IN THE SUPREME COURT OF MISSOURI

Appeal No. SC-91539

ST. CHARLES COUNTY, MISSOURI,

Plaintiff-Respondent,

v.

LACLEDE GAS COMPANY

Defendant-Appellant.

On Appeal From The Eleventh Judicial Circuit

Hon. Jon A. Cunningham, Circuit Judge

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment entered on the parties' cross-motions for summary judgment in favor of plaintiff St. Charles County, Missouri and against defendant Laclede Gas Company in a declaratory judgment action. On February 8, 2011, the Missouri Court of Appeals, Eastern District, affirmed the trial court's judgment by a 2-1 majority, with a dissent, and ordered that the case be transferred to this Court pursuant to Missouri Supreme Court Rule 83.02 as a question of general interest and importance.

STATEMENT OF FACTS

A. The Five Subdivision Plats

Defendant/Appellant Laclede Gas Company ("Laclede") is a publicly-regulated utility company that provides natural gas service to residents of St. Charles County and neighboring counties. Legal File ("LF") 0007, 0020. Plaintiff/Respondent St. Charles County, Missouri ("St. Charles County" or the "County") is a county of the State of Missouri. *Id.*

The County brought this action seeking a declaratory judgment that Laclede bear the cost of relocating its gas lines, installed decades ago, because they are now in conflict with a County construction project along Pittman Hill Road. LF 0031. Beginning in 1987, Laclede installed the gas lines at issue ("Subject Gas Lines") in easements specifically granted to Laclede (or its predecessor) by the subdivision owners in order to provide gas utility service to residents of the Muirfield, Crosshaven and Summit at Whitmoor subdivisions in St. Charles County. LF 0028, 0047, and Supplemental

Thaemert Affidavit. Each subdivision borders Pittman Hill Road. Each Subject Gas Line was installed in a fifteen (15) foot wide "dedication strip," adjacent to, but outside the pavement of the existing Pittman Hill roadway and pavement. LF 0012-19, 0206. For at least ten years in some cases, and for more than twenty years in other cases, the Subject Gas Lines have provided natural gas service to the residents of these subdivisions.

The subdivision developers/owners specifically granted these gas utility easements by the terms of a subdivision plat. LF 0027. There are five such subdivision plats, each of which was attached to the County's Petition in the underlying matter as Exhibits A through E (the "Subdivision Plats"). *Id.*; *see also* LF 0012-19; Appendix ("App.") 009-16. The five Subdivision Plats are: Muirfield Plats One, Two and Three (recorded at St. Charles County Plat Book 27, pages 168-69, Plat Book 27, pages 170-71, and Plat Book 28, pages 72-73, respectively); Crosshaven Estates (recorded at Plat Book 36, page 318); and The Summit at Whitmoor (recorded at Plat Book 36, page 390). LF 0027; App. 009-16.

The relevant dedication language for the utility easements in the Subdivision Plats is as follows:

- **Muirfield Plats One, Two and Three** state that the owner of the subdivided land "hereby designates the streets and roadways shown" on those plats "as public streets and roadways," and further state that "this covenant further designates these streets as *utility easements for the purposes of* sanitary sewers, *gas lines*, water lines, and as easements for electric powerlines, telephone lines and cable television lines." LF 0012-19. They each further state that "All easements shown

on this plat, unless otherwise designated, are hereby dedicated to . . . St. Charles Gas Company . . . and to their successors and assigns as their interests may appear for the purpose of public utilities. .. ." *Id.*

- **The Crosshaven Estates Plat** states that the owner of the subdivided land "hereby designates the streets and roadways as shown" on the plat "as a public street and roadway and are hereby dedicated to the City of Weldon Spring, Missouri for public use forever." Exhibit D further states, "The undersigned further *designates these streets as* <u>*utility easements*</u> for the purpose of sanitary sewers, storm sewers, *gas lines*, water lines, cable lines, electrical lines and telephone lines." *Id.* (emphasis added). "All other easements shown on this plat are hereby dedicated to . . . Laclede Gas Company . . .their successors and assigns as their interests may appear for installation, use and maintenance, repair and replacement of . . . gas lines" *Id.*
- **The Summit at Whitmoor Plat** states, "The area shown hatched hereon, for the widening of Pittman Hill Road, is hereby dedicated to the City of Weldon Spring, Missouri for public use. Said hatched area for the widening of Pittman Hill Road *is hereby established as a* <u>*utility easement*</u> and is hereby granted to the City of Weldon Spring, its successors and assigns *and to the respective utility companies*, their successors and assigns." *Id.* (emphasis added).

Each subdivision plat contains the proviso that the County did not accept any dedication strip until roadway construction was completed per County specifications. *Id.*

B. Location of Laclede's Existing Lines as Compared to Current Right-of-Way

All of the Subject Gas Lines were installed in Laclede's easements over ten years ago. Many lines were installed over twenty years ago. The lines were installed in the dedicated easements for the Muirfield Plats (Muirfield Plats One, Two and Three) in 1987; in the Crosshaven Plat in 1997; and in the Summit at Whitmoor Plat in 2000. LF 0206.

The Subject Gas Lines have never been located underneath the existing right-of-way (*i.e.*, the actual paved roadway of Pittman Hill Road). *Id.* Laclede installed the Subject Gas lines in easement dedication strips, approximately fifteen (15) feet wide, and outside the existing roadway and pavement. *Id.* These lines remain outside of the pavement and right of way of Pittman Hill Road. *Id.*

There is no evidence that the County has ever used, improved or accepted the easement dedication strips occupied by the Subject Gas Lines for any road purposes. Now the County proposes to use these dedication strips to widen the present roadway, requiring relocation of the Subject Gas Lines installed many years ago in the easements described in the Subdivision Plats. LF 0045, 0076, 0206.

In 2008, the County notified Laclede that it planned to widen a section of Pittman Hill Road, located in St. Charles County. LF 0027. That project is referred to as the Pittman Hill Road Improvement Project, Phase II (hereinafter, the "Project"). *Id.* The County claims that the Subject Gas Lines are in conflict with the Project and has demanded that Laclede relocate the Subject Gas Lines at its own expense. LF 0029, 0047.

C. The Present Lawsuit and the Parties' Motions for Summary Judgment

On September 15, 2008, the County filed its Petition in this matter, seeking a declaratory judgment that Laclede is required to move the Subject Gas Lines at its own expense. LF 0001; *see also* LF 0007-19. After filing its Answer, on December 8, 2008, Laclede filed a Motion for Summary Judgment, Memorandum of Law in Support and Statement of Undisputed Material Facts in support. LF 0002. On January 12, 2009, the County filed its response to Laclede's Motion for Summary Judgment, as well as its own Motion for Summary Judgment. *Id.*

D. The Trial Court's Admission of the Affidavit of Christopher Bostic

In support of its Motion for Summary Judgment, the County filed the Affidavit of Christopher Bostic (the "Bostic Affidavit"). LF 0002; *see also* LF 0075-0114, App. 017-24. According to the Affidavit, Mr. Bostic is a Highway Projects Manager for the St. Charles County Highway Department. LF 0075, App. 017. The Bostic Affidavit alleges that before this dispute arose, Laclede relocated gas lines in other unrelated locations at its own expense to accommodate County road projects. LF 0077-81, App. 019-23.

Laclede filed its Motion to Strike the Bostic Affidavit on February 20, 2009, along with its combined reply in support of its own motion for summary judgment and response to the County's motion for summary judgment. LF 0003, 0146-59. Laclede moved to strike the Bostic Affidavit for two primary reasons. First, the language of the Subdivision Plats granting utility easements to Laclede was clear and unambiguous, making extrinsic evidence inadmissible. *Id.* Second, evidence of Laclede's conduct was irrelevant to the intent of the subdivision developers/grantors. *Id.*

On August 4, 2009, the trial court entered its order denying Laclede's Motion to Strike the Bostic Affidavit. On September 16, 2009, the Court granted leave to Laclede to file a Supplemental Affidavit of Kent Thaemert (the "Supplemental Thaemert Affidavit"). LF 0005, 0201-04, App. 025-28. Mr. Thaemert is a Senior System Planning Engineer for Laclede who dealt with St. Charles County in all matters related to the present dispute. LF 0205, App. 026. The Supplemental Thaemert Affidavit disputes certain allegations asserted in the Bostic Affidavit, including the alleged location of the gas lines relocated by Laclede in other subdivisions and the allegation that Laclede had a similar right to maintain its lines in other irrelevant subdivisions as compared to its right to maintain the Subject Gas Lines in the dedication strips. LF 0205-08, App. 025-28. For example, in one such instance, the pipes relocated by Laclede at its own expense were located in the Towers Road right of way and *not* in the dedication strip, as alleged in the Bostic Affidavit. LF 0206-07, App. 026-27. Thaemert's Affidavit further disputes the factual assertions in the Bostic Affidavit by noting that the other lines and pipes referred to in the Bostic Affidavit, which Laclede relocated at its own expense, were *not* located in the dedication strip depicted on the pertinent plats. *Id.*

E. The Trial Court's Judgment and the Court of Appeals' Decision

On November 5, 2009, the trial court entered its order granting the County's motion for summary judgment and denying Laclede's motion for summary judgment. LF 0213-32, App. 001-07. Laclede timely filed its Notice of Appeal on December 1, 2009. LF 0233. On February 8, 2011, the Court of Appeals affirmed the trial court's judgment by a 2-1 majority, with a dissent. The Court of Appeals also ordered that the

case be transferred to this Court pursuant to Missouri Supreme Court Rule 83.02 as a question of general interest and importance.

POINTS RELIED ON

I. The Trial Court Erred in Granting Summary Judgment in Favor of St. Charles County, In That the Language of Dedication in the Five Subdivision Plats Specifically Created Easements Belonging to Laclede, and Any Attempt by the County to Force Laclede to Move Its Lines Located in These Easements Without Just Compensation Constitutes a Taking of Laclede's Property in Derogation of Laclede's Constitutional Rights.

Panhandle E. Pipe Line Co. v. State Hwy. Comm'n., 294 U.S. 613, 55 S. Ct. 563 (1935)

Riverside-Quindaro Bend Levee Dist. v. Missouri-American Water Co., 117 S.W.3d 140 (Mo. App. 2003)

First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114 (10th Cir. 2002)

II. The Trial Court Erred in Admitting the Affidavit of Christopher Bostic, In That the Language of the Five Subdivision Plats at Issue Was Clear and Unambiguous And, As a Result, Extrinsic Evidence Like the Bostic Affidavit is Not Admissible in Interpreting Such Plats.

Muilenburg, Inc. v. Cherokee Rose Design & Build, L.L.C., 250 S.W.3d 848 (Mo. App. 2008)

Jake C. Byers, Inc. v. J.B.C. Investments, 834 S.W.2d 806 (Mo. App. 1992)

Blackburn v. Habitat Dev. Co., 57 S.W.3d 378 (Mo. App. 2001)

III. The Trial Court Erred in Granting Summary Judgment in Favor of St. Charles County, In That, If the Bostic Affidavit is Admissible in Interpreting the Intent of the Landowner in giving the Utility Easements in the Five Subdivision Plats, Summary Judgment Was Automatically Precluded as a Matter of Law.

Park Lane Med. Ctr. of Kansas City, Inc. v. Blue Cross/Blue Shield of Kansas City, 809 S.W.2d 721 (Mo. App. 1991)

Essex Dev., Inc. v. Cotton Custom Homes, LLC, 195 S.W.3d 532 (Mo. App. 2006)

Zeiser v. Tajkarimi, 184 S.W.3d 128 (Mo. App. 2006)

ARGUMENT

I. Introduction

Among the most fundamental rights set forth in the United States and Missouri Constitutions are the protection against the taking of private property by the government without just compensation and the right to trial by jury. *See* United States Constitution, Fifth Amendment and Seventh Amendment; Missouri Constitution, Article I, Section 26 and Article XI, Section 4. The trial court's judgment, affirmed by a 2-1 majority of the Court of Appeals, threatens to deprive Laclede of both.

Laclede's gas line easements are compensable property interests. The Judgment (and majority opinion) that Laclede must move these lines, without compensation, is an unconstitutional taking of Laclede's property and deprives Laclede of its constitutional right to a jury trial as well. The trial court's consideration of the Bostic Affidavit, in and

of itself, was a bar to entry of summary judgment. The trial court's reliance on the Bostic Affidavit, and disregard of the Thaemert Affidavit to resolve a disputed factual issue in the County's favor was reversible error.

This appeal does not involve the County's power to require relocation of the Subject Gas Lines in order to construct improvements to Pittman Hill Road. Laclede is willing to relocate its lines. Rather, this appeal presents the constitutional questions of whether the County can exercise that power without compensating Laclede for its relocation costs, and whether Laclede is entitled to a jury trial on these issues.

More than seventy years ago, the United States Supreme Court, in *Panhandle E. Pipe Line Co. v. State Hwy. Comm'n.*, 294 U.S. 613, 617-18, 55 S. Ct. 563 (1935), held as a matter of substantive due process that a utility cannot be forced to relocate facilities from property in which it has a valid easement right without just compensation. This is also the law of the State of Missouri. *See Riverside-Quindaro Bend Levee Dist. v. Missouri-American Water Co.*, 117 S.W.3d 140, 155-56 (Mo. App. 2003).

In affirming the trial court's judgment, the majority below committed several fundamental errors. First, the majority (like the trial court) relied heavily on franchise law cases to justify the County's taking of Laclede's property. In such cases as *Union Elec. Co. v. Land Clearance for Redev. Auth. Of St. Louis*, 555 S.W.2d 29, 32 (Mo. banc 1977) and *City of Bridgeton v. Missouri-American Water Co.*, 219 S.W.3d 226, 232 (Mo. banc 2007), this Court previously stated the general rule that the government can require a utility to relocate its lines located *pursuant to a franchise* when the relocation is required by public safety, necessity or convenience. This rule, of course, has no

application here. The County never granted Laclede a franchise to install the Subject Gas Lines in public right-of-way. Laclede claims its rights through a specific grant of utility easements by a private, non-governmental third party landowner in the Subdivision Plats.

The majority, however, misapplied the rule established by this Court, expanding it to *all* "utility facilities placed within public roads," whether or not the source of utility rights was a governmental franchise. Court of Appeals Opinion ("Op. 5). The difference between a franchise and an easement is significant. A franchise right is conferred by a governmental body and is not a property right. An easement is a compensable property right. In disregarding this critical distinction, the majority dismissed the constitutional implications of its ruling and stated that it was unnecessary to decide whether Laclede possessed easement rights in the dedication strips. Op. 13. By any definition, an easement is a compensable property interest. To hold that Laclede was not entitled to compensation, without determining whether it possessed a compensable property interest, is legally indefensible. This result should not be permitted to stand.

The underlying assumption of the majority and the foundation on which its opinion is based is that whatever rights Laclede possessed, they did not "predate" the County's property interests. This finding is factually and legally incorrect. First, neither *Panhandle* nor *Riverside-Quindaro* condition the utility's right to just compensation on the date it acquired its property interest. Neither the majority, the trial court nor the County have pointed to any legal authority for such a condition. In fact, *absolutely no case law supports such a requirement at all*. *Panhandle* and *Riverside-Quindaro* dictate

only one question: were the subject utility lines located in an easement? If yes, the utility must be compensated for moving them.

Equally importantly, the finding that Laclede's rights did not "predate" the County's was plain error. It is true that Laclede received its easement rights in the dedication strips by the same instruments, i.e. the Subdivision Plats, as the County. Laclede installed the Subject Gas Lines in those easements at about the same time the plats were recorded and long before the County finally adopted plans to widen Pitman Hill Road. Laclede installed the Subject Gas Lines in the fifteen foot wide dedication strips outside the right of way of Pitman Hill Road. The Subject Gas Lines are not now and never have been in the pavement or public right-of-way of Pitman Hill Road. The County now wants to widen the right-of-way of Pitman Hill Road to cover the dedication strips and displace the Subject Gas Lines.

Each Subdivision Plat specifically said that the County did not accept the dedication until roadway improvements were made in compliance with County road specifications. LF 0012-19. There is no evidence in the record that the County ever used the dedication strips for roadway purposes or accepted the dedications. Acceptance is required to complete a dedication, or any conveyance. Absent its acceptance of the dedication, the County has no property interest at all. This fact alone requires reversal of the trial court's judgment. The majority's determination that Laclede did not "predate" the County in the subject property is flat wrong. Laclede's lines have been located in the easement dedication strips for many years. The County has never maintained public right-of-way or roadway in the dedication strips from which the County now demands

that Laclede move the Subject Gas Lines, nor did it ever accept the dedication of such property.

In addition to the trial court's judgment effectively depriving Laclede of its right to compensation for the taking of its property, the judgment deprives Laclede of its due process right to trial by jury on these issues. In granting summary judgment in favor of the County, the trial court relied heavily on the Bostic Affidavit - that is, on parol evidence - to interpret the Subdivision Plats. But case law (discussed *infra*.) clearly holds that summary judgment *should be denied* when parol evidence is admitted.

The trial court should not have admitted parol evidence to interpret the clear and unambiguous language of the Subdivision Plats. As the dissent below determined, the language of the plats "is clear," and the plats "want of ambiguity." Op., Dissent, 2. Case law clearly holds that parol evidence is inadmissible to interpret the Subdivision Plats as a result. However, once the trial court relied on parol evidence, summary judgment in the County's favor should have been denied automatically.

Laclede's constitutional rights—the protection against the taking of property without compensation, and the right to a jury trial—are important questions not only for Laclede, but for other utility companies who have lines located in these plat-granted easements, which are very common.

First, requiring Laclede (or other utilities) to pay for moving lines located in easements granted by third party/landowners in exchange for utility services forces Laclede's customers outside the County to subsidize road improvements for St. Charles County residents. An affirmance of the trial court's judgment would allow local

governments to strip utilities of private property rights guaranteed by the United States and Missouri Constitutions. Laclede and other utilities have installed thousands of miles of utility lines in St. Charles County and across the States of Missouri with the justified expectation that their investment and property rights were protected by the Missouri Constitution. In return for easements granted by subdivision developers, like those before this Court, Laclede and other utilities have invested significant sums to install and maintain these lines, fulfilling their duty to provide utility service to their customers and ratepayers. The Subject Gas Lines have benefitted the residents of St. Charles County for many years, not because the County granted Laclede a franchise to use its public roads but because the subdivision developers conveyed utility easements to Laclede. There is no legal support for the Judgment. The Judgment and majority opinion are a major departure from American jurisprudence.

For all of these reasons, and the reasons set forth herein, this Court should reverse the trial court's judgment in the County's favor.

II. Standard of Review and Standard For Summary Judgment

"Summary judgment is a drastic remedy, which borders on a denial of due process and effectively denies the party against whom it is entered a day in court." *Cornerstone Mortgage, Inc. v. Ponzar*, 254 S.W.3d 221, 225 (Mo. App. 2008). It is well-settled that this Court reviews the trial court's grant of summary judgment under a de novo standard of review. *Clay County Realty Co. v. City of Gladstone*, 254 S.W.3d 859, 863 (Mo. banc 2008); *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). In order to permit an entry of summary judgment, the moving

party must demonstrate both: (1) that there is no genuine dispute as to any material fact; and (2) that the moving party is entitled to judgment as a matter of law. *Id.* at 380. A "genuine issue" of material fact exists when the "record shows two plausible, but contradictory, accounts of the essential facts…." *Clay County*, 254 S.W.3d at 863. This Court reviews the record in the light most favorable to the party against whom judgment was entered—in this case, in the light most favorable to Laclede. *Id.*

III. The Trial Court Erred in Granting Summary Judgment in Favor of St. Charles County, In That the Language of Dedication in the Five Subdivision Plats Created Easements Belonging to Laclede, and Any Attempt by the County to Force Laclede to Move Its Lines Located in These Easements Without Just Compensation Constitutes a Taking of Laclede's Property in Derogation of Laclede's Constitutional Rights.

A. As a matter of law, each of the Subdivision Plats conveyed an easement to Laclede.

It is beyond dispute that Laclede possesses easements in the dedication strips occupied by the Subject Gas Lines. Each of the five Subdivision Plats explicitly granted *"utility easements"* to Laclede. LF 0012-28, App. 009-16. Both the County and the trial court recognize that the subdivision developers conveyed easements to Laclede in the Subdivision Plats. *See, e.g.,* County's Brief before Court of Appeals, pp. 32 (" … the language that dedicated public roadways preceded any language regarding utility *easements*"); 33 ("The precise language of the clauses designating the utility *easements*…," and "The express language of these plats makes any use of the

easements…"); and 34 ("…and any utility *easement* use…") (emphasis added); *see also* Trial Court Judgment, p. 2 (App. 002) ("…and also contain language that it 'further designates' or establishes the streets or roads as utility *easements* and these *easements* were dedicated to various utility companies…"); 4 (App. 004) ("…title to the utility *easements* …"); and 5 (App. 005) ("Therefore, the utility *easement* rights…") (emphasis added). The dissent below agreed that Laclede possesses easement rights. *See* Court of Appeals Opinion, dissent at p. 3 ("Simply, it seems to me that all parties received the same interest, an easement – since the plats say so by their words of dedication – for their respective uses.").

Surprisingly, the majority below believed they "need not determine the extent, if any, of the property rights Laclede obtained by virtue of the subdivision plats." Op. 13. In essence, the majority found, without any legal authority, that it did not matter whether Laclede possessed easement rights. Yet that is and has been the decisive issue in this case. The law is clear. An easement is a compensable property interest.

Likewise, in avoiding consideration of the County's failure to show it had accepted the dedications, the majority also found it didn't matter whether the County had property rights in the dedication strips. Op. 10. Absent evidence the County accepted the dedications, it has no property interest in the dedication strips, requiring a dismissal of its claims as a matter of law. *See* section III(D) *infra.*

Dedication of land to public use, whether by recordation on a plat or otherwise, may occur either under the terms of the statute or by operation of common law.[1] *See Ackerman v. Roufa*, 584 S.W.2d 100, 102 (Mo. App. 1979). It is well established that:

> A common law dedication may be accomplished when the plat does not comply with the statutory requirements or is not accepted by a public body, but the intent of the owner to vest rights of use in the general public appears and there is an acceptance by public use.

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

Maps or plats commonly dedicate easements to public utilities and other non-governmental entities so long as the dedication serves a public purpose. *See, e.g., Trustees of Green Trails Estates Subdivision v. Marble*, 80 S.W.3d 841, 846 (Mo. App. 2002); *States ex rel Rhodes v. City of Springfield*, 672 S.W.2d 349, 352 (Mo. App. 1984); *Goad v. Bennett*, 480 S.W.2d 77, 79 (Mo. App. 1972). It is beyond dispute that the use of

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[1] R.S.Mo. § 445.070 provides a statutory means for dedication of private property to public use. However, Missouri courts have not decided whether the statute applies to public utilities. In order to resolve the issues presented by this appeal, it is unnecessary for this Court to address application of the statute to public utilities. Whether or not R.S.Mo. § 445.070 applies, Laclede clearly acquired utility easements in the dedication strips through the Subdivision Plats under the doctrine of common law dedication or traditional principles of the law of conveyances.

property by a public utility for utility purposes is a public use. *See, e.g., River's Bend Red-E-Mix, Inc. v. Parade Park Homes, Inc.*, 919 S.W.2d 1, 2 (Mo. App. 1996).

In *State ex rel. Missouri Highway and Transportation Commission v. London*, 824 S.W.2d 55 (Mo. App. 1991), this Court stated that subdivision plats may convey easements to public utilities, as long as there is acceptance by the public utility:

> [I]t is not our intent to restrict developers or landowners filing plats from providing in said plats for the dedication of land to public use for . . . utility easements and public uses other than those owned or operated by cities, towns or villages . . .or counties . . . In such case, the interest acquired is held by the city, town, village, or county in trust for the public uses set forth. However, there must be acceptance by the appropriate entity before any ownership interest will pass to that entity**.**

Whether or not the Subdivision Plats effected a statutory dedication of utility easements to Laclede, it is clear that the Subdivision Plats effected a common law dedication.

"The elements of common law dedication are: (1) the owner, by unequivocal actions, intended to dedicate the land to public use; (2) the public accepted the dedicated land; and (3) the public is using the dedicated land." *See Hoag v. McBride & Son Inv. Co., Inc.*, 967 S.W.2d 157, 174-75 (Mo. App. 1998); and *Patterson v. Null*, 751 S.W.2d 381, 386 (Mo. App. 1988).[2]

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[2] The majority below noted that Laclede did not "pay" for the utility easements conveyed by the Subdivision Plats. Op. 2, fn. 2. While it is true that Laclede did not pay a

As a matter of undisputed fact, each element of a common law dedication is present here. First, the language of conveyance in each Subdivision Plat unequivocally stated the subdivision owner's intent to dedicate utility easements to Laclede. For example, Plat Exhibits A, B and C each provide:

> "this covenant further designates these streets as *utility easements for the purposes of* sanitary sewers, *gas lines*, water lines, and as easements for electric powerlines, telephone lines and cable television lines . . .. *All easements shown on this plat, unless otherwise designated, are hereby dedicated to . . .St. Charles Gas Company . . .and to their successors and assigns as their interests may appear for the purpose of public utilities. . .."*

LF 0012-17, App. 009-14 (emphasis added); *see also Patterson*, 751 S.W.2d at 386 (holding that intention to dedicate was shown by recordation of a plat containing language of dedication).

Second, Laclede accepted dedication of the easements in each of the Subdivision Plats by construction, operation and maintenance of the Subject Gas Lines within those easement areas many years ago. *Patterson*, 751 S.W.2d at 386 (holding that acceptance

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monetary amount to the subdivision developers, a monetary payment is not a required element of a dedication. *See supra.* Moreover, subdivision developers commonly dedicate easements such as those at issue so that the residents of their subdivisions will receive utility services. In turn, Laclede and other utilities accept such easements as consideration for the substantial expenses incurred in installing utility lines to serve them.

and use of a dedication is shown by the intended recipient's use of the dedication). Ownership of the utility easements passed to Laclede upon its acceptance of the dedication. *State ex rel. Missouri Highway and Transportation Commission*, 824 S.W.2d at 62. Finally, for many years, these easements (located in the dedication strips on each Subdivision Plat) have been used for the public purpose of providing gas utility service to residents of the County.

In addition, the Subdivision Plats operated as deeds to convey easements to Laclede. It is not necessary for the legal instrument to formally be labelled as a "deed" in order to effectively convey a utility easement to Laclede. *Nolte v. Corley*, 83 S.W.3d 28, 33 (Mo. App. 2002). In this case, the Subdivision Plats operated, in all material respects, as deeds to Laclede of the utility easements shown on the plats. As stated in *Gregg v. Georgacopoulos*, 990 S.W.2d 120, 123 (Mo. App. 1999): "The essential elements of a deed are: (1) names of the parties thereto, (2) words of grant, (3) description of the property, (4) execution and delivery by the grantor, and (5) acceptance by the grantee."

As a matter of law, the Subdivision Plats meet each of these requirements. First, each Subdivision Plat identifies the grantor[3] and specifically identifies Laclede, its predecessor St. Charles Gas Company, or the "respective utility"[4] as the entity to which to utility easements are conveyed. *See* LF 0012-19, App. 009-16.

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[3] The Muirfield Plat One identifies Muirfield Development Corporation as the grantor.

[4] There can be no question that Laclede, the only public gas utility serving the subdivided area, is the "respective utility" to which an easement was granted for purposes of

Second, each Subdivision Plat plainly states that the subdivision owner is granting a utility easement to Laclede. For example, the Muirfield Plats each provide:

> "this covenant further designates these streets as *utility easements for the purposes of* sanitary sewers, *gas lines*, water lines, and as easements for electric powerlines, telephone lines and cable television lines . . .All easements shown on this plat, unless otherwise designated, are hereby dedicated to . . . St. Charles Gas Company . . . and to their successors and assigns as their interests may appear for the purpose of public utilities. . .."

LF 0012-17, App. 009-14. Missouri courts have found such language to be sufficient indication of intent to convey an easement. *See, e. g, Miller v. KAMO Electric Cooperative, Inc.,* 351 S.W.2d 38 (Mo. App. 1961) ("Grantor hereby grants, bargains, sells and conveys to KAMO the perpetual easement").

Third, each of the Subdivision Plats describes the property to be conveyed as "shown on this plat." Coupled with the Subdivision Plats, this language is sufficient to describe the property conveyed. *Lurkin v. Kieselman,* 259 S.W.2d 785 (Mo. 1953). Fourth, each of the Subdivision Plats was acknowledged by the grantor and recorded in the St. Charles County Records. Lastly, Laclede accepted the grant by installing and maintaining its gas lines in the utility easements. *See, e.g., Patterson,* 751 S.W.2d at 386;

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installing and maintaining its gas lines. *See, e.g., State ex rel. Laclede Gas Co. v. Public Service Comm'n.*, 156 S.W.3d 513, 515 (Mo. App. 2005) (recognizing that Laclede is a public utility).

and *Deer v. King*, 30 S.W.2d 980 (Mo. 1930). The Subdivision Plats qualified in all material respects as easement deeds. As a matter of law, the Subdivision Plats effectively conveyed easements to Laclede.

B. Laclede's easements conveyed by the Subdivision Plats are compensable property rights.

Just as there can be no dispute that the Subdivision Plats conveyed easements to Laclede, there can similarly be no doubt that easements are compensable property rights. Easements are "constitutionally cognizable property interests." *First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1122-23 (10th Cir. 2002); *see also Brooklyn E. Dist. Terminal v. City of New York*, 139 F.2d 1007, 1011 (2d Cir. 1944) ("There can be little doubt that easement rights are subject to compensation…."). "It is well established that the government may not take an easement without just compensation." *Ridge Line, Inc. v. U.S.*, 346 F.3d 1346, 1352 (Fed. Cir. 2003), *citing U.S. v. Dickinson*, 331 U.S. 745, 67 S.Ct. 1382 (1947).

The protections against the taking of private property without just compensation set forth in the United States and Missouri constitutions thus apply to easements, like any other property rights. "Government condemnations of easements are takings under the Fifth Amendment and entitle the grantor to compensation." *First Unitarian Church*, 308 F.3d at 1122, *citing Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309 (1994). The majority below recognized the general principle that private property may not be taken by the government without just compensation but failed to discuss that principle further (presumably because the majority avoided the fact that the Subdivision Plats conveyed

easements to Laclede). *See* Op. 6. The dissent below, however, found that "[w]ithout a doubt on our facts, private property has been taken." *Id.*, Op. Dissent, 5. The undisputed facts here demonstrate that the Subdivision Plats conveyed easements to Laclede. The law is well-settled that Laclede is entitled to just compensation for relocating the Subject Gas Lines from those easements.

C. The County's attempt to force Laclede to move its gas lines located in easements would constitute a taking of Laclede's property without just compensation.

Because the Subject Gas Lines are located in easements owned by Laclede, the County cannot compel it to move its gas lines without compensation. At least two controlling cases have examined this issue, and both concluded that a utility must be compensated when a governmental entity requires it to move lines located in easements belonging to the utility.

In *Panhandle E. Pipe Line Co. v. State Highway Comm'n.,* 294 U.S. 613, 617-18, 55 S.Ct. 563 (1935), the Kansas Highway Commission attempted to require a pipeline company to move its lines located in an easement to accommodate a road construction project. There, the Supreme Court succinctly held that "the challenged statute [purportedly requiring the move] authorizes an arbitrary and unreasonable order by the state highway commission, whose enforcement would deprive appellant of rights guaranteed by the Federal Constitution." *Id.* at 623. The Court further held that requiring the move, without just compensation, would constitute a "disregard of constitutional inhibitions" against the taking of private property without compensation. *Id.* at 619.

Because "no compensation was provided for" the move, "the challenged order of the commission would result in taking private property for public use" and "such taking is inhibited by the Fourteenth Amendment." *Id.* at 618.

Similarly, in *Riverside-Quindaro Bend*, 117 S.W.3d at 155-56, a levee district attempted to force a public water utility to move its pipes located in an easement without compensation. In holding that the levee district could not do so, the court stated:

> An easement gives the grantee an interest in the property of the grantor and thus runs with the land and is binding upon successive landowners. … [I]t is a right to use the land for a particular purpose. … ***When a utility's right to construct and maintain its utility equipment is premised upon an easement, the utility is not responsible for the costs of relocating its equipment.*** … In *Panhandle*, the United States Supreme Court held that a pipeline company could not be compelled, without compensation, to relocate or alter its distribution lines to make way for construction of a highway across its private right-of-way.

Id. (emphasis added). The court in *Riverside-Quindaro*[5] held that the water company could not be forced to move its pipes located in the easement, or even move them within

[5] The Court in *Riverside-Quindaro* reached a different conclusion where the water company had only a license or franchise from the public entity to locate its lines within public right of way.

the boundaries of the easement, without receiving compensation for the cost of the move. *Id.*

The same principles apply here. The Subject Gas Lines are located within the utility easements conveyed to Laclede in the Subdivision Plats. Based on *Riverside-Quindaro* and *Panhandle*, the County must compensate Laclede for moving the Subject Gas Lines.

The majority below attempted to distinguish *Panhandle* and *Riverside-Quindaro* by stating that "any property interest Laclede may have acquired was not prior to County obtaining its rights in the property." Op. 11. In other words, the majority believed that *Panhandle* and *Riverside-Quindaro* do not apply because in those cases, the utility's easement "predated" the government's interest. Here, the majority erroneously found that Laclede's easements did not predate the County's interest. This distinction is plain error.

First, neither *Panhandle* nor *Riverside-Quindaro* requires that the utility's easement *predate* the government's interest in order to be compensable. The rule stated in both cases contains no such limitation. Both cases hold, without condition or reservation, that government must compensate utilities for moving their lines from easements they own. The dissent highlighted the majority's error, stating, "The Court's opinion, determined to use 'predating' cases finds that the easement of Laclede did not predate the County easement, . . . – the determination is meaningless." Op., Dissent 1. In reaching its result, the majority relies solely on this "meaningless" distinction, without citing any positive authority for its finding. *See* Op. 11.

The majority's finding that Laclede's easements did not predate the County's interest in the dedication strips is also plain error. As discussed in Laclede's statement of facts, *supra.*, Laclede's easements and gas lines *did* predate the County's interest in the dedication strips. Laclede's lines are located in the dedication strips, which run *alongside, but not underneath*, the existing roadway.[6] Laclede's lines are *not* currently located under the roadway, *nor have they ever been*. Not until this action has the County proceeded to widen the right-of-way over the dedication strips which the Subject Gas Lines have occupied for many years. Laclede's lines *did* predate the County's interest.

For this reason, the majority's reliance on *Panhandle E. Pipe Line Co. v. Madison County Drainage Bd.*, 898 F. Supp. 1302, 1304 (S.D. Ind. 1995) is misplaced. There, the pipeline company had installed its lines over an *already existing drain* owned by the county. *Id.* Under those facts, the court held that drain was established before the utility acquired its easements and installed its lines. *Id.* at 1312. Those facts stand in contrast to the present case, where Laclede's easement was obtained, at the latest, concurrently with

[6] Because Laclede's lines are not located in the public right-of-way, nor have they ever been, the article cited on page 13 of the majority opinion is inapposite. That article states that a utility can be required to relocate, at its own expense, lines in an easement "located within an existing public right-of-way." Court of Appeals Opinion, p. 13, *citing* James W. Ely, Jr. & Jon W. Bruce, *The Law of Easements & Licenses in Land*, § 7.16. Laclede's easements at issue here are not located in the existing public right-of-way, nor have they ever been.

the County's, and where Laclede installed its lines in the subject property long before the County ever sought to widen the roadway.

D. There is no evidence that the County accepted the dedications, meaning that the County possesses no property interest that trumps Laclede's easement rights and *Panhandle* and *Quindaro* clearly apply.

The only basis for the majority opinion is the erroneous distinction between the facts in *Panhandle* and *Riverside-Quindaro* and the majority's statement that Laclede's easements did not "predate" the County's interests in the subject property. The absence of any evidence that the County accepted the dedications deprives the majority of the only stated basis for their opinion, a hypothetical distinction between the undisputed facts before them and the facts in *Panhandle* and *Riverside-Quindaro.* The absence of any evidence that the County accepted the dedications precludes any finding in favor of the County. It means that the County has no interest in the dedication strips at all. It is beyond dispute that the County cannot force Laclede to move the Subject Gas Lines from dedication strips unless the County has superior property rights in the same property.

As discussed in Laclede's briefs throughout this matter, acceptance is a required element to find that a dedication has occurred; without an acceptance, there can be no dedication to the County. *See, e.g.*, LF 0036, *citing State ex rel. Hwy. & Trans. Comm'n. v. London*, 824 S.W.2d 55 (Mo. App. 1991). The trial court found that the Subdivision Plats dedicated "public roadways" to the County, and therefore by necessity determined that the County's acceptance of the dedications, a required element, had occurred. LF 0214.

However, the record contains *no evidence* that the County ever accepted the dedications. The Subdivision Plats set forth a specific procedure by which the County could accept the dedications. The Plats stated that County acceptance of the dedications would not occur until the road construction and improvements were completed in accordance with County requirements. *See, e.g.*, LF 0012-17 ("County acceptance of said streets and roadways shall not be petitioned until the streets and roadways are improved in such manner as to comply with the required improvements section of the Rules for Land Subdivision of St. Charles County, Missouri on November 2, 1959 and amendments thereto . . ."). None of these procedures have occurred here, nor could they have, because as discussed *supra.*, the County has never laid pavement on the dedication strips.

Absent evidence that the County accepted the dedications, the right to be present in the dedication strips (where the subject gas lines have been for many years) could not have vested in the County. *See, e.g., Smith v. City of Hollister*, 238 S.W.2d 457, 461-462 (Mo. App. 1951); *see also Johnson v. Ferguson*, 44 S.W.2d 650, 653 (Mo. 1931) (dedication requires acceptance by the public); and *Ginter v. City of Webster Groves*, 349 S.W.2d 895, 900 (Mo. 1961) (dedication is not complete without acceptance by public). In other words, the County has no property interest at all in the dedicated strips until such time as it accepts the dedications. *See Hayes v. Kansas City*, 242 S.W. 411, 414 (Mo. 1922) (without acceptance by city, dedication was not effective and dedicator had right to resume activity on dedicated property and to exclude public from use of the property);

and *Ginter*, 349 S.W.2d at 900 (until city accepted dedications, dedicator had right to revoke dedications).

The effect of the County's failure to accept the dedications is significant. Both the trial court and the majority below found that the County's interests in the subject property were superior to Laclede's interests. However, there is no evidence that the County accepted and, therefore, possessed any interest in the subject property. Without such a finding of acceptance by the County, then the County could not prevail.[7]

The majority below avoided this conclusion by contending that Laclede had not raised this argument (the County's failure to accept the dedications) before the trial court and, as a result, had not preserved this issue for appeal. Op. 10 fn. 9. This contention is incorrect for two reasons. First, the trial court found that the Subdivision Plats dedicated public roadways to the County and that title vested in the County pursuant to the dedications. App. 002, 004. The requirement that a dedication must be accepted was thoroughly addressed in Laclede's summary judgment papers. *See, e.g.*, LF 0035-36, 136. As a result, the trial court's judgment necessarily found that all of the elements of dedication, including acceptance, had occurred. As such, the issue of "acceptance" was addressed by Laclede at both the trial and appellate court level.

A point is preserved for appellate review when implicit in an express ruling by the trial court. *See, e.g., Walls v. City of Overland*, 865 S.W.2d 839, 841 (Mo. App. 1993);

[7] Even if the County had accepted the dedications, Laclede still has a valid non-exclusive easement which is compensable for all the reasons stated above.

Segraves v. Consolidated Elec. Coop., 891 S.W.2d 168, 171 (Mo. App. 1995). The trial court could not find that the County's rights were superior to Laclede's without determining that the County had accepted the dedications. This issue was therefore preserved for review.

Moreover, this Court has discretion to consider the point under the "plain error rule." Rule 84.13(c) permits an appellate court to review an issue that was not raised before the trial court or otherwise properly preserved. Rule 84.13(c) states, "Plain errors affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom." Both a "plain error" and a "manifest injustice" have occurred here.

Missouri courts of appeals, including this Court, have reviewed decisions for plain error when constitutional or other fundamental rights are involved. For example, in *Hames v. Bellistri*, 300 S.W.3d 235, 238 (Mo. App. 2009), the court held that "justice required" the court to review the unpreserved issue, because the appellant "may be denied his rights to property without due process of law." *Hames* involved an allegedly improper delinquent land tax auction, as a result of which appellant's property was sold to pay delinquent taxes. *Id.*; *see also Shaw v. Armstrong*, 235 S.W.2d 851, 858-59 (Mo. 1951), *overruled on other grounds*, *Journey v. Miler*, 250 S.W.2d 164 (Mo. 1952) (this Court exercising discretion to review unpreserved error in delinquent tax sale case).

Similarly, in *City of Overland v. Wade*, 85 S.W.3d 70, 71-72 (Mo. App. 2002), the Court of Appeals exercised its discretion to review an unpreserved argument that an

ordinance was unconstitutional and violated the appellant's due process protections against the taking of property without compensation. The rights at issue here—Laclede's constitutional protection against the taking of private property without compensation or a jury trial—warrant review of the issue at hand whether or not it has been preserved.

Once a court exercises its discretion to review an unpreserved error, the court reviews two issues: first, whether there was a clear error made by the court below; and second, whether the error resulted in manifest injustice or a miscarriage of justice. *Hames*, 300 S.W.3d at 239-40. Both have occurred here. It was plain error for the trial court and the majority to conclude that the Subdivision Plats had dedicated property to the County in the absence of evidence that the County accepted the dedications. There is no dedication without acceptance.

Manifest injustice has also occurred. "For there to be a manifest injustice or a miscarriage of justice, the error in question must be decisive in the outcome of the proceeding." *Id.* at 240. There is no question that the error here was decisive below. The majority's opinion, like the trial court's judgment, rested entirely on the incorrect assumption that the County had an interest in the subject property. This Court should review the opinion for plain error; conclude that the County did not accept the dedications; and reverse the Judgment.

E. The trial court and the majority below errantly relied on franchise law to justify the trial court's judgment, and in so doing, the majority misstated the law as declared by this Court.

To justify the conclusion that the County can require Laclede to move its lines at its own expense, the majority and the trial court relied on *franchise* law, which has no application here. In its Judgment, the trial court asserted that "utility facilities placed within public roads are subject to the general rule that the utility must relocate, at its own expense, when changes are required by public necessity, or public convenience and security require it." LF 0214-15, App. 002-03. The majority below also said that "[u]tility facilities placed within public roads are subject to the general rule that the utility must relocate its facilities at is own expense when changes are required by public necessity, public convenience, or public security." Op. 5. The "general rule" recited by the trial court and the majority below is *not* a rule of law at all, and not a rule that this Court has adopted or affirmed. Rather, it is a legally indefensible expansion of a franchise rule to constitutionally protected easements which threatens to deprive Laclede and other utilities of their private property rights in violation of the United States and Missouri Constitutions.

As this Court has clearly enunciated on at least two prior occasions, the "general rule" cited by the trial court and the majority below applies only to *franchises*. In *City of Bridgeton v. Missouri-American Water Co.*, 219 S.W.3d 226, 232 (Mo. banc 2007), this Court stated, "The fundamental common-law right *applicable to franchises in streets* is that the 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.'") (emphasis added). This Court previously recited the same rule, with the same condition applying the rule *only to franchises*, in *Union Elec. Co. v. Land Clearance for Redev. Authority of St. Louis*, 555 S.W.2d 29, 32 (Mo. banc 1977).

The difference between a franchise and an easement cannot be overstated. A franchise is "merely a license for a term of years" permitting a utility to place its lines on public property or right-of-way. *State ex rel. Union Elec. Co. v. Public Service Comm'n. of Mo.*, 770 S.W.2d 283, 286 (Mo. App. 1989). "The distinction between an easement and license is important in a condemnation case because a license *does not constitute property for which the government is liable upon condemnation.*" *U.S. v. 126.24 Acres of Land, More or Less, Situate in St. Clair County, Mo.*, 572 F. Supp. 832, 834 (D.C. Mo. 1983) (emphasis added). By definition, a franchise is conferred upon a public utility by the government:

> "Generally, a franchise is defined as a special privilege <u>conferred by the government</u> on individuals and corporations . . ."

McQuillen, *Municipal Corporations*, (3d Ed), Section 34.74 (emphasis added).

This distinction between a franchise and an easement gives rise to the general rule recited in *City of Bridgeton* and *Union Electric*. Because a franchise is only a license, or a permission, granted by the governmental entity, that governmental entity can therefore require the utility to move its lines without compensation in certain situations. In contrast, an easement is not a revocable permission, but a permanent and compensable property right conveyed by a third party.

In *City of Bridgeton* and *Union Electric*, the utilities obtained their right to locate facilities within public roadway as part of a franchise granted by the municipality. *See City of Bridgeton*, 219 S.W.3d at 228; and *Union Electric*, 555 S.W.2d at 32. By definition, the franchise or license was terminable by the municipality and created no compensable property right in the utility. *Riverside-Quindaro*, 117 S.W.3d at 149. In contrast, both in *Riverside-Quindaro,* and under the circumstances presented here, the public utility derived its rights from the private property owner, not a governmental body. An easement is a property right protected by the due process clause of the federal and state constitutions.

So, *City of Bridgeton* and *Union Electric* have no application here. Nor do other cases relied upon by the majority, including *New Orleans Gaslight Co. v. Drainage Comm'n. of New Orleans*, 197 U.S. 453, 25 S.Ct. 471 (1905), and *Norfolk Redev. & Housing Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 34, 104 S.Ct. 304 (1983). In fact, in *Panhandle*, the United States Supreme Court noted that these franchise cases do not apply when a utility is required to move lines from its own easement. *See Panhandle*, 294 U.S. at 622-23 (noting that *New Orleans Gaslight* "and similar cases are not controlling" because "[i]n them the pipes were laid upon agreement … that the owner would make reasonable changes when directed by the municipality."). The dissent correctly concluded that the application of franchise cases to the present facts is "flat wrong," because "neither license nor franchise is at issue" here. Op. Dissent, 3.

F. The trial court erred in assigning higher priority to the County's easements based on the sequence in which Subdivision Plats mention the dedications to the County and to Laclede and the other utilities.

The trial court apparently agreed with Laclede that the subdivision owners intended to dedicate utility easements to Laclede.[8] However, the trial court erred in holding that the Subdivision Plats' dedication of easements to the County for public roads assumed priority over the utility easements dedicated to Laclede merely because the County's easements were listed first. LF 0214. Although the majority below did not mention this as a basis for their opinion, the dissent challenged the legal basis for such a holding. Op., Dissent, 4. The order in which the easements were mentioned in the Subdivision Plats has no legal significance.

The language of the Subdivision Plats clearly indicated an intent to grant non-exclusive easements to the County and Laclede. The language of dedication is similar in each Subdivision Plat. Each plat dedicates the land demarked on the plat "as public streets and roadways" and "as utility easements" for the respective utilities. LF 0012-19, App. 009-016. The trial court improperly attributed legal significance to the order in which these dedications were listed, stating,

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[8] It is of critical importance for subdivision developers to make provisions for delivery of utility services to their residents. The dedication of utility easements are part and parcel of new subdivision development. Without full utility service, subdivision homes are practically unmarketable.

> In each subdivision plat the language dedicating the public roadways preceded the language regarding utility easements. The Court finds that the public road dedication was the primary consideration while the dedications of the utility easement were secondary objectives.

LF 0214, App. 002.

There is no authority for this holding, i.e., when a conveyance grants an easement to one party "***and***" an easement to a second party, the first party's easement gains priority because of its earlier mention in the conveyance. To the contrary, the law is well-settled that non-exclusive easements may co-exist over the same servient tenement. *Kiwala v. Biermann*, 555 S.W.2d 663, 666-67 (Mo. App. 1977); *see also Gisler v. Allen*, 693 S.W.2d 201, 206 (Mo. App. 1985); and *Robert Jackson Real Estate Co., Inc. v. James*, 755 S.W.2d 343, 346 (Mo. App. 1988). "By definition, an easement is not an exclusive interest in reality." *Gisler*, 693 S.W.2d at 205.

Easements may co-exist over the same property even when a second easement was granted *in a later dedication or deed. See, e.g., Kiwala*, 555 S.W.2d at 667 (second easement granted subsequent to first in later deed co-existed with easement previously granted); and *Gisler*, 693 S.W.2d at 206 (same). In contrast to *Kiwala* and *Gisler*, Laclede's easements were part of the *same dedication* as the County's easements. If the later easements in *Kiwala* and *Gisler* co-existed with the first easements, the rule applies with greater force to easements granted to Laclede and the County in the same Subdivision Plats.

The only exceptions to the general rule that easements may co-exist in the same property are: (a) if the first easement was expressly stated to be exclusive; or (b) if the second easement interferes with enjoyment of the first. *Gisler*, 693 S.W.2d at 206. Neither exception applies here. First, there is no language of exclusivity in any of the Subdivision Plats. On the contrary, the Subdivision Plats grant easements to the County for roadways "***and***" to Laclede and the other respective utilities for placement of their facilities. Use of the conjunctive "and" demonstrates the subdivision owners' intent that the easements be non-exclusive. *See Robert Jackson Real Estate Co., Inc. v. James*, 755 S.W.2d 343, 346 (Mo. App. 1988) (easement is exclusive only if grantor uses language of exclusivity in grant).

Nor does the second exception to concurrent existence of easements apply. The practice of installing utility lines below or near public roadways is nearly universal; plats commonly dedicate property for use as a public roadway and, concurrently, for use as utility easements. *See, e.g., State ex rel. State Hwy. Comm'n. v. Green*, 305 S.W.2d 688, 690 (Mo. 1957) (plat dedicated property for use as "New U.S. Highway 66" and as utility easements). There is no allegation that Laclede's placement of facilities in these particular easements has impeded the County's use of the roadways for their intended purpose (nor could there be). Since the outset of this dispute, Laclede has been willing to relocate its facilities to accommodate the Project. Due process requires that Laclede be compensated for relocation of the Subject Gas Lines.

Nor does recognition of Laclede's rights in non-exclusive utility easements implicate the County's police power. The trial court apparently believed that a ruling for

Laclede would deprive the County of its police power, stating, "The Subdivision plats state no provisions that would deprive the County of its police power over the public roadways." LF 0215, App. 003. The trial court similarly stated, "Failure to recognize the public road use as the dominant interest in the area will preclude the County from being able to fulfill its duty to properly maintain these roads…." LF 0219, App. 007. These concerns for the County's police power are unfounded. Laclede is not refusing to remove its facilities.

G. The trial court erred in applying the doctrine of merger to the present case.

In its Judgment, the trial court incorrectly held that Laclede's utility easements merged into the County's easement rights. The trial court held that "pursuant to RSMo. 445.070 and the doctrine of merger, title to the utility easements merged into the County's title to the dominant use of a public road." LF 0216, App. 004. The doctrine of merger simply does not apply in this case.

In general, mergers "are not favored, either in law or equity." *Dent v. Matthews*, 213 S.W. 141, 143 (Mo. App. 1919). Under the doctrine of merger, when a greater and a lesser estate in property "coincide and meet in one and the same person, in one and the same right," the lesser estate is merged into the greater estate. *Curry v. La Fon*, 113 S.W. 246, 249-50 (Mo. App. 1908); *see also Morgan v. York*, 91 S.W.2d 244, 248 (Mo. App. 1936) ("In short, where the legal ownership of the land and the absolute ownership of the incumbrance become vested in the same person," the interests will merge.). In order for the doctrine of merger to operate to eliminate the lesser title, there must be a unity of title

and a unity of possession, both in the same person. *Curry*, 113 S.W. at 250; *see also Wonderly v. Giessler*, 93 S.W. 1130, 1132 (Mo. App. 1906). The doctrine of merger does not apply unless both elements are present.

The County did not show the presence of either element necessary for application of the merger doctrine. First, there is no unity of title present. As discussed above, there is no evidence that the County ever accepted the dedication strips for roadway purposes. The evidence that Laclede accepted the dedication strips for utility purposes is undisputed. Secondly, there is no unity of possession. While Laclede possesses utility easements in the dedication strips, there is no evidence that the County has ever possessed the dedication strips for any purpose. The doctrine of merger simply does not apply.

Finally, it is essential to the interpretation of plats that "every part of the instrument be given effect [and] no part of the plats are to be rejected as meaningless." *Byam v. Kansas City Public Service Co.*, 41 S.W.2d 945, 949 (Mo. 1931). The trial court's holding that Laclede's rights merged into the County's rights renders the language in the Subdivision Plats expressly dedicating utility easements to Laclede meaningless. For all these reasons, the doctrine of merger does not apply.

IV. The Trial Court Erred in Admitting the Affidavit of Christopher Bostic, In That the Language of the Five Subdivision Plats at Issue Was Clear and Unambiguous And, As a Result, Extrinsic Evidence Like the Bostic Affidavit is Not Admissible in Interpreting Such Plats.

The Judgment should be reversed for the additional reason that admission of the Bostic Affidavit was prejudicial error. The Bostic Affidavit alleges that, before this dispute, Laclede relocated other gas pipes and lines at its own expense from dedication strips denoted in other subdivision plats. LF 0077-81, App. 019-23.

The trial court should not have considered the Bostic Affidavit. It was not admissible evidence. *See, e.g., Perry v. Kelsey-Hayes Co.*, 728 S.W.2d 278, 280 (Mo. App. 1987) (reversing summary judgment where evidence cited in support of summary judgment was inadmissible); and *Scott v. Ranch Roy-L, Inc.*, 182 S.W.3d 627, 634-35 (Mo. App. 2005) (evidence or affidavit testimony submitted in support of motion for summary judgment must be admissible evidence). Where, as here, the language of the subdivision plats[9] is clear and unambiguous, the parol evidence rule prohibits consideration of extrinsic evidence (like the Bostic Affidavit) to interpret such language. Moreover, the allegations contained in the Bostic Affidavit are irrelevant to the present case, because they refer to different pipes, at different locations under different plats than those involved here.

[9] One of the subdivision plats mentioned in the Bostic Affidavit is the Muirfield Plat One. Other gas lines were relocated as part of a negotiated, written agreement with the County.

Yet the trial court relied heavily on the Bostic Affidavit in granting summary judgment in favor of the County. *See*, *e.g.*, three separate instances on pages 2, 5 and 6 of trial court's judgment making clear its reliance on the Bostic Affidavit—in fact, the trial court stated that the Bostic Affidavit was highly probative in construing the subdivision plats. Moreover, although the majority below stated that it was "not necessary to consider" the past conduct of the parties, as set forth in the Bostic Affidavit, the dissent believed that the majority in fact *did* rely on such past conduct in reaching its decision. *See* Op., Dissent, p. 3 ("The majority – though claiming not to reach the parol evidence violation – decides this case on what I believe to be reliance on the same parol evidence as did the trial court – alleged <u>past conduct</u> over the several years since the recording of the plats."). Reliance by the trial court or the majority on such parol evidence warrants reversal of the trial court's judgment.

A. The parol evidence rule prohibited admission of the Bostic Affidavit or other extrinsic evidence to interpret the Subdivision Plats because the relevant provisions are clear and unambiguous.

Under the parol evidence rule, "[u]nless an ambiguity is present in the contract, a court will not look outside of the four corners of the contract to determine the intent of the parties." *Muilenburg, Inc. v. Cherokee Rose Design & Build, L.L.C.*, 250 S.W.3d 848, 854 (Mo. App. 2008); *see also Jake C. Byers, Inc. v. J.B.C. Investments*, 834 S.W.2d 806, 814 (Mo. App. 1992) ("Our Supreme Court prohibits the use of extrinsic evidence to interpret an otherwise unambiguous contract."); and *Pugsley v. Ozark Cooperage & Lumber Co.*, 141 S.W. 923, 926 (Mo. App. 1911) (where a written contract is

unambiguous, evidence of the parties' interpretation of the contract or past action upon the contract is inadmissible). Only when the language of a deed is unclear and ambiguous should a court consider extrinsic evidence. *City of Jackson v. Bettilee Emmendorfer Revocable Trust*, 260 S.W.3d 918, 923 (Mo. App. 2008). In cases where the deed or dedication is unambiguous, "the writing itself becomes and is the single and final memorial of the understanding and intention of the parties." *Blackburn v. Habitat Dev. Co.*, 57 S.W.3d 378, 386-87 (Mo. App. 2001).

Courts have regularly held that the admission of extrinsic evidence to interpret an unambiguous deed or conveyance constituted reversible error:

> "It is our view, after having perused the Dedication, that the trial court erred in receiving parol evidence in an attempt to interpret its provisions. The instrument was clear on its face. Its provisions were neither ambiguous nor confusing."

Blackburn, 57 S.W.3d at 387; *see also Celtic Corp. v. Tinnea*, 254 S.W.3d 137, 142 (Mo. App. 2008); *Erwin v. City of Palmyra*, 119 S.W.3d 582, 584-85 (Mo. App. 2003); and *City of Jackson*, 260 S.W.3d at 923.

The Judgment does not find that the Subdivision Plats were unclear or ambiguous or otherwise justify consideration of the extrinsic evidence contained in the Bostic Affidavit. As a matter of law, the Subdivision Plats are unambiguous on their faces and, therefore, extrinsic evidence should not have been considered in interpreting them.

B. The Bostic Affidavit, and any other evidence of prior transactions or other plats, was not admissible because it is not relevant to the interpretation of these particular Subdivision Plats.

It is axiomatic that only relevant evidence is admissible. *See, e.g., Guess v. Escobar*, 26 S.W.3d 235, 242 (Mo. App. 2000); *Olinger v. General Heating & Cooling Co.*, 896 S.W.2d 43, 48 (Mo. App. 1994); and *Ward v. Kansas City Southern Ry. Co.*, 157 S.W.3d 696, 698 (2004). A trial court should exclude evidence that is "irrelevant, immaterial or which is collateral to the proceeding." *Bella v. Turner*, 30 S.W.3d 892, 896 (Mo. App. 2000).

The Bostic Affidavit is inadmissible because it is not relevant to the present dispute. The Bostic Affidavit involved the parties' conduct long after the plats were recorded and concerned different plats, different subdivision owners, different language of dedication, different property, and different gas lines than the present case.

Additionally, evidence of prior dealings between Laclede and the County are irrelevant for a second significant reason. All of the allegations in the Bostic Affidavit refer to conduct by Laclede and the County, and *not* the subdivision owners. Interpretation of the Subdivision Plats at issue here depends on the intentions of the subdivision owners, not Laclede or the County. The trial court erred in admitting the Bostic Affidavit because the allegations contained therein are not relevant to the present dispute.

It is well-settled that previous transactions between parties, as well as transactions involving third parties, simply are not relevant to interpretation of a subsequent contract

between the parties. In *University City v. Home Fire & Marine Ins. Co.*, 114 F.2d 288, 294 (8th Cir. 1940), an action on an insurance policy, the Eighth Circuit held that evidence of other prior policies and transactions between the plaintiff and defendant was not relevant to the parties' dispute. The Eighth Circuit stated the general rule prohibiting admission of such evidence as follows: "Evidence of other agreements than the one involved in a particular issue is as a general rule inadmissible." The Eighth Circuit further stated that "[t]ransactions with a third person are not admissible to prove the terms of a contract." *Id.* On this basis, the court held: "Clearly, these exhibits [the prior policies] were not relevant and should not have been admitted to aid the court in construing the [subsequent] policies." *Id.*

Other cases have similarly held that evidence of prior dealings or contracts between parties are not relevant to the interpretation of a subsequent contract between the parties. For example, in *Gillioz v. State Hwy. Comm'n.*, 153 S.W.2d 18, 26 (Mo. 1941), the court held that exclusion of prior contracts between the plaintiff and the defendant was proper because those contracts were unrelated to the contract in dispute, stating, "It was likewise improper for defendant to inject matters connected with other contracts between it and plaintiff." Similarly, in *Schlicker v. C.M. Gordon*, 19 Mo. App. 479 (1885), the court held that evidence of prior guaranties between plaintiff and defendant was "rightly excluded" by the trial court in an action on a subsequent guaranty between the same parties. The court stated concerning these prior guaranties,

> I think this was rightly refused by the court. It tended to complicate the case with collateral issues … [and] such evidence was liable to do great

> mischief. The rule of safety in such cases is to adhere to the strict rule of evidence in order to avoid collateral issues, calculated to mislead the jury and prevent justice.

Id.; *see also Castigliola v. Lippicolo*, 229 S.W.2d 266, 269 (Mo. App. 1950) (prior contracts between defendant and third parties not relevant to contract dispute between defendant and plaintiff); and *Turner v. King*, 224 S.W. 91, 92 (Mo. App. 1920) (evidence of defendant's contracts with other tenants properly excluded in action between defendant and plaintiff tenant).

Prior contracts, transactions or dealings between Laclede and the County are irrelevant and inadmissible for the same reasons. Only one of the instance recited in the Bostic Affidavit involved a Subdivision Plat at issue here, *i.e.* Muirfield Plat One (A). However, Laclede relocated gas lines in that instance pursuant to the terms of a negotiated, written contract which provided for cost-sharing between the County and Laclede and involved several different gas lines in different locations. LF 0206-07. In fact, some of those gas lines were located in public roadways in which Laclede had no utility easements. *Id.*

C. Laclede was prejudiced as a result of the trial court's admission of and reliance upon the Bostic Affidavit.

The trial court committed reversible error by considering the Bostic Affidavit. *See, e.g.*, Mo. S. Ct. Rule 84.13(b) (improper admission of evidence constitutes reversible error when the admission materially affects the merits of the action). The Judgment devotes several pages to a discussion of the Bostic Affidavit and relied heavily on the

Bostic Affidavit in granting summary judgment in favor of the County. LF0217-0219. For example, the Judgment stated, "This past conduct, referenced in more detail below, is ***highly probative*** in construing the Subdivision plats." LF 0217 (emphasis added). Additionally, the Judgment stated that the court would "look to the parties' past conduct as ***the best way*** to ascertain the meaning of the Subdivision Plats." LF 0218 (emphasis added). There can be no question, then, that Laclede was prejudiced by the trial court's improper admission of the Bostic Affidavit.

V. The Trial Court Erred in Granting Summary Judgment in Favor of St. Charles County, In That, If the Bostic Affidavit is Admissible in Interpreting the Five Subdivision Plats, Summary Judgment Was Automatically Precluded as a Matter of Law.

As discussed above, Laclede maintains that the Bostic Affidavit should not have been admitted into evidence by the trial court because the language of the Subdivision Plats was clear and unambiguous. If, however, the Bostic Affidavit was admissible, then the trial court erred in granting summary judgment in favor of the County for an additional reason. The admission of parol evidence to interpret a contract or document *automatically precludes summary judgment, as a matter of law.*

By definition, extrinsic evidence like the Bostic Affidavit can only be admitted when a document is ambiguous. Ambiguity, in turn, is a question of fact that *must* be decided by a jury. When the trial court chose to admit the Bostic Affidavit, the County's motion for summary judgment should have been denied, with no further analysis needed.

The trial court's failure to deny the County's motion for summary judgment after

admitting parol evidence requires reversal of the trial court's judgment. In addition to such reliance being impermissible here due to lack of ambiguity in the language of the property owners' subdivision plats, the conclusions in the Bostic Affidavit are disputed (by the allegations in the Supplemental Thaemert Affidavit). In essence, the trial court improperly usurped Laclede's constitutional right to have a jury determine these disputed factual contentions (assuming there can be any ambiguity in the clear language of the plats as to the utility easements).

"Once it is determined as a matter of law that an ambiguity does exist, *then it is for the jury to resolve that ambiguity*." *Park Lane Med. Ctr. of Kansas city, Inc. v. Blue Cross/Blue Shield of Kansas City*, 809 S.W.2d 721, 725 (Mo. App. 1991) (emphasis added). A trial court *cannot grant summary judgment* if it rules that a contract is ambiguous. *See Essex Dev., Inc. v. Cotton Custom Homes, LLC*, 195 S.W.3d 532, 535 (Mo. App. 2006) ("Where a contract is ambiguous, then a question of fact arises as to the intent of the parties as to its meaning, and *thus it is error to grant summary judgment*. [citation omitted] … Rather, the determination of the parties' intent should be left to the jury.") (emphasis added).

"*Summary judgment is inappropriate* in an action arising out of a contract, however, where the disputed contract language is ambiguous and parol evidence is required to interpret the contract and the parties' intent.… Where a contract is ambiguous, then a question of fact arises as to the intent of the parties as to its meaning, and *thus it is error to grant summary judgment*. [citation omitted] Rather, the determination of the parties' intent should be left to the jury." *Zeiser v. Tajkarimi*, 184

S.W.3d 128, 132 (Mo. App. 2006) (emphasis added); *see also Tuttle v. Muenks*, 21 S.W.3d 6, 9 (Mo. App. 2000) ("Where a contract is ambiguous, then a question of fact arises as to the intent of the parties as to its meaning. Where such a fact issue exists as to the parties' intent, *it is error to grant summary judgment.* Rather, the determination of the parties' intent should be left to the jury.") (emphasis added); *Edgewater Health Care, Inc. v. Health Systems Management, Inc.*, 752 S.W.2d 860, 865 (Mo. App. 1988) ("If it is determined that an ambiguity exists, it is then for the trier of fact to resolve the ambiguity."); and *Mal Spinrad of St. Louis, Inc. v. Karman, Inc.*, 690 S.W.2d 460, 464 (Mo. App. 1985) ("However, once the court has made the threshold determination that ambiguity exists it is then for the jury to resolve the ambiguity.").

When the trial court made the decision to admit parol evidence (the Bostic Affidavit) to interpret the Subdivision Plats, summary judgment in favor of the County should have been automatically precluded as a result. The trial court committed reversible error in granting summary judgment in favor of the County after admitting the parol evidence.

The facts set forth in the Supplemental Thaemert Affidavit demonstrate all the more why admission of the Bostic Affidavit should have precluded summary judgment in the County's favor. As discussed above, the Bostic Affidavit refers to past dealings between Laclede and the County in which, Mr. Bostic alleges, Laclede agreed to move gas lines located in similar dedication strips at its own expense. However, the Supplemental Thaemert Affidavit contradicts the Bostic Affidavit regarding these prior instances. These contradictions are as follows:

- ***Bostic Affidavit ¶¶ 10-17:*** Mr. Bostic alleges that in 2003, Laclede relocated, at its own expense, a main located in a "20' wide dedication strip" granted in the Muirfield Plat One subdivision plat. LF 0077, App. 019. *In contrast*, in the Supplemental Thaemert Affidavit, Mr. Thaemert alleges that the relocated main was *not* located in a dedication strip, but rather in the right of way of Towers Road. LF 0206, App. 026.
- ***Bostic Affidavit ¶¶ 18-21:*** Mr. Bostic alleges that in 2006-2007, Laclede relocated, at its own expense, certain facilities located in a "15' dedication strip" granted in the Golden Triangle Estates subdivision plat. LF 0078, App. 020. *In contrast*, in the Supplemental Thaemert Affidavit, Mr. Thaemert alleges that the relocated facilities were *not* located in the dedication strip on that plat. LF 0207, App. 027.
- ***Bostic Affidavit ¶¶ 24-26:*** Mr. Bostic alleges that in 2006-2007, Laclede relocated, at its own expense, certain facilities located in a "20' R.O.W. Dedication" on the Park Place subdivision plat. LF 0079, App. 021. *In contrast*, in the Supplemental Thaemert Affidavit, Mr. Thaemert alleges that the relocated facilities were *not* located in the dedication strip on that plat. LF 0207, App. 027.

At a minimum, the distinct contradictions between the allegations of the Bostic Affidavit and the Supplemental Thaemert Affidavit create disputed issues of fact. Summary judgment is only appropriate when "*there is no genuine dispute as to any material fact*" and the moving party is entitled to judgment as a matter of law. *ITT*

Commercial, 854 S.W.2d at 380 (emphasis added); *Y.G. v. Jewish Hosp. of St. Louis*, 795 S.W.2d 488, 494 (Mo. App. 1990). An issue of fact is material if it has "legal probative force as to a controlling issue in the litigation" and "is said to exist when there is the 'slightest doubt about a fact.'" *Id.*, *citing Tatum v. General Motors Acceptance Corp.*, 732 S.W.2d 591, 592 (Mo. App. 1987); and *Gast v. Ebert*, 739 S.W.2d 545, 546 (Mo. banc 1987).

Cases in which the trial court improperly granted summary judgment when a material issue of fact existed are frequently reversed on appeal. *See, e.g.*, *Daugherty v. City of Maryland Heights*, 231 S.W.3d 814, 824 (Mo. banc 2007); and *Korando v. Mallinckrodt, Inc.*, 239 S.W.3d 647, 650 (Mo. App. 2007).

The trial court considered the past dealings between Laclede and the County to be material, devoting almost half of its order and judgment to a discussion of that past conduct. And there can be no doubt that a substantial issue of fact exists concerning such past conduct. Two distinctly different accounts of what occurred in those past dealings were entered into evidence in this matter—the Supplemental Thaemert Affidavit directly contradicts the Bostic Affidavit regarding the types of property rights in which Laclede's facilities were located in such previous dealings. As a result, this Court should reverse the trial court's judgment and remand for further proceedings.

CONCLUSION

WHEREFORE, for all of the reasons set forth herein, Appellant Laclede Gas Company respectfully requests that the Court reverse the judgment of the trial court and enter judgment in favor of Appellant, or in the alternative, remand this matter for further

proceedings consistent therewith, and grant such other and further relief as the Court deems just and proper under the circumstances.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief contains the information by Missouri Supreme Court Rule 55.03, complies with Missouri Supreme Court Rule 84.06, and contains 12,616 words, excluding the parts of the brief exempted; has been prepared in proportionately spaced typeface using Microsoft Word 2007 in 13 pt. Times New Roman font; and includes a virus free CD in Microsoft Word format.

_____

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies of Appellant's Opening Brief and one virus-free CD, containing an electronic copy of the brief, were mailed, first class postage prepaid this ___ day of March, 2011 to:

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_____

IN THE SUPREME COURT OF MISSOURI

Appeal No. SC-91539

ST. CHARLES COUNTY, MISSOURI,

Plaintiff-Respondent,

v.

LACLEDE GAS COMPANY

Defendant-Appellant.

On Appeal From The Eleventh Judicial Circuit

Hon. Jon A. Cunningham, Circuit Judge

APPELLANT'S APPENDIX

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APPENDIX

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