No. SC91539

IN THE
MISSOURI SUPREME COURT

ST. CHARLES COUNTY, MISSOURI

Plaintiff/Respondent,

v.

LACLEDE GAS COMPANY,

Defendant/Appellant

Appeal from the Circuit Court of St. Charles County
Honorable Jon A. Cunningham, Division 5

SUBSTITUTE BRIEF OF *AMICUS CURIAE* MISSOURI ENERGY DEVELOPMENT ASSOCIATION

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JURISDICTIONAL STATEMENT

This case is before the Missouri Supreme Court as a result of a Civil Rule 83.02 transfer from the Eastern District Court of Appeals on its own motion. The Court of Appeals has transferred the matter "because the issues involved are of general interest and importance".

STATEMENT OF FACTS

Amicus Curiae Missouri Energy Development Association ("MEDA") accepts the Statement of Facts set forth in the Appellant's Substitute Brief. This brief is filed in support of Appellant Laclede Gas Company ("Laclede") and on its First Point Relied On because the Trial Court's Summary Judgment ("Judgment") in favor of Respondent St. Charles County, as affirmed by a two-to-one majority of the Court of Appeals, Eastern District, in favor of Respondent St. Charles County (the "County") disregards important legal authority and principles and misconstrues key facts in reaching an erroneous conclusion that has important constitutional, policy and operational implications for MEDA's member companies.[1]

[1] Union Electric Company, d/b/a Ameren Missouri; Kansas City Power & Light Company; The Empire District Electric Company; Aquila, Inc.; Laclede Gas Company; Missouri Gas Energy; Atmos Energy Corporation and Missouri-American Water Company.

POINTS RELIED ON

A. **THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF ST. CHARLES COUNTY, BECAUSE THE JUDGMENT OF THE TRIAL COURT DISREGARDS APPELLANT'S COMPENSABLE PROPERTY INTEREST AND MISAPPLIES THE LAW IN THAT (1) IT REQUIRES APPELLANT TO MOVE ITS FACILITIES LOCATED IN EASEMENTS GRANTED BY PLAT DEDICATION WITHOUT JUST COMPENSATION CONSTITUTING A TAKING OF APPELLANT'S PROPERTY WITHOUT JUST COMPENSATION, (2) IT MISAPPLIES MUNICIPAL FRANCHISE LAW TO CIRCUMSTANCES OCCURRING IN UNINCORPORATED ST. CHARLES COUNTY AND (3) IT ARBITRARILY ASSIGNS AN ORDER OF PRIORITY TO THE INTERESTS OF APPELLANT AND RESPONDENT.**

Anderton v. Gage, 726 S.W.2d 859, 862 (Mo. App. S.D. 1987)

Panhandle Eastern Pipeline Company v. State Highway Commission, 294 U.S. 613, 617-18, 55 S. Ct. 563 (1935)

Riverside-Quindaro Bend Levy District v. Missouri-American Water Company, 117 S.W.3d 140, 155-56 (Mo. App. 2003)

State ex rel. M.O. Danciger v. Public Service Commission, 205 S.W. 36, 40 (Mo. 1918)

ARGUMENT

A. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF ST. CHARLES COUNTY, BECAUSE THE JUDGMENT OF THE TRIAL COURT DISREGARDS APPELLANT'S COMPENSABLE PROPERTY INTEREST AND MISAPPLIES THE LAW IN THAT (1) IT REQUIRES APPELLANT TO MOVE ITS FACILITIES LOCATED IN EASEMENTS GRANTED BY PLAT DEDICATION WITHOUT JUST COMPENSATION CONSTITUTING A TAKING OF APPELLANT'S PROPERTY WITHOUT JUST COMPENSATION, (2) IT MISAPPLIES MUNICIPAL FRANCHISE LAW TO CIRCUMSTANCES OCCURRING IN UNINCORPORATED ST. CHARLES COUNTY AND (3) IT ARBITRARILY ASSIGNS AN ORDER OF PRIORITY TO THE INTERESTS OF APPELLANT AND RESPONDENT.

The fundamental question presented on this appeal is whether the subdivision plats in question granted to Appellant an easement for gas utility purposes by virtue of the doctrine of common law dedication. The answer to this question is determinative of the responsibility for the costs of relocating Appellant's gas lines to accommodate a road construction project to be undertaken by the County.

The constitutional protection against the taking of private property by the government without just compensation is among the most fundamental rights

provided in the Constitutions of the United States[2] and the State of Missouri.[3] It is undisputed that easements are compensable property interests which cannot be taken by the government without just compensation. *See, e.g. First Unitarian Church of Salt Lake City v. Salt Lake City Corp*, 308 F.3d 1114, 1122-23 (10th Cir. 2002); *Brooklyn E. Dist. Terminal v. City of New York*, 139 F.2d 1007, 1011 (2nd Cir. 1944); and *Ridgeline, Inc. v. United States*, 346 F.3d 1346, 1352 (Fed. Cir. 2003).[4] In essence, the Trial Court's[5] Judgment in this matter, as affirmed by a two-to-one majority of the Court of Appeals, permits the County to take Laclede's private property without compensation, by forcing it to move its lines which are located in utility easements belonging to Appellant and other relevant public utilities at its own cost. MEDA's interest is that the Trial Court's Judgment, as affirmed by the Eastern District Court of Appeals, impairs that right,

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[2] U.S. Const. Amend. XIV, §1.

[3] Mo. Const. Art. I, §§10 and 26.

[4] This fundamental principle underlies the decisions in *Panhandle Eastern Pipeline Company v. State Highway Commission*, 294 U.S. 613, 617-18, 55 S. Ct. 563 (1935) and *Riverside-Quindaro Bend Levy District v. Missouri-American Water Company*, 117 S.W.3d 140, 155-56 (Mo. App. 2003) which stand for the proposition that a utility cannot be forced by the government to moves its lines located in easements the utility owns without compensation.

[5] The term "Trial Court" refers to the Circuit Court of St. Charles County.

not only with respect to Laclede, but also with respect to every other utility acquiring easement interests by grant in similar subdivision plats.

There is no question that subdivision plats effectively can grant and convey an easement for public utility purposes. Utilities such as the members of MEDA frequently obtain easements by means of subdivision plats like those at issue in this lawsuit. The law confirms the appropriateness of dedicating utility easements by means of subdivision plats. It has been observed that there can be a grant of an easement by means of a plat to an individual or limited number of individuals. *Anderton v. Gage*, 726 S.W.2d 859, 862 (Mo. App. S.D. 1987). For years, subdivision developers throughout the state have platted their developments and on the plats, expressly dedicated "utility easements" to the respective utilities, just like the plats at issue here. Laclede and other utilities have installed their lines, pipes and other facilities at considerable cost with those easements in reliance on the plat dedications.

In the case at hand, it is apparent that the subdivision developers intended to dedicate utility easements. Nothing could be more plainly expressive of this intention that to use the term "utility easements". There is no support for the proposition that these easements are anything but just that – easements.

Nevertheless, the Trial Court concluded that the plat language conferred upon Laclede nothing more than revocable licenses or franchises.[6] This conclusion is at odds with the plain language of subdivision plats, the circumstances surrounding the dedications and is unsupported by compelling legal authority or by public policy. There is absolutely no authority for the proposition that contemporaneous dedications of platted public use easements for vehicular transportation and for utility purposes convert the utilities' easements into mere licenses by operation of law. The Trial Court's judgment, which so treated the utilities' easements are mere licenses, simply had no legal precedent for doing so.

The Trial Court and the Court of Appeals have further confounded the question by reliance on case law addressing and misapplying the question of governmental consent under municipal franchise law. *See, e.g., Union Electric Company v. Land Clearance for Redevelopment Authority of St. Louis*, 555 S.W.2d 29, 32 (Mo. banc 1977) and *City of Bridgeton v. Missouri-American Water Company*, 219 S.W.3d 226, 232 (Mo. banc 2007). Both the Trial Court and the Court of Appeals to a greater or lesser extent applied principles applicable to utilities located pursuant to municipal franchises, that is, that a city or town can

[6] Rather than address the central question of what the grant of utility easements in the subdivision plats actually created, the Court of Appeals stated that it "need not determine the extent, if any, of the property rights Laclede obtained by virtue" of the plats. Slip Op. at 13.

require a utility to relocate its lines located pursuant to a franchise when the relocation is required by public safety, necessity or convenience. This case law has no bearing on the matter before this Court.

A franchise represents a governmental consent to use the public rights-of-way. It is nothing more than "local governmental permission to use public roads and rights-of-way in the manner not available to or exercised by the ordinary citizen." *State ex rel. Union Electric Company v. Public Service Commission*, 770 S.W.2d 283, 285 (Mo. App. W. D. 1989). It is a privilege typically granted by ordinance for a specified term. An easement, by way of contrast, is granted by a property owner, is binding on successors in interest and runs with the land.

Municipal franchise case law is inapplicable to the matter at hand because it addresses property interests located in unincorporated St. Charles County. As such, the Trial Court's Judgment erroneously relies on law that has no bearing on the facts of the case.

Additionally, §229.100, RSMo 2000, which addresses the use of county rights-of-way, requires a formal, written "assent of the county commission" to exercise the privilege. The facts of this case fail to support this argument as well in that the grantors in this case were private parties. Consequently, the County owned nothing at the time of the dedication which it could consent to the utilities using.

Similarly, there is no Missouri case law support for the Court of Appeals' determination that a utility's property interest must "predate" the government's

interest in order to claim a compensable property interest.[7] Neither the *Panhandle* or *Riverside-Quindaro* opinions contain any mention of such a chronological qualifier to determine the priority of co-existent public uses. This appears to be nothing other than an arbitrary construct with the objective of providing a bright-line rule, but the desire for ease of application provides no principled basis for failing to come to grips with the important constitutional question at stake in this case.

Where the question of public use dedication is concerned, this Court should remain mindful of the fact that the devotion of private property by an investor-owned utility like Laclede to serve the public generally and indiscriminately is a public use. In fact, it is the devotion of private property to public use that is the premise for regulation by the Missouri Public Service Commission. *See, State ex rel. M.O. Danciger v. Public Service Commission*, 205 S.W. 36, 40 (Mo. 1918). This is not an inferior or subsidiary public use to that of transportation. The extension of utility services (electricity, natural gas, water, wastewater and communications) is essential to economic development and to the public welfare. Absent a full complement of essential public services, subdivided properties are unlikely to be improved or easily sold. The Trial Court's Judgment, if upheld,

[7] The approach taken by the Court of Appeals does not resolve the priority rule it adopts in that it does not address the question of if or when the County accepted the roadway grant.

could discourage utilities from extending essential public services into new subdivisions absent the creation and grant by deed of specific utility corridors which are separate and distinct from any roadway dedications. This could have the practical effect of impeding economic development and increasing costs to private land developers.

CONCLUSION

Permitting counties to force utilities to move lines located in private easements at the utility's expense will have significant consequences. This is not free to the public. The utility's ratepayers who ultimately bear the costs of such expenses will be required to pay for road projects in a city or county in which they may not live. More significantly, the Trial Court's Judgment, as affirmed by the Eastern District Court of Appeals, substantially weakens constitutional protections private property rights guaranteed by the Constitutions of the United States and the State of Missouri.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 15th day of March, 2011, one (1) copy of *Amicus Curiae's* Brief in the form specified by Rule 84.06(a) and one (1) copy of *Amicus Curiae's* Brief in the form specified by Rule 84.06(g) were served by hand-delivery, facsimile, electronic mail, or by placing a copy of such Brief, postage prepaid, in the United States mail to the following:

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CERTIFICATE PURSUANT TO SUPREME COURT RULE 84.06(c) AND (g)

I, Paul A. Boudreau, an attorney for *Amicus Curiae* Missouri Energy Development Association, hereby state and certify that the foregoing Brief of Amicus Curiae complies with the limitations contained in Supreme Court Rule 84.06(b) and contained 1869 words, excluding the cover, the Table of Contents, the Table of Authorities, the Certificate of Service, this Certificate, the signature block, and the Appendix, if any. In preparing this Certificate, I relied on the word count function of the Microsoft Word 2003 word processing software. I further certify that the CD-ROMs and electronic mail message containing the Brief Amicus Curiae have been scanned for viruses and are virus-free and notify this court that a CD-ROM is filed with this Court in lieu of a floppy disk.