
IN THE

Appellate Court of Illinois

FOR THE FOURTH JUDICIAL DISTRICT

CAMILLE MAYFIELD COOPER BROTZE)	
and WAYNE BROTZE, husband and wife,)	
Plaintiffs-Appellees,)	Appeal from the Circuit Court
)	of the Seventh Judicial Circuit
)	Macoupin County, Illinois
v.)	
)	Case No. 2019-MR-92 (formerly
)	2018-L-5 ¹)
CITY OF CARLINVILLE, ILLINOIS,)	
a Municipal Corporation,)	The Honorable
Defendant-Appellant.)	APRIL G. TROEMPER,
)	Presiding Judge.

DEFENDANT’S MOTION TO STAY
IN THE REVIEWING COURT PENDING APPEAL

NOW COMES Defendant-Appellant, the CITY OF CARLINVILLE, a Municipal Corporation, by John Gabala of Giffin, Winning Cohen & Bodewes, P.C., and Dan O’Brien of the O’Brien Law Office, pursuant to Illinois Supreme Court Rule 305(d), for its Motion to Stay in the Reviewing Court Pending Appeal following the trial court’s August 3, 2020 denial of Defendant’s Motion to Stay Pending Appeal filed in the trial court, and in support thereof states the following:

I. INTRODUCTION

1. Plaintiffs, husband and wife, own a residence in Carlinville, Illinois, which is connected to the City’s potable water distribution system. (C1).²

¹ Plaintiffs originally filed this matter as 2018-L-5 on February 23, 2018. On April 18, 2019, the trial court ordered all subsequent filings to be made in 2019-MR-92. On July 23, 2019, the trial court consolidated 2018-L-5 with 2019-MR-92.

² See Bates Stamped Supporting Record, attached hereto.

2. Defendant is a non-home rule municipal corporation. (C240). The Village of Dorchester is also a non-home rule municipality. (C240). Jersey County Rural Water Company Inc. (“Jersey Rural Water Co.”) is an Illinois private, not-for-profit corporation. (C240). All three entities were seeking a new source of potable water. (C240). The area water source, Carlinville Lake, is not sustainable. Capacity has been dramatically reduced by sedimentation since the lake was first built in 1939. The area also has a long history of poor water quality attributable to manganese levels in the water. In 2006, Lake Carlinville was listed on the Illinois Section 303(d) List of Impaired Waters as a body of water not meeting water quality standards for phosphorus and manganese. See *Watershed Plan and Phase 1 Diagnostic/Feasibility Study of Lake Carlinville, Macoupin County, Illinois*, available at <http://www.epa.state.il.us/water/tmdl/implementation/macoupin-creek/lake-carlinville-phase1-study.pdf>, at pg. 5 (last visited August 11, 2020). Swimming and boating on the lake have been at times suspended due to higher than normal levels of manganese. See *Boating, swimming suspended at Carlinville Lake*, available at <https://enquirerdemocrat.com/boating-swimming-suspended-carlinville-lake> (last visited August 11, 2020).

3. On March 8, 2016, Defendant entered into a Grant Agreement with the United States Department of Agriculture (“USDA”), wherein Defendant was awarded \$30,000.00 in federal grant money for purposes of developing a regional water supply system. (C10-16; C241). By the terms of the grant, Defendant was required to match \$10,000.00 for project development costs, which was used to retain engineers to evaluate water supply options. (C10).

4. In the fall of 2017, pursuant to The General Not for Profit Corporations Act of 1986 (805 ILCS 105/101.01 *et seq.*), representatives of the City of Carlinville, the Village of Dorchester, and Jersey Rural Water Co., associated with one another to form a not-for-profit corporation,

known as Illinois Alluvial Regional Water Company, Inc. (“Alluvial”) for the purposes of designing, constructing and thereafter operating a regional water treatment facility and distribution system to supply potable water to them on a mutual or cooperative basis. (C30). It is the formation of Alluvial that is the subject of the underlying litigation.

5. Membership in Alluvial is restricted to municipalities and not-for-profit rural water companies. (C18). Alluvial is intended to provide wholesale water to the communities of Carlinville, Dorchester, and Bunker Hill and the rural water distribution systems of Jersey County Rural Water Co., and Central Macoupin Rural Water District. The principal benefits of membership in Alluvial is the right to purchase potable water from the company and to participate in its management, including rate setting. (C27).

6. While significant efforts have been expended to this point, Alluvial is not yet operational. Prior to the trial court’s summary judgment order, Defendant was engaged in a number of efforts to aid Alluvial in becoming operational. For example, in October 2019, Defendant entered into a Revolving Credit Promissory Note agreement for \$2.5 million dollars with COBANK, which Defendant has borrowed to conduct such work as securing easements and engineering on its interconnect to Bunker Hill and Jersey County Rural Water Co. (C58-63; C71). In June 2019, Defendant also contracted with MECO-Heneghan L.L.C. (C65-C71) in the amount \$1.5 million dollars for engineering and surveying services related to the interconnect. (C67).

7. Without a stay pending appeal, Defendant’s efforts to obtain a safe water supply will be jeopardized by the trial court’s ruling regardless of whether Defendant eventually prevails on appeal.

II. RELEVANT PROCEDURAL HISTORY

8. On February 23, 2018, Plaintiffs filed their original complaint for declaratory judgment (Count I) and injunctive relief (Count II) against Defendant, as well as the Village of Dorchester, Jersey County Rural Water Co., and Alluvial, seeking (i) a declaration that Defendant, lacked the requisite authority to incorporate, fund or operate Alluvial and (ii) an injunction to prevent Defendant's participation, funding, and operation of Alluvial. (C275; C73).

9. On May 4, 2018, Alluvial filed its motion for summary judgment as well as its memorandum in support thereof. (C278; C73).

10. On May 8, 2018, Defendant filed its motion to dismiss Plaintiffs' complaint for lack of standing. (C375; C73).

11. On August 10, 2018, the parties argued the motions to dismiss and the motion for summary judgment before the trial court. (C274).

12. On January 2, 2019, the trial court issued its written order granting the Village of Dorchester's and Jersey County Rural Water Co.'s motions to dismiss for lack of standing. The court also *sua sponte* dismissed Alluvial for lack of standing and did not take up its pending motion for summary judgment. (C273; C74). Instead, the court found that motion moot in light of its ruling dismissing Alluvial for lack of standing. (C273; C74). The court denied Defendant's motion to dismiss and gave Plaintiffs leave to file an amended complaint. (C273; C74).

13. On May 2, 2019, Plaintiffs filed their first amended complaint for a single count of declaratory relief against Defendant (C272; C207), which the trial court dismissed with leave to refile on August 2, 2019, after Plaintiffs conceded it was a defective pleading. (C270-71).

14. On August 7, 2019, Plaintiffs filed their Second Amended Complaint, in which they abandoned their prior declaratory and injunctive causes of actions in favor of a single count for

mandamus relief. (C270; C1; C41). Plaintiffs' Second Amended Complaint contended that the formation of Alluvial by Defendant, the Jersey County Rural Water Co., and the Village of Dorchester was done without authority. (C4).

15. According to Plaintiffs' Second Amended Complaint, they "have no other mechanism to challenge [Defendant's] abuse of authority regarding [its] participation in the creation, funding, or operation of Illinois Alluvial [Regional Water Company]." (C5). Plaintiffs' pleading requested the Court "issue a Writ of Mandamus compelling the Carlinville Aldermen and Alderwomen, in their official capacities, to take the actions necessary to withdraw from and cease any further participation in the creation, funding, or operation of Illinois Alluvial". (C5).

16. Thereafter, the parties filed their respective motions for summary judgment. (C39; C137). The party's respective responses and replies thereto followed. (C109; C122; C180; C195).

17. Defendant argued, *inter alia*, that Plaintiffs mandamus complaint was barred by the affirmative defense of laches where (i) Plaintiffs did not file it until almost a year and a half after they filed their original complaint, (ii) Plaintiffs failed to respond to Defendant's laches affirmative defense, and (iii) Plaintiffs failed to offer any explanation for the delay. (C47).

18. Defendant also argued that Article VII, section 10(a) of the Illinois Constitution of 1970 (Ill. Const. 1970, Art. VII, S 10(a)) expressly allows municipalities to exercise their authority over the public water supply through an association with other municipalities and private corporations without the need for separate statutory authority and no statute or ordinance exists prohibiting such association. (C131). Defendant maintained that its association with the Village of Dorchester, and Jersey Rural Water Co. to form Alluvial was therefore proper. (C133).

19. In Defendant's Response to Plaintiffs' Motion for Summary Judgment, Defendant specifically argued, *inter alia*, that Plaintiffs (i) failed to meet their burden of proof for issuance of

a writ of mandamus; (ii) Defendant has abided its duty to follow the law; and (iii) mandamus relief was not the appropriate vehicle for Plaintiffs' claims under the circumstances presented by this case. (C126; C130; C133).

20. On June 9, 2020, the trial court held a hearing on the parties' motions for summary judgment. During the hearing, the trial court *sua sponte* raised the question of whether the use of the word "and" in the second sentence of section 10(a) as opposed to the use of the word "or" in the first sentence would make it mandatory under the second sentence for a municipality to both contract and associate with a corporation. At the conclusion of the hearing the court requested the parties prepare proposed orders of judgment. (C202). Specifically, the court requested the parties address in their proposed orders the previously unbriefed issue raised *sua sponte* by the trial court during the hearing. (C268; C202).

21. On June 23, 2020, Defendant filed its Proposed Order. (C205). Plaintiffs filed their proposed Order on Motions for Summary Judgment on June 23, 2020 as well. (C288).

22. In its July 7, 2020 written Order, the trial court denied Defendant's motion for summary judgment and granted Plaintiffs' motion for summary judgment on their Second Amended Complaint and (1) found that "based upon the City of Carlinville's unauthorized actions, [Alluvial] was created in violation of the law and is a void corporation" and (2) issued "a Writ of Mandamus to compel Defendant to compel the undoing of an act not authorized by law and to require public entities, such as the City of Carlinville and its officials, to comply with State law." (C17).

23. On July 16, 2020, Defendant filed a Motion to Stay Pending Appeal in the trial court pursuant to Illinois Supreme Court Rule 305(b). (C252).

24. On July 20, 2020, Plaintiffs filed their Response to Defendant's Motion for Stay Pending Appeal. (C256).

25. On July 21, 2020, the trial court conducted a hearing on Defendant's motion to stay via Zoom teleconferencing. (C264; C268). Following the hearing, the trial court granted the parties five (5) days, to provide supplemental research as to the ability of the court to order a stay of the writ of mandamus it issued pending appeal. (C264).

26. On July 24, 2020, Defendant filed its Supplemental Research as instructed by the trial court. (C268).

27. On July 24, 2020, Plaintiffs emailed their supplemental research to counsel for Defendant and the trial court. Plaintiffs did not file their supplemental research with the trial court.

28. On August 3, 2020, the trial court entered an order denying the Motion to Stay Pending Appeal. (C265; C268).

29. On August 5, 2020, Defendant timely filed its notice of appeal. (C268).

30. This Motion to Stay in the Reviewing Court Pending Appeal followed.

III. ARGUMENT

31. This is an important case involving statutory and constitutional interpretation with the potential to resonate throughout Illinois and it is deserving of a stay to preserving the status quo pending appeal.

32. It is not at all unreasonable to stay this matter to avoid damaging Defendant, the citizens of Carlinville, and Alluvial while giving this Court an opportunity to review the issues.

33. Rule 305(d) states that a motion for a stay may be made to the reviewing court, or to a judge thereof, but such a motion must show that application to the circuit court is not practical,

or that the circuit court has denied an application or has failed to afford the relief that the applicant has requested. Ill. S. Ct. R. 305(d).

34. Here, the trial court entered an order denying Defendant's Motion to Stay Pending Appeal on August 3, 2020. (C265).

35. Illinois Supreme Court Rule 305(b) allows a party to seek a stay of enforcement of any judgment, other than a money judgment. Such stay shall be conditioned upon just terms. Ill. S. Ct. R. 305(b).

36. Pursuant to Illinois Supreme Court Rule 305(i), when the appeal is prosecuted by a governmental body, such as Defendant, the circuit court may stay the judgment pending appeal without requiring that any bond or any other form of security be given. Ill. S. Ct. R. 305(i)

37. A bond or other form of security is unnecessary and inappropriate as this matter involves a nonmoney judgment and Defendant is an Illinois municipality.

38. A stay is warranted because the discontinuation of Defendant's efforts pending appeal will be significantly disruptive to its financial position and interfere with its existing contractual obligations. Importantly, Defendant's ongoing efforts to aid Alluvial in becoming operational so it can provide safe water to Defendant's residents as well as the residents of the other municipalities Alluvial is intended to serve, will be irreparably delayed without a stay.

39. On September 25, 2018 the USDA approved a loan of \$42 million and a grant of \$24 million to Alluvial to assist it with construction of a new 4 million gallons per day lime softening water treatment plant, new water supply field, 47 miles of transmission line, meter stations, and applicable appurtenances. Alluvial will provide wholesale water to the communities of Carlinville, Dorchester and Bunker Hill and the rural water distribution systems of Jersey County Rural Water Co. and Central Macoupin Rural Water District. Alluvial will alleviate the

health and sanitary issues residents have with their current water source. Carlinville's most recent IEPA Evaluation non-compliance advisory was issued on May 2, 2018. It identified a list of actions for Carlinville to take to bring its water plant into compliance. That list included a variety of items which have to be corrected if the water treatment plant is to continue operation into the future. Many of those items are unnecessary if Carlinville receives its water from Alluvial.

40. Defendant attached to its motion for summary judgment an affidavit from City Clerk Carla Brockmeier (C71) stating that Defendant has entered into a Revolving Credit Promissory Note agreement for \$2.5 million dollars with COBANK, which Defendant has borrowed to conduct such work as securing easements and engineering on its interconnect to Bunker Hill and Jersey County Rural Water Co. to aid Alluvial in becoming operational. That affidavit also stated Defendant has contracted with MECO-Heneghan L.L.C. (C71) in the amount of \$1.5 million dollars for engineering and surveying services related to the interconnect. (C67).

41. As a result of the trial court's Order and denial of a stay pending appeal, Carlinville engineering and easement acquisition for its interconnect to Bunker Hill and Jersey County Rural Water stopped. Carlinville engineering for its pipeline from a Carlinville Water Tower to its connection point with the interconnect has also ceased. Carlinville's contracts with Meco Heneghan Engineering are also at a standstill.

42. The project, when completed, will impact a multi-county area that will ultimately provide for long-term savings over individually completed projects. The loan term is for 40 years and the total project cost will be approximately \$66 million dollars. The opportunity to finance this project at historically low interest rates may be lost as a result of the trial court's Order without a stay. The interest rate at the time of the obligation date of September 25, 2018 was 2.375%. The current interest rates are at all-time lows of 1.125% for a poverty rate and 1.5% for intermediate

rate. The difference in interest rates right now would save Alluvial approximately \$291,000.00 per year in debt payments and many millions of dollars over the life of the loan. This refinancing would, in turn, save Defendant's water users significant costs on their water bills over time. If a stay is not granted such funding may not remain in place and any opportunity to take advantage of current refinancing options could be lost.

43. With a stay, the status quo will be preserved. Plaintiffs will continue to be residential water customers of Defendant while Defendant and Alluvial continue to work on the replacement water source. Defendant would be allowed to continue work on its interconnect to Bunker Hill and Jersey County Rural Water Co. Non-party and former defendant Alluvial would be allowed to continue as a valid Illinois Corporation pending appeal thereby not disrupting its obligations to Carlinville and other non-party former defendants and others.

44. Moreover, the trial court erred in denying Defendant's Motion to Stay Pending Appeal. In its August 3, 2020 written order denying the motion, the court stated, "Defendant asks this Court to declare Illinois Alluvial a valid Illinois Corporation" and characterized such request as "inappropriate". (C265). The court continued to state, that "It would be improper and not just for this Court to now declare Illinois Alluvial a valid corporation while this case is on appeal." (C265). However, it was the court's own order that declared Alluvial to be a void corporation. See C250 ("THE COURT FURTHER FINDS that based on the City of Carlinville's unauthorized actions, Illinois Alluvial was created in violation of the law and is a void corporation."). Defendant's motion to stay in the trial court requested, *inter alia*, that the court's writ of mandamus declaring Alluvial to be in an invalid corporation should be stayed pending final resolution of this matter on appeal. (C252). Put simply, the trial court's order invalidated Alluvial, despite the court previously *sua sponte* dismissing Alluvial as a defendant. Defendant is simply requesting that

order be stayed pending appellate review of its propriety along with the other issues in the case. Such a request is not only not inappropriate given the gravity of such a declaration, it is entirely prudent and warranted under the circumstances.

45. The trial court also stated Defendant needed to show that third parties will suffer a hardship if the stay is not granted. (C266). The trial court then acknowledged in its denial of the motion to stay that “the Citizens of Carlinville will suffer” with or without a stay. (C266). Assuming, *arguendo*, the trial court’s position that whether a stay issues or not, “Either way the Citizens of Carlinville will suffer” begs the question of what harm then exists in staying the status quo to give this Court the chance to determine whether the trial court got it right. Further, the trial court’s above-detailed declaration that Alluvial, a nonparty, is a void corporation should also be seen as presenting a hardship to a third party sufficient to grant the requested stay.

46. Moreover, the trial court’s order denying the motion for stay also proclaimed that “the citizens of Carlinville always have deserved to know what decisions are being made by their elected officials” and “have been deprived transparency because the Open Meetings Act does not apply to non-for-profit corporations, such as Illinois Alluvial”. (C235). However, the trial court had already specifically found Plaintiffs had not and indeed could not plead any FOIA or OMA violations because the facts do not support them. (C76; C190; C210). As such, any transparency related grounds for the denial of the motion to stay is wholly unsupported by the facts and pleadings in this case and in contradiction of the trial court’s own prior order.

47. In sum, a stay pending appeal is appropriate in this case because a stay will maintain the status quo and allow Carlinville’s efforts to aid Alluvial in becoming operational to continue. Specifically, a stay would (1) allow Carlinville engineering and easement acquisition for its interconnect to Bunker Hill and Jersey County Rural Water to continue; (2) allow Carlinville

engineering for its pipeline from a Carlinville Water Tower to its connection point with the interconnect to continue; (3) allow Carlinville's contracts with Mecco Heneghan Engineering to proceed; (4) allow Alluvial to continue as a valid Illinois Corporation pending appeal; (5) allow Defendant to continue to participate in Alluvial board meetings; (6) avoid and prevent unnecessary and unfortunate (i) disruptions to the financial position of Defendant and Alluvial, (ii) interference with Defendant's contractual obligations, and (iii) risk to the efforts to provide a safe potable public water supply while the appeal is pending.

48. Absent a stay in this case, irreparable damage will occur to Defendant's continuing efforts to aid Alluvial in becoming operational and remedy Defendant's failing water supply even if this Court ultimately reverses the trial court's judgment on appeal.

IV. CONCLUSION

49. Plaintiffs originally filed this matter in February 2018. It has taken approximately two and half years to get to this point. It is not unreasonable to continue the status quo for a few months longer during the appeal process to avoid potentially irreversible damage to Defendant's efforts to provide its residents with a safe potable water supply by, what Defendant will argue on appeal, was an erroneous decision by the trial court. Even if this Court ultimately reverses the decision of the trial court, irreparable damage will occur in the meantime without a stay in place to preserve the status quo.

WHEREFORE, Defendant, the CITY OF CARLINVILLE, hereby respectfully requests this Court to enter an order staying enforcement of the trial court's July 7, 2020 order pending review of this matter on appeal without bond or other form of security being required, and for such other relief this Court deems just and proper.

Respectfully submitted,

**CITY OF CARLINVILLE, ILLINOIS,
A Municipal Corporation,
Defendant-Appellant**

By: /s/ John M. Gabala

One of Its Attorneys

Dan O'Brien, ARDC No. 6207572
Dan_obrien@mac.com
O'BRIEN LAW OFFICE
124 E. Side Square
P.O. Box 671
Carlinville, Illinois 62626
(217) 854-4775

John M. Gabala, ARDC No. 6288162
jgabala@GiffinWinning.com
GIFFIN, WINNING, COHEN & BODEWES, P.C.
One West Old State Capitol Plaza
Myers Building, Suite 600
Springfield, Illinois 62701
(217) 525-1571

CERTIFICATE OF FILING AND PROOF OF SERVICE

I certify that, on August 14, 2020, I submitted the foregoing document for electronic filing with the Clerk of the Fourth District Appellate Court by using the Odyssey eFileLL system.

I further certify that I served the following by transmitting a copy via email on the above date to:

Jacob N. Smallhorn
Smallhorn Law LLC
609 Monroe
Charleston, IL 61920
jsmallhorn@smallhornlaw.com

Dan O'Brien
O'Brien Law Office
331 E. 1st Street
Carlinville, IL 62626
dan_obrien@mac.com

David M. Foreman
Counsel for Alluvial
Foreman & Kessler, Ltd.
204 E. Main Street
Salem, IL 62881
dforeman@foremanandkessler.com

Under penalties as provided by law pursuant to Section 1-109 of the Illinois Code of Civil Procedure, I certify that the statements set forth in this instrument are true and correct to the best of my knowledge.

/s/ John M. Gabala
John M. Gabala, ARDC #6288162
Giffin, Winning, Cohen & Bodewes, P.C.
One West Old State Capitol Plaza
Myers Building – Suite 600
Springfield, IL 62701
(217) 525-1571

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CAMILLE MAYFIELD COOPER BROTZE)	
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CITY OF CARLINVILLE, ILLINOIS,)	2018-L-5)
a Municipal Corporation,)	
Defendant-Appellant.)	The Honorable
)	APRIL TROEMPER,
)	Presiding Judge.

ORDER

This cause coming to be heard on Appellant’s Motion to Stay in the Reviewing Court Pending Appeal, due notice having been given, and the Court being duly advised:

IT IS HERBY ORDERED: its Motion to Stay in the Reviewing Court Pending Appeal ALLOWED/DENIED.

DATE: _____

ENTERED: _____