

IN THE MISSOURI SUPREME COURT

No. SC 87744

CITY OF BRIDGETON,

Appellant,

v.

MISSOURI AMERICAN WATER COMPANY,

Respondent.

Appeal from the Circuit Court of St. Louis County
Honorable Robert S. Cohen
Circuit Judge

SUBSTITUTE BRIEF OF AMICUS CURIAE
MISSOURI GROWTH ASSOCIATION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....2

SUMMARY OF AMICUS CURIAE.....3

POINT RELIED ON AND ARGUMENT3

CONCLUSION12

CERTIFICATES12

TABLE OF AUTHORITIES

Crabtree v. Bugby, 967 S.W.2d 66 (Mo. banc 1998)..... 11

Hill-Behan Lumber Co. v. State Highway Com’n,
148 S.W.2d 499 (Mo. 1941).....8

Home Builders Ass’n of Greater St. Louis v. St. Louis County Water Co.,
784 S.W.2d 287 (Mo. App. 1989)..... 5-7, 10-11

Riverside-Quindaro Bend Levee Dist. v. Missouri American Water Co.,
117 S.W.3d 140 (Mo. App. 2003).....9

State ex rel. Office of Public Counsel v. Public Service Com’n,
858 S.W.2d 806, 811 (Mo. App. 1993).....9

*Union Electric Co. v. Land Clearance for Redevelopment Authority
of the City of St. Louis*, 555 S.W.2d 29 (Mo. banc 1977) 5-6, 8-11

Mo. Const. Art. I § 28..... 9

Section 393.170, R.S. Mo..... 9

Sections 393.1000 through 393.1006, R.S. Mo..... 10

4 CSR 240-3.650 10

Missouri Growth Association submits this brief as amicus curiae in support of Appellant City of Bridgeton in this matter.

SUMMARY OF AMICUS CURIAE

Missouri Growth Association is a Missouri nonprofit corporation, organized for the purpose of promoting the common business interests of people and companies engaged in developing, owning, and operating real estate. The activities of Missouri Growth Association include working for the reform of public policies and governmental practices with the goal of fostering a healthy and strong commercial real estate industry, with the ultimate goal of supporting economic growth and general community well-being statewide. The Circuit Court's judgment, if allowed to stand, creates an unwarranted burden on the development of real estate in Missouri.

POINT RELIED ON AND ARGUMENT

THE CIRCUIT COURT ERRED IN GRANTING SUMMARY JUDGMENT TO THE WATER COMPANY, BECAUSE THE CITY OF BRIDGETON WAS PERFORMING A GOVERNMENTAL FUNCTION BY IMPROVING TAUSSIG ROAD, IN THAT THE PUBLIC IS THE PRIMARY BENEFICIARY OF THOSE IMPROVEMENTS AND ANY BENEFIT TO TRISTAR IS MINIMAL AND INCIDENTAL. *Union Electric Co. v. Land Clearance for Redevelopment Authority of the City of St. Louis*, 555 S.W.2d 29 (Mo. banc 1977).

Park 370 is a retail/industrial park developed by TRiSTAR Business Communities (TRiSTAR) in northwest St. Louis County. (Defendant's Exhibit R.) A great part of Park 370's market appeal is its location next to a divided, limited-access highway, Missouri

Highway 370, approximately two miles from the intersection of Interstate Highways 70 and 270. (Appendix at A2.) Primary access to Park 370 is through a Missouri Highway 370 interchange¹ constructed by TRiSTAR, providing excellent access over major highways.

Park 370 itself is located in the City of Hazelwood, but part of the highway interchange is located in the City of Bridgeton, at the north end of Taussig Road. While it is possible to reach Park 370 by traveling first over St. Charles Rock Road (four lanes) and then over Taussig Road (two lanes), that access is far inferior to access by Highway 370 and the other highways that serve the area. From the east, south, or west, the Rock Road/Taussig route is virtually the same distance as the highway route, but at much slower speed. From the north, the Rock Road/Taussig route is both longer and slower. For that reason, TRiSTAR's traffic engineering study estimated that the development of Park 370 would not add significantly to the traffic on Taussig Road and that only three percent of Park 370's traffic would travel that route.² (Plaintiff's Exhibit 19 at 13.)

The City of Bridgeton considered Taussig Road to be obsolete and had for many years planned for its reconstruction. (Plaintiff's Exhibits 8, 10, 19, and 34.) When TRiSTAR sought a permit to construct the part of the highway interchange in Bridgeton,

¹The interchange is in the location marked "Vicinity of Proposed Interchange" on the map in the Appendix at A2.

²Park 370's name reflects the importance of access by Highway 370 and implicitly suggests that people use that highway to get there.

the city required TRiSTAR to fund Bridgeton's reconstruction of Taussig Road as a condition of granting the permit. (Defendant's Exhibit R.)

This Court has established a common law rule to determine when a utility must bear the cost of moving its facilities to accommodate road improvements. The utility bears the cost when the improvements are due to public necessity or public convenience and security. *Union Electric Co. v. Land Clearance for Redevelopment Authority of the City of St. Louis*, 555 S.W.2d 29, 32 (Mo. banc 1977). The Court of Appeals has acknowledged that rule. *Home Builders Ass'n of Greater St. Louis v. St. Louis County Water Co.*, 784 S.W.2d 287, 289-90 (Mo. App. 1989). In this case, however, both the Circuit Court and the Court of Appeals have repudiated this Court's rule. Because the improvements to Taussig Road serve a public rather than a private need, the Circuit Court erred in not requiring the water company to move its facilities at its own cost, and the Court of Appeals erred in affirming the Circuit Court.

In its opinion, the Court of Appeals states that, "... it appears that TriSTAR's development in itself does not necessitate the improvements to Taussig Road. Rather, improvements to Taussig Road have been necessary and contemplated by Bridgeton for some time before TriSTAR's proposed development." Slip op. at 4. Applying this Court's common law rule to those facts, the water company must pay to move its facilities.

But, the Court of Appeals circumvented the common law rule by applying a further test. It stated that, because the funds for the road improvements resulted from "an exaction" on TRiSTAR, there must be a "cost-benefit analysis;" and because TRiSTAR

benefited from its development, the road improvements were primarily for TRiSTAR's benefit. Slip op. at 4-5. In so holding, the Court of Appeals erred.

The Court of Appeals erred in holding that an exaction would be conclusive on the issue of public or private benefit. The test that this Court set out is a comparison of the public and private benefits of the project in question, not the process by which a payment occurred. The Court of Appeals failed to distinguish between the source of funds for the road improvements and the purpose of the road improvements. The purpose of the road improvements is crucial, and the source of funds is just a distraction.

The Court of Appeals apparently came to that error by assuming that TRiSTAR's payment necessarily meant that the benefit to TRiSTAR outweighed the benefit to the public. TRiSTAR's payment meant only that TRiSTAR concluded that the benefit of the payment (securing a building permit) outweighed the loss of the amount paid. It says nothing about whether the improvements to Taussig Road primarily benefited the public or TRiSTAR.

The Court of Appeals also erred in applying a "cost-benefit analysis." Under this Court's common law rule, the appropriate test is a simple comparison of the public and private benefits of the project in question. *Union Electric Co. v. Land Clearance for Redevelopment Authority of the City of St. Louis*, 555 S.W.2d at 32. The Circuit Court's judgment and the Court of Appeals' decision fly in the face of the City of Bridgeton's long-standing determination that improving Taussig Road was in the public interest.

In entering summary judgment for the water company, the Circuit Court misapplied this Court's decision in *Home Builders Ass'n of Greater St. Louis v. St. Louis*

County Water Co., supra. In that case, this Court’s holding—that those developers were required to bear the expense of relocating water lines—was predicated on the fact that “... the actions of private developers constructing their projects, not the actions of a governmental entity, have caused the need for right-of-way improvements and have, in turn, necessitated water facility relocations.” *Home Builders Ass’n of Greater St. Louis v. St. Louis County Water Co.*, 784 S.W.2d at 291. That fact does not exist here. TRiSTAR’s Park 370 development does not need access over Taussig Road; it needs access from Highway 370. If access over an improved Taussig Road were sufficient, TRiSTAR would simply have improved Taussig Road and not incurred the additional expense of building an interchange on a divided, limited access highway. This case, unlike *Home Builders Ass’n of Greater St. Louis*, presents “... a situation in which a public entity is exercising its police power to make road improvements necessitating facility relocations.” 784 S.W.2d at 291. In such cases, utilities bear the expense of moving their facilities. *Id.*

The Circuit Court also erred by failing to distinguish between the source of funds for the road improvements and the purpose of the road improvements. “Because the Taussig Road improvements were resultant from an exaction on a private developer, as opposed to public necessity, Missouri-American cannot be forced to pay for the relocation of its facilities and structures.” (Legal File at 219.) It is the purpose of the road improvements that is crucial, not the source of funds. And, the purpose of the road improvements is clear. The City of Bridgeton had wanted for some time to improve Taussig Road—no doubt in part because its athletic complex is on Taussig Road

(Appendix at A2)—and it seized the opportunity to have TRiSTAR fund that improvement. TRiSTAR did not need access over Taussig Road; it needed access from Highway 370. The Taussig Road improvements benefit the public, not TRiSTAR.

The source of funds for an improvement does not determine whether the government in question is acting for a governmental rather than a proprietary purpose. If the funds for these road improvements had come from state or federal sources, or from a gift or bequest, no one could question that Bridgeton was serving a public purpose, in light of its long-standing plans to improve Taussig Road when funds became available. That the funds came from private hands is not determinative.

The construction and maintenance of roads is “purely a governmental function.” *Hill-Behan Lumber Co. v. State Highway Com’n*, 148 S.W.2d 499, 501-02 (Mo. 1941). With respect to the relocation of utility facilities for road improvements, that general rule gives way only when the government exercises a proprietary purpose. *Union Electric Co. v. Land Clearance for Redevelopment Authority of the City of St. Louis*, 555 S.W.2d at 32. In that case, the City of St. Louis acted with a governmental purpose in vacating a street for the St. Louis Convention Center, and the utility was required to remove its facilities at its own expense, although a privately owned and operated hotel was going to occupy the area. *Id.* at 31-32. If the Supreme Court required the electric company to remove its facilities in that case, this Court must require the water company to move its facilities here. In this case, any benefit of the Taussig Road improvements to TRiSTAR will be incidental and minimal. Clearly, the benefit to the hotel owner in the *Union Electric Co.* case was far greater than that. Nevertheless, because that redevelopment

served a public purpose,³ the utility bore the cost of removing its facilities. The result here should be the same.

Requiring the water company to move its facilities here is consistent with the statutory scheme regulating public utilities. The water company is licensed as a public utility to serve the public interest. Section 393.170, R.S. Mo.⁴ It is not a governmental entity suffering shortfalls in tax revenues; it is a privately-owned business that is assured a reasonable return on its capital investments. *E.g.*, *State ex rel. Office of Public Counsel v. Public Service Com'n*, 858 S.W.2d 806, 811 (Mo. App. 1993). One of the burdens of serving the public as a utility is bearing the cost of relocating facilities for public improvements. *E.g.*, *Union Electric Co. v. Land Clearance for Redevelopment Authority of the City of St. Louis*, *supra*, *Riverside-Quindaro Bend Levee Dist. v. Missouri American Water Co.*, 117 S.W.3d 140 (Mo. App. 2003).

The timing of any particular project—whether or not a private developer is involved—is generally outside of the utilities’ control. Federal, state, and municipal road construction, casualty damage, and many other events do not occur to suit the convenience of the utilities. However, the expense of relocating facilities is predictable

³The city government declared that public purpose, *id.* at 33, as Bridgeton did here. (Plaintiff’s Exhibit 8.) Bridgeton also authorized the use of eminent domain, which can be used only for public purposes. Mo. Const. Art. I § 28.

⁴Except as otherwise indicated, all statutory references are to the Revised Statutes of Missouri as now in effect.

and is built into a utility's rates as an expense, so that the water-consuming public indirectly (and correctly) pays for the public benefit of relocating the facilities to accommodate public improvements. There is even a specific statute permitting *this* utility in *this* county to recover major unbudgeted costs of (among other things) facilities relocations required for road improvements. Sections 393.1000 through 393.1006, R.S. Mo.⁵ Facilities relocation is just one of the costs of doing business as a water company. In this instance, the water company management is simply looking for a windfall, because costs like those at issue here should be built into its rates.

The outcome of this case and others like it should not turn on the fortuitous appearance of a developer to fund a planned public improvement for which tax revenues or other funds are not yet available. Rather, these cases should turn on the relationship of the improvement to the public. If the primary benefit is for the developer, then the developer should bear the cost of relocating any utility facilities. *Home Builders Ass'n of Greater St. Louis v. St. Louis County Water Co.*, 784 S.W.2d at 291. On the other hand, if the primary benefit is for the public, as it is here, then the utilities should bear the cost of

⁵Section 393.1000(8)(c), R.S. Mo., and the Public Service Commission's regulation at 4 CSR 240-3.650(1)(G)3 bring facilities relocations within those provisions. The surcharge authorized by those provisions is reset to zero when a rate proceeding establishes a new general rate, since the expenses previously justifying the surcharge are then built into the water company's rate structure. Section 393.1006.6(1), R.S. Mo., 4 CSR 240-3.650(17).

relocating their facilities. *Union Electric Co. v. Land Clearance for Redevelopment Authority of the City of St. Louis*, 555 S.W.2d at 33. As a general rule, the issue of primary benefit is fact-based, precluding summary judgment in most cases. In this case, however, the record makes it clear that the public is the primary beneficiary of the improvement of Taussig Road—particularly the residents of Bridgeton, whose large recreational complex is on Taussig Road. (Appendix at A2.)

Developers should not be forced to bear expenses that they have not agreed to bear, and which they could not be forced to bear under established legal principles. In cases such as the present one, where a municipality is improving a road within its boundaries, public utilities should be required to demonstrate that the improvements are not primarily for a public purpose if they wish to avoid the cost of relocating their facilities. The water company has made no such showing in this case.

The Circuit Court's summary judgment, affirmed by the Court of Appeals, fails to apply this Court's decision in *Union Electric Co. v. Land Clearance for Redevelopment Authority of the City of St. Louis*, *supra*, and misinterprets the Court of Appeals' decision in *Home Builders Ass'n of Greater St. Louis v. St. Louis County Water Co.*, *supra*. The water company has demonstrated no compelling reason to change the rule set out in the *Union Electric Co.* case. *See, Crabtree v. Bugby*, 967 S.W.2d 66, 71-72 (Mo. banc 1998). The judgment below fundamentally changes the economic considerations for the development of real estate in Missouri and creates an unwarranted burden on that development.

CONCLUSION

The Circuit Court erred in entering summary judgment in favor of the water company. For the foregoing reasons, in addition to those advanced by Appellant City of Bridgeton, this Court should reverse the judgment of the Circuit Court and remand this cause for entry of judgment in favor of the City of Bridgeton. In the alternative, this Court should reverse the judgment of the Circuit Court and remand this cause for trial.

Respectfully submitted,

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CERTIFICATES

The undersigned certifies that:

1. One complete copy of the foregoing Substitute Brief of Amicus Curiae and one floppy disk as required by Mo. Rule 84.06(g) were served on each of the following by first-class mail, postage prepaid, this 22nd day of September, 2006:

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2. The foregoing Substitute Brief of Amicus Curiae complies with the limitations contained in Mo. Rule 84.06(b).

3. In reliance on the word count of Microsoft Word 2002, the word-processing software used to prepare the brief, the number of words in the foregoing Substitute Brief of Amicus Curiae—excluding the cover, these certificates, signature blocks, and appendix—is 2,697.

4. The undersigned has scanned the floppy disk filed with the foregoing Brief of Amicus Curiae for viruses, using McAfee VirusScan Enterprise (v8.0.0, virus definition 4857), and in reliance on that scan, that disk is virus-free.

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