

**IN THE CIRCUIT COURT OF THE  
SEVENTH JUDICIAL CIRCUIT  
JERSEY COUNTY, ILLINOIS**

Jeffrey D. Ferguson, Ron Floyd, Woody Goforth, )  
Harold Kallal, Gary Krueger, Robert Ruland, )  
Leland Snyders and Marilyn J. Woolsey, )  
individually and as taxpayers of Jersey and )  
Greene Counties, State of Illinois )

Cause No. 06-PH-52

Petitioners, )  
)  
)

v. )  
)

Linda J. Crotchett and Deborah Banghart, in their )  
official capacity as the duly elected and acting )  
County Clerks of Jersey and Greene Counties, )  
State of Illinois, and the Community Unit School )  
District #100, a School District in Jersey and )  
Greene Counties, State of Illinois, )

Defendants. )  
)

**MEMORANDUM IN OPPOSITION TO DEFENDANT SCHOOL DISTRICT'S  
MOTION TO DISMISS PURSUANT TO 735 ILCS 5/2-619(a)(9)**

COMES NOW Plaintiffs, by and through their attorneys Francis X. Duda and Rod Pitts, and for their Memorandum in Opposition to Community Unit School District #100's Motion to Dismiss Pursuant to 735 ILCS 5/2-619(a)(9) respectfully state as follows:

**I. INTRODUCTION**

This is an action by property owners and taxpayers of the Community Unit School District #100, hereafter, sometimes "the District", in Jersey and Greene Counties in the State of Illinois who are subject to property taxes to pay for fire safety and health bonds issued by the District in 2003 and 2004. The bonds were issued pursuant to 105 ILCS 5/17-2.11 which allows a school district to levy a tax without voter approval in order to comply with various health and safety requirements as set forth in the statute. Plaintiffs allege that the bonds were issued

contrary to law and seek injunctive relief to prohibit the levy of taxes to pay for these bonds. As property owners and taxpayers, Plaintiffs have standing to seek injunctive relief to prohibit the imposition of an illegal tax. See *Schwarzbach v. City of Highland Park*, 82 Ill.App.3d 807, 403 N.E.2d 102, 38 Ill.Dec. 87 (1980) (enjoining city from issuing bonds on suit by taxpayers), and *O'Beirne v. City of Elgin*, 187 Ill.App. 581 (1914) (held taxpayer may maintain bill to enjoin extension of illegal tax created by issuance of bonds regardless of whether taxpayer could also defend against tax levied on property). The defendants are the duly elected County Clerks of Jersey and Greene counties and the Community School District #100 which approved the bond issue for the construction of a new high school and elementary school.

## **II. STATEMENT OF FACTS**

### **A. Complaint For Permanent Injunction**

This is an action by taxpayers and citizens of Jersey County and Greene Counties for injunctive relief to prohibit the County Clerks and the Community Unit School District #100 (¶s 9, 10, Complaint) from assessing property taxes which have been or will be paid by the taxpayers of the school district for at least the next 19 years for health and safety bonds issued for the construction of a new high school and elementary school. (¶s 1-8, Complaint)<sup>1</sup> Jeffery D.

Ferguson, Ron

Floyd, Woody Goforth, Harold Kallal, Gary Krueger, Robert Ruland, Leland Snyder, and

Marilyn J. Woolsey, taxpayers and residents of the counties, allege that they are residents and

taxpayers in the Community Unit School District #100, hereafter sometimes, “the District” or

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<sup>1</sup> Except as otherwise stated, all references are to the Complaint for Injunctive Relief and to the Exhibits attached to the Complaint, namely, Exhibits 1-22. Defendant School District’s motion to dismiss submits without affidavit Exhibits A-Q and should for purposes of the motion be disregarded. See 735 ILCS 5/2-619(a)(9) which calls for an affidavit to introduce facts beyond the allegations of the Complaint. Because Defendant has introduced facts and documents outside of the Complaint, Plaintiffs have filed 2 affidavits to respond to this motion, i.e., affidavits of Jeffrey D. Ferguson and Rodney Stumpf.

CUSD” and that, one or more of the Plaintiffs (§ 16, Complaint), voted against a referendum that appeared on the ballot on or about April 13, 1999 which asked the voters of the counties to approve a bond issue of \$21,000,000 for the construction of a new high school. (§s 11 & 12, Complaint) As alleged in the Complaint, the proposition for general revenue bonds was soundly defeated by the voters. (i.e., 71% of the voters in Jersey County voted against the bond issue and, in Greene County, 63.5% of the voters also rejected the proposition.) At the time the proposition was submitted, the school district had applied for additional funds needed to build a new high school from the Illinois Capital Development Board hereafter sometimes, the “ICDB”. In the ballot proposition, the voters were asked to approve a bond issue under the provisions of 105 ILCS 5/10-22.36 for the construction of a new high school at an estimated cost for the new high school of approximately \$21 million. (§11, Complaint) The total estimated cost of the new high school was \$29 million (i.e., \$21 million for the bond issue and approximately \$8 million from grants from the ICDB.) (§14, Complaint) Despite the defeat of the proposition, the school district sought to raise funds needed for a new high school and an elementary school from a different source, namely through the issuance of fire prevention and safety fund bonds pursuant to the provisions of 105 ILCS 5/17-2.11. (§s 18, 19, Complaint) The issuance of fire prevention and safety bonds pursuant to the provisions of 105 ILCS 5/17-2.11 does not require voter approval. (§20, Complaint)

## **B. Fire Prevention and Safety Bonds**

Under the provisions of 105 ILCS 5/17-2.11, the Illinois School Code provides in part:

... a school district may replace a school building or build additions to replace portions of a building when it is determined that the effectuation of the recommendations for the existing building **will cost more than the replacement costs. Such determination shall be based on a comparison of estimated costs made by an architect or engineer licensed in the State of Illinois. The new building or**

**addition shall be equivalent in area (square feet) and comparable in purpose and grades served and may be on the same site or another site.**

The statute further provides that:

... such district may, by proper resolution, levy a tax for the purpose of making such alteration or reconstruction... **If the proceeds from the tax levy authorized by this Section are insufficient to complete the work approved under this Section, the school board is authorized to sell bonds without referendum under the provisions of this Section in an amount that, when added to the proceeds of the tax levy authorized by this Section, will allow completion of the approved work.**

(Emphasis ours; ¶s 21, 22, Complaint)

### **C. Health and Life Safety Surveys**

As stated in the Complaint, applicable Health/Life Safety estimates were prepared by Calvin E. Morris of AAIC, Inc. at the request of the school district to identify Health/Life Safety violations in Jersey High School and Grafton Elementary School (¶s 23, 24, Complaint) These comprehensive estimates required by statute (Amendment Nos. 3 for Grafton and No. 11 for Jersey HS) were certified by the Illinois licensed architect, selected by the district, Calvin E. Morris, to be “all of the urgent or necessary work... to abate the violations of applicable code requirements.” (¶23, 24, Complaint; Exs. 4 & 5) On or about December 7, 2000, Calvin E. Morris and the school district filed Applications for the Approval of Ten-Year Safety Survey Reports (¶28, Complaint; Ex. 3) and filed Certifications of Need For Fire Prevention and Safety Funds as provided in Section 17-2.11 of the School Code representing that the district needs to raise \$580,515 in additional revenue through the levy of tax or the issuance of bonds to finance the recommended work for the high school, (¶27, Complaint; Ex. 4); and \$213,556 for Grafton Elementary School. On or about December 1, 2001, the Regional Superintendent approved a

revised survey in the amount of \$531,167 for the high school (§29, Complaint) and \$204,303 for Grafton Elementary School (§30, Complaint) or a total of \$735,470 to bring the school buildings into compliance with the safety standards set forth in 23 Ill. Adm. Code Part 175, 23 Ill. Adm. Code Part 180 and/or 20 Ill. Adm. Code Part 105 as promulgated by the State Board of Education. (§s 31, 32, 33, Complaint; Ex. 4, 5, 6 & 7) On or about May 10, 2001, the district apparently attempted to withdraw the life, health and safety surveys but left the schools' application for state funds pending. (§34, Complaint) Another architect was selected by the school district, David D. Pool, who determined, on November 13, 2001, that the cost to remedy and implement improvements for the high school were \$12,657,158, \$13,872,519 and \$13,988,124 and for the Grafton Elementary School on December 6, 2001 in the amounts of \$2,926,216, \$3,417,396 and \$3,445,872. (See Exhibits 8, 9, 10, 11, 12 and 13) On October 16, 2002, the school district approved the highest estimated repair costs (\$13,988,124 for the high school and \$3,445,872 for the elementary school) and sent surveys for repair to the Regional Office of the Illinois State Board of Education with Certificates of Need seeking approval of Fire Prevention and Safety Funds in the amount of \$13,988,124 for the high school and \$3,445,872 for the grade school. (§s 39, 40, 41, Complaint; Exs. 14 & 15)

On November 27, 2002, the Regional Superintendent for the Illinois Office of Education issued a Combined Order of Compliance for the high school **and** the elementary school approving Amendment Number 1 in the amount of \$14,151,018 (§s 42, 43, Complaint; Ex. 16). On February 23, 2003, Certificates of Approval were issued for the high school for \$11,354,034 and for the elementary school for \$2,796,984 (§s 44,45 Complaint; Exs. 17 & 18). The replacement cost for the high school was estimated by Design Architects, Inc. at \$12,684,893 and for the Grafton Elementary School at \$3,071,609.10 (§s 46, 47, Complaint; Exs. 19 & 20).

**RECAPITULATION**

**AAIC, Inc. - Calvin E. Morris**

<b>Grafton Elementary</b>	<u>Cost to Repair</u>	<u>Replacement</u>
	\$204,303.00 (Ex. 5 to Complaint)	(none submitted)

<b>Jersey Community High School</b>	\$531,167.00 (Ex. 4 to Complaint)	(none submitted)
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**Design Architects, Inc. – David D. Pool**

<b>Grafton Elementary</b>	<u>Cost to Repair</u>	<u>Replacement</u>
	\$2,796,984.00* (Ex. 17, ¶ 2 to Complaint)	\$3,071,609.10.00 (Ex. 20 to Complaint)

<b>Jersey Community High School</b>	\$11,354,034.00* (Ex. 18 to Complaint)	\$12,684,893.00 (Ex. 19 to Complaint)
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\* State Approved Estimate of \$14,151,018.

Despite the failure to obtain condemnation orders, the school district board, on or about April 17, 2002, adopted a resolution to issue fire prevention and safety bonds in the amount of \$14,151,018 to secure funding to build a new high school and elementary school and to obtain the grant of \$20,528,288 from the ICDB. (¶s 47 & 48, Complaint) A public meeting was called by the school board for January 28, 2003, after published notice, to give the public the opportunity to discuss the issuance of the bonds. (¶49, Complaint) On March 1, 2003, bonds

were sold in the amounts of \$10,998,429.80 and \$3,721,570.65 (¶s 50, 51, Complaint; Exs. 21 & 22)

#### **D. Equivalent Area (Square Feet) and Comparable in Purpose**

It is undisputed that the new Jersey Community High School and new Grafton Elementary School are not equivalent in area (square feet) and comparable in purpose as the buildings they replaced. (¶62 VIII, Complaint) According to the Replacement Cost Estimate prepared by Design Architects, Inc., the existing high school had 146,173 square feet and could be replaced at a cost of \$12,684,898 (Ex. 19) while the Grafton Elementary School had 29,430 square feet with an estimated replacement cost of \$3,071,609.10 (Ex. 20) As submitted by the architect, the new Jersey Community High School is 207,890 square feet in size with an estimated cost of \$24,269,520, and the Grafton Elementary School is 45,520 square feet in size at a cost of \$5,500,000. (Affidavit of Rodney Stumpf, Applications for Building Permits, dated December 2, 2003 for the grade school and July 12, 2004, for the high school attached hereto.)

### **III. THE MOTION TO DISMISS AND STANDARD OF REVIEW**

The motion to dismiss, at ¶ 2, refers to a motion for summary judgment filed contemporaneously with this motion. The summary judgment motion was not filed. Consequently, the only motion before the court at this time is a motion to dismiss pursuant to 735 ILCS 5/2-619 (a)(9). The motion, as stated in ¶ 3, admits the legal sufficiency of the Complaint but attempts to raise defects, defenses or other affirmative matters which appear on the face of the complaint or are established by external submissions which act to defeat the plaintiff's claim. *LaSalle National Bank v. City Suites, Inc.* 325 Ill. App 3d 780, 787, 758 N.E. 2ds 382 (1<sup>st</sup> Dist. 2001); *Wipple v. Murphy*, 317 Ill. 3d 581, 584, 736 N.E. 2d 1174 (1<sup>st</sup> Dist.

2000) It is unclear if the District relies upon the exhibits filed with its motion or it contends, as a matter of law, that the suit is barred based upon the averments and exhibits in the Complaint.

Pursuant to 735 ILCS 5/2-619(a)(9), all well pleaded facts by the non-movant are deemed true. Therefore, in deciding this motion the Court must only look to the averments pled in the Complaint and disregard any documents attached to the District's motion. See, *W.W. Vincent and Co. v. First Colony Life Ins. Co.*, 286 Ill. Dec. 734, 351 Ill. App. 3d 752, 814 N.E.2d 960 (1<sup>st</sup> Dist. 2004) As the following law indicates, the doctrine of laches cannot be used as a bar to defeat a claim against an illegal act.

#### **IV. LEGAL AUTHORITIES AND ARGUMENT**

##### **A. The Doctrine Of Laches**

The *laches* doctrine is defined as “ ‘the neglect or omission to assert a right which, taken in conjunction with a lapse of time and circumstances causing prejudice to the opposite party, will operate as a bar to a suit.’ ” *Lee v. City of Decatur*, 256 Ill.App.3d 192, 195, 194 Ill.Dec. 614, 627 N.E.2d 1256, 1258 (4<sup>th</sup> Dist.1994), quoting *People ex rel. Heavey v. Fitzgerald*, 10 Ill.App.3d 24, 26, 293 N.E.2d 705, 707 (1<sup>st</sup> Dist. 1973). A plaintiff must have knowledge of his right but fail to assert it in a timely manner for *laches* to apply. *Sundance Homes, Inc. v. County of Du Page*, 195 Ill.2d 257, 270, 253 Ill.Dec. 806, 746 N.E.2d 254, 262 (2001). *Laches* is an affirmative defense, requiring a two-prong analysis, which addresses (1) whether the movant was prejudiced by the delay, and (2) whether the non-movant has demonstrated a reasonable excuse for the delay. *Long v. Tazewell/Pekin Consolidated Communications Center*, 236 Ill.App.3d 967, 970, 176 Ill.Dec. 910, 602 N.E.2d 856, 857-58 (3<sup>rd</sup> Dist. 1992). The burden is on the party seeking to prove laches to show that there was an unreasonable delay and that the delay materially prejudiced the party. *Hannigan v. Hoffmeister*, 240 Ill.App.3d 1065, 608 N.E.2d 396,

(1<sup>st</sup> Dist. 1992). Application of the laches doctrine is limited to instances where there is no reasonable excuse for the plaintiff's delay. *Bill v. Board of Educ. School Dist. 99*, 351 Ill.App.3d 47, 58-59, 285 Ill.Dec. 784, 812 N.E.2d 604, 611-12 (1<sup>st</sup> Dist. 2004).

**B. The Suit Should Not Be Barred By The Doctrine Of Laches In That The School District Was Not Prejudiced Because It Knew or Should Have Known The Tax Was Illegal**

As the above demonstrates, the doctrine of laches cannot be used as a bar to suit unless the opposing party would be prejudiced. Here the defendants cannot in good faith claim prejudice when they caused the illegal tax to be promulgated in the first place.

105 ILCS 5/17-2.11 sets forth the requirements that must be met for a school board to levy a tax and issue bonds to pay for safety repairs. The district did comply with some of these requirements, but its failure to meet all of the necessary requirements is fatal to its defense and the validity of the bonds. At a minimum, these failures, omissions, or evasions by the school board support the plaintiffs' claim that the levy and bond issuance were merely pretextual efforts to circumvent the statutory requirements.

First, one of the requirements set forth by the statute is that a school board may issue bonds for these types of repairs whenever "a lawful order of any agency, other than a school board, having authority to enforce any school building code" orders them to do so. In this case a combined order was given by Larry Pfeiffer, the Regional Office of Education Superintendent, in November of 2002 but the order did not require the replacement of the buildings or the bond issuance.

In its memorandum, the school district ignores the allegations in the Complaint that the total costs to repair Jerseyville High School and Grafton Elementary School was \$742,590.42 and that, even under the amended estimates submitted by the new architect, the cost to repair the

high school was less than its replacement costs. In addition, there is no attempt to justify the larger buildings which were built in direct conflict with the statute. The district does argue that the cost to replace the school buildings was less than the costs to repair them but this statement is not supported by the exhibits to the Complaint or even in the exhibits attached to the motion without supporting affidavits.

On January 15, 2003, the school district adopted a resolution calling for a public hearing concerning its intent to sell bonds and approved a Notice of Public Hearing for January 28, 2003, at 6 o'clock P.M., at the School District Office "...to receive public comments on the proposal to sell bonds of the District in the amount of \$16,000,000 for the purpose of conforming its existing facilities that house students to the building code...by altering, reconstructing and repairing said facilities and having equipment purchased and installed therein." (Ex. G to the District's Memorandum)

But the district cannot even show that the public was properly notified of the proposed sale of the bonds because the published notice on January 15, 2003 in the Alton Telegram did not advise the citizens and taxpayers where the public hearing would take place and again stated that the bond sale was "...for the purpose of conforming its existing facilities that house students to the building code by altering, reconstructing, and repairing said facilities" – not constructing new buildings. (Defendant's Memo in Support of Motion to Dismiss, Ex. G)

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**NOTICE OF PUBLIC HEARING CONCERNING THE INTENT OF  
THE BOARD OF EDUCATION OF COMMUNITY UNIT SCHOOL  
DISTRICT NUMBER 100, JERSEY AND GREENE COUNTIES, ILLINOIS,  
TO SELL \$16,000,000 SCHOOL FIRE PREVENTION AND SAFETY BONDS**

PUBLIC NOTICE IS HEREBY GIVEN that Community Unit School District Number 100, Jersey and Greene Counties, Illinois (the "District"), will hold a public hearing on the 28th day of January, 2003, at 6:00 o'clock P.M. The hearing will be held at the School District Office, 100 Lincoln Street, Jerseyville, Illinois. The purpose of the hearing will be to receive public comments on the proposal to sell bonds of the District in the amount of \$16,000,000 for the purpose of conforming its existing facilities that house students to the building code promulgated by the State Board of Education of the State of Illinois, by altering, reconstructing and repairing said facilities and having equipment purchased and installed therein.

By order of the Board of Education of Community Unit School District Number 100, Jersey and Greene Counties, Illinois.

DATED the 15th day of January, 2003.

/s/ Sherry Droste

Secretary, Board of Education,  
Community Unit School District  
Number 100, Jersey and Greene  
Counties, Illinois

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Note to Publisher: Please be certain that this notice appears above the name of the Secretary of the Board.

The notice published in the Alton Telegraph on January 15, 2003, did not disclose the location of the meeting and again advised the taxpayers that the purpose of the meeting was to sell bonds for the purpose of conforming the school buildings to the building code. (Defendant's Memo in Support of Motion to Dismiss, Ex. G)

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CERTIFICATE OF PUBLICATION

Vs.

FREEDOM NEWSPAPERS OF ILLINOIS, INC.  
111 E. Broadway, Alton, IL 62002

Does hereby certify that it is the publisher of the Telegraph.

The said Telegraph is a secular newspaper and has been published daily in the city of Alton, county of Madison and state of Illinois, continuously for more than one year prior to the first publication of the notice appended, and is of general circulation throughout the counties of Madison, Macoupin, Jersey, Greene and Calhoun in the state of Illinois, and that it is a newspaper as defined in "an act to revise the law in relation to notices" as amended by act approved July 17, 1959-IL Revised Statutes, Chap. 100 Paragraphs 1 & 5.

That the notice appended was published in the said Telegraph on  
Monday, January 20, 2003

In witness whereof, the undersigned has caused this certificate to be signed this  
28<sup>th</sup> day of January, A.D. 2003

By Ronald M. Miller

**Notice of Public Hearing Concerning the Intent of  
the Board of Education of Community Unit School  
District Number 100, Jersey and Greene Counties, Illinois,  
to Sell \$16,000,000 School Fire Prevention and Safety Bonds**

Public Notice is Hereby Given that Community Unit School District Number 100, Jersey and Greene Counties, Illinois (the "District"), will hold a public hearing on the 28th day of January, 2003, at 6:00 o'clock P.M. The purpose of the hearing will be to receive public comments on the proposal to sell bonds of the District in the amount of \$16,000,000 for the purpose of confirming its existing facility that house students to the building code promulgated by the State Board of Education of the State of Illinois, by altering, reconstructing and repairing said facilities and having equipment purchased and installed therein.

**By order of the Board of Education of Community Unit School  
District Number 100, Jersey and Greene Counties, Illinois.**

Dated the 15th day of January 2003  
Sherry Droste  
Secretary, Board of Education  
Community Unit School District  
Number 100, Jersey and Greene Counties, Illinois

At the “public hearing”, the only person to speak was Linda Rafanello, a representative of Harris Bank which purchased the bonds at very favorable interest rates to the detriment of the citizens and taxpayers of the district.

There is even a question whether the public hearing was properly called by the school board in that there were 3 affirmative votes of the 6 members in attendance for this 7-member board. (See Certification of Minutes and Resolution, Exhibit G to the District’s response.)

Another requirement is that “the new building(s) or addition shall be equivalent in area (square feet)” as the existing building(s). The new Jersey High School and Grafton Elementary are each approximately 30-40% larger than the buildings that needed to be repaired due to “safety concerns.” (Compare the Applications for Building Permits and Exs. 19 & 20 - Affidavit of Rodney Stumpf)

Lastly, the statute states that:

“a school district may replace a school building . . . when it is determined that the effectuation of the recommendations for the existing buildings will cost more than the replacement costs. Such determination shall be based on a comparison of estimated costs made by an architect or engineer.”

105 ILCS 5/17-2.11

Here the school board employed a rather coy method of “compliance” with this requirement. In October of 2000, licensed architect Calvin E. Morris, at the request of the school board, authored a Health and Life Safety Survey Report for both Jersey Community High School and Grafton Elementary. In these surveys, he estimated that it would cost **\$213,556.75** to repair violations at Grafton Elementary and **\$580,515.42** to repair Jersey Community High School. These amounts were submitted to the State Board of Education for Approval, and approved for \$204,303 for the elementary school and \$531,167 for the high school. Following the approval,

the District apparently withdrew its application in May 2001 at which time the Mr. Morris was discharged. In July, 2001, architect David Pool was hired to again do surveys on the two schools to determine what needed to be done to comply with the relevant health and safety codes. His three estimates ranged from \$12,657,158 to \$13,988,124 for Jersey Community High School and from \$2,926,216 to 3,445,872 for Grafton Elementary. While Mr. Morris' reasonable estimates fell far short of the amounts needed to justify the building of new schools under the statute, it appears that Mr. Pool re-surveyed the schools until he had done what was necessary to increase the costs to a point where new buildings were statutorily justified. But, as stated in the fact statement, he still failed to justify the replacement.

In conclusion, the district and the school board should not be allowed to hide behind the equitable doctrine of laches to uphold their illegal actions. In unlawfully and impermissibly forcing a tax upon the plaintiff taxpayers that had previously been voted down, the defendants knew that litigation was possible, if not likely, and decided to build new schools in violation of the letter and the spirit of the statute. To allow the district to hide behind an equitable defense that is based on justice would frustrate the very notions of equity themselves.

Because the bonds were sold in violation of 735 ILCS 5/2-619 (a)(9) this court has authority to enter injunctive relief to prohibit the assessment of taxes.

**C. The Suit Should Not Be Barred By The Doctrine Of Laches Because Defendants Knew That A Suit Would Be Filed And the District Caused The Delay In Filing Suit**

Defendant argues in its motion that the letters written by Plaintiff Ferguson to various newspapers and to Governor Blagojevich<sup>2</sup> indicate that they knew of the illegal tax years ago and

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<sup>2</sup> Although the plaintiffs reference this correspondence to dispute the claims made by the defendants, they reiterate that a Court deciding on a 5/2 619(a)(9) motion can only consider those facts which have previously been plead, and that extrinsic evidence is only proper in a motion for summary judgment which requires an affidavit. No affidavit is present with the defendants' motion.

that therefore their delay in filing suit implicates the doctrine of laches. In fact such correspondence and other efforts only indicate that the plaintiffs attempted to remedy the actions of the school board without litigation. As indicated in his letter to the school district superintendent on August 28, 2003, Plaintiffs' attempt to obtain the facts was thwarted by the district. It was the actions, inactions, and evasions by the district which caused the delay which the district now wishes to use as a shield.

As stated in the superintendent's letter of November 14, 2003, "The Board of Education has directed me to inform you that it is not interested in meeting with you in regard to [the bond issuance]." This and other pre-litigation efforts fell on deaf ears. The district's contention that the Plaintiffs' failure to immediately file a lawsuit should bar their claim is simply another attempt to brush-off their lawful protest to its unlawful actions.

**D. The Tax Itself Is Illegal And Has Not Become Legal By Lapse of Time**

"If the act complained of is illegal, it was so at inception and continues so throughout, and it loses none of its illegality by lapse of time." 74 Am.Jur.2d §51. The courts of Illinois, while not adopting the exact same language as that quoted above, have held the doctrine of laches inapplicable to bar suits against illegal acts. As the Illinois Court of Appeals stated, "Laches is an equitable doctrine which requires that the party who seeks equity must do equity. [D]efendants cannot have been prejudiced by reason of their commission of an unauthorized illegal act." *Fruhling v. Champaign County*, 95 Ill.App.3d 409, 512, 420 N.E.2d 1066, 1071 (4<sup>th</sup> Dist. 1981). (holding that defendants illegal discharge of employee prevented them from using defense of laches) Other jurisdictions have also held that laches cannot bar suits seeking to enjoin illegal actions. See *Harfst v. Hoegen*, 349 Mo. 808, 817, 163 S.W.2d 609, 614 (Mo banc 1942) ("[T]he long acquiescence of appellants in the management of the school cannot make

such management proper. No one may waive the public interest.”), and *Smith v. Government of Virgin Islands*, 329 F.2d 131, 133 (Vir. Island C.A. 1964) (holding that taxpayers have absolute right to sue public officials to prevent them from committing an illegal act).

None of the cases or laches cited by defendants involve the actions of a public body that are alleged to have committed an illegal act. While *Blankenship v. Kane County*, 85 Ill.App.3d 621, 407 N.E.2d 145 (2<sup>nd</sup> Dist. 1980) involved the legality of an ordinance for a special use, permit 10 years had elapsed, while in this case plaintiffs’ complained in August 2003, only months after the bonds were sold and before building permits were issued to construct the school buildings. (i.e. December 2, 2003 (Grafton Elementary) and July 12, 2004 (Jersey Community High School). It takes parties time to generate funds necessary to file a lawsuit of this type Defendants certainly cannot now claim prejudice as they were well aware that many taxpayers considered the bond issuance to be illegal. (See Affidavits of Ferguson and his letter to the school district and its response.)

## **V. CONCLUSION**

In conclusion, the petitioners are seeking to enjoin the defendants, public officers, from continuing to collect an illegal tax. Petitioners ardently contend that the bond issuance and subsequent tax levy are illegal due to omissions, evasions, and outright violations of the statutory requirements that must be met before fire and safety bonds can be issued. As the Illinois Court of Appeals and courts from other jurisdictions have held laches cannot be a shield by which the commission of an illegal act is protected. Therefore the motion should be denied and the petitioners given the opportunity to present all of the evidence that supports their contentions.

WHEREFORE, Plaintiffs respectfully submit that the defendants' motion to dismiss should be denied for the foregoing reasons, and for such other and further relief as this court deems just and proper.

Respectfully submitted,

ANDERSON & GILBERT

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