SC91539

IN THE
SUPREME COURT OF MISSOURI

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 MUNICIPAL LEAGUE

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STATEMENT OF FACTS

Amicus Curiae Missouri Municipal League accepts the Statement of Facts set forth in the Substitute Brief of Respondent St. Charles County, Missouri, as though fully set forth herein.

With consent of all parties, the Missouri Municipal League (the "League") files this Substitute Amicus Brief in support of Respondent St. Charles County and against Appellant Laclede Gas on Appellant's First Point Relied On. Because the application of R.S.Mo. § 445.070 is dispositive to all issues in the case and specifically the statutory and policy questions of concern to the League and its member municipalities, the League does not respond to the ancillary evidentiary issues raised in Points Relied On II and III of Appellant's Substitute Brief.

ARGUMENT

RESPONSE OF *AMICUS CURIAE* MISSOURI MUNICIPAL LEAGUE TO APPELLANT'S FIRST POINT RELIED ON

This appeal involves the question of whether a private utility company may claim a direct private property interest in public rights-of-way by means of a platted easement dedication even though the statute authorizing such dedications expressly mandates that the platted dedications shall vest in the applicable city, town, village or county. This core issue affects not just the rights of St. Charles County, but also the rights and ability of municipalities throughout the State to protect the public health, safety and welfare of their citizens and to use municipal public rights-of-way without improper interference and delay from private users of the rights-of-way such as Appellant, Laclede Gas Company ("Appellant" or "Laclede Gas"). The trial court correctly rejected Laclede Gas's claim to a private property interest in a public dedication for various reasons, including because Appellant cannot have a private property right in either the rights-of-way or dedicated easements therein as such are by law "vested in the County pursuant to 445.070." Legal File ("L.F.") at 217. The Court of Appeals, Eastern District, properly affirmed the trial court.

The trial court's ruling honors the mandate of Chapter 445 vesting dedications only in the public entity, which thereby ensures that any private company's use of publicly owned rights-of-way and easements remains subordinate to the public's interest in and use of public rights-of-way so that the private use is not allowed to interfere with or otherwise obstruct the primary public use. Laclede Gas, however, seeks a contrary

ruling: *i.e.*, that a private company may claim private property in an easement dedicated pursuant to R.S.Mo. § 445.070 and even within a public right-of-way so as to obstruct the public's primary use of the public right-of-way by refusing to relocate its gas lines until compensation satisfactory to the private company is paid. The clear language of the Missouri platting statute, the language of other statutes requiring exclusive control of rights-of-way by the public entity, and abundant public policy unambiguously support the trial court's ruling and require rejection of Laclede Gas's private ownership position.

Converting platted "public" rights-of-way dedications to "private" ones would not only interfere with the primary public use of these easements and rights-of-way, but would also impose a fundamental, as well as unlawful, shift of private utility relocation costs onto the public for the public's use of its own easements and property. For these reasons, *Amicus Curiae* Missouri Municipal League, on behalf of its member municipalities across the State, files this Substitute Amicus Brief in support of Respondent St. Charles County to advise the Court of the particular impact on municipalities statewide, and thus to their taxpayers, that would arise from changing the established law and statutory mandate cited by the trial court.

A. AN EASEMENT "DEDICATED" BY PLAT PURSUANT TO SECTION 445.070 R.S.MO. IS BY LAW "VESTED" IN THE PUBLIC ENTITY AND NOT IN ANY OF THE PRIVATE USERS

Laclede Gas seeks a ruling that it must be compensated for moving its facilities located within the public rights-of-way and easements dedicated to the County (and in two plats, to the City of Weldon Spring) and to "respective utility companies." See Sub.

App. Br. at 3. Laclede Gas's entire argument rests on its claim to a private property right in easements dedicated specifically or generally within the public rights-of-way under a plat subject to R.S.Mo § 445.070. Because this platting statute expressly precludes private ownership by specifically mandating that the dedication shall be owned by the local government approving the plat, the trial court's judgment must be affirmed. Moreover, neither Laclede Gas nor any other party is able to cite a single case in Missouri history in which a takings claim against a local government arose from a plat dedication.

As noted, Laclede Gas claims its private "property rights" solely from easements that were "dedicated" by a subdivision plat approved by local government, as opposed to any private easements created by a deed or other individually recorded instrument under ordinary real property law. A "dedication" – unlike a deed or easement agreement – is by definition not a transfer of a private property interest of any kind, but rather "[t]he donation of land or creation of an easement for *public* use." *Black's Law Dictionary 442* (8th ed. 2004) (emphasis added). This basic tenet of real property law is codified in the very statute that Laclede Gas relies on to allege a private right. R.S.Mo. § 445.070.2 provides that subdivision plats:

> [S]hall be a sufficient conveyance to *vest the fee* of such parcels of land as are therein named, described or intended for public uses *in such city, town or village*, when incorporated, in trust and for the uses therein named, expressed or intended, *and for no other use or purpose*." (emphasis added)

Section 445.070.3 provides further that:

> If such city, town or village shall not be incorporated, then *the fee* of such lands conveyed as aforesaid *shall be vested in the proper county* in like trust, and for the uses and purposes aforesaid, *and none other*. (emphasis added)

Not only do the specific plats at issue in this case convey a "dedicated" or "public" interest (*i.e.*, public, rather than private, property interests), the statutory authority for such conveyances (1) clearly vests title to such dedications only in the applicable public entity (city or county), and (2) expressly limits the conveyance to "public," not private uses. Thus, while the statute authorizes private uses that also benefit the public, such as by private utilities, the property interest is expressly placed in the listed public entity, not in any of the various private secondary entities that may be given permission by the plat and public entity to also use the public dedication.

The express language of the statute unequivocally prohibits what Laclede Gas demands – *i.e.*, that title to a plat dedication should vest in a private company under a subdivision plat governed by Section 445.070. The statute further prohibits Laclede Gas from using such "public" dedication to interfere with the public entity's contemplated uses by demanding compensation and refusing to allow the public uses until they are paid whatever Laclede Gas chooses to demand. Because all such dedicated easements and rights-of-way are expressly owned by the "county," or "city, town or village" approving the plat, Laclede Gas simply does not qualify under the statute to take title or a private property interest by means of plat dedication – the sole source of its claimed property interest in this case.

Moreover, any attempt by a private entity to require compensation as a pre-condition to eliminating its private interference with the local government's public use of the rights-of-way is also wholly contrary to the statutorily mandated purpose of vesting ownership only in the public entities. As noted by the trial court:

> Failure to recognize the public road use as the dominant interest in the area in question will preclude the County from being able to fulfill its duty to properly maintain these roads and any others that were dedicated using similar language. Such a result would harm the public's interest and is not within the intent apparent from dedication language used in the Subdivision Plats.

L.F. at 219.

Laclede Gas contends that because it is a utility within the term of the plat language specifying the dedication uses or is even specifically mentioned in the plat language as one of the intended users, it has therefore obtained its own private property right for which it must be compensated if the public wants to use their own rights-of-way within which such private "dedication" purportedly exists. Yet again, this argument simply ignores the clear statutory mandate for a plat "dedication" that makes it incapable of creating any such legal interest vested in a private party.

Apparently recognizing this weakness, Laclede Gas alternatively argues that the plat should be treated like a recorded easement – a separate instrument that if it actually had been recorded independent of a plat, of course, might be able to create a private property interest if it had been recorded prior to the public grant. First, there simply is no

such separate easement document at issue – only a plat bound by the limitations of Section 445.070 requiring public ownership prevails. Second, this argument additionally fails because even if the plat was not bound by the ownership requirements of the statute, the easement language is not prior to the public grant, but actually appears after the dominant grant language dedicating the rights-of-way solely to the County. L.F. at 13, 15-16, 18-19. Laclede Gas can only succeed if this Court simply disregards state statutory requirements that the ownership of the dedication on a plat shall be in the public entity, not a private beneficiary. Section 445.070 clearly and unequivocally vests the title in the "county," or "city, town or village" when the interest is transferred by plat dedication. The mandate of the statute would be completely circumvented if Laclede Gas could just pretend that a plat dedication is "really just a deed" and that the special plat requirements can therefore just be disregarded. Thus, the statutory mandate would have no meaning if you could simply call a plat a deed and then ignore the requirement that the dedications on the plat "shall be vested in the proper county" as required by R.S.Mo. § 445.070. The statute is clear: dedications shown on plats vest in the city, town or village, and if unincorporated, in the applicable county – not in private entities – and that mandate may not be avoided by simply pretending that a plat was not involved.

This argument was essentially raised and rejected in *Marks v. Bettendorf's, Inc.*, 337 S.W.2d 585, 593 (Mo. App. 1960). In that case, the court dealt with a similar attempt by private users of a public dedication to claim private property rights in such dedication. In rejecting such possibility, the court held:

> *There is no such thing as a 'dedication' between an owner and individuals.* The public is the only party to a dedication. The dedication must be of a use that serves the public at large. (emphasis added).

Similarly, in *State ex rel. Missouri Highway and Transp. Com'n v. London*, 824 S.W.2d 55, 60 (Mo. App. 1991), the Court held that Chapter 445 allowed an easement dedicated by plat to be owned *only* by a "city, town, village, or county" and that even where such easement is used by an entity other than the qualified local government, it is not owned by the private utility, but rather held "in trust for the public uses set forth." Thus, both Chapter 445 and the authority interpreting it make it clear that utilities cannot obtain private easements, or ownership of any kind, of platted easements as they, by law, are owned by the "city, town, village" or county in trust for public use. *See also, City of Camdenton v. Sho-Me Power Corp.*, 237 S.W.2d 94, 98 (Mo. 1951) (attempt to reserve private utility easement rights in dedication of public streets was invalid and "void, as against public policy.").

Finally, Laclede Gas seeks to confuse the relocation obligations in use of public easements with those when an easement is wholly private. There is no dispute that a utility located in a wholly private easement adjacent to a right-of-way may have a right to compensation for relocations due to public works projects, because as owner of the easement, the utility actually holds a contractual property interest obtained by separate deed or easement independent of a plat. However, the clear law in Missouri is that a utility is not entitled to relocation compensation if its facilities are in a public easement or right-of-way because the public, not the private utility, owns the property interest at issue,

and the private user is a mere licensee or beneficial user. *See City of Bridgeton v. Missouri-American Water Co.*, 219 S.W.3d 226 (Mo. 2007). No claim for compensation, no property right and no "taking" can be claimed if the property is – as a matter of state law – owned by the public from plat dedications rather than private users or beneficiaries. *See State ex rel. State Highway Com'n of Missouri v. St. Charles County Associates*, 698 S.W.2d 34, 35 (Mo. App. 1985) (Missouri state law determines existence of compensable property interest); *see also, e.g., Phillips v. Washington Legal Foundation*, 524 U.S. 156, 164 (1998) ("Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law,'" *citing Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972)). Laclede Gas seeks to fundamentally alter this balance by claiming that it can convert or re-characterize a publicly-dedicated easement within the public rights-of-way to a private property right contrary to the state law statutory mandate that platted dedications are publicly owned.

As discussed above, a private utility simply cannot claim a private property interest in a platted right-of-way/easement dedication regardless of how inartfully written the plat language may be because the applicable statute simply does not authorize a private property interest and mandates ownership in the public entity. It makes no difference how many private users are listed as contemplated beneficiaries – it is a publicly owned property right, not a private one. Moreover, a private utility certainly cannot do so in order to require payment of relocation costs or other compensation where its use of that public dedication delays, blocks or interferes with public uses of that

easement or right-of-way. By definition, the private utility is using *public* property, not private property, when it locates in a publicly dedicated right-of-way and "there is no such thing as a 'dedication' between an owner and individuals." *Marks v. Bettendorf's*, 337 S.W.2d at 593. Any attempt to grant ownership rights directly to a private entity in derogation of public rights must be rejected as strictly in violation of the clear language and purpose of Chapter 445 that transfers such interests only to the county or municipality approving the plat.

B. THE PUBLIC POLICY OF THIS STATE ESTABLISHED BY STATUTE AND AFFIRMED BY JUDICIAL DECISIONS DICTATES THAT THE PUBLIC ENTITY USE SUPERSEDES ANY OTHER USES OR CLAIMED INTEREST IN PUBLIC RIGHTS-OF-WAY.

Laclede Gas's attempt to acquire private rights in public rights-of-way must be independently rejected because it would create new rights that violate the public policy of this State as set forth not only in R.S.Mo. § 445.070, but also in numerous other statutes granting public authority over public rights-of-ways.

There can be no dispute that cities and counties are by law delegated to be the <u>exclusive</u> managers of local public rights-of-way and easements and that the simultaneous uses of those public rights-of-way and easements by the various private companies must be relocated at their own cost when those private uses interfere with the public uses. *See, e.g., R.S.Mo. § 82.190* ("city shall have <u>*exclusive*</u> control over its public highways, streets, avenues, alleys and public places, and shall have exclusive power, by ordinance, to vacate or abandon any public highway, street, avenue, alley or public place,

or part thereof, *any law of this state to the contrary notwithstanding*.")(emphasis added); *R.S.Mo. § 77.520* ("The council may prohibit and prevent all encroachments into and upon the sidewalks, streets, avenues, alleys and other public places of the city . . . and the making of excavations through and under the sidewalks or in any public street, avenue, alley or other public place within the city."); *R.S.Mo. § 79.410* (same); *R.S.Mo. § 71.270*.1 ("the county commission of the county in which the subdivision is located may vacate the streets, alleys, roads, public easements, public square or common . . . ."); and *State ex rel. Roland v. Dreyer*, 129 S.W. 904, 916 (Mo. 1910) ("[A] street dedicated to public use for the passage of vehicles and pedestrians may in addition be used for street railways, gas, and electric light wires and poles, and subways, *which do not interfere* with or destroy its value for a public highway.") (emphasis added).

These statutes, and the public policy behind them, make clear that a public right-of-way, while available for many uses that benefit the public, is exclusively within the management and control of the local government having jurisdiction over such right-of-way. This is so because a grant to private parties of rights in or control over the public ways would thwart the public interest in use of these important public areas. If multiple users had multiple legal rights, no construction could ever occur and litigation over the impacts and compensation to such private rights would be endless and would defeat the purpose of having public dedications of land for roads, stormwater control, utilities, and other aspects of public safety and welfare.

Thus, the many private users of public rights-of-way are by law subordinate to the public necessity determined by the public entity having jurisdiction over the public way.

In *City of Bridgeton*, 219 S.W.3d at 232, the Missouri Supreme Court reiterated the rule that a "utility company must relocate its facilities in public streets when changes are required by public necessity, or public convenience and security require it, *at its own expense*." (*citing Union Electric Co. v. Land Clearance for Redevelopment Authority of City of St. Louis*, 555 S.W.2d 29 (Mo. 1977) (en banc) (emphasis added).

This clear statutory and common law mandate granting control to and supremacy of local governments over their own rights-of-way and public easements would be wholly thwarted if, as Laclede Gas seeks, a private utility could simply declare that a "public" easement or street was in fact subject to private property rights that are clearly inconsistent with such public dedication. If, contrary to the clear language of Chapter 445, a utility could obtain ownership of an easement inside a city street or other public easement, this would thwart and contradict the "exclusive" control and right to remove obstructions that the statutes and abundant common law clearly grant to the title owner of such streets and easements. Moreover, it would flatly violate the clear and repeated public policy of this State of prohibiting infringements on government control of public dedications.

Thus, any attempt to reserve a private utility easement in a dedicated street has already been flatly rejected as violative of Missouri public policy. *City of Camdenton v. Sho-Me Power Corp.*, 237 S.W.2d at 98 ("A condition in a deed of dedication . . . circumscribing the future freedom of action of the authorities to devote the street to the wants and convenience of the public *is void, as against public policy* or as inconsistent with the grant." (emphasis added)). In *City of Camdenton*, the Court invalidated the

same type of claimed private utility easement in a dedicated right-of-way that Laclede Gas seeks to establish here because such reservation of private rights would defeat the public's use of the street dedication. And while cases such as *Anderton v. Gage*, 726 S.W.2d 859, 862 (Mo. App. 1987), cited by Laclede Gas, describe situations where plats are used to aid easement rights implied or supported by independent deeds (not the situation here), none of these cases involve the local government's public ownership of the same dedication and the authority cited even reaffirms the point that "there cannot be a dedication, in the strict sense of the word, in favor of an individual or a limited number of individuals." (*citing Marks v. Bettendorf's, Inc.*, 337 S.W.2d 585 (Mo. App. 1960) and other cases). In other words, there is simply no Missouri authority to disregard the mandate of public ownership of rights-of-way and dedications and allow a platted dedication also including other users to create a property right that interferes with the same land dedicated for public use.

Laclede Gas argues to this Court that its appeal does not seek to challenge the "County's power to require relocation" of the subject facilities in the rights-of-way, but only its power to do so without compensation – somehow implying that mere compensation would not interfere with the public use. Sub. App. Br. at 9. Yet, Laclede Gas's claim for compensation depends wholly on a purported private property right in the rights-of-way that has been clearly rejected by the courts. Moreover, if Laclede Gas were correct, the County could not simply force Laclede Gas to relocate its gas lines, it would have to negotiate a price – and Laclede Gas may or may not be willing to relocate its facilities at a fair price, or any price. While the County might then have to resort to

condemnation authority, that process is time-consuming, expensive and may or may not be available in all circumstances. Thus, this case is clearly not just about compensation – it is also about the right to obstruct and even to refuse to relocate due to a claimed private property right that precludes the public use of public dedications. Such a power certainly would defeat the ability of the public to use land by dedication and would put in question the status of countless miles of public land dedicated over the course of almost two centuries.

Moreover, even the order of the placement of the utility dedication language on the subject plats reflects its subordinate position to the dedication for streets, which is the first dedication granted on the plat. Even if the statute did allow plats to dedicate private easements – something that the precedent cited above clearly rejects – such a grant could not be interpreted to take away rights from the dominant rights-of-way use vested by public policy within the exclusive control of a city or county.

Finally, the clear statutory and common law bases for giving supremacy and exclusive control to municipalities and counties over their own rights-of-way and easements – and thereby precluding claims of private easements or of users who would interfere with such – are further justified by the practicality of who can and cannot pay for such relocations. Unlike utilities, municipalities and counties cannot pass along these relocation costs to their citizens because, as here, those municipalities and counties do not charge rent to their citizens for use of their public easements and rights-of-way, like the ones owned by the County and City at issue here. While utilities may and certainly do include relocation costs in the rates they charge their customers by tariff, or even by

special surcharge,[1] cities and counties would be forced to cut other necessary services to pay for any such shift in relocation costs because new taxes, licenses and fees are otherwise prohibited by the Missouri Constitution without a vote of the people. Mo. Const. Art. X, § 22. Moreover, because the cost of relocations in public dedications is a cost currently borne by the private party using the dedication for free, no statutory process currently exists to authorize a city or county to levy a public tax to pay for relocation of private facilities.

The current legal balance that Laclede Gas seeks to destroy works because a utility is able to be fully reimbursed for any relocation costs it incurs through the service fees it charges its customers. Municipalities and counties charge no such fees and thus cannot recover the costs that private users would impose on the public by virtue of having to pay for relocations in order to effectively use the public rights-of-way. Accordingly, shifting the payment of relocation costs from a private utility to a public entity, as sought by Laclede Gas, is not only a violation of state statute and public policy, it would also unfairly allow recovery by the utility of relocation costs that are already within its rate authority and subsumed in the rates it charges its customers.

CONCLUSION

The clear statutory language, case law, and abundant public policy unambiguously support the County's position and preclude a finding in favor of Appellant Laclede Gas.

[1] *See* R.S.Mo. § 393.1009(5)(c) providing for special recovery of "Facilities relocations required due to construction or improvement of a highway, road, street, public way…"

Moreover, converting public easements to "private" ones would not only interfere with the primary public use of these easements and rights-of-way, but would also impose a fundamental, as well as unlawful, shift of private utility relocation costs onto the public for the public's use of its own easements and property.

For the reasons stated above, Appellant's appeal should be denied on the merits as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 1st day of April, 2011, one (1) copy of Amicus Curiae's Substitute Brief in the form specified by Rule 84.06(a) and one (1) copy of Amicus Curiae's Substitute Brief in the form specified by Rule 84.06(g) were mailed, postage prepaid, to be received within the time required, to the following counsel of record:

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

I, Daniel G. Vogel, an attorney for Amicus Curiae Missouri Municipal League, hereby state and certify that the foregoing Substitute Brief of Amicus Curiae complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 4,422 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 Substitute Brief of 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.

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