BEFORE THE ST. CHARLES COUNTY COUNCIL
ST. CHARLES COUNTY, MISSOURI

In the matter of Bill 4816 / Appeal of Missouri )
American Water Company, Property Owner and )
Applicant from Board of Zoning Adjustment’s )
Denial of Variance No. VAR19-06 )

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION, AND ORDER

On March 30, 2020, the County Council (“Council”), by a vote of two (2) nays and five (5) ayes, voted to pass Bill No. 4816 to affirm the St. Charles County Board of Zoning Adjustment’s denial of Variance No. VAR19-06. Under Section 405.639.B of the Ordinances of St. Charles County, Missouri (“OSCCMo.”), an affirmative vote of the majority of the Council’s seven (7) members was required to affirm the decision of the Board of Zoning Adjustment. The County Council is required to approve Findings of Facts and Conclusions of Law.

For the purpose of making those findings and conclusions, the County Council hereby receives into the record the following documents: (1) the St. Charles County Master Plan Year 2030; (2) the Unified Development Ordinance of St. Charles County, Missouri; (3) Exhibit A, the record certified to the Council by the Board of Zoning Adjustment (“BZA”) pursuant to Section 405.639.B, OSCCMo, which includes (a) a synopsis dated January 24, 2020, prepared by the Planning and Zoning Division Director; (b) the Staff Recommendation to BZA Report dated December 23, 2019; (c) Photos of the Site; (d) Aerial Photo; (e) Surrounding Zoning Map; (f) Topographical Map; (g) Applicant’s Statement of Hardship dated December 13, 2019 and further information submitted in correspondence dated January 22, 2020; (h) Concept Plan; (i) Letters received; (j) Emails received; (k) Board of Zoning Adjustment January 2, 2020 Meeting Minutes; (l) Notice to Applicant of the Board’s decision on Variance No. VAR19-06 dated January 3, 2020; and (m) Request to County Council for an Appeal from the Decision of the Board of Zoning Adjustment; and any documents or exhibits received by the Board during those proceedings; and (4) any other documents relied upon in reaching this determination of the Council.

Having been duly advised in the premises, the County Council hereby makes its Findings of Fact, Conclusions of Law, Order, and Decision, as required by law.

FINDINGS OF FACT

APPLICABLE PROVISIONS OF THE UNIFIED DEVELOPMENT ORDINANCE

1. At all times relevant to this decision, St. Charles County has had in effect the Unified Development Ordinance for St. Charles County, Missouri (“UDO”), including its zoning regulations codified as Chapter 405 of the OSCCMo.

2. Chapter 405 of the UDO sets out zoning regulations applicable to the unincorporated part of St. Charles County.
3. Among the zoning districts established and regulated by the UDO is the “R1A” Single-Family Residential zoning district. Sections 405.065.A.1.d; 405.090, OSCCMo.

4. Among the regulations applicable within the “R1A” Single-Family Residential zoning district are regulations on height, area, and lot requirements. Section 405.090 OSCCMo. Specifically, applicable portion of Section 405.090.D.1 provides:

   Maximum height. Forty (40) feet.

5. The UDO establishes a Board of Zoning Adjustment (“BZA”). Sections 405.590-405.639, OSCCMo.

6. Among the BZA’s powers is granting variances where applicants prove undue and unnecessary hardship due to strict application of the UDO’s requirements to the applicant’s property, all as provided in Section 405.590.C, which states in full:

   Variances. The Board of Zoning Adjustment may hear a request for a variance from a non-use regulation herein contained as applied to a specific lot or tract and render a decision on that request. In order to provide relief where the conditions of a property prevent development consistent with the intent or purposes of the applicable zoning regulations, the Board of Zoning Adjustment may vary the strict application of a non-use regulation upon appeal by the owner of a specific piece of property if that property owner proves that:

   1. The variance is requested due to unique circumstances inherent to the specific piece of property and not to personal considerations of the property owner;
   2. The variance is not needed as the result of an affirmative act of the property owner that could have been avoided through a different course of action;
   3. The variance would not merely grant a special benefit to the property beyond what is enjoyed by other properties regulated by the same set of zoning regulations; and
   4. The application of such non-use regulation would result in practical difficulties to the property owner. In determining whether "practical difficulties" exist, relevant factors to consider include whether, or to what degree, the owner can pursue the permitted use without a variance; the financial hardship to the property owner from the strict application of the regulation; how substantial the variance request is in relation to the regulation; whether the difficulty can be obviated by some method other than a variance; and whether such relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose and integrity of the zoning regulations as embodied in the Unified Development Ordinance and maps.
If the Board of Zoning Adjustment determines that the above-required standards are met, the Board may issue a variance, signed by the Chairperson, and set out the terms or conditions of the variance. In no case shall the Board of Zoning Adjustment issue a variance permitting a use to be placed in a district in which it is not permitted in this Chapter or Chapter 410. In no case shall the Board decide an appeal from a legislative action of the County Council.

Section 405.590.C, OSCCMo.

7. Parties may appeal adverse decisions by the BZA to the County Council, as provided by the UDO’s Section 405.639, OSCCMo.

APPLICATION FOR VARIANCE NO. VAR19-06:
PROCEDURAL HISTORY BEFORE THE BOARD OF ZONING ADJUSTMENT

8. In its application for Variance No. VAR19-06, owner Missouri American Water Company (hereinafter “Applicant”) requested to vary the 40-foot maximum height from 40 feet to 140 feet for the construction of a water tower on the subject property.

9. To support its application, Applicant explained in their Statement of Hardship / Need for the Project letter that the existing pumped storage facilities are inadequate to meet maximum day equalization and fire reserve caused by the continued growth in the western St. Charles region. Because of low water pressure complaints, it is necessary to construct a new booster station and install an elevated storage tank with an overall height of approximately 140 feet. Because elevated storage tank can maintain more constant system pressures without relying on mechanical pumping, the Applicant stated that the 140 feet height of the tank is necessary to operate appropriately with the existing system hydraulics and stabilize customer service pressures for the surrounding area during peak hour periods. Applicant selected the subject property because it already owns the property and the property is in a zoning district which allows the proposed improvements.

December 23, 2019 Staff Report to the BZA

10. The Staff Report to the BZA cited the Applicant’s Statement of Hardship / Need for the Project explaining the reasons for the proposed 140 feet water tank, requiring a variance approval from the 40 feet maximum height allowed in the RA1 zoning district to the 140 feet requested by the Applicant.

11. In assisting the BZA to reach their decision on the requested variance, the Staff Report noted the following: (1) there are no unique circumstances inherent to this specific property to necessitate the variance for a 140 feet water tower, other than the existing ownership of the property by the Applicant and suitability of the location for the construction of the water tower to service the surrounding geographical area; (2) applicant has provided the technical reasons for the request and why this location is necessary for the placement of the elevated tank, namely to be able to provide the necessary water pressure for both
consumption and fire flows for approximately 375,000 customers; (3) the applicant could erect a ground storage tank at this location below the 40-foot height limit imposed by the zoning regulations; however, it would not provide the height necessary for proper water pressure to distribute water systemwide; and (4) the applicant has provided documentation that there is no other alternative to constructing the water tank at the required height of 140 feet to provide the needed water pressure for the customers and for fire suppression.

*September 5, 2019 BZA Meeting*

12. Upon opening of the public hearing, by Chairman, Gary Prinster, the Applicant’s representative, Renee Lawrence, was sworn in and testified that she is a Senior Project Engineer with the property owner, Missouri American Water Company. Lawrence explained that the Applicant is seeking a variance to allow the construction of a 140-foot tall elevated water tank on this property to better serve customers in St. Charles County, St. Louis County, and Chesterfield. This property was purchased in 1989 by Missouri American in order to accommodate current and future water supply needs for these areas. The existing pumped storage facilities alone are no longer adequate to meet maximum day equalization and fire reserve, resulting in an increase in low pressure complaints, which necessitates construction of a new booster station with a 2.0 MG elevated storage tank and all required yard piping. Elevated storage can maintain more constant system pressures without relying on mechanical pumping. The proposed storage tank will be constructed out of concrete and steel, with a bowl diameter of 100 feet and stand 140 feet high. No trees will be removed from the back of the property, adjoining residences.

13. In response to questions from Board members, Lawrence testified that American Water has not explored any other locations since it already owns the subject property; the adjoining Berkshire Downs Subdivision was built after the Missouri American purchased this property in 1989; and the life expectancy of these tanks is at least 50 years.

14. County staff pointed out the four criteria that must be met per County Ordinance in order for a variance to be approved by the Board of Zoning Adjustment and summarized the information from its December 23, 2019 Staff Report to the Board. Robert Myers, Director of Planning and Zoning added that the Board may also wish to take into consideration that the requested height will not affect the needed clearance for the County’s Emergency Communications microwave radio network, with Lawrence adding that the FAA has stated that there is no need for any lighting or marking for the proposed tower. Lawrence stated the tank is typically painted white except for the color of the Missouri American logo, which Myers stated would not require a sign permit. When asked if there was an industry standard for the color the tanks are painted in or if they are painted to blend with the sky, Lawrence testified in the negative.

15. Seeing no further questions from the Board members, Board Chairman Prinster opened the meeting for public comments.

16. Chairman Gerry Prinster asked if there was anyone in the audience that would like to speak for or against this application.
A. The following individuals were sworn in and testified against the requested variance: Donna Arizzi-Shields, 3 Greenbriar Summit Court; Mark Siddle, 5 Greenbriar Summit Court; Edward Murat, 135 Berkshire Downs Drive; Dennis Mayer, 109 Berkshire Downs Drive; Jennifer Wagner, 210 Greenbriar Bluff Drive; Don Wendel, 8 Moorbriar Court; Charles Shields, 3 Greenbriar Summit Court; Pam Siddle, 5 Greenbriar Summit Court. The following comments document their concerns:

i. The Water tower height at 140 will make it viewable from many of the houses in the adjoining subdivision of Berkshire Downs;

ii. There are alternate locations, vacant land for sale in the surrounding area which Missouri American can purchase to build this tower away from the residential area;

iii. Missouri American Water Company does not even serve the Berkshire Downs Subdivision, as they are served by PWSD #2.

iv. This tower will negatively affect the residential property values, and residents would sell their house if this tower is allowed at 140 feet;

v. A study should be considered on the sewer system to see if it can take that much water when the tank is drained for maintenance.

vi. Concerns that were the tank to be drained, the water would go directly down onto the adjoining residential property

vii. The Berkshire Downs Subdivision was built in 1999, and property owners were told when they purchased their property that if Missouri American built a water tower on that property it would be a ground tank.

viii. The tower is being built for future anticipated needs to expand the company’s system and the profit line instead of addressing current existing water issues;

ix. The Company incurring additional costs to accommodate the allowed 40 feet tower is a not a hardship to the company because they knew there was a 40-foot limit on water towers when they purchased this property.

x. The tower would be an eyesore, infringing upon residents’ enjoyment of their residences.

B. Lawrence responded to the comments by testifying that if water tank needs to be drained, it will be drained into the sanitary sewer system by permit through Duckett Creek. The Department of Natural Resources will determine whether the sanitary sewer system can handle the amount of water to be drained prior to Duckett Creek approving the permit. Further, Lawrence stated that Missouri American Water Company purchased this property in 1989 and has not had a need for additional water storage until now. Choosing another location would entail additional infrastructure and pipes, along with the necessary electrical components to run the system. This would push out the completion date of this project substantially.

C. Myers added that County building permit are required to authorize any connection to any sanitary or storm sewer lines.
There being no further audience speakers or comments from staff regarding the application, Chairman Prinster called the applicant’s representative back to the podium to respond to questions from the Board. Lawrence responded to questions from the Board members with the following testimony:

A. Water pressure is directly correlated to the height of the tower, not the larger diameter of the tower, and to have the adequate required water pressure the tower needs to be at 140 feet.

B. The current pump station could support a 40 ft tall tower, however, due to the increased population the minimum required water pressure cannot be achieved with the current station and a 40 ft tower.

C. While it is possible to achieve the required pressure with bigger pumps and a 40 ft tower, the amount of infrastructure that would be required to achieve that would be massive, requiring redundant electrical sources and back-up generators that, if failing, would drop the water pressure.

D. The tower would be built to the specific WCGC seismic zone standards as required by the Department of Natural Resources

E. Lawrence stated that the outreach efforts are handled through the Missouri American’s External Affairs Department responsible for releasing information to the public at their discretion, therefore she was not aware of whether Missouri water had indeed reached out to the property owners in the adjacent Berkshire Downs subdivision.

F. Lawrence responded that Missouri American’s Planning Group determined that this was the best location for this project prior to handing it over to her. She reiterated that if they were to build this tower at another location, a large amount of infrastructure would be required to achieve that.

In response to direct questions from the Board members, Myers testified that the property owner in the subdivision would have known of the Missouri American Water Company owned site and that a water tower can be built there within the limits the UDO places on buildings within the zoning district. He further testified that there are other zoning district categories where structures over 140 ft tall are allowed, one being the Industrial Zoning District.

Chairman Gerry Prinster closed the public hearing and called for discussion from the Board members. After considering whether the application should be tabled and receiving Myers’ advice to proceed with the application based upon the information at hand and table it only if they felt sufficient information has not been submitted, the BZA voted. The application for VAR19-06 was denied by a vote of 2 ayes, 3 Nays, and 0 Abstentions.
APPEAL TO COUNTY COUNCIL

20. On January 22, 2020, Applicants appealed the decision to the County Council. The “[r]eason for appealing decision” given by the Applicants was that Missouri American Water Company believes that the decision is in direct conflict with Section 405.090.B.12 of the St. Charles County Zoning Ordinance for parcels zoned as R1A. Attached to the Appeal request is the January 22, 2020 Statement of Hardship / Need for Project correspondence reiterating information pertaining to the life safety benefits of locating the tank at the 530 Knaust Road property.

February 10, 2020 Council Meeting

21. On February 10, 2020, Bill No. 4816 upholding the BZA’s decision was given its first reading by the Council.

22. Testimony in opposition to the variance allowing a 140 ft water tower was introduced by the following:

A. Stephanie Owens, St. Charles, expressed concerns with the large water tower just off her backyard of her residence. She testified that she had received no notification of the proposed tower and noted the variance from 40 ft to 140 ft elevation was too large to ignore. Owens felt that there is land available for the tower closer to Cottleville, whose residents will be serviced by the tower.

B. Roger Arizzi, O’Fallon, stated the water tower won’t serve nearby residents but unfairly affects the neighboring property values. Arizzi was concerned that problems may arise during construction and servicing the tower and wanted in writing that the homeowners or their insurance companies would not be held liable. Arizzi stated the water company is using the easiest and cheapest option and urged them to look at other locations in a more suitable area.

C. Arno Wulfert, St. Charles, stated American Water has been a good neighbor other than their work trailers occasionally impeding access to his driveway. Wulfert questioned the time frame of the project and how much turmoil construction would cause in addition to how it would affect his view from his home. Wulfert stated the tower should be located closer to the service area it intends to cover.

D. Dennis Mayer, O’Fallon, questioned the sudden need for additional water and stated the tower should be located closer to the residents it will serve. Mayer stated Missouri American Water could explore other options, not in a residential area, even though another location may not be as easy or quick to find.

E. Gary Hartnell, St. Charles, requested information about the impact of water towers on property values and requested American Water provide alternative sites for the project with pros and cons.
F. Mark Siddle and Bradley Whitford stated their opposition sharing the same concerns already set forth by the previous speakers.

G. Arnie Dienoff, O’Fallon, stated he was opposed to the water tower as well.

23. Testimony in support of the variance allowing a 140 ft water tower was introduced by the following:

A. Renee Lawrence, Missouri American Water Co. – Senior Project Manager, stated this water tower would provide service to 30,500 residents in Unincorporated St. Charles County, Cottleville, St. Peters, O’Fallon and Weldon Spring and the fire districts of Cottleville, O’Fallon, Central County, and St. Charles. Lawrence explained that because of gravity, elevated tanks ensure water delivery in the event of electrical outages. Lawrence stated there is no current storage in the western part of the service district and explained height benefits and the current underground infrastructure that make this site ideal. Lawrence stated the subject property is the second highest point along the water transmission line, and Missouri American Water purchased this property in 1989 to support elevated storage, therefore, if a tower is not approved it could affect development in St. Charles County.

B. Ryan Roberts, Assistant Chief - Cottleville Fire District, explained that increased water pressure from an elevated water tower greatly benefits the fire districts and can lower homeowner insurance rates. Roberts is in favor of this project due to the elevation of the site and noted it will keep water supply ahead of future development demands.

24. Discussion was held concerning the proposed elevated water tower. The County Executive, Steve Ehlmann clarified that the height of the tower proportionately affects water pressure and that the current plan would have no restrictions if the site was annexed into O’Fallon.

25. Council Members requested information on the location of the transmission line, alternative tower sites or a possible compromise plan, noting the complaints received that this variance request is very large and affects the esthetics of the residential area. Council Member Schneider acknowledged about 30 audience members in the room who were there to protest the variance request.

February 24, 2020 Council Meeting

26. At the February 24, 2020 Council meeting, Council Member Elam motioned to table Bill No. 4816, seconded by Council Member Hammond and unanimously approved. Council Member Hollander explained with the amount of interest in this issue, it would be good to have all Council Members present when proceeding.
March 30, 2020 Council Meeting

27. At the March 30, 2020 Council meeting, County Counselor John Watson explained under the unique situation of the COVID-19 Pandemic, the public attended the meeting through virtual presence.

28. Council Chair Hollander opened public comments. Hollander explained due to the unusual circumstances with the COVID-19 Pandemic, the Council posted their “Tentative Agenda” on Wednesday, March 25, 2020 instructing anyone wishing to submit a public comment to do so by Monday, March 30, 2020 at 5:00 p.m. Those comments received will be placed with the County Registrar as part of the official record. Hollander explained the Council will hear a total of six comments alternating pro and con views on any agenda item or the COVID-19 Response.

29. At the March 30, 2020 Council meeting, the following six comments received in writing about Bill 4816 were read out loud:

A. Ben Reiling, resident of a Bradford Heights Subdivision, requested the support of the Council to affirm the Board of Zoning Adjustment’s decision to deny the variance request from Missouri-American Water Company. Reiling explained there may be a need for the additional water and pressure, there are also several concerns such as shouldering the burden and loss of revenue by way of reduced property values as a result of a 140 ft. water tower. In addition, Reiling noted Missouri-American Water Company should explore alternative locations or consider a 40 ft. tower with the necessary equipment to make it work.

B. Drew Weber, Attorney representing Missouri-American Water Company requested the Council’s support in denying the Board of Zoning’s decision and approve the construction of the 140 ft. water tower. Weber indicated in his comments that water pressure is vital to the surrounding communities and explained there has been a Certificate of Convenience and Necessity issued by the MO Public Service Commission to provide water service within St. Charles County. Weber also pointed out that Missouri-American Water Company prepared an engineering report to analyze three different properties for the storage tank and the results were the site at 530 Knaust Road to be the best location.

C. Greg Rosenow, resident of Greenbriar Downs explained his opposition to the proposed 140 ft. water tower. Rosenow explained the current rules allow for a 40 ft. water tower and Missouri-American Water Company has admitted that a pump can be utilized to serve the needs of their water pressure issues.

D. Renee Lawrence, representative with Missouri-American Water Company explained Missouri-American Water Company has done its due diligence to compile information for the Council such as an estimated cost analysis for alternative locations as well as holding a public meeting to allow more information
to be shared to the surrounding residents. Lawrence also stated there is an e-mail address set up to field questions regarding the proposed tower at StCharlesWaterStorage@amwater.com. Lawrence requested an approval of the variance request.

E. Scott Wagner, resident of Greenbriar Downs thanked Council Member Mike Elam for helping communicate with the applicant and the residents. Wagner explained Missouri-American Water Company wants the Council to approve their variance so they can build their 140 ft. water tower at this location which will save the water company money in the long run, however that does not benefit the nearby residents. Wagner pointed out many residents were aware of Missouri-American Water Company’s right to construct a 40 ft. tower when they built/bought their homes but did not envision a water tower 140 ft. tall. Wagner also pointed out that Missouri-American is a for-profit company. Wagner requested the Council affirm the Board of Zoning’s decision in denying the variance request.

30. Other Comments in writing in support of the Bill 4816 confirming the BZA denial of the variance were received from 57 property owners from the surrounding residential subdivisions. These comments are made part of the official records for this bill.

31. Council Member Elam made a motion to remove Bill No. 4816 from the table, seconded by Council Member Hammond and the motion was unanimously approved. Council Member Elam further explained that there has been lots of discussion regarding this variance request and Missouri-American Water Company has tried to answer as many questions as possible, however, he noted a 40 ft. tower with pumps would be more acceptable than a 140 ft. tower that no one was expecting. Elam encourage a yes vote from his fellow council members. The following comments were offered by Councilmembers:

A. Council Member White shared some photos of subdivision areas with towers very near to the properties and explained he spoke to residents of the various locations. White shared that some of the residents were upset at first with the construction of the towers but after time do not even notice them. White contacted a real estate agent on a home that was for sale very near a tall tower and the agent explained the homes sell very fast even with a tall tower close by. White indicated he was in support of the water tower as areas within the County depend on it.

B. Council Members Brazil and Hammond both agree if Missouri-American Water Company would have been more proactive in placing notification that at some point in the future they were going to build a 140 ft. storage tank it would have been beneficial to the nearby residents.

C. Council Member Cronin explained a similar story regarding construction of a tall tower and agreed with Council Member White and as he sympathizes with the neighbors, he is in support of the tower.
32. There being no further discussion, the council members voted. Bill No. 4816 was approved by a vote of 5-2.

**CONCLUSIONS OF LAW**

33. Upon hearing testimony from the Applicant and its representatives, and property owners residing in the neighboring subdivision, County Council concluded that the facts surrounding the variance before them supported the denial of the variance and therefore uphold the decision of the BZA.

34. The County Council concluded as a matter of law that it has the authority to deny this variance VAR19-06 because the facts presented in the case do not support the elements based upon which a variance request is considered, as follows:

A. The variance requested is due to the Applicant’s desire to utilize its already owned property to construct a water tower of the height that would achieve the optimal service at the lowest cost to the Applicant. While the record reflects that the subject property is the second highest point along the water transmission line, and that Missouri American Water Company intended to use it for elevated water storage when in purchased the site in 1989, the elevation of the property is still inadequate for the water pressure required. There was no evidence of any other unique circumstances inherent to the specific property to support the variance request.

B. The specific variance is needed because of Applicant’s desire to build the water tank at this location which it already owns, and evidence shows that there are areas allowing structures over 140 ft tall which the Applicant could consider as its location of the proposed 140 ft tall water tank.

C. This variance would indeed merely grant a special benefit to the Applicant beyond what is enjoyed by other property owners. Evidence introduced by many property owners of the adjoining residential subdivisions shows that the structure would be the only one of its kind in the area, as the rest of the properties are residential properties already improved with structures lower than the 40 ft height limit.

D. Because evidence shows that it is possible to erect a functioning water tower within the height limit of 40 ft, the difficulties from the compliance with the limit without the variance claimed by the Applicant are not practical difficulties, but rather business operational and financial difficulties related to constructing a water tower that would provide optimal operational efficiency at the least cost to the Applicant.

**DECISION AND ORDER**

On this April 13, 2020, the St. Charles County Council hereby:

1. Approves and spreads upon its records it’s March 30, 2020 decision and order to affirm the decision of the Board of Zoning Adjustment being appealed and denies Variance No. VAR19-06.
2. Directs the County Registrar to mail or send certified copies of this Findings of Fact and Decision and Order to ______________________, MO _____, and to the Department of Community Development; and

3. Directs the Department of Community Development to retain its certified copy of this Decision and Order with its records on Variance No. VAR19-06 as required by the Unified Development Ordinance.

ST. CHARLES COUNTY COUNCIL

By: ______________________________
   Terry Hollander, Chairperson

ATTEST:

By: ______________________________
   Brenda Hinton, County Registrar

Certificate of Service

The undersigned certifies that on this ___ day of ____________, 2020, she mailed or sent certified copies of this Decision and Order to _______________________, and to Michael Hurlbert, Director of Community Development, St. Charles County, 201 North Second Street, St. Charles, Missouri 63301.

______________________________
Brenda Hinton, County Registrar