IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI

CAROLYN MILLS, individually and as Next Friend of Caitlin Mills and Abigail Mills, Minors	)	
Plaintiffs,	)	Case No. 11SL-CC01399
v.	)	
CITY OF HAZELWOOD,	)	Division No. 2
Defendant.	)	

PLAINTIFFS' RESPONSE TO DEFENDANT'S MOTION TO DISMISS

Plaintiffs Carolyn Mills, Caitlin Mills, and Abigail Mills ("the Mills family") respond to Defendant's Motion to Dismiss as follows:

1. Denied. This case arose from the City's declaration that the Plaintiffs' front-yard cookie stand violated section 405.040 of the Hazelwood City Code. The relief Plaintiffs have requested is a judicial determination that the definition of "home occupation" established in that section does not encompass their front-yard cookie stand and, further, that the City may not constitutionally prohibit Plaintiffs from having their front-yard cookie stand.

2. Denied. Plaintiffs have not made any assertion related to the City's Director of Public Works.

3. Denied. Section 405.755 of the Hazelwood City Code clearly states that the Hazelwood Board of Adjustment is empowered to hear and decide appeals as to "any order, requirement, decision or determination made by the Director of Public Works." Plaintiffs are not appealing any such order, requirement,

decision or determination and to the best of their knowledge the Director of Public Works *has not issued* any order, requirement, decision or determination relevant to the facts of this case.

4. Admitted that Plaintiffs did not seek an administrative appeal; denied that there was any matter to appeal.

5. Denied. The Missouri Supreme Court has held that where a plaintiff "proffers only questions of law clearly within the realm of the courts, the doctrine of exhaustion does not apply." *Premium Standard Farms v. Lincoln Township of Putnam County*, 946 S.W.2d 234, 238 (Mo. banc 1997); *see also Council House Redevelopment Corp. v. Hill*, 920 S.W.2d 890, 893 (Mo. banc 1996).

6. Denied.

7. Denied.

8. In support of this response, Plaintiffs file the attached Suggestions in Opposition to Defendant's Motion to Dismiss.

Respectfully submitted,

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SUGGESTIONS IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

I. Introduction.

The Mills family has brought before this Court two basic questions of law: (1) Does the temporary sale of cookies on residential property in the City of Hazelwood ("Hazelwood" or "the City") constitute a home occupation forbidden by the Hazelwood City Code, and (2) If so, does the City's cookie stand prohibition violate the Mills family's constitutional right to use their property in this harmless way? The material facts of this case are exceedingly simple and, although the City adds certain inaccurate embellishments, the facts do not appear to be in serious dispute. In the context of a disagreement over the application of a zoning ordinance the Missouri Supreme Court has held that the doctrine of exhaustion of remedies does not apply where the dispute involves "only questions of law clearly within the realm of the courts." *Premium Standard Farms v. Lincoln Township of Putnam County*, 946 S.W.2d 234, 238 (Mo. banc 1997). The City's Motion to Dismiss is unfounded and should be overruled.

II. Exhaustion of Remedies is Not Required in This Case.

In its Motion to Dismiss Hazelwood cited a litany of appellate cases – none of which are factually on point – for the general proposition that a party must exhaust administrative remedies before seeking redress from the courts.[1] The City neglected to mention, however, the Missouri Supreme Court cases that establish the applicable exceptions to this rule. Specifically, the Missouri Supreme Court has repeatedly ruled that a plaintiff need not exhaust administrative remedies if their case presents only questions of law. *See Premium Standard Farms v. Lincoln Township of Putnam County*, 946 S.W.2d 234, 238 (Mo. banc 1997); *Council House Redevelopment Corp. v. Hill*, 920 S.W.2d 890, 893 (Mo. banc 1996); *Farm Bureau Town and Country Ins. Co. v. Angoff*, 909 S.W.2d 348, 353 (Mo. banc 1995); *Nicolai v. City of St. Louis*, 762 S.W.2d 423, 425 (Mo. banc 1988); *B&D Inv. Co., Inc. v. Schneider*, 646 S.W.2d 759, 762 (Mo. banc 1983). It has further held that a plaintiff need not exhaust administrative remedies if the administrative body lacks the authority to grant the requested relief. *See Nicolai*, 762 S.W.2d at 425; *Farm Bureau Town and Country, Inc.*, 909 S.W.2d at 353; *see also Group Health Plan,*

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[1] Plaintiffs are not seeking and do not want a permit, license, or variance, yet almost every case the City cites for this proposition involved the question of whether a permit, license, or other zoning variance should be issued or sustained. *See Parker v. City of St. Joseph*, 167 S.W.3d 219 (Mo. App. W.D. 2005) (subdivision residents sought a withdrawal of plat approval); *Normandy School Dist. v. City of Pasadena Hills*, 70 S.W.3d 488 (Mo. App. E.D. 2002) (school district sought permit to build modular units); *McDonald v. City of Brentwood*, 66 S.W.3d 46 (Mo. App. E.D. 2001) (restaurant sought conditional use permit and occupancy permit); *State ex rel. Maynes Const. Co. v. City of Wildwood*, 965 S.W.2d 949 (Mo. App. E.D. 1998) (developer sought unconditional approval of site development plan); *Drury Displays v. Richmond Heights*, 922 S.W.2d 793 (Mo. App. E.D. 1996) (company sought permit for outdoor advertising structure); *Shaffer v. City of Pacific*, 807 S.W.2d 207 (Mo. App. E.D. 1991) (property owners sought declaration of valid nonconforming use); *Boling Concrete Const. Co. v. Townsend*, 686 S.W.2d 842 (Mo. App. E.D. 1985) (property owners sought to retain building permit); *N.G. Heimos Greenhouse, Inc. v. City of Sunset Hills*, 597 S.W.2d 261 (Mo. App. E.D. 1980) (business sought declaration of valid nonconforming use); *State ex rel. J. S. Alberici, Inc. v. City of Fenton*, 576 S.W.2d 574 (Mo. App. E.D. 1979) (property owner sought building permit).

Inc. v. State Bd. of Registration for the Healing Arts, 787 S.W.2d 745, 748 (Mo. App. E.D. 1990).

a. This Case Presents Only Questions of Law.

The Missouri Supreme Court has been very clear — a plaintiff whose challenge of a city ordinance only involves questions of law is not required to seek administrative review of those questions of law. In *Premium Standard Farms v. Lincoln Township of Putnam County* a local code enforcement officer sent a letter to a business suggesting that their property did not comply with the township's zoning ordinances. The company responded by filing a lawsuit seeking declaratory judgment and injunction against the township's enforcement of the ordinance, arguing that the township had exceeded its authority. The township asserted that the court lacked jurisdiction because the company had failed to exhaust its administrative remedies by asking the Board of Adjustment for a variance permit before filing suit. The Missouri Supreme Court held that the exhaustion of remedies is not required "where no adequate remedy lies through the administrative process," neither is it required where a plaintiff challenges "the authority of the political subdivision to impose particular regulations." *Id*. at 237. Because the case before the court did not require the administrative process to develop the record, "but instead proffer[ed] only questions of law clearly within the realm of the courts, the doctrine of exhaustion" was inapplicable. *Id*. at 238.

The instant case presents a very similar scenario. One of Hazelwood's code enforcement officers[2] gave the Mills family a notice stating that they were violating a city ordinance and threatening to issue a summons if they failed to remedy the alleged violation. The Mills family filed this action, requesting declaratory judgment and injunction to prevent the City from

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[2] Notably, this was not the Director of Public Works.

enforcing the ordinance against them because such enforcement would exceed the City's authority. Hazelwood has given no indication that it disputes the material facts as the Plaintiffs have presented them, nor has it suggested that the Board of Adjustment is capable of affording the Mills family with the requested relief. This being the situation, the Missouri Supreme Court's holding in *Premium Standard Farms* is binding; this Court has proper jurisdiction over the legal questions presented and the Defendant's Motion to Dismiss should be overruled.

b. The Board of Adjustment Cannot Provide the Requested Relief.

The City's Motion creatively suggests that "any party who may be dissatisfied with the City's interpretation of its Zoning Code [must] seek an administrative review through the Board of Adjustment." Of course, the Hazelwood City Code says nothing of the sort. In fact, the Code only empowers the Board of Adjustment to "hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination *made by the Director of Public Works*." Hazelwood City Code § 405.755. The Mills family has not challenged any "order, requirement, decision or determination made by the Director of Public Works," and Hazelwood has failed to identify any such "order, requirement, decision or determination made by the Director of Public Works" that the Mills family *could* appeal.[3] This being the case, the Hazelwood City Code does not give the Board of Adjustment authority to hear the Mills family's complaint.

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[3] In *Nicolai v. City of St. Louis*, 762 S.W.2d 423 (Mo. banc 1988), the Missouri Supreme Court expressed skepticism that, where a plaintiff challenged the validity of a license requirement established by city ordinance, the plaintiff would have standing to seek administrative review of a health inspector's determination that the plaintiff was subject to that requirement. The court stated that if the inspector could be said to have made any determination at all, "it was purely ministerial, and review before the [administrative board] would be meaningless." *Id*. at 425. Thus, the plaintiff was not required to exhaust administrative remedies before seeking relief in the courts.

Even if the Board of Adjustment had authority to review some aspect of this case, the Board is powerless to grant the Plaintiffs' requested relief. The Board is not competent to issue a legal opinion as to either the proper interpretation of the challenged ordinance or its constitutionality,[4] and the Board has no authority to enjoin the City from enforcing the ordinance against the Plaintiffs and similarly situated homeowners in Hazelwood. Because the Board of Adjustment cannot grant the Plaintiffs' requested relief, it would be a "hollow formality" to require the Mills family to appear before it. *See Nicolai*, 762 S.W.2d at 425.

III. Conclusion.

The City's Motion to Dismiss runs contrary to Missouri Supreme Court precedent and contrary to its own City Code. The Hazelwood Board of Adjustment has no authority to assess the legal issues raised by the Mills family's Petition, nor does it have the authority to grant the requested relief. This Court should overrule the City's Motion to Dismiss.

Respectfully submitted,

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[4] *See Callier v. Director of Revenue*, 780 S.W.2d 639, 645 (Mo. banc 1989); *City of Joplin v. Industrial Commission of Missouri*, 329 S.W.2d 687, 689 (Mo. banc 1959).

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing was served by mail on June 27, 2011, addressed to:

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