

**IN THE
SUPREME COURT OF MISSOURI**

Appeal No. SC87744

**CITY OF BRIDGETON,
Plaintiff/Appellant,**

v.

**MISSOURI-AMERICAN WATER COMPANY,
Defendant/Respondent.**

ON APPEAL FROM THE CIRCUIT COURT
OF ST. LOUIS COUNTY,
HONORABLE ROBERT S. COHEN, CIRCUIT JUDGE,
CAUSE NO. 04CC-2107.

**AMICI CURIAE BRIEF OF THE OFFICE OF THE PUBLIC COUNSEL
AND THE MISSOURI INDUSTRIAL ENERGY CONSUMERS**

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INTEREST OF OFFICE OF THE PUBLIC COUNSEL AND THE MISSOURI
INDUSTRIAL ENERGY CONSUMERS AS AMICI CURIAE

The Office of the Public Counsel (Public Counsel) is the State of Missouri's statutory representative of the State of Missouri tasked with the significant job of protecting the interests of the public utility ratepayers of Missouri. RSMo § 386.710 (2000).

The Missouri Industrial Energy Consumers (MIEC) is a group of large industrial utility consumers incorporated under Missouri law. Its members served by Missouri-American Water Company include The Boeing Company, DaimlerChrysler, GKN Aerospace, Hussmann, J.W. Aluminum and Monsanto.

Public Counsel and the MIEC share the purpose of ensuring that the financial burden placed on the ratepayer is fair and equitable when balanced with the benefits received. Under the regulatory jurisdiction, the Missouri Public Service Commission (Commission) is the gatekeeper that determines what utility costs may be shifted to the ratepayers. Normally, utilities are required to bill any utility project costs in arrears. Under this system, utility relocation is not charged to the ratepayer in advance. If the utility wishes to recover its costs for line relocation, the relocation costs first must be incurred by the utility. After the cost is incurred and the utility lines have been made useful to the ratepayers, then the public utility may seek to recover these costs by requesting a rate increase approved by the Commission. The ratepayers would then be charged for the cost of the relocation through the utility's rate structure.

The cost of relocation of utility lines is a major financial burden to a public utility and its ratepayers. Also, there is no doubt that utility relocation costs are shifted to the ratepayers. These costs may be directly placed on the ratepayer through specific charges and rate increases or they may be indirectly paid for through their negative effects on service, maintenance and upgrades. There are costs associated with planning as well as implementation. Customers are inconvenienced and other projects are put on hold in order to accommodate the relocation. Utility ratepayers may even be doubly affected not only by having to pay for the new relocated utility lines which are being used, but also by having to continue to pay for the lines that were relocated and are no longer used. Therefore, the outcome of this case is very important to the Office of Public Counsel, the Missouri Industrial Energy Consumers and the public to ensure that any utility relocation requirement be, above all other things, fair and equitable to the public utility ratepayers of Missouri and consistent with the principle that there must be a valid governmental act and a public, not private, benefit before the utility and its ratepayers must bear the relocation costs.

The Office of the Public Counsel, as the ratepayer's advocate, and the Missouri Industrial Energy Consumers, as large industrial utility consumers, bring unique points of view and expertise to this case discussion that may assist the Court in its consideration in this case.

POINTS AND AUTHORITIES RELIED ON

- I. The Circuit Court Correctly Entered Summary Judgment In Favor Of Missouri-American Water Company Because The Utility Relocation Was Not Required By A Valid Governmental Act In That The Relocation Of Water Service Facilities At Taussig Road Resulted From The City Of Bridgeton's Exaction Of Road Improvements From The Private Developer As A Condition Of TRiSTAR's Park 370 Project And Was Merely A Pretext For A Governmental Act Which Had The Primary Purpose To Bestow A Private Benefit On The Developer.

Home Builders Association of Greater St. Louis v. St. Louis County Water Company, 784 S.W.2d 287 (Mo. App. E.D. 1989)

Kelo v. City of New London, Connecticut, 545 U.S. 469, 125 S.Ct. 2655 (2005)

Pacific Gas & Electric Company v. Dame Construction Company,
191 Cal.App.3d 233 (Cal. App. 1st Dist. 1987)

Union Electric Company v. Land Clearance for Redevelopment Authority of the City of St. Louis, 555 S.W.2d 29 (Mo. banc 1977)

JURISDICTIONAL STATEMENT

Amici Curiae adopts the Jurisdictional Statement set forth in Respondent Missouri-American Water Company's Brief.

STATEMENT OF FACTS

Amici Curiae adopts the Statement of Facts set forth in Respondent Missouri-American Water Company's Brief.

SCOPE OF REVIEW

Amici Curiae adopts the Scope of Review set forth in Respondent Missouri-American Water Company's Brief.

ARGUMENT

I. The Circuit Court Correctly Entered Summary Judgment In Favor Of Missouri-American Water Company Because The Utility Relocation Was Not Required By A Valid Governmental Act In That The Relocation Of Water Service Facilities At Taussig Road Resulted From The City Of Bridgeton's Exaction Of Road Improvements From The Private Developer As A Condition Of TRiSTAR's Park 370 Project And Was Merely A Pretext For A Governmental Act Which Had The Primary Purpose To Bestow A Private Benefit On The Developer.

A. Ratepayers should be shielded from the shift of a developer's costs that are not attributable to a governmental act.

Ratepayers should not have to shoulder the burden of paying for a relocation of utilities due to an exaction agreed to by a private developer. In order for utilities to be required to move utilities at their own expense, the relocation must be required by a governmental act. A governmental act is not presented when a developer is given the choice of taking an exaction or not receiving governmental approval. It is the developer's private potential for profits that drives his decision.

The Missouri Constitution states that private property may not be taken for private use. Mo. Const. Art. I (1945) §28. Public utility lines are the private property of the utility company. Requiring utilities to relocate their lines for private purposes would be a taking under the Missouri Constitution.

Balanced against this takings clause, the common law rule states that utilities must relocate their facilities at their own expense when relocation is necessary to facilitate a governmental action in furtherance of a public necessity. *Union Electric Co. v. Land Clearance for Redevelopment Authority of the City of St. Louis*, 555 S.W.2d 29, 32 (Mo. banc 1977). In *Union Electric*, the essential factor was that the primary purpose of the governmental act was to accomplish or advance a public purpose - the removal of blight as recognized by statute. *Id.* at 33. Therefore, the key component in the analysis under this common law rule is that there must be a governmental act. But an action taken by a government entity is not necessarily a governmental act. The governmental act required by *Union Electric* means the primary purpose for the actions of the governmental entity, such as the City of Bridgeton, must be for a public purpose.

In *Home Builders Association of Greater St. Louis v. St. Louis County Water Company*, 784 S.W.2d 287, 291 (Mo. App. E.D. 1989), the Missouri Court of Appeals applied the common law rule to hold that a utility company is not required to bear the cost of relocating its facilities if it is required to relocate those facilities for a road improvement necessitated by an exaction on a private developer by a city. The court did not find the required governmental act when the developer was given the choice whether to accept the exaction or not receive governmental approval for his private development. The court said the choice to take the exaction was primarily based on the private benefit for the developer. Therefore, according to the common law, the developer is responsible for the cost of relocating the utility lines, not the utility company.

The court in *Home Builders* relied on a California case in its decision to equitably relate the developer's private interest in accepting an exaction to a private purpose. *Home Builders*, 784 S.W.2d at 292. In *Pacific Gas & Electric Company v. Dame Construction Company*, 191 Cal. App. 3d 233, 238 (Cal. App. 1st Dist. 1987), the California Appeals court stated that when a private development leads to an improvement project as a result of an exaction, a legal nexus is formed which justifies imposition of all costs on the developer. Without the private development project, the exaction would not have been offered to the private developer. The necessity of moving utility lines depends solely on the private developer's decision to accept the exaction or not. If he accepts the exaction, the lines will need to be moved. If he rejects the exaction, they do not. The legal nexus between the private development and the need for the utility lines to be moved has been formed. Therefore, this is primarily a private purpose and there is no governmental act.

In this case, Bridgeton placed an exaction on TRiSTAR as a condition for approval of its project. TRiSTAR's Park 370 project included an improved interchange at Route 370 and Missouri Bottom Road, which required Bridgeton's approval. Bridgeton gave TRiSTAR a choice. TRiSTAR could make improvements to Taussig Road and Bridgeton would give its approval. If there were no improvements to Taussig Road, there would be no approval. The choice was TRiSTAR's to make. If TRiSTAR refused, Taussig Road would remain in the unimproved condition. But TRiSTAR balanced the costs of the Taussig Road improvement against the potential profits from its Park 370 project and agreed to the exaction. If the costs had outweighed the potential

profits, TRiSTAR was certainly free to walk away from the exaction. Bridgeton knew that the improvements to Taussig Road were needed, but the city had no plans at that time to complete and pay for those improvements itself. Whether the Taussig Road improvements were to be completed at that time was purely a private, profit-driven decision on the part of TRiSTAR. Since TRiSTAR's Park 370 private development led to the Taussig Road improvement project as a direct result of Bridgeton's exaction from TRiSTAR, the legal nexus was formed. Therefore, the Taussig Road improvement project was a private action, not a governmental act. Without a governmental act, it is the private developer and not the public utility that must pay for the costs of utility line relocation.

The only time the government is allowed to take the private property of another is when the taking is clearly a governmental act and is for a public purpose. Since the primary purpose of the exaction was to promote TRiSTAR's private interests, Bridgeton should not be allowed to shift the cost of the utility relocation to the water company's ratepayers under the guise of a governmental act designed to carry out a public purpose.

B. A city should not be able to shift utility relocation costs to public utility ratepayers under the pretext that the exaction of an improvement in connection with the developer's project is a governmental act, when the primary purpose is to bestow a private benefit.

The determination of whether there is actually a governmental act should not be based solely on the city's statement that the primary purpose is public rather than private. A developer cannot claim that its actions are those of the government acting for a public

purpose when it agrees to an exaction that is designed to benefit the specific interests of the developer. Neither should the exaction's residual benefit to the public change the determination that the overall beneficiary of an exaction is the private developer. Only when there is a purely governmental act that is for a public purpose and that creates public benefit can the costs for utility relocation be shifted to the ratepayers.

The U.S. Supreme Court has stated that a city is not allowed to take property under the mere pretext of a public purpose when the actual purpose was to bestow a private benefit. *Kelo v. City of New London, Connecticut*, 545 U.S. 469, 125 S. Ct. 2655, 2661 (2005). Also, just because it was the government who acted, it does not make that action an act of public necessity within the scope of the common law rule. In *Dame*, the court stated that the fact that the city requested that the public utility move the utility lines was not determinative of who was responsible to pay the costs. *Dame Construction*, 191 Cal. App. 3d at 238. Also, a city may not merely declare that its actions are a public necessity in order to invoke the common law rule to shift the burden of paying for moving utility lines to the ratepayer. To determine if a public use exists, the U.S. Supreme Court held that it was the taking's purpose, not its mechanics that mattered. *Kelo*, 125 S. Ct. at 2664.

Using the same analysis, the construction of road improvements as a condition of a private development cannot be converted into a governmental act of public necessity just because the developer has agreed to make this improvement as an exaction required by the city. In *Home Builders*, the court said that if a project does not involve a "governmental action" then the utility is not obligated to pay the relocation costs. *Home*

Builders, 784 S.W.2d at 291. The court also stated that developers are not performing a governmental act by complying with an exaction. *Id.* Even if the city knew that road repairs were necessary, the mere act of making the repairs does not automatically make it a governmental act. The private developer does not assume responsibility for a public improvement that the city would otherwise eventually have had to undertake and it does not stand in the shoes of the government who is shielded from bearing the costs of utility location. *Dame Construction*, 191 Cal. App. 3d at 238. When a private developer, on its own initiative and not upon that of the government, creates or aggravates a need for a public improvement which requires the relocation of existing utility lines, the private developer bears the necessary relocation costs. *Id.* at 242. A city cannot call an exaction it makes on a developer a public necessity, especially when that exaction is used to complete maintenance and repairs the city knows are needed but has no plans at that time to pay for them out of city funds. Even though the city may have acknowledged the need for the repair, it is inequitable to pass those costs on to the public utility ratepayers when the city is unwilling to complete and fund the repairs.

Using same considerations, a project does not automatically become a public purpose project just because there may be some residual benefit to the public. A use is not a public use just because the property taken is put to use for the general public. *Kelo*, 125 S. Ct. at 2663. While there may be some residual benefit when a street is repaired, the benefits of the exaction fall squarely on the developer. If the benefits outweigh the added cost to the private development, the developer will agree to make the

improvements demanded by the city. If not, the developer will decline to make the improvements.

In this case, Bridgeton knew for many years that Taussig Road needed repairs. It was Bridgeton's responsibility to make the necessary repairs, but it had not done so and had no intention of doing so in the near future. Only when TRiSTAR approached Bridgeton about gaining approval for the improved interchange at Route 370 and Missouri Bottom Road did Bridgeton consider improvements to Taussig Road. If TRiSTAR refused Bridgeton's exaction, Taussig Road would not be repaired. Bridgeton may claim that the Taussig Road improvements were a public necessity, but it is the purpose of the project that matters, not how the city characterizes it. The purpose behind TRiSTAR's concession to the exaction was to gain approval for its Park 370 private development. The costs of the exaction were weighed against the Park 370 profits and the exaction was agreed to. No residual benefit to the public from the repairs to Taussig Road can overshadow the fact that without a private benefit to TRiSTAR, the exaction would not have been accepted.

The government may only take private property when it is a clear public necessity. Without the demonstrated public necessity, a city cannot shift utility relocation costs to the ratepayers. Since the primary purpose of the exaction was to promote a private interest and not a public purpose, the city cannot shift the cost of the utility relocation to the public utility and its ratepayers.

C. It is equitable to require developers to pay for the cost of utility relocation when they accept an exaction required to gain the City's approval, rather than shifting these costs to the public utility that will in turn recover these expenses through increased customer rates, because developers have a better opportunity to anticipate and plan for the costs of relocation associated with their projects.

Just as taxpayers have often been protected by the courts from shouldering the burden of costs of private development, public policy dictates that ratepayers should be protected as well. Public utility ratepayers should not be required to subsidize a private developer's costs nor should they be required to pay for the development costs that the city is unwilling to pay for from its own coffers.

The *Home Builders* reasoning was adopted and reinforced by the Maryland Supreme Court. In *Potomac Electric Power Company v. Classic Community Corporation*, 382 Md. 581, 595-596 (Md. 2004), the Court relied upon the importance of the public policy to protect the public utility ratepayers from shouldering the costs demanded from a public utility that were not required by a valid governmental act. In *Potomac*, the Maryland Supreme Court stated that the purpose of the common law is to protect the government and the taxpayers from the cost of utility relocation required by a valid governmental act. *Id.* at 595.

Like the California court in *Dame*, the *Potomac* court compared ratepayers and taxpayers. In *Dame*, public policy favored imposing the liability for the costs on the developer to protect the utility's ratepayers from that private purpose burden. *Dame*

Construction, 191 Cal. App. 3d at 237. The court in *Potomac*, recognizing that ratepayers like taxpayers must be protected, stated that there was no legal basis, and certainly not an equitable one, for requiring the public utility's ratepayers to bear the cost triggered and made necessary by a private developer's project. *Potomac Electric*, 382 Md. at 596. In the reasoning of the court, requiring the ratepayers to pay relocation costs under these circumstances would mean that ratepayers subsidize the cost of a private development. *Id.* Where a developer faces an exaction in order to receive approval for its project, the developer has the opportunity to balance the economic feasibility of going forward in light of the added expense due to the exaction. The utility has no part in the negotiation of the project and has no opportunity to prevent the relocation. *Dame Construction*, 191 Cal. App. 3d at 241-242. In *Dame*, the court pointed out that it is economically and otherwise fair that the developer bear the costs of that exaction since the developer had reason to anticipate it would have to pay for those costs. *Id.* at 241.

Using an exaction circumvents the normal and equitable bid process that a city would normally have to employ for a public use project. In an exaction, a private developer is given full rein to make decisions on what the project will entail, who will do the work and what it will cost. There is little or no oversight by the city and none allowed by the public utility.

In a bid process, the city would have been required to specifically plan what repairs would be needed. The public utility would be able to look at the city's plan, make suggestions and possibly even point out areas of cost savings. Once the plan was completed, various bids would be secured. Through the bid process, all parties' interests

have been incorporated. However, when an exaction is placed on a private developer, it is the developer's interests that are primarily served.

In this case, TRiSTAR was presented with a choice: it could accept Bridgeton's exaction of fixing Taussig Road in order to obtain the approval it sought or it could refuse and be denied. TRiSTAR had the ability to evaluate the cost of the exaction and balance it with the overall profitability of the Park 370 development. Bridgeton gave all control to TRiSTAR for the planning and therefore the cost of the Taussig Road improvement. The normal bid process was circumvented by the exaction on TRiSTAR. Missouri-American was not a part of the planning and had no say in what the project entailed. Missouri-American's ratepayers will be required to shoulder the cost of a project which did not contain any thought for their needs.

The courts have often protected taxpayers from shouldering the burden of the costs of private developments. In the same way, public policy dictates that ratepayers should not be required to subsidize a private developer's costs nor should they be required to carry the development costs a city is unwilling to fund. Since the primary purpose of the exaction was to promote a private interest and not a public purpose, the city cannot impose the Taussig Road improvement water facilities relocation costs to Missouri-American's ratepayers. Not all of Missouri-American's customers are residents of Bridgeton which further compounds the inequity of the ratepayers funding improvements that lie in the City of Bridgeton and benefit a developer seeking to construct a project in the city.

CONCLUSION

Amici Curiae Office of the Public Counsel and the Missouri Industrial Energy Consumers ask the Court to protect ratepayers from an unfair and unlawful financial burden and affirm the Circuit Court’s entry of Summary Judgment in favor of Missouri-American Water Company and against the City of Bridgeton. Missouri courts have adopted and reinforced the Common Law rule described in the California *Dame* case and the Maryland *Potomac* case regarding the obligation to pay the relocation of utility service costs. The focus of the inquiry centers on the presence of a governmental act that promotes a public purpose, rather than a purely private benefit act. The City’s exaction of the Taussig Road improvements as a condition for granting TRiSTAR permission to construct its Park 370 interchange is not a valid governmental act that should obligate Missouri-American and its ratepayers’ to pay the cost to relocate the company’s facilities.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies pursuant to Supreme Court Rule 84.06(c) that (1) brief includes the information required by Rule 55.03; (2) the brief complies with the limitations contained in Rule 84.06(b); and (3) the brief contains 3,698 words (exclusive of the cover, certificates of service and compliance, signature blocks, and tables of contents and of authorities) as calculated by Microsoft Word 2003, the software used to prepare the brief.

The undersigned further certifies that a three-and-one-half-inch diskette containing an electronic copy of the brief, in compliance with Supreme Court Rule 84.06(g), has been scanned for viruses, and is virus-free.

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 84.07(a), the undersigned hereby certifies that two copies of this brief, along with a three-and-one-half-inch disk containing an electronic version of the brief complying with Supreme Court Rule 84.06(g), were sent via U.S. Mail, postage prepaid, on October 30, 2006, to the following counsel of record:

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