COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

DUKE ENERGY OHIO, INC., : Case No. A1301131

Plaintiff :

vs. : Judge Carl Stich

CITY OF CINCINNATI, OHIO, :

Defendant :

DECISION AND ENTRY GRANTING SUMMARY JUDGMENT TO PLAINTIFF DUKE ENERGY AND DENYING MOTION FOR SUMMARY JUDGMENT OF DEFENDANT CITY OF CINCINNATI

This case involves legal responsibility for the costs of relocating electrical and gas lines to accommodate construction of the Cincinnati street car. Duke sued for a declaratory judgment holding that the City of Cincinnati is responsible. The City argues that Duke is responsible.

The parties entered into detailed stipulations of fact, including the authentication of over 150 documents, and submitted the deposition testimony of five witnesses. Both parties move for summary judgment on the basis that there are no disputed issues of material fact. Although the evidence submitted by the parties is extensive, the relevant facts are simple.

RELEVANT FACTS

Plaintiff Duke provides gas and electric services in the Cincinnati metropolitan area. Its utility lines run beneath the downtown streets in the public right of way. Duke's predecessors installed the lines in the 19th and early 20th centuries under franchise agreements with the City. Those franchise agreements expired long ago.

From around the turn of the 20th century until approximately 1951, privately-owned companies operated an extensive network of streetcars within the City right-of-way. After that streetcar system stopped operating the City roadways have been used primarily by automobiles, busses, and bicycles.

The bus system in Cincinnati is operated by the Southwest Ohio Regional Transit Authority (SORTA). In 2002 SORTA submitted a ballot initiative for a new public transit plan. A streetcar was one element of the plan. Although the initiative failed, the City continued to study the feasibility of building a streetcar to operate from downtown to the Uptown area and the University of Cincinnati. The City commissioned a transportation and engineering study in 2006, and City Council passed a resolution in 2007 instructing the City Administration to proceed with planning the streetcar system.

Although from SORTA'S standpoint the streetcar was one element of a comprehensive regional transportation plan, it is clear from the record that the City's primary motivation was to spur economic growth along the corridor served by the streetcar rails. There is no evidence that the bus system or other modes of transportation are unsafe or insufficient to serve needs within the served area. Rather, the objective is to increase economic development and enhance the City's tax base, with Portland, Oregon; Seattle, Washington; and Salt Lake City, Utah, as examples of successful streetcar projects.

The City sought funding from a variety of state and federal sources. After a series of successes and set-backs, the streetcar route was divided into phases, with the first being a 3.6 mile loop from the downtown area known as the Banks to the Over-the-Rhine neighborhood north of downtown. Construction of the streetcar requires the City to excavate portions of the roadway and install a track slab containing the streetcar rails.

The City advised Duke to identify and relocate any utilities within the roadway that would conflict with construction and operation of the streetcar.

In 2012, City Council passed Ord. No. 349 establishing Chapter 722 of the Cincinnati Municipal Code, titled "Management and Control of the Use of the City Right-of-Way." Chapter 722 arguably imposes the relocation obligations upon Duke. Meanwhile, the City negotiated agreements with other utilities for the City to either share or pay the full cost of relocating facilities in the right-of-way.

The City and Duke have agreed on the amount of relocation work required, but cannot agree on who should bear the costs. Duke estimates the cost of relocation at $15 million. The City has placed that amount in escrow pending resolution of this action. Duke has been performing the relocation work in accordance with a Cooperation Agreement with the City.

DISCUSSION

The City argues that "Council's reasoned determination to move forward with the Streetcar is entitled to deference from the judiciary." CITY'S MOTION FOR SUMMARY JUDGMENT at 19. That is unquestionably true. There is no doubt that the City has the authority to build the streetcar and to order Duke to relocate its utilities. Thus the City's Home Rule powers and its authority to enact Chapter 722 of the Municipal Code are not reasonably in dispute. What is disputed is the authority of the City to force Duke to bear a significant portion of the project costs—using the Municipal Code to engage in an allegedly unconstitutional taking. Whether the City's actions are unconstitutional depends on whether it is lawfully exercising its police powers.

1. **Duke cannot be required to bear the cost of relocating its utilities because construction of the streetcar is a proprietary function and the order to relocate is not a valid exercise of the City's police power.**

If the City's order for Duke to relocate its utility lines is a valid exercise of police power, then Duke is not entitled to compensation.

> "The distinction between an exercise of the eminent domain power that is compensable under the Fifth Amendment and an exercise of the police power is that in a compensable exercise of the eminent domain power, a property interest is taken from the owner and applied to the public use because the use of such property is beneficial to the public * * * [whereas] in the exercise of the police power, the owner's property interest is restricted or infringed upon because his continued use of the property is or would otherwise be injurious to the public welfare."

City of Perrysburg v. Toledo Edison Co., 171 Ohio App. 3d 174, 2007-Ohio-1327, 870 N.E.2d 189, ¶14 (6th Dis.), quoting *Johnson v. United States*, 479 F.2d 1383, 1389 (Ct. Cl. 1973).

The question, then, is whether the construction of a streetcar is an exercise of the City's police power. "Generally, legislative enactments of a municipality exercising its police power enjoy a presumption of validity, which can be rebutted if the opponent proves that the restriction is 'unreasonable and arbitrary or ha[s] no real or substantial relation to the public health, safety, morals, or general welfare.'" *Portage County Bd. of Comm'rs v. City of Akron*, 109 Ohio St. 3d 106, 2006-Ohio-954, 846 N.E.2d 478, ¶ 104, quoting *Dayton v. S. S. Kresge Co.*, 114 Ohio St. 624, 151 N.E. 775 (1926), syllabus paragraph one. Duke argues both prongs. First, it argues that the City acted arbitrarily by treating Duke differently; the City is paying up to 100% of relocation costs of the other utilities in the right-of-way. Second, Duke argues that the streetcar is not a proper exercise of police power at all.

Duke may well be correct that the City is singling it out for different treatment, but that is academic if the City is not validly exercising police power in the first place.

Does the streetcar bear a "substantial relation to the public health, safety, morals, or general welfare?" It is not related to public health in any meaningful way. It transports people from one part of town to another. Any impact on public health (say, reducing auto emissions) is marginal. Nor is it related to public safety. There is no evidence in the record that a streetcar was designed to address any existing safety problem. It obviously has nothing to do with public morals, unless we adopt an entirely new definition of that term.

What is left is the catchall phrase. Does the streetcar bear a substantial relation to the general welfare? This is not the same as asking whether the streetcar is good public policy. Many laudable public programs do not require the exercise of police power, and it is not the province of the court to decide whether the streetcar is a worthy project or not. It is apparent from the record that the streetcar is expected to have a variety of benefits, but its primary purpose—as announced in any number of settings—is to spur economic development.

The relevant case law discusses exercises of police power by using the traditional distinction between governmental and proprietary functions. The clearest statement on point comes from *State ex rel. Speeth v. Carney*, 163 Ohio St. 159, 178, 126 N.E.2d 449 (1955), syllabus paragraph six:

> In the absence of contract to that effect, there is no power in a governmental subdivision to require public utilities in its public streets to relocate facilities at their own expense to accommodate the proprietary public utility operations of such subdivision, but a governmental subdivision may lawfully contract with such public utilities for reimbursement for any such necessary expenses.

The Court expressly held that "operation of a governmentally owned transit system is a proprietary and not a governmental function." 163 Ohio St. at 178.

The City challenges the relevance of *Speeth* on the basis that it arose from a county auditor's refusal to issue bonds for construction of a public subway system. Even so, the Court was required to address the auditor's argument that it was unlawful to use public money from the bond issuance to pay for relocation of utilities. The rule of law stated by the Court was thus an essential part of its holding. The syllabus of a decision of the Supreme Court of Ohio states the law of Ohio. *Williamson Heater Co. v. Radich*, 128 Ohio St. 124, 190 N.E. 403 (1934), syllabus paragraph one. Although the syllabus must be read in the context of the facts of the case, nothing about the facts of *Speeth* invalidate the application of the rule here. If the government is obligated to pay utility relocation costs resulting from construction of a proprietary public utility, and if a public transit system is a proprietary utility, then the City is obligated to pay Duke's relocation expenses resulting from construction of the streetcar.

Duke also relies on *Cincinnati v. Cincinnati & Suburban Bell Tel. Co.*, 123 Ohio St. 174, 174 N.E. 586 (1931), which held that the City could not compel the telephone company to pay the cost of moving its lines to accommodate relocation of the streetcar track from the center of the street to the side of the street. As the City points out, the streetcar at that time was privately owned. The rationale for the Court's ruling was that the City could not favor one utility company over another utility company, which is not the precise issue here (although it does come into play for Duke's equal protection argument). The Court did, however, make the following relevant comment:

> If the city has now determined that the advantage which will accrue to the city by having the street car tracks on the sides of the street instead of in the center justifies the order for their relocation, then no sound reason is apparent why the city should not make good the loss which will be suffered by another public utility company by reason of such an order by the city.

123 Ohio St. at 177. That observation is no less persuasive merely because the City itself is now the builder and owner of the streetcar.

This result is also supported by the statutory definition of "proprietary functions" to include the "establishment, maintenance, and operation of a utility, including, but not limited to, a light, gas, power, or heat plant, *a railroad, a busline or other transit company*, an airport, and a municipal corporation water supply system." R.C. 2744.01(G)(2)(c) (emphasis added). While it is true that Ch. 2744 deals with tort liability, there is no sound reason for adopting a different definition when the liability arises from a governmental taking.

The City argues that there is a long line of precedent for requiring utilities to relocate their lines at their own expense, starting with *New Orleans Gaslight Co., v. Drainage Comm'n of New Orleans*, 197 U.S. 453, 462, 49 L. Ed. 831, 25 S. Ct. 471 (1905). *New Orleans Gaslight* held that when a utility company makes use of the public right of way, the municipality may require the company to relocate its equipment at its own cost when the public welfare so requires. The Sixth Circuit Court of Appeals described the rule as follows:

> The law is well established that a statutory, permissive right of use of public highways by public utilities is subordinate to the rights of the public; that the original location of . . . facilities in a public highway does not create an irrevocable right to have such poles and facilities remain forever in the same place; and that a utility company may be required to relocate its lines at its own expense when such relocation is demanded by public necessity and for public safety and welfare.

Tennessee v. United States, 256 F.2d 244, 256 (6th Cir. 1958). Those holdings do not vary from the principles reflected in *Speeth*; the key issue remains whether the relocation is "demanded by public necessity and for public welfare and safety," such as

to make the government's order an exercise of police power rather than a proprietary function.

The holdings in *New Orleans Gaslight* and *Tennessee* were relied upon in *AT&T Corp. v. Lucas County*, 381 F. Supp. 2d 714 (N.D. Ohio 2005), which is also cited by the City. *AT&T* involved the telephone company's demand to be compensated for the forced relocation of fiber optic lines. The county had purchased property in Toledo, and wanted the lines moved to permit construction of a baseball stadium. Nothing in the *AT&T* opinion adequately addresses why relocation was required by "public necessity and for public safety and welfare," as the *Tennessee* opinion put it, nor is there any discussion of whether the construction at issue was proprietary or governmental. The *AT&T* opinion cannot nullify the rule of law announced in *Speeth*.

The City relies upon a variety of other cases involving relocation of utilities in connection with roadway projects. Construction and maintenance of the roadways involve classic governmental functions. *See, e.g.*, R.C. 2744.01(C)(2)(e) (regulation, maintenance, and repair of roadways are governmental functions). None of the state cases relied upon by the City arose from a proprietary project.

In *City of Perrysburg v. Toledo Edison Co.*, 171 Ohio App. 3d 174, 2007-Ohio-1327, 870 N.E.2d 189, ¶14 (6th Dis.), the court held that the utility company was required to bear relocation costs from a road widening project in connection with construction of a new high school. The court held that the city's "relocation order was a valid exercise of the municipality's police powers in furtherance of public safety and welfare, and for purposes of travel and transportation." *Id.* at ¶ 18. The utility therefore had no claim under eminent domain.

The Twelfth District held in *One Seventy-Seven West v. Cincinnati Bell Tel. Co.*, 12th Dist. No. CA96-08-149, 1997 Ohio App. LEXIS 1360, that Cincinnati Bell could be

required to relocate utilities to accommodate a road-widening project. The road was widened as a condition of the city's approval of a private development project, but the widening of a road to address safety and traffic concerns is a core governmental function. The only reason for the City's order to Duke to relocate utilities is to permit the construction and operation of the streetcar, not to address issues of road design in themselves.

The City also relies upon the Ohio Supreme Court's remark in *Complaint of City of Reynoldsburg v. Columbus Southern Power Co.*, 134 Ohio St. 3d 29, 2012-Ohio-5270, 979 N.E.2d 1229, ¶ 53, that under common law "utilities have been required to relocate power lines from the right of way at their own expense whenever requested to do so by state or local authorities." The quoted language is dictum. The Court did not address the common law issue as it was not preserved for appeal. There is no analysis of the distinctions germane to Duke's case; the City of Reynoldsburg was not constructing a transit system or any other proprietary project, but was merely ordering the utility to relocate facilities in the public right of way to underground. The isolated remark in *Reynoldsburg* is of no help.

The court cannot disregard the explicit ruling in *Speeth* that utilities cannot be forced to bear the expense of relocating their facilities to accommodate construction of a public transit system. Until the Ohio Supreme Court modifies or overrules that holding, it requires judgment in favor of Duke.

2. The expired franchise agreements do not require Duke to bear the relocation expenses.

As *Speeth* indicates, the constitutional issues are irrelevant if the parties had an agreement resolving their rights and responsibilities. The City argues that the franchise agreements with Duke's predecessors still govern, but those agreements expired long

ago. If the parties wished their rights and obligations to remain governed by franchise agreements, they could have entered into new ones or extended the old ones. The City itself has represented to the federal authorities that no franchise agreements govern relocation expenses, and it cannot justifiably renounce that representation now.

Even if the agreements had not expired, they do not in fact address relocation costs. Generic language about the responsibility of the utilities to maintain their facilities and comply with City ordinances is insufficient to impose the significant obligations at issue in this case. If it was material to the City for the utilities to assume those obligations, the City should have included language making that clear. Adopting the City's reading would require the court to add provisions omitted by the parties, which would be an abuse of the court's authority. "The law will not insert by construction for the benefit of one of the parties an exception or condition which the parties either by design or neglect have omitted from their own contract." *Montgomery v. Board of Educ.*, 102 Ohio St. 189, 193, 131 N.E. 497 (1921).

3. Duke's Equal Protection argument and the constitutionality of Municipal Code Ch. 722 are moot.

Duke raises legitimate issues about the City's disparate treatment of the utilities in the right of way. The essence of the City's argument is that Cincinnati is entitled to pragmatically address its litigation risk, and that Duke simply missed the boat when it refused to claim a part of the money set aside for utility relocation expenses. In light of the dispositive holding in *Speeth*, those issues need not be addressed.

Likewise, it is unnecessary to address Duke's challenge to the constitutionality of Municipal Code Ch. 722. The City is entitled to pass ordinances for the regulation of its roadways. The fact that the City's interpretation of the ordinance in this instance would

result in an unlawful taking does not require the court to pass on the validity of the ordinance as a whole.

CONCLUSION

The City is well within its authority to construct and operate a streetcar. Doing so is a proprietary function. Although the City may exercise its Home Rule powers to enact Chapter 722 of the Municipal Code governing use of the City's right-of-way, it is not a legitimate use of the City's police powers to compel Duke to bear the expense of relocating utilities to accommodate the construction and operation of a proprietary public transportation system. Based upon settled precedent, judgment must issue in favor of Duke.

Plaintiff Duke Energy of Ohio, Inc.'s motion for summary judgment against the City of Cincinnati is GRANTED to the extent that the City may not impose upon Duke the costs of relocating its utility lines to accommodate construction or operation of the streetcar.

Defendant City of Cincinnati's motion for summary judgment against Duke is DENIED.

Judgment is accordingly entered in favor of Plaintiff Duke Energy and against Defendant City of Cincinnati at Defendants' costs.

SO ORDERED.

Carl Stich

Carl Stich, Jr., Judge