to who would be awarded the leachate contract. The selection committee's responsibility was simply to recommend an offeror to the Board and it was the Board who made the determination to offer the contract to Lakengren, not Simmons or Cross. Based upon our review of the record, we find that the trial court did not err in applying the doctrine of laches to the case at hand, as there is no evidence that the Board acted with unclean hands.

Sufficient Evidence

[9] {¶ 28} Finally, appellants contend that, even if the doctrine of laches is applicable to taxpayer and local government actions, the doctrine should not be applied in this case, as the Board failed to present sufficient evidence for a finding of laches.

[10] {¶ 29} The party invoking the doctrine of laches "must establish, by a preponderance of the evidence, the following four elements: (1) unreasonable delay or lapse of time in asserting a right; (2) absence of an excuse for the delay; (3) knowledge, actual or constructive, of the injury or wrong; and (4) prejudice to the other party." *Dyrdek v. Dyrdek,* 4th Dist. Washington No. 09CA29, 2010-Ohio-2329, 2010 WL 2091649, ¶ 18, citing *State ex rel. Meyers v. Columbus,* 71 Ohio St.3d 603, 605, 646 N.E.2d 173 (1995); *Pavkov v. Time Warner Cable,* 9th Dist. Wayne No. 99CA0025, 2000 WL 354163, *4–5 (Apr. 5, 2000).

[11] [12] {¶ 30} "What constitutes material prejudice is primarily a question of fact to be resolved through a consideration of the special circumstances of each case." *Shockey v. Blackburn,* 12th Dist. Warren No. CA98–07–085, 1999 WL 326174, *4 (May 17, 1999), citing *Bitonte v. Tiffin Savings Bank,* 65 Ohio App.3d 734, 739, 585 N.E.2d 460 (3d Dist.1989). "An appellate court will not reverse the decision of a trial court regarding the application of the doctrine of laches unless there is a showing of an abuse of discretion." *Id.,* citing *Payne v. Cartee,* 111 Ohio App.3d 580, 590, 676 N.E.2d 946 (4th Dist.1996); *see also State ex rel. Choices for South–Western City Schools v. Anthony,* 108 Ohio St.3d 1, 2005-Ohio-5362, 840 N.E.2d 582, ¶ 27. An abuse of discretion is more than an error of law or judgment; it involves a determination that the trial court's decision is arbitrary, unreasonable, or unconscionable. *247 *Blakemore v. Blakemore,* 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

{¶ 31} We find the case at hand analogous to the Eighth Appellate District's case of *Ormond v. City of Solon,* 8th Dist. Cuyahoga No. 79223, 2001 WL 1243959 (Oct. 18, 2001). In *Ormond,* the Eighth District addressed the dispute between a resident property owner and the city of Solon concerning the development of a residential subdivision within the city limits. *Id.* at *1. The resident asserted that the city, in contravention of the city charter, changed the zoning classification of the land which was to be used for the subdivision. *Id.* The resident, therefore, sought a preliminary injunction enjoining the construction of the subdivision. *Id.* The trial court found that the resident "waited too long after the * * * construction on the project had started to seek a temporary restraining order and/or preliminary injunction to enjoin the construction efforts." *Id.* at *2.

{¶ 32} On appeal, the Eighth District found that the doctrine of laches applied to bar the resident's claims. *Id.* The court determined that "ample documentation" demonstrated "the material prejudice which would have inured to the detriment of the city and the developers had the trial court granted the [resident's] untimely request for injunctive relief." Specifically, the Eighth District quoted the finding of the trial court:

> Notwithstanding the fact that [the resident] had notice that construction would start shortly after the January 18, 2000 approval of the preliminary plat, [the resident] did not move for a Temporary Restraining Order or Preliminary Injunction under June 28, 2000. * * * By that time, the construction of [the subdivision] had completed over seven major steps out of a total of ten steps in the development. * * * Thus, for almost seven months, [the resident] did not actively pursue an injunction until much of the construction had already been completed. To halt the construction now would certainly harm the developers more than [the resident] would be harmed without the injunction. Moreover, [the resident] should not be permitted to delay seeking an injunction thereby increasing the harm [the city] would suffer from such an injunction when the degree of harm would have been less severe had [the resident] actively sought an injunction sooner.

Id. at *3. With that, the Eighth District concurred with the trial court's application of the doctrine of laches and conclusion that it would have been inequitable to have granted injunctive relief after the resident's delayed request for relief. *Id.*

{¶ 33} Just as in *Ormond,* ample evidence was presented before the trial court that appellants waited 27 months after

the leachate contract was awarded to Lakengren before filing suit. Even if we discount, as appellants propose, the time between the leachate contract being awarded to Lakengren (January 2010) and when Brumbaugh was hired to build the sewer line (November 2011), appellants still waited an unreasonable four months before filing suit in state court. *See Jefferson Regional Water Auth. v. Montgomery Cty.*, 161 Ohio App.3d 310, 2005-Ohio-2755, 829 N.E.2d 1310, ¶ 8 (2d Dist.) (plaintiff who waited seven months after knowing about a construction contract to file a claim was barred by the doctrine of laches). By the time appellants filed their March 19, 2012 complaint, 79 percent of the force main construction was complete and Preble County had already expended $240,125 to Brumbaugh. In addition, by the time of trial, $333,799 had already been spent by Preble County on the force main portion of the project alone, and the construction *248 performed by Brumbaugh was within one month of completion. Finally, testimony at the trial revealed, and Doran confirmed, that Preble County's taxpayers would have been required to pay, at minimum, an additional $381,355 for the construction of a new sewer line to the Village had appellants' prevailed in the suit.

{¶ 34} Appellants assert the Board was put on notice of the potential lawsuit in October 2011 when appellants' trial counsel called Preble County's prosecutor, asking that the prosecutor discuss with the Board the leachate project, as Doran personally wished to avoid litigation if the Village was not awarded the leachate contract. However, beyond the testimony of Doran that his attorney said he made a telephone call to the prosecutor, there is no evidence in the record that such a conversation took place or that the Board was aware of any such communication. Rather, the testimony reveals, at best, that Doran's attorney contacted the Preble County prosecutor's office regarding the leachate contract and was told "that ship has sailed." Without more, we cannot say that the Board had notice of the potential for suit in state court prior to the March 2012 filing of appellants' complaint.

{¶ 35} Appellants further claim that their reason for any delay in filing suit was due to the fact that the Village is a "small community" and too "poor" to file a lawsuit, as they did not "really budget for something like this." Appellants also allege that an Ohio EPA water supply emergency in the Village prevented the filing of the lawsuit in a more timely fashion. However, Doran testified that the water supply emergency which occurred in the Village did not affect funding for the lawsuit, as the emergency issue was funded by a low-interest loan which had no bearing on the Village's general fund. In addition, Doran testified that, although the water emergency occurred at the same time as the leachate project, the Village "never lost [their] focus" on the leachate project and that the project was "something that [the Village] always worked on, even in the midst of [the water emergency]." Finally, Doran testified that the Village has annual gross receipts of approximately $1,000,000 and was able to hire an attorney to represent the Board in federal court just one year prior to the state suit. Accordingly, we find that appellants failed to present a just reason for their delay in filing suit against the Board.

{¶ 36} Based upon our review of the record, we find evidence supporting the trial court's determination that there was an unreasonable delay between appellants' learning of the leachate contract and appellants' filing suit, there was no excuse for such a delay, and the Board, as well as the taxpayers of Preble County, were materially prejudiced by the delay. If appellants had filed suit sooner, prior to the commencement of construction or the award of a construction contract, their claims could have been addressed without harm to Preble County's taxpayers. We agree with the trial court that awarding the contract to the Village or requiring the Board to rebid the leachate project at this time would result in the substantial waste of taxpayer funds in an already completed project. Appellants should not be permitted to delay filing their suit when such a delay causes a degree of harm that would have been less severe had appellants actively sought relief sooner. Consequently, we find that the trial court did not abuse its discretion in applying the doctrine of laches to the case at hand. It would have been inequitable to award judgment in favor of appellants after they delayed requesting relief for such an extended period of time.

*249 {¶ 37} For the foregoing reasons, appellants' first assignment of error is overruled.

{¶ 38} Assignment of Error No. 2:

{¶ 39} THE TRIAL COURT ERRED BY HOLDING THAT OHIO'S ETHICS STATUTES WERE NOT VIOLATED WHEN COUNTY–APPOINTED COMMITTEE MEMBERS LIVING IN THE PRIVATE LAKENGREN COMMUNITY VOTED TO AWARD A 20–YEAR LEACHATE CONTRACT TO THE COMMUNITY.

{¶ 40} In their second assignment of error, appellants contend the Board violated R.C. 102.03 and R.C. 305.27 by including Lakengren residents as members of the leachate

project selection committee. Specifically, appellants argue that Simmons and Cross had improper personal and pecuniary interests (1) when they developed scoring criteria for scoring the proposals after receiving Lakengren's proposal, (2) when they gave a higher score to Lakengren's proposal, and (3) when they voted to recommend to the Board that Lakengren receive the leachate project contract.

{¶ 41} Although the trial court addressed the merits of appellants' ethics claims relating to Simmons and Cross, the court ultimately dismissed these claims on the basis of laches, as discussed above. As our finding that laches applies in this case resolves the issue raised here, we decline to address appellants' second assignment of error. *See* App.R. 12(A)(1)(c); *Emerson Family Ltd. Partnership v. Emerson Tool, L.L.C.*, 9th Dist. Summit No. 26200, 2012-Ohio-5647, 2012 WL 6033142, ¶ 23.

{¶ 42} Judgment affirmed.

S. POWELL and PIPER, JJ., concur.

Parallel Citations

2013 -Ohio- 3579

Footnotes

1 The village of Camden is a municipality located in Preble County, Ohio.

2 Lakengren and Brumbaugh were named as indispensable parties in the action under Civ.R. 19 and Ohio's declaratory judgment statute because they were parties to the contracts being challenged. Neither Lakengren nor Brumbaugh actively participated in the trial other than to support the position taken by the Board.

3 Leachate consists of the soluble constituents derived from waste as it decomposes and enters into water by percolating through a landfill.

407 S.W.3d 635
Missouri Court of Appeals,
Southern District,
Division Two.

STATE of Missouri, ex rel., CITY OF MONETT, Missouri, Respondent,
v.
LAWRENCE COUNTY, Missouri, Kelli McVey, Sharon Kleine, Defendants,
Barry County, Missouri, Gary Youngblood, Janice Varner, and Lois Lowe, Appellants,
Barry County Emergency Services E–911 Board, Appellant.

Nos. SD 31500, SD 31502. | May 13, 2013. | Motion for Rehearing and/or Transfer to Supreme Court Denied June 4, 2013. | Application for Transfer Denied Oct. 1, 2013.

Synopsis

Background: City brought mandamus action against county to enforce tax increment financing (TIF) allocation, and county counterclaimed that TIF districts were not validly created, and thus were void ab initio. The Circuit Court, Lawrence County, Neal Quitno, J., granted summary judgment in city's favor. County appealed.

Holdings: The Court of Appeals, Daniel E. Scott, J., held that:

[1] county's claims were barred by estoppel and laches, and

[2] emergency services sales tax, which was adopted after TIF districts were created, was subject to TIF allocation.

Affirmed.

West Headnotes (6)

[1] **Municipal Corporations**
⇐ Payment

Tax Increment Financing (TIF) Act authorizes municipalities to adopt and finance redevelopment plans for blighted areas with the purpose to create in such areas new and substantial sources of sales tax revenue. V.A.M.S. § 99.800 et seq.

[2] **Estoppel**
⇐ Counties and subdivisions thereof

Municipal Corporations
⇐ Payment

County's claims that city's tax increment financing (TIF) districts were not validly created were barred by estoppel and laches in city's mandamus action to enforce TIF allocation; TIF districts were created several years before county challenged their validity, county actively participated in creation of districts and its representatives were part of the commission approving redevelopment plans in TIF districts, city issued bonds to finance redevelopments, and county performed under the Real Property Tax Increment Allocation Redevelopment Act as if districts were valid. V.A.M.S. § 99.800 et seq.

1 Cases that cite this headnote

[3] **Equity**
⇐ Rights of public

Estoppel
⇐ Estoppel Against Public, Government, or Public Officers

Estoppel and laches rarely lie against government bodies; this reluctance rests on the principle that public rights generally should not yield to those of private parties.

1 Cases that cite this headnote

[4] **Equity**
⇐ Rights of public

Estoppel
⇐ Estoppel Against Public, Government, or Public Officers

A case between public bodies does not present the concerns regarding application of estoppel and laches against government bodies.

1 Cases that cite this headnote

[5] **Estoppel**

Effect of estoppel

Estoppel operates as a defense to legal and equitable claims.

[6] **Municipal Corporations**

Payment

County's emergency services sales tax, which was adopted after city's creation of tax increment financing (TIF) districts, was subject to TIF allocation; revenues from tax were not specifically exempted from TIF allocation in the Real Property Tax Increment Allocation Redevelopment Act or the sales tax enabling legislation. V.A.M.S. §§ 99.800 et seq., 190.335.

Attorneys and Law Firms

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Opinion

DANIEL E. SCOTT, P.J., Judge.

This appeal involves tax increment financing (TIF). [1] There are two principal questions:

1. Can a county watch TIF projects be undertaken and completed, and collect, distribute, and retain TIF monies related thereto, all for years without protest, then claim the TIF actions were void *ab initio?*

2. Is an E–911 tax subject to TIF allocation if voters approved the tax after the TIF district was created?

The trial court said "no" and "yes" respectively on summary judgment. We uphold *637 those rulings, reject other complaints on appeal, and affirm the judgment entered in favor of the City of Monett ("City") and against Barry County and certain elected officials (collectively "County") and the Barry County E–911 Board ("Board"). [2]

Background

[1] The TIF Act authorizes municipalities to adopt and finance redevelopment plans for blighted areas with the purpose to create in such areas new and substantial sources of sales tax revenue. *See State ex rel. Village of Bel–Ridge v. Lohman,* 966 S.W.2d 356, 357 (Mo.App.1998).

The 1996 and 2005 TIFs

City created one TIF district in 1996 and another in 2005. In each instance, City created a TIF commission and County appointed a representative who actively participated. County received the proposed redevelopment plan and notice of the public hearing. After the public hearing, the TIF commission recommended that City approve the plan, which City did by ordinance.

The 1996 TIF district included, as core projects, highway improvements and a Wal–Mart Supercenter. The 2005 TIF district included a Lowe's home improvement center. City pledged TIF allocation funds and issued over $9 million in bonds, etc., to finance these redevelopments.

After redevelopment, these areas generated new County sales tax revenues totaling millions of dollars. County kept 50% of these monies and sent 50% to City for reimbursement of TIF redevelopment costs, starting in 1997. *See* § 99.845.3; *Lohman,* 966 S.W.2d at 357.

The E–911 Tax

After creation of both TIF districts, County voters adopted a § 190.335 emergency services sales tax ("E–911 tax"). Through November 2010, the TIF districts generated nearly $1 million in E–911 tax revenue, none of which was allocated or paid to City.

The Litigation

County stopped allocating TIF monies in July 2009. City sued in mandamus to enforce TIF allocation. County and Board filed an amended answer and counterclaim which denied that the TIF districts were validly created or that the E–911 tax was subject to TIF capture in any event.

City prevailed on the parties' cross-motions for summary judgment. In a 46–page judgment, the trial court found, *inter alia,* that County's counterclaims and defenses were barred by laches and estoppel, the TIF districts were validly enacted, and the E–911 tax was subject to TIF allocation.

County and Board appeal, raising a total of five points.

County's Appeal–Points I, II, III & V

[2] Points I and II reassert County's claims that the 1996 and 2005 TIFs were not validly created and, thus, void *ab initio.* In Point III, County urges that projects "approved in 1998 and 2007 did not meet the requirements of the TIF Act in effect at those times." Point V challenges trial court findings that laches or estoppel barred the foregoing complaints. [3] Finding ***638** no merit to Point V as stated, we need not reach Points I–III. [4]

We begin by quoting at length from the judgment's disposition of County's claims and defenses based on laches and estoppel:

> In the instant case, the 1996 TIF District was adopted over thirteen years prior to Respondents' bringing their counterclaims. The 2005 District was adopted four years prior to Respondents' counterclaims. Prior to November 2009, Respondents had not initiated any challenges to the validity of the TIF Districts. In each instance, the Counties' representatives were members of the TIF Commission approving the TIF District's redevelopment plans and projects. Respondents actively participated in the creation of the TIF Districts, watched while improvements under the TIF Districts were made, collected increased sales tax revenues derived from the TIF Districts and refrained from making any claim until the City sought to enforce its rights under the TIF Districts in this lawsuit.
>
> Since the approval of the TIF Districts, projects identified in the TIF Districts have been constructed. Wal–Mart, Lowe's and road improvements have all been made as contemplated by the TIF Districts [sic] plans. Bonds have been issued and the City has entered into redevelopment agreements with Wal–Mart and Lowe's that require the City to reimburse these developers with costs associated with construction of the TIF District projects. The City continued to implement its TIF District plans in light of the Counties' participation and silent acquiescence.
>
> The issuance of bonds is significant. R.S.Mo. 99.835.4 provides that recitals in bond issuances that they are issued pursuant to the TIF Act are given conclusive evidence of their validity. Not only did bond holders rely on the validity of the TIF Districts, numerous third parties relied as well. Wal–Mart, Lowe's, the Missouri Highway and Transportation Commission and the City all spent funds to construct the TIF District improvements, improvements known to the Counties and approved by the Counties, while the Counties sat on their claims. The TIF Act presumes validity when bonds are issued. This Court should defer to the legislature's intent.
>
> Until 2009, Respondents performed under the TIF Act as if the TIF Districts were valid. Respondents allocated sales taxes and PILOTs to the City. Pursuant to the TIF Act, each dollar of increased tax from within the TIF Districts was split 50/50 between the Counties and the City's special allocation funds. Respondents accepted the increased taxes generated within the TIF Districts. Respondents acted as if the TIF Districts were valid. Respondents benefitted from the validity of the TIF Districts. *See State ex rel. York v. Daugherty,* 969 S.W.2d 223, 226 (Mo. banc 1998) (parties to a void judgment are estopped from attacking it when they perform acts required by a void decree or accept its benefits.)
>
> ***639** Respondents' delay in bringing its claim has worked an injustice on the City. Respondents and their witnesses have limited or no knowledge regarding the claims they bring. Without attacking whether the City's findings were in fact accurate when made, Respondents' claims demand that the City recreate events that occurred years prior. Respondents insist that the City justify its actions and substantiate judgments made long after memories have faded. This insistence allows the Respondents to pick apart the City's actions, with 20/20 hindsight, and second guess the evidence that City witnessed and considered based on a "record" that is not required under the TIF Act. This recreation of events is precisely what the doctrine of laches seeks to prohibit.
>
> The Counties' belated attacks on the City's TIF Districts and legislation would disrupt settled expectations after

> years of work and reliance by various parties while, at the same time, allow the Counties to conduct themselves with impunity, as if they had no role or participation, and as if they have received no benefit. This is precisely the circumstance prohibited under Missouri law, and in which the doctrine of laches or estoppel should be applied. The entry of Summary Judgment is proper under the doctrines of laches or estoppel.

County does not deny the foregoing facts in Point V, nor argue that they would not support laches or estoppel against a private party in other circumstances. Rather, Point V offers three special objections to applying laches or estoppel here, with two pages of supporting argument, in total, as to all three of these sub-claims.

1. The factual record "is not extensive enough to determine the equities between the parties."

The lone cited authority is *North v. Hawkinson,* 324 S.W.2d 733, 742 (Mo.1959), which County partially quotes as stating that the "question of laches is one of fact which can better be determined upon the trial of the merits from all the facts and circumstances." County omits the beginning of that sentence ("Also, the claim of laches is not pressed on this appeal ..."), which shows why *North* is distinguishable. We may agree with the partial quote in general, but nothing in *North* or County's scant argument indicates why a trial was needed *here.*

Point V does not allege any specific deficiency in the record, dispute the facts cited by the trial court, or (aside from its next two sub-claims) suggest why those facts do not support application of laches or estoppel. As seen hereafter, the facts cited here compare favorably with prior cases where such relief was upheld. In addition, *see Rodgers v. Seidlitz Paint & Varnish Co.,* 404 S.W.2d 191, 198 (Mo.1966) (estoppel more a question of law than of fact, especially when essential facts are undisputed; concluding "that from the established facts only one reasonable inference can be drawn, namely, estoppel."); *Comens v. SSM St. Charles Clinic Med. Group, Inc.,* 258 S.W.3d 491, 497 (Mo.App.2008) (similar, citing *Rodgers).* We reject this sub-claim.

2. Laches and estoppel do not apply to government entities.

[3] County correctly notes that estoppel and laches rarely lie against government bodies. As County also notes, this reluctance rests on the principle that public rights generally should not yield to those of private parties. *See Fraternal Order of Police Lodge No. 2 v. City of St. Joseph,* 8 S.W.3d 257, 263 (Mo.App.1999).

[4] There is little or no such concern in this dispute *between* public bodies. Estoppel ***640** has been "held to apply, particularly where, as is true here, the controversy is between one class of the public as against another class." *State ex rel. Consol. Sch. Dist. No. 2 v. Haid,* 328 Mo. 739, 41 S.W.2d 806, 808 (1931). *See also Consol. Sch. Dist. No. 2 v. Cooper,* 28 S.W.2d 384, 386 (Mo.App.1930) (citing cases); *Town of Montevallo v. Village School District of Montevallo,* 268 Mo. 217, 186 S.W. 1078, 1079 (1916); 31 C.J.S. *Estoppel and Waiver* § 262 & n. 8 (citing *Haid*).

Laches has been applied against counties for more than a century. *See Simpson v. Stoddard County,* 173 Mo. 421, 73 S.W. 700, 710 (1903); *Dunklin County v. Chouteau,* 120 Mo. 577, 25 S.W. 553, 557 (1894). For example, when a county offered "[n]o excuse whatever" for its long delay and inaction, our supreme court declared that "[t]he neglect of the county in asserting its rights in a proper way for so great a length of time, to the continued prejudice of the rights of the defendant, cannot be excused." *Dunklin County,* 25 S.W. at 557.

Likewise for estoppel, as shown in *Montevallo,* where:

> the school district erected a building costing several thousand dollars, and from that time until the institution of this action no one questioned the title or right of the school district to use and enjoy the property. Valuable improvements were made thereon by the school district, and *as between the town and the school district* any judgment other than that rendered by the court nisi would result in the perpetration of a wrong and rank injustice.

186 S.W. at 1080 (our emphasis).

A case between public bodies does not present the concerns noted by County. This sub-point fails.

3. Laches and estoppel do not apply when legal remedies are sought.

[5] This is plainly wrong as to estoppel, which "operates as a defense to legal and equitable claims." *State ex rel. Leonardi*

v. Sherry, 137 S.W.3d 462, 471 n. 8 (Mo. banc 2004) (citing Dan B. Dobbs, Law of Remedies § 13.2(5) (2d ed.1993)).

As to laches, Professor Dobbs states at § 2.4(4) of the same treatise:

> *Law and equity.* Courts have routinely referred to laches as an equitable defense, that is, a defense to equitable remedies but not a defense available to bar a claim of legal relief.[5] However, delay in pursuing a right might well qualify as an estoppel or even a waiver or abandonment of a right, as courts sometimes recognize. If the plaintiff "unreasonably" delays under circumstances suggesting that he intends not to pursue a claim and the defendant relies on this appearance to his detriment, all the elements of ordinary estoppel are present, and perhaps even the elements of waiver or abandonment. Because estoppel and waiver are substantive defenses that reach all remedies, both legal and equitable, they are applicable "at law."

Missouri law is in accord. *See UAW–CIO Local No. 31 Credit Union v. Royal Insurance Co.,* 594 S.W.2d 276, 281 (Mo. banc 1980).[6]

***641** Our highest court once memorably noted that laches "borrows from" estoppel, the elements of which "serve as a handmaiden to laches," such that both doctrines "meet in a faded line, or overlap at the edges...." *Troll v. City of St. Louis,* 257 Mo. 626, 168 S.W. 167, 175 (1914). Laches, in particular, was said to address unreasonable or unexcused delay and the inequity of enforcing a claim due to changed conditions or relations; it "forbids the spying out from the records of ancient and abandoned rights ... and often bars the holder of a mere technical right, which he has abandoned for years, from enforcing it when its enforcement will work large injury to many." *Id.* at 175–76 (quoting *Shelton v. Horrell,* 232 Mo. 358, 134 S.W. 988, 992 (1911)). These further observations, with some editing, might fit the case before us:

> The facts in this case in no small tones call out for the application of the doctrine of laches against plaintiffs claim ... a case in which the omission to move for many years has caused vast changes to be made in the betterment of the property and in the rise of values, a case in which it would cause a just man instinctively to cry out against holding that defendants, who in good faith invested great sums to improve the property, should now lose part of it on this newly sprung, newly asserted stale claim.

Troll, 168 S.W. at 176. Or, to echo a more contemporary sentiment, it is well to enforce the law, "but it is quite another matter to disrupt settled expectations years after" an alleged violation. *See Green v. Lebanon R–III Sch. Dist.,* 13 S.W.3d 278, 287 (Mo. banc 2000) (Wolff, J., concurring).

We deny this third and final Point V challenge to the trial court's application of laches and estoppel. Accordingly, we need not review the court's further findings that the TIF districts were validly enacted or County's Point I–III claims to the contrary.

Board's Appeal—Point IV

[6] The trial court ruled that the E–911 tax, adopted after these TIF districts were created, was subject to TIF allocation. Some case law background is in order.

The statutes as to TIF allocation facially conflict with statutes governing special-purpose sales taxes. *County of Jefferson v. Quiktrip Corp.,* 912 S.W.2d 487, 490 (Mo. banc 1995). Our supreme court reconciled this, in *Quiktrip,* by finding that the legislature intended to create a TIF exception to such sales tax laws. *Id.* TIF districts get "50% of additional revenues *from all county sales taxes* except those specified [in § 99.845]." *Id.* (our emphasis). *Lohman,* 966 S.W.2d at 358–59, cited and followed *Quiktrip* in this respect.

Board argues that *Quiktrip* and *Lohman* did not involve taxes adopted *after* a ***642** TIF district's creation. Even if so,[7] the reasoning of those cases remains persuasive:

> [I]t does not follow [from the appellant county's argument] that the subsequent enactments of specially designated sales taxes renders them exempt from allocations under the TIF formula. Having ascertained that the legislature intended by its enactment of the TIF Act to create an exception to the requirement that certain sales taxes be devoted only to specified purposes, that intent presumably applies to any increased tax revenues from the increased economic activity in the TIF District unless such revenues

are specifically exempted from allocation either in the TIF Act itself or in the sales tax enabling legislation.

> Moreover, St. Louis County's argument completely ignores the other basis for the *Quiktrip* decision, that the legislature had seen fit to exclude certain specified taxes from the TIF allocation required by Sec. 99.845 and thus presumably did not intend to exclude any others.

Lohman, 966 S.W.2d at 359. *Lohman* also emphasized "the Missouri Supreme Court's conclusion in *Quiktrip* that the taxes specifically excluded in Sec. 99.845 are the only taxes the legislature intended to exclude." *Id.*

Board concedes that E–911 taxes are not invulnerable to TIF capture. They are not "specifically excluded in Sec. 99.845," which per *Quiktrip* "are the only taxes the legislature intended to exclude." *Lohman,* 966 S.W.2d at 359.

We are not persuaded by Board's strained arguments not to follow *Quiktrip* and *Lohman,* [8] especially in the absence of case law or legislative action suggesting a different view. We deny Point IV and affirm the judgment.

JEFFREY W. BATES, J., and DON E. BURRELL, C.J., concur.

Footnotes

1 *See* RSMo § 99.800 *et seq.,* the Real Property Tax Increment Allocation Redevelopment Act ("TIF Act"). Given our grounds for decision, we need not detail the complexities of the case below (documents exceeding 2800 pages) or of TIF law in general. Missouri TIF basics were recently summarized in *Great Rivers Habitat Alliance v. City of St. Peters,* 384 S.W.3d 279, 281–82 (Mo.App.2012). Secondary sources include Cory C. VanDyke, *Fields of Dreams: The Expectation and Common Reality of Tax Increment Financing,* 79 UMKC L.Rev. 791, 794 (2011), and Josh Reinert, *Tax Increment Financing in Missouri: Is It Time for Blight and but-for to Go ?,* 45 St. Louis U. L.J. 1019 (2001).

2 Judgment also was entered against Lawrence County (in which part of City lies) and some of its elected officials. They voluntarily dismissed their appeal, so we omit facts and references as to them.

3 Point V also takes issue with other findings which, in light of our disposition, we need not address.

4 Point III further fails because, as the judgment states (footnotes omitted):

> What the Respondents [*i.e.,* County and Board] claim are material facts related to amendments to the 1996 TIF District, among other "facts," were not raised in the pleadings or disclosed in discovery and Respondents have not timely sought leave to amend their pleadings. These "material facts" were raised for the first time in Respondents' Motions for Summary Judgment, and in any case do not go to the questions as plead [sic] in the Amended Counterclaims or in Respondents' Affirmative Defenses as to whether the 1996 and 2005 TIF Districts are void *ab initio.*

5 Arguably, the "rule" cited by County and Professor Dobbs does not fit this case at all. Laches was found to bar, not City's claim of legal relief, but County's *defensive* claims.

6 *See also Schwind v. O'Halloran,* 346 Mo. 486, 142 S.W.2d 55, 60 (1940) (laches borrows from equitable estoppel and is akin to it); *Powell v. Bowen,* 279 Mo. 280, 214 S.W. 142, 145 (1919) ("Laches is but a manifestation of estoppel *in pais.* The latter is the genus, the former merely a species."). Our supreme court has connected laches with estoppel in these terms:

> *Laches* in legal significance, is not mere delay, but delay that works a disadvantage to another. So long as parties are in the same condition, it matters little whether one presses a right promptly or slowly, within limits allowed by law; but when, knowing his rights, he takes no steps to enforce them until the condition of the other party has, in good faith, become so changed that he cannot be restored to his former state, if the right be then enforced, delay becomes inequitable and operates as an *estoppel* against the assertion of the right.

In re Thomson's Estate, 362 Mo. 1043, 246 S.W.2d 791, 795 (1952) (quoting Pomeroy's Eq. Juris., 5th ed., § 419d) (our emphasis).

7 According to Board, City claims that *Lohman did* involve taxes approved after creation of a TIF district. We do not so interpret City's argument. At any rate, we assume *arguendo* that the taxes predated the TIF district in *Lohman.*

8 We disregard City's new arguments raised for the first time on appeal. *Sheedy v. Missouri Hwy. & Transp. Comm'n,* 180 S.W.3d 66, 70–71 (Mo.App.2005).