In the

Supreme Court of Missouri

Appeal No. SC87744

CITY OF BRIDGETON,

Plaintiff/Appellant,

v.

MISSOURI-AMERICAN WATER COMPANY,

Defendant/Respondent.

ON APPEAL FROM THE CIRCUIT COURT
OF ST. LOUIS COUNTY,
HONORABLE ROBERT S. COHEN, CIRCUIT JUDGE,
CAUSE NO. 04CC-2107.

APPELLANT'S SUBSTITUTE BRIEF

Robert Schultz # 35329
SCHULTZ & LITTLE, LLP
640 Cepi Drive, Ste. A
Chesterfield, MO 63005
(636) 537-4645
(636) 537-2599 (Fax)
rschultz@sl-lawyers.com

Carl Hillemann # 35230
LASHLY & BAER, P.C.
714 Locust Street
St. Louis, MO 63101
(314) 621-2939
(314) 621-6844 (Fax)
chillemann@lashlybaer.com

Barry Sullivan
(admitted *pro hac vice*)
Gabrielle Sigel
(admitted *pro hac vice*)
JENNER & BLOCK LLP
330 North Wabash
Chicago, IL 60611
(312) 222-9350
(312) 923-2752 (Fax)
bsullivan@jenner.com
gsigel@jenner.com

Attorneys for Plaintiff/Appellant City of Bridgeton

TABLE OF CONTENTS

TABLE OF AUTHORITIES 6

JURISDICTIONAL STATEMENT 11

INTRODUCTION 12

STATEMENT OF FACTS 13

Bridgeton's Taussig Road Project 13

The Litigation 17

The Circuit Court's Decision 21

The Court of Appeals' Decision 22

POINTS RELIED ON 23

ARGUMENT 26

PRELIMINARY STATEMENT OF SUMMARY JUDGMENT STANDARD AND RELEVANT SUBSTANTIVE LAW 26

I. The Circuit Court erred in granting summary judgment in favor of Missouri-American because the court failed to apply established Missouri law, which follows the common-law rule that public rights-of-way belong to the public and may be used by utilities for their profit-seeking activities only insofar as those activities do not interfere with the public's use of the right-of-way, and that utilities must therefore relocate their facilities at their own expense when relocation is necessary to facilitate a governmental action in furtherance of public necessity, in that the court fashioned an unprecedented exception to the

common-law rule, holding that Missouri-American was excused from paying to relocate its facilities simply because the long-needed improvements to Taussig Road were primarily financed with private funds..... 28

A. Common law establishes that Missouri-American's authority to use the Taussig Road right-of-way for its profit-seeking activities is necessarily subordinate to Bridgeton's authority to use Taussig Road and all other public rights-of-way in furtherance of the public necessity and convenience, and that Missouri-American is therefore required to relocate its facilities at its own expense when necessary to make way for improvements to satisfy public necessity. 31

B. The Circuit Court erred when it interpreted *Home Builders* as having created a new exception to the common-law rule stated in *Union Electric,* when, in fact, *Home Builders* is consistent with *Union Electric* and holds only that the common-law rule is not triggered without the involvement of governmental action and does not apply where a private entity is solely responsible for a project's necessity..... 37

1. The Court of Appeals in *Home Builders* did not create a new exception to the common-law rule, but noted unique factual circumstances to which the common-law rule does

not apply, that is, when the roadway project is not a public project. 37

2. The courts below misinterpreted *Home Builders* when they relied on it to fashion a new exception to the common-law rule which focuses solely on the source of the project's funding. 45

3. An exception to the common-law rule based on the source of the project's funding is contrary to sound public policy..... 51

C. If *Home Builders* did create a new exception to the common-law rule, the new exception would be inconsistent with *Union Electric* and other Missouri law, and this Court should decline to adopt it. 53

D. Even if *Home Builders* created a new exception to the common-law rule that warranted adoption by this Court, Missouri-American could not avoid paying to relocate its facilities because the Taussig Road Project overwhelmingly benefits the public and affords virtually no private benefit to TRiSTAR..... 57

II. The Circuit Court also erred in granting summary judgment in favor of Missouri-American because Missouri-American did not prove that it has an unqualified right to occupy the Taussig Road right-of-way and refuse to relocate its facilities, in that: (1) the grounds offered by the Circuit Court are insufficient to show such a right as a matter of law;

(2) the 1902 County Franchise upon which Missouri-American relies could not grant the utility a right to occupy a right-of-way that belonged to Bridgeton, rather than to the County, at the time the first pipes were installed; and (3) even the County Franchise requires by its terms that the utility pay to relocate its facilities whenever the relevant governmental unit determines – in its sole discretion – that such relocations are necessary. 62

A. The grounds the Circuit Court gave for holding that Missouri-American has a right to occupy the Taussig Road right-of-way are insufficient to establish that right as a matter of law. 64

B. Summary judgment cannot properly be based on Missouri-American's contention that the County Franchise affords it a present, unqualified right to occupy a Bridgeton municipal right-of-way..... 65

1. By its terms, and according to Missouri law, the County Franchise is limited in geographical scope to areas that remain unincorporated parts of St. Louis County, and the County Franchise therefore no longer applied to Taussig Road by the time Missouri-American first laid its pipes there. 67

2. Under the terms of the 1902 County Franchise that Missouri-American invokes, it would not be entitled to compensation for relocating its facilities in any event. 76

III. The Circuit Court erred in granting summary judgment in favor of Missouri-American with respect to facilities located on formerly private property because Missouri-American was obliged to relocate those facilities at its own expense, in that Bridgeton has title to the property and has exercised its common-law and contractual rights to revoke Missouri-American's authority to occupy that property. 79

A. The Norfolk and Western "License for Underground Facility" explicitly provides that the utility's right to maintain its pipes in a particular place may be revoked at the will of the grantor, and Bridgeton, as successor to the grantor, has properly exercised that right. 80

B. Summary judgment also must be reversed with respect to those facilities not covered by any easement or license on formerly private land outside the Taussig Road right-of-way. 83

CONCLUSION 84

TABLE OF AUTHORITIES

CASES

Annin v. Lake Montowese Dev. Co., 759 S.W.2d 240
(Mo. App. E.D. 1988) 25, 80-81

Anson v. Tietze, 190 S.W.2d 193 (Mo. 1945) 63

Blair v. City of Chicago, 201 U.S. 400 (1906) 68

Calcasieu Sanitation Serv., Inc. v. City of Lake Charles,
118 So.2d 179 (La. Ct. App. 1960) 71

Churchin v. Mo. Indus. Dev. Bd., 722 S.W.2d 930 (Mo. banc 1987) 56

City and County of Denver v. Mountain States Tel. and Tel. Co.,
754 P.2d 1172 (Colo. banc 1988) 33, 38-39

City of Albuquerque v. N.M. Pub. Reg. Comm'n, 79 P.3d 297
(N.M. 2003) 33

City of Columbia v. Bright, 79 S.W. 151 (Mo. 1904) 62-63

City of Kansas City v. Hon, 972 S.W.2d 407 (Mo. App. W.D. 1998) 59

City of Kansas City v. Kindle, 446 S.W.2d 807 (Mo. banc 1969) 55

City of Livermore v. Pacific Gas & Elec. Co., 51 Cal. App. 4th
1410 (1997) 24, 50-51

City of Springfield v. Clouse, 206 S.W.2d 539 (Mo. banc 1947) 39

City of Wichita v. Kansas Gas & Elec. Co., 464 P.2d 196 (Kan. 1970) 33

Coalition to Pres. Educ. on the Westside v. School Dist. of Kansas City,
649 S.W.2d 533 (Mo. App. W.D. 1983)..... 65

Cochran v. Burger King Corp., 937 S.W.2d 358 (Mo. App. W.D. 1996)..... 27

Consol. Edison Co. of New York v. New York, 276 A.D. 677
(N.Y. App. Div. 1950) 34

Dixie Elec. Membership Corp. v. City of Baton Rouge, 440 F.2d 819
(5th Cir. 1971).....66-67, 71

Duckworth v. City of Springfield, 184 S.W. 476 (Mo. App. 1916)..... 25, 68

Farmers' Elec. Coop. v. Mo. Dep't of Corrections, 977 S.W.2d 266
(Mo. banc 1998)..... 75

Harjoe v. Herz Fin., 108 S.W.3d 653 (Mo. 2003) 26

Hart v. Kupper Parker Commc'ns, Inc., 114 S.W.3d 342
(Mo. App. E.D. 2003) 26

Home Builders Ass'n. of Greater St. Louis v. St. Louis County Water Co.,
784 S.W.2d 287 (Mo. App. E.D. 1989) .....*passim*

Interstate Power Co. v. Dubuque County, 391 N.W.2d 227 (Iowa 1986) 33

ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.,
854 S.W.2d 371 (Mo. banc 1993).....26-27

J.C. Nichols Co. v. City of Kansas City, 639 S.W.2d 886
(Mo. App. W.D. 1982)..... 59

Jansen v. Pobst, 922 S.W.2d 43 (Mo. App. S.D. 1996)..... 27

Junior College Dist. of St. Louis v. City of St. Louis, 149 S.W.3d 442 (Mo. banc 2004) 39

Kansas City, St. Joseph & Council Bluffs Ry. Co. v. Morley, 45 Mo. App. 304 (1891) 61

Loving v. City of St. Joseph, 753 S.W.2d 49 (Mo. App. W.D. 1988) 39

Macios v. Hensley, 886 S.W.2d 749 (Mo. App. E.D. 1994) 83

McKittrick ex rel. City of California v. Mo. Utilities Co., 96 S.W.2d 607 (Mo. 1936) 25, 64-65, 69

Moschenross v. St. Louis County, 188 S.W.3d 13 (Mo. App. E.D. 2006) 56-57

Mo. Pub. Serv. Comm'n v. Platte-Clay Elec. Coop., 407 S.W.2d 883 (Mo. Div. 1 1966) 69

New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans, 197 U.S. 453 (1905) 24, 30, 32

Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co. of Va., 464 U.S. 30 (1983) 32-34

Pacific Gas & Elec. Co. v. Dame Constr. Co., 191 Cal. App. 3d 233 (1987) 21, 40, 43-44, 57-58

Peterson v. Tacoma Ry. & Power Co., 111 P. 338 (Wash. 1910) 71

Pine Belt Chevrolet, Inc. v. Jersey Cent. Power & Light Co., 626 A.2d 434 (N.J. 1993) 35, 59

Port of N.Y. Auth. v. Hackensack Water Co., 195 A.2d 1 (N.J. 1963) 34-36

Riverside-Quindaro Bend Levee Dist. v. Missouri-American Water Co., 117 S.W.3d 140 (Mo. App. W.D. 2003) 32, 49-50

Rosenfeld v. Thoele, 28 S.W.3d 446 (Mo. App. E.D. 2000) 27

St. Joseph Light & Power v. United Elec. Coop., 43 S.W. 3d 330 (Mo. App. W.D. 2001) 75

Smith v. Woodward, 15 S.W.3d 768 (Mo. App. S.D. 2000) 27

S. Cal. Gas Co. v. City of Los Angeles, 329 P.2d 289 (Cal. 1958) 34

State ex rel. Askew v. Kopp, 330 S.W.2d 882 (Mo. 1960) 39

State ex rel. Audrain County v. City of Mexico, 197 S.W.2d 301 (Mo. 1946) 25, 68, 70, 72-74

State ex rel. City of Jefferson v. Smith, 154 S.W.2d 101 (Mo. 1941) 59-60

State ex rel. St. Joseph Water Co. v. Eastin, 192 S.W. 1006 (Mo. banc 1916) 25, 70-71

State ex rel. Walmar Inv. Co. v. Mueller, 512 S.W.2d 180 (Mo. App. 1974) 65

State Highway Comm'n of Wyo. v. Sheridan-Johnson Rural Elec. Assoc., 784 P.2d 588 (Wyo. 1989) 33

State on Info. Dalton ex rel. Shepley v. Gamble, 280 S.W.2d 656 (Mo. banc 1955) 73

Stillings v. City of Winston-Salem, 319 S.E.2d 233 (N.C. 1984) 71

Union Elec. Co. v. Land Clearance for Redevelopment Auth. of the City of St. Louis, 555 S.W.2d 29 (Mo. banc 1977) ..... *passim*

Wilson v. Owen, 261 S.W.2d 19 (Mo. 1953) 25, 80

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Mo. Const. art. V, § 3 11

Mo. Const. art. V, § 10 11

Mo. Const. art. VI, § 18(a) 73

RSMo § 71.520 (2000). 25, 72

RSMo § 71.530 (2000) 25, 72

RSMo § 393.010 (2000) 24, 36, 75

RSMo § 394.080 (2000). 25, 74

RSMo § 512.020 (2000) 11

RSMo § 516.090 (2000) 62-63

RSMo § 524.060 (2000) 27

RSMo § 524.080 (2000) 27

RSMo § 9431 (1899) 73

Mo. R. Civ. P. 74 26

OTHER AUTHORITIES

Charter of the City of Bridgeton, Art. III ¶ 3.06(3) 72

12 McQuillin, THE LAW OF MUNICIPAL CORPORATIONS § 34:92

(3d ed., rev. vol. 2006) 24, 38

2A McQuillin, THE LAW OF MUNICIPAL CORPORATIONS § 7.46.70

(3d ed., rev. vol. 1996) 25, 68, 71

JURISDICTIONAL STATEMENT

The City of Bridgeton ("Bridgeton" or "City") appeals from the April 6, 2005 Order of the Circuit Court of St. Louis County (Division 1) granting summary judgment in favor of Missouri-American Water Company ("Missouri American") on Bridgeton's claims of trespass and ejectment, and denying Bridgeton's request for injunctive and other appropriate relief. (A.167-72; L.F.215-20.)[1] On May 13, 2005, the City perfected an appeal to the Missouri Court of Appeals, Eastern Division. (L.F.222-32.) That court, which had jurisdiction under Article V, § 3 of the Missouri Constitution, affirmed the decision of the Circuit Court on March 28, 2006. (A.173-82.) The Court of Appeals denied the City's timely motion for rehearing or transfer on May 25, 2006. (A.197.) Thereafter, the City filed a timely application for transfer with this Court, which this Court granted on August 22, 2006. (A.214.) This Court has jurisdiction under Article V, § 10 of the Missouri Constitution and RSMo § 512.020(5) because Bridgeton's appeal from the final judgment of the Circuit Court raises questions of general interest or importance. Specifically, this appeal raises important questions concerning the power of

[1] "A.__" refers to the two-volume Appendix filed with this brief; "L.F.__" refers to the Legal File on appeal; "Deft. Ex. __" refers to Exhibits attached to Missouri-American's Motion for Summary Judgment. "P1. Ex.__" refers to Exhibits attached to Bridgeton's Memorandum in Opposition to Summary Judgment. Where a document contained in the Legal File is reproduced in the Appendix, the parallel citation will be used and cited as "A.__; L.F.__."

a local municipality to require those who have occupied the public right-of-way to vacate or alter their occupancy, at their own expense, to facilitate a public improvement project that serves the general public.

INTRODUCTION

This appeal raises three principal issues. The first is whether this Court should create an exception to the common-law duty of public utilities to pay for relocating their facilities, when such relocation is necessary to accommodate a long-needed municipal road improvement project, undertaken by a municipality as a matter of public necessity, simply because the City, which owns the right-of-way, has arranged to finance much of the project through private funds. Rather than comply with its responsibilities under long-standing Missouri law, Missouri-American asks the Court to fashion an exception to its usual common-law obligations solely because of the municipality's source of funding for this road project.

The second issue is whether a 1902 order of the former county court of St. Louis County (the "County Franchise" or "1902 County Franchise"), which granted Missouri-American's predecessor the right to lay and maintain facilities along "all the public highways as they now exist, or may hereafter be laid out, of the County of St. Louis," gives Missouri-American a current right to refuse to move its pipes, at its expense, in a public right-of-way where: (a) the right-of-way has belonged to Bridgeton, rather than St. Louis County, since before the time Missouri-American first began laying pipes there; (b) the right-of-way already was subject to a later franchise issued by Bridgeton to Missouri-American before any pipes were laid; and (c) the County Franchise, even if

applicable, specifically grants the franchisor (the County Court, and Bridgeton, presumably, as its successor) the authority to require alterations at the franchisee's expense.

The third issue is whether the Circuit Court erred in granting summary judgment in favor of Missouri-American with respect to certain facilities that were not previously incorporated in the right-of-way, but which Bridgeton owned, and from which Bridgeton had the common-law and contractual rights to exclude Missouri-American.

STATEMENT OF FACTS

Taussig Road is a Bridgeton municipal right-of-way; it has long needed upgrading, but Bridgeton has lacked the funds to do so. (A.291.)[2] Taussig Road extends from St. Charles Rock Road in the southwest, to a point in the northeast where Taussig Road becomes Missouri Bottom Road, a right-of-way that does not belong to Bridgeton. (A.261, 377.) Continuing northward, Missouri Bottom Road soon crosses over Route 370, the area's major east-west highway, at which point it passes into Hazelwood, Bridgeton's neighbor to the north. (A.261, 376, 379.) In this particular area, Route 370 runs roughly parallel to the boundary between Bridgeton and Hazelwood. (A.261, 376, 379.)

Bridgeton's Taussig Road Project

Taussig Road is narrow and congested, with substandard curves limiting sight distance and safe travel speeds, an absence of shoulders, insufficient clearance from trees

[2] The appendix contains four maps of the relevant area. (A.376-80.)

and utility poles, uneven pavement surfaces, and skewed intersections. (A.261, 288, 290, 294-95.) Bridgeton has long sought to overhaul Taussig Road to improve its safety for motorists, promote business and industrial development in the area, and address storm water runoff that also may affect road safety and the environment. (A.288, 291, 334.) Bridgeton was hampered in its efforts, however, by a lack of funding. (A.291.)

Bridgeton perceived a possible source of funding for these needed improvements in the late 1990s, when TRiSTAR Business Communities, LLC ("TRiSTAR") was developing "Park 370," an industrial park located in Hazelwood and named for its proximity to Route 370 to its south. (A.268, 297.) To improve access to Park 370, TRiSTAR desired to build an interchange on Route 370 near the point where Missouri Bottom Road crosses over it (the "Route 370 project"); part of the planned entrance and exit ramps would be located south of Route 370, in Bridgeton. (A.297, 376, 379.) In other words, most of the Route 370 project was to be located in Hazelwood, but part would spill over into the Bridgeton city limits. (A.376, 379.) When TRiSTAR sought Bridgeton's approval for that part of the Route 370 project falling within Bridgeton's city limits, the City required that TRiSTAR help finance the long-needed and unrelated Taussig Road improvements. (A.297.)

Bridgeton granted the needed approval, and TRiSTAR agreed to finance the unrelated Taussig Road improvements involved in this case. (A.297.) The need for the Taussig Road improvements was longstanding, was unrelated to Park 370 or the Route 370 project, and would provide no benefit to Park 370. Park 370's clients had "direct and

easy access to [Route] 370 without the need to travel over local roads," and the Park 370 development "would have little or no impact on Taussig Road." (A.297-98.)

On October 20, 1999, Bridgeton and TRiSTAR entered into an agreement with respect to the upgrading, replacement, and realignment of sections of Taussig Road (the "Taussig Road Project" or "Project"). (A.299-330.) Bridgeton took responsibility for actually accomplishing the Project and for conveying to St. Louis County the land that would be within that part of the Missouri Bottom Road right-of-way belonging to the County after the redevelopment of the Missouri Bottom Road/Taussig Road intersection. (A.306-07, 313.) Bridgeton also contributed part of its Municipal Athletic Complex grounds, and acquired title to certain additional parcels, which it also dedicated to the Taussig Road Project. (A.2, 127-28, 307-08; L.F.7, 129-30.)

For its part, TRiSTAR agreed to pay the costs of: securing all designs, plans, and specifications for the Taussig Road Project; acquiring all property needed to accomplish the Project, except for that contributed by Bridgeton; relocating any utility facilities not paid for by the utility; all labor and material furnished in connection with the construction; and any legal fees associated with the Project. (A.307-08.) In addition, TRiSTAR agreed to pay for realigning Missouri Bottom Road at its intersection with Taussig Road, and for building a railroad overpass. (A.299-301, 306-08.)

Some of Missouri-American's facilities are located in the Taussig Road right-of-way; others are located in what was adjacent private land before Bridgeton acquired it for use in the Project. Missouri-American installed the majority of these pipes and hydrants between 1956 and 1971, during the life of a 1951 "franchise agreement" between

Missouri-American and Bridgeton, which authorized Missouri-American to make use of Bridgeton rights-of-way. (A.243-49; L.F.170-177.) No Missouri-American facilities were installed in the Taussig Road right-of-way before 1956, when Bridgeton annexed Taussig Road and the area around it. (A.114-15, 250-53; L.F.116-17.) Many of the facilities were installed after 1971, when the franchise expired without being renewed. (A.92-94; L.F.94-96.)[3]

Missouri-American provided Bridgeton with information showing that the Taussig Road Project would require the relocation of some pipe sections and hydrants. (A.332.) The City offered Missouri-American the opportunity to relocate all of the affected facilities to other locations within the new Taussig Road right-of-way under a license agreement with the City. However, Missouri-American refused to do so unless it was also paid more than $500,000. (A.334.) In a June 26, 2003 letter, Bridgeton Mayor Conrad Bowers therefore formally demanded that Missouri-American either pay to relocate its pipes in consultation with Bridgeton's City Engineer or remove them entirely from the Taussig Road area. (A.334.) Mayor Bowers explained that Bridgeton could not

[3] Missouri-American claims the right to lay and maintain pipes under Taussig Road by virtue of the 1902 County Franchise, but it is undisputed that no facilities were actually installed along Taussig Road until after Bridgeton annexed the area that includes Taussig Road in 1956, at which time the 1951 agreement between Bridgeton and Missouri-American (itself a continuation of earlier agreements) became applicable to that area. (A.49, 114-15; L.F.51, 116-17, Deft. Ex. O.)

begin construction on the Taussig Road Project until Missouri-American relocated its interfering facilities. (A.334.)

In a July 2, 2003 resolution, Bridgeton's City Council "direct[ed] the Mayor and the staff of the City of Bridgeton to take all lawful and proper actions to carry out the expansion of Taussig Road, as detailed on the [Project plans]," including the taking of "all lawful action to induce, convince or initiate legal action against any . . . utility company to move at its own expense any property or facility it owns that block the planned expansion and improvement of Taussig Road." (A.288-89.) In its resolution, the City Council also specifically "determin[ed] that the [City's] plans and actions . . . to expand and improve Taussig Road are public governmental acts in the public interest and safety," because they "serve the traveling public [and] encourage business and industrial activity and growth throughout the St. Louis County region." (A.288.) Despite Bridgeton's efforts, Missouri-American continued to refuse to relocate its pipes.

The Litigation

On May 19, 2004, Bridgeton filed a Petition in the Circuit Court of St. Louis County, asserting claims of trespass and ejectment against Missouri-American. (A.1-6; L.F.5-11.) Bridgeton alleged that Missouri-American, by refusing to relocate its facilities within the right-of-way, had exceeded any arguable entitlement to occupy Bridgeton's property. (A.3-4; L.F.8-9.) The Petition also challenged Missouri-American's legal basis for occupying the right-of-way at all, noting that the 1951 franchise agreement had expired, without being renewed. (A.1-4; L.F.6-9.)

Bridgeton sought injunctive relief requiring Missouri-American to relocate its facilities along Taussig Road at its own expense, as directed by Bridgeton's City Engineer, or, alternatively, to remove its pipes and hydrants from the Taussig Road area. (A.5-6; L.F.10-11.)[4] The Petition expressly stated that the City remained willing to grant Missouri-American a license to locate its pipes in alternative locations within the improved Taussig Road right-of-way. (A.2; L.F.7.) In addition, Bridgeton sought compensatory and punitive damages, attorneys' fees, costs, and other appropriate relief. (A.4-5; L.F.9-10.)

On December 3, 2004, Missouri-American filed a motion for summary judgment. (A.25-34; L.F.26-35.) Because most of the facilities are located in the existing right-of-way, while others were located in property that previously had been private (but would be incorporated into the new right-of-way), the parties' arguments on summary judgment may be divided according to the two locations in which the particular facilities were located, and to which the respective arguments relate. First, Missouri-American claimed the right to occupy the Taussig Road right-of-way under the 1902 County Franchise, which granted Missouri-American's predecessor a franchise to lay and maintain water mains and pipes along "all the public highways as they now exist, or may hereafter be laid out, of the County of St. Louis." (*See* A.335-39, *as modified by* A.341.) According to Missouri-American, the 1902 County Franchise applies to the present-day Taussig

[4] The Petition contained a "third count," but that was merely a prayer for relief with respect to the trespass and ejectment counts. (A.26-27, 56; L.F.27-28, 58.)

Road – a Bridgeton municipal right-of-way – because the Road was owned by the County until 1956, when it was annexed by Bridgeton, even though Missouri-American had not installed a single pipe there until after the annexation. (A.42-43, 67; L.F.44-45, 69.)

Notwithstanding the clear common-law obligation of utilities to pay the costs of facility relocations required to accommodate public road projects, Missouri-American relied on the Missouri Court of Appeals' decision in *Home Builders Ass'n of Greater St. Louis v. St. Louis County Water Co.*, 784 S.W.2d 287 (Mo. App. E.D. 1989), to argue that it need not pay in this case. (A.75-78; L.F.77-80.) According to Missouri-American, the Taussig Road Project was exempt from the general requirement that utilities pay for the relocation of facilities because TRiSTAR's assumption of the costs precluded the Project from being considered a "governmental act" serving a "governmental purpose," and therefore relieved Missouri-American of its otherwise clear obligation to pay. (A.156-62; L.F.158-64.)

In response, Bridgeton argued that the 1902 County Franchise did not give Missouri-American a right to occupy Taussig Road in perpetuity, let alone to expand the scope of its operations there, without regard to Bridgeton's present ownership of the right-of-way, and that Missouri-American had not demonstrated compliance with the express terms and conditions of the County Franchise in any event. (A.102-09; L.F.104-11.) Bridgeton also argued that, even if Missouri-American were entitled to occupy the right-of-way under the County Franchise, notwithstanding the fact that it had not commenced operations there before 1956 (when Bridgeton acquired dominion over it), Missouri-American still was required to relocate the interfering facilities at its own

expense. The City explained that *Home Builders* was inapposite because it involved a dispute between two private parties, and it did not involve a governmental body seeking to vindicate the exercise of its police power, as is the case here. (A.117-19; L.F.119-121.) Furthermore, even if *Home Builders* applied, the summary judgment record showed that the need for improvements to Taussig Road existed independent of TRiSTAR's Route 370 project, and that TRiSTAR's Park 370 development would not materially benefit from the Taussig Road Project. These facts demonstrated that the Taussig Road Project is a "governmental act" serving a "governmental purpose." (A.120-23; L.F.122-125.)

Second, Missouri-American claimed that all of the remaining facilities (which are located on land that was private property until Bridgeton acquired it in furtherance of the Project) were within irrevocable written easements; that Bridgeton had not acquired these easements; and that Bridgeton could not therefore lawfully order relocation of these facilities. (A.78; L.F.80.) The City explained that Missouri-American had only a revocable license with respect to certain facilities, and that the City, as successor to the grantor, had properly acted to revoke the licenses. (A.123-25; L.F.125-27.) Bridgeton further responded that Missouri-American was not entitled to compensation because many of the facilities could be relocated to other positions within the existing easement areas. (A.126; L.F.128.) In general, Bridgeton argued that it held title to all of the parcels on which pipes are located, and thus was empowered to order relocation of facilities within them at Missouri-American's expense. (A.127-28; L.F.129-30.)

The Circuit Court's Decision

On April 6, 2005, the Circuit Court granted Missouri-American's motion for summary judgment. (A.167-72; L.F.215-220.) First, the Circuit Court held that Missouri-American had a present right to occupy the Taussig Road right-of-way. The court did not analyze the terms of either the 1902 County Franchise or the 1951 Bridgeton agreement; nor did the court address any of the parties' arguments concerning these documents. Instead, the court based its holding on the fact that Missouri-American and its predecessors had "existed as public utilities in St. Louis County for over one-hundred years," and "[b]y the time the City granted its franchise to the Water Company in 1951, the Water Company was operating in the area for 50 years." (A.171; L.F.219.) Thus, it was "inconceivable that a Court of Equity could conclude that the Water Company's operations along Taussig Road constitute trespass [and] require ejectment of the Water Company's pipes and structures." (A.171; L.F.219.)

Likewise, the Circuit Court held that Missouri-American had no obligation to pay for moving its facilities within the Taussig Road right-of-way. Purporting to rely on the Court of Appeals' decision in *Home Builders*, and on *Pacific Gas & Electric Co. v. Dame Construction Co.*, 191 Cal. App. 3d 233 (1987), the California Court of Appeal decision which the Missouri Court of Appeals had found persuasive in *Home Builders*, the Circuit Court held that "[b]ecause the Taussig Road improvements were resultant from an exaction on a private developer, as opposed to public necessity, Missouri-American cannot be forced to pay for the relocation of its facilities and structures." (A.171; L.F.219.)

The Circuit Court did not specifically address the parties' arguments concerning the Missouri-American facilities that were located outside the existing Taussig Road right-of-way, but the court's plenary grant of summary judgment allowed Missouri-American to avoid paying to relocate these pipes and hydrants as well.

The Court of Appeals' Decision

On appeal to the Missouri Court of Appeals, Eastern District, Bridgeton again argued that Missouri-American was subject to the long-standing common-law rule requiring utilities to pay relocation costs necessitated by street improvements, and that the Taussig Road Project was a routine exercise of Bridgeton's police powers. (A.175.) Bridgeton further argued that it planned and intended to execute the Taussig Road Project for a genuine public purpose benefiting the general public (improved safety on a substandard street, long in need of upgrading), rather than to facilitate a private plan, or even to remediate a significant increase in traffic created by a private development. (A.176.) In this way, the Taussig Road Project was fundamentally different from the street-improvement at issue in *Home Builders*. Bridgeton also argued that the Circuit Court improperly granted summary judgment because it apparently misconstrued Missouri-American's rights and obligations under the 1902 County Franchise. (A.178.)

In its opinion, the Court of Appeals acknowledged that Missouri common law requires utilities to pay relocation costs that result from a governmental act undertaken for a governmental purpose, such as improvements to enhance the safety of a substandard street. (A.175.) But the Court of Appeals failed to apply that rule and instead fashioned an exception, ostensibly based on *Home Builders*, for cases in which the needed public

improvements are accomplished through private funding. (A.176-77.) Where, as here, a private firm agrees to provide significant funding to accomplish needed public improvements, the court will assume that the private party is the primary beneficiary of the improvements, and that the utilities are therefore excused from paying for relocating their facilities. (A.177.) Applying this new test, the court held that the long-needed Taussig Road Project, for which TRiSTAR provided substantial funding, did not have a governmental purpose, and that Missouri-American was therefore freed from its common-law obligation to pay relocation costs. (A.177.)

The Court of Appeals held that, notwithstanding Bridgeton's 1956 annexation of Taussig Road (before a single pipe was ever laid in the right-of-way), the 1902 County Franchise continued to afford Missouri-American a perpetual right to occupy the right-of-way, and to continue and expand its operations in that area. (A.179.)

POINTS RELIED ON

I. The Circuit Court erred in granting summary judgment in favor of Missouri-American because the court failed to apply established Missouri law, which follows the common-law rule that public rights-of-way belong to the public and may be used by utilities for their profit-seeking activities only insofar as those activities do not interfere with the public's use of the right-of-way, and that utilities must therefore relocate their facilities at their own expense when relocation is necessary to facilitate a governmental action in furtherance of public necessity, in that the court fashioned an unprecedented exception to

the common-law rule, holding that Missouri-American was excused from paying to relocate its facilities simply because the long-needed improvements to Taussig Road were primarily financed with private funds.

City of Livermore v. Pacific Gas & Elec. Co., 51 Cal. App. 4th 1410 (1997)

Home Builders Ass'n. of Greater St. Louis v. St. Louis Water Co., 784 S.W.2d 287 (Mo. App. E.D. 1989)

New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans, 197 U.S. 453 (1905)

Union Elec. Co. v. Land Clearance for Redevelopment Auth. of the City of St. Louis, 555 S.W.2d 29 (Mo. banc 1977)

RSMo § 393.010 (2000)

12 McQuillin, THE LAW OF MUNICIPAL CORPORATIONS § 34: 92 (3d ed., rev. vol. 2006)

II. The Circuit Court also erred in granting summary judgment in favor of Missouri-American because Missouri-American did not prove that it has an unqualified right to occupy the Taussig Road right-of-way and refuse to relocate its facilities, in that: (1) the grounds offered by the Circuit Court are insufficient to show such a right as a matter of law; (2) the 1902 County Franchise upon which Missouri-American relies could not grant the utility a right to occupy a right-of-way that belonged to Bridgeton, rather than to the County, at the time the first pipes were installed; and (3) even the County

Franchise requires by its terms that the utility pay to relocate its facilities whenever the relevant governmental unit determines – in its sole discretion – that such relocations are necessary.

Duckworth v. City of Springfield, 184 S.W. 476 (Mo. App. 1916)

McKittrick ex. rel. City of California v. Mo. Utilities Co., 96 S.W.2d 607 (Mo. 1936)

State ex rel. Audrain County v. City of Mexico, 197 S.W.2d 301 (Mo. 1946)

State ex rel. St. Joseph Water Co. v. Eastin, 192 S.W. 1006 (Mo. banc 1916)

RSMo § 71.520 (2000)

RSMo § 71.530 (2000)

RSMo § 394.080 (2000)

2A McQuillin, THE LAW OF MUNICIPAL CORPORATIONS § 7.46.70 (3d ed., rev. vol. 1996)

III. The Circuit Court erred in granting summary judgment in favor of Missouri-American with respect to facilities located on formerly private property because Missouri-American was obliged to relocate those facilities at its own expense, in that Bridgeton has title to the property and has exercised its common-law and contractual rights to revoke Missouri-American's authority to occupy that property.

Annin v. Lake Montowese Dev. Co., 759 S.W.2d 240 (Mo. App. E.D. 1988)

Wilson v. Owen, 261 S.W.2d 19 (Mo. 1953)

ARGUMENT

PRELIMINARY STATEMENT OF SUMMARY JUDGMENT STANDARD AND RELEVANT SUBSTANTIVE LAW

Summary Judgment Standard. "When considering appeals from summary judgments, . . . [r]eview is *de novo*." *Harjoe v. Herz Fin.*, 108 S.W.3d 653, 654 (Mo. 2003). "The criteria on appeal for testing the propriety of summary judgment are no different from those which should be employed by the trial court to determine the propriety of sustaining the motion initially." *ITT Commercial Fin. Corp. v. Mid-America Marine Supply Corp.*, 854 S.W.2d 371, 376 (Mo. banc 1993). Thus, a summary judgment may be affirmed only if the appellate court determines that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Mo. R. Civ. P. 74.04(c)(6).

Summary judgment is "a drastic remedy, which borders on a denial of due process." *Hart v. Kupper Parker Commc'ns, Inc.*, 114 S.W.3d 342, 345 (Mo. App. E.D. 2003). For this reason, the burden rests on the movant to establish the absence of any genuine issue of material fact, and the Court must accord the non-movant "the benefit of all reasonable inferences from the record." *ITT Commercial*, 854 S.W.2d at 376, 380. A "genuine issue" exists whenever the record "contains competent materials that evidence two plausible, but contradictory, accounts of the essential facts." *Id.* at 382. A contradictory interpretation of the record need only be "plausible;" "summary judgment tests simply for the existence, not the extent, of these genuine disputes." *Id.* at 378. Moreover, it is not sufficient for a movant simply to demonstrate the absence of a

genuine factual dispute. Rather, "[t]he key to summary judgment is the undisputed right to judgment as a matter of law; not simply the absence of a fact question." *Id.* at 380. This standard of review applies to all three points of error.

Trespass and Ejectment Claims. Civil trespass is "the unauthorized entry by a person upon the land of another, regardless of the degree of force used, even if no damage is done, or the injury is slight." *Rosenfeld v. Thoele*, 28 S.W.3d 446, 449 (Mo. App. E.D. 2000). "Entering land with consent or license and exceeding the scope of that consent or license constitute a trespass." *Smith v. Woodward*, 15 S.W.3d 768, 773 (Mo. App. S.D. 2000). *Accord Cochran v. Burger King Corp.*, 937 S.W.2d 358, 362 (Mo. App. W.D. 1996) Similarly, a claim of ejectment will lie if the defendant retains possession of the plaintiff's property without a valid right to do so. RSMo §§ 524.060 and 524.080 (2000); *Jansen v. Pobst*, 922 S.W.2d 43, 47-48 (Mo. App. S.D. 1996).

Thus, Missouri-American could demonstrate its entitlement to summary judgment only by showing, with respect to both of the City's claims, that there is no "genuine dispute" that it has a "valid right" to keep its facilities in their current locations, and that it has not exceeded the scope or limits of that right. The Circuit Court erred in granting summary judgment for three reasons:

First, there is a "genuine dispute" as to whether Missouri-American overstepped any right it may have had to occupy the Taussig Road right-of-way when it refused to relocate its facilities at its own expense, as required by Missouri law, to make way for a road improvement project that was shown by overwhelming record evidence to be a matter of public necessity and for a governmental purpose.

Second, summary judgment was improper as to the facilities located in the existing Taussig Road right-of-way because Missouri-American has failed, as a matter of law, to show that it has a present right to occupy what is now municipal, not County, property, or to show that any such right was free from a concomitant duty to relocate its facilities when necessary to facilitate the accomplishment of an important governmental purpose.

Third, the Circuit Court failed to address the facilities located outside the existing Taussig Road right-of-way, but the court's broad grant of summary judgment permits Missouri-American to avoid paying to relocate those facilities as well. Summary judgment with respect to these pipes and hydrants was improper because the record shows that Bridgeton has exercised its common-law and contractual rights to revoke Missouri-American's authority to occupy land to which Bridgeton now holds title.

I. The Circuit Court erred in granting summary judgment in favor of Missouri-American because the court failed to apply established Missouri law, which follows the common-law rule that public rights-of-way belong to the public and may be used by utilities for their profit-seeking activities only insofar as those activities do not interfere with the public's use of the right-of-way, and that utilities must therefore relocate their facilities at their own expense when relocation is necessary to facilitate a governmental action in furtherance of public necessity, in that the court fashioned an unprecedented exception to the common-law rule, holding that Missouri-American was excused from

paying to relocate its facilities simply because the long-needed improvements to Taussig Road were primarily financed with private funds.

Under well-established Missouri law, it is clear that a utility must relocate facilities placed under or within a public right-of-way when the relevant governmental body determines that such action is required by "public necessity or public convenience and security." *Union Elec. Co. v. Land Clearance for Redevelopment Auth. of the City of St. Louis*, 555 S.W.2d 29, 32 (Mo. banc 1977).

Here, the record evidence clearly established that the Taussig Road Project served both public necessity and public convenience and security. Bridgeton's expert in traffic engineering and transportation planning explained in an affidavit that, based on his own experience and familiarity with the area, as well as on the findings of several traffic studies, "Taussig Road is a substandard facility that is in need of modification and/or reconstruction." (A.294-95.) Taussig Road has "a narrow pavement cross-section, no shoulders, insufficient lateral clearance from trees and utility poles, . . . uneven pavement surfaces, skewed intersections and substandard horizontal and vertical curves that limit sight distance and safe travel speeds." (A.295.) According to the expert, these defects make repairs and improvements necessary "[r]egardless of any new or future development within [the] area." (A.294-95.) Missouri-American presented no evidence to demonstrate that Taussig Road was not substandard and not in need of upgrading.

Thus, the record evidence overwhelmingly shows that the Taussig Road Project serves the "public necessity or public convenience and security."[5]

Common law has long recognized that a utility's right to occupy a public right-of-way is subordinate to the right of the public to use the right-of-way for public purposes, and that the utility's interest must give way to that of the public in the event of a conflict. *See New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans*, 197 U.S. 453, 460-61 (1905). It is for this reason that a utility must relocate its facilities at its own expense

---

[5] The Court of Appeals expressly found that "the purpose of the [Taussig Road] improvements . . . is governmental, in that the improvements are necessary for the safety and benefit of the public." (A.176.) For its part, the Circuit Court acknowledged Bridgeton's legislative finding that Taussig Road was badly in need of repair and improvement (and thereby obliquely recognized that the improvements satisfied the public necessity test), but the court did so only in the context of noting that Bridgeton had been unable to finance the project until TRiSTAR's contribution made it possible. (A.168; L.F.216.) The Circuit Court did not focus on the undisputed public safety need for the project. Instead, the court focused on the conclusion that this long-needed project might never have been undertaken (and Missouri-American might never have been required to move its facilities), if TRiSTAR had not contributed the funding. But no case has found relevant (let alone dispositive) the fact that a public project of demonstrated need has been made possible through private funding. *See* pages 45-51, *infra.*

when necessary to accommodate a governmental decision to undertake a road improvement project for purposes of public necessity. *Union Elec.*, 555 S.W.2d at 32.

Like other utilities, Missouri-American knew that any right it had to occupy the Taussig Road right-of-way was subordinate to the public's rights, and Missouri-American took the risk, when it laid its pipes in the right-of-way, that it might have to move them at its own expense, if Bridgeton upgraded the road. Certainly, no prior decision of this Court suggests that a utility should be relieved of its common-law obligations simply because a municipality has managed to secure private funds with which to accomplish a long-needed public improvement in furtherance of the public health and safety. Because the Circuit Court held to the contrary, and effectively created a new exception to the common-law rule, the decision below should be reversed.

A. Common law establishes that Missouri-American's authority to use the Taussig Road right-of-way for its profit-seeking activities is necessarily subordinate to Bridgeton's authority to use Taussig Road and all other public rights-of-way in furtherance of the public necessity and convenience, and that Missouri-American is therefore required to relocate its facilities at its own expense when necessary to make way for improvements to satisfy public necessity.

Union Electric properly states the general common-law rule that a utility must bear the cost of relocating facilities in a public right-of-way when that relocation is necessary to accommodate the needs of the public or to further public convenience and

security. Stated differently, a utility must bear relocation costs where the government finds that relocation is necessary to further a public purpose. Subsequent Missouri cases state the same rule. Thus, "[u]tilities must relocate their equipment in public rights-of-way at their own expense when the changes are required for a public purpose." *Riverside-Quindaro Bend Levee Dist. v. Missouri-American Water Co.*, 117 S.W.3d 140, 152 (Mo. App. W.D. 2003). *Accord*, *Home Builders* at 784 S.W.2d 289-90 (Mo. App. E.D. 1989) (quoting *Union Elec.*, 555 S.W.2d at 32).

The common-law rule articulated in Missouri's case law is consistent with long-standing precedents of the Supreme Court of the United States and with the common law of other states. In *New Orleans Gaslight*, 197 U.S. at 460-61, the Supreme Court recognized the paramount public interest in using public rights-of-way to further the public health, safety, and convenience. The Court held that New Orleans Gaslight could not recover the costs it incurred in relocating its facilities to accommodate a new city drainage system because "uncompensated obedience to a regulation enacted for the public safety under the police power of the state [is] not taking property without due compensation. . . . In complying with [the] requirement [that it move its facilities] at its own expense, none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*." *Id.* at 462.

New Orleans Gaslight is universally recognized as a correct statement of both the common-law rule that a utility company must bear the cost of relocating its facilities where relocation is occasioned by an exercise of the police power and the rationale underlying that rule. *See also Norfolk Redevelopment & Housing Auth. v. Chesapeake &*

Potomac Tel. Co. of Va., 464 U.S., 30, 35 (1983). ("Under the traditional common law rule, utilities have been required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities"); *City of Albuquerque v. N.M. Pub. Reg. Comm'n*, 79 P.3d 297, 301 (N.M. 2003) (same); *State Highway Comm'n of Wyo. v. Sheridan-Johnson Rural Elec. Assoc.*, 784 P.2d 588, 589 (Wyo. 1989) (same); *Interstate Power Co. v. Dubuque County*, 391 N.W.2d 227, 230 (Iowa 1986) (same); *City of Wichita v. Kansas Gas & Elec. Co.*, 464 P.2d 196, 202 (Kan. 1970) (same). This widely-recognized rule rests both on the simple principle of property law that an owner holds rights superior to those of a licensee, and on the government's inherent police power to act in furtherance of the public health, safety, and welfare.

Because public rights-of-way exist to serve the public, the public's interest in their use and disposition is paramount. Utilities and other non-public entities may be authorized to use public rights-of-way by license or statute, but the pursuit of their profit-seeking activities necessarily is subordinate to the government's non-negotiable power to act in furtherance of the public health, safety, and convenience. *City and County of Denver v. Mountain States Tel. & Tel. Co.*, 754 P.2d 1172, 1176 (Colo. banc 1988) ("[T]he right of a public utility to locate its facilities on or beneath a public right-of-way is impliedly limited by those municipal services which further the health, safety, or welfare of its citizens.").[6] Thus, "[a] utility company is permitted to locate its lines

[6] Utilities benefit significantly from being granted access to public rights-of-way, without being required to purchase expensive private rights-of-way or easements. To the

within the public right of way as a use ancillary to the principal and primary use of the way by the public," *Port of New York Authority v. Hackensack Water Co.*, 195 A.2d 1, 4 (N.J. 1963), but "the right of a franchised public utility is subordinate to a municipality's authority to make such changes as the public interest demands." *See also Consol. Edison Co. of New York, v. New York*, 276 A.D. 677, 681 (N.Y. App. Div. 1950) ("The location of respondent's utility equipment . . . was subject to public necessity and convenience, and they acquired no rights superior to the public interest."). Indeed, the common-law rule allocating relocation costs to the utility is so deeply rooted in "the paramount right of the people as a whole to use the public streets wherever located" that the California Supreme Court has held that the rule applies even when the improvements are effected by a governmental entity outside its territorial limits. *S. Cal. Gas Co. v. City of Los Angeles*, 329 P.2d 289, 291 (Cal. 1958) (Traynor, J.).

The source and breadth of the government's, and therefore the public's, rights with respect to utility relocation was perhaps explained best by the New Jersey Supreme Court

---

extent they are required to expend funds in relocating their facilities, that is an expense which easily may be anticipated and planned for by utilities whose operations are often statewide, regional, or national in scope. *See, e.g.*, *Norfolk Redevelopment & Housing Auth.*, 464 U.S. at 42-43 (recognizing that such expenses are included in rate requests). As with other utilities, Missouri-American regularly includes such expenses in its rate requests. (*See, e.g.*, A.365-66.)

in *Port of New York Authority*. There, the New Jersey Supreme Court observed that a utility

> is permitted to use the public way because it serves a public interest, but since its venture is for gain and since in any event the primary purpose of the public easement is the public's own use of it, the utility's interest in the public way is subordinate to the public's enjoyment of it. Hence the utility runs the risk that the public welfare may require changes in the road which will call for relocation of its facilities.

Port of N.Y. Auth., 195 A.2d at 4. *Accord Pine Belt Chevrolet, Inc. v. Jersey Cent. Power & Light Co.*, 626 A.2d 434, 438 (N.J. 1993).

In *Port of New York Authority*, the New Jersey Court went on to explain the fundamental relationship between the government and the utility:

> The true connection between the police power and the relocation of facilities is not, as the companies urge, that the duty to relocate is generated in each specific instance by a decision under the police power to impose it. Rather the meaning is that the utility's interest in the street was intended to be subordinate to the police power, that is to say, that government's authority to exert its police power in the street for the public welfare was not bargained away in the least by the legislative grant to the utility company. Hence, if

> government undertakes an activity in the street in the exercise of the police power, the utility must figuratively move over at its own expense to the end that the exercise of the police power will not be impeded or burdened. And this the utility must do because the law governing the basic arrangement obliges it to do so.

Port of N.Y. Auth., 195 A.2d at 5.

That Missouri follows the common-law rule is clear, not only from the case law, such as *Union Electric*, but from Missouri statute as well. Thus, Missouri statute grants utilities the right "to lay conductors . . . through the streets, alleys and squares of any city, town or village," but conditions that right on "the consent of the municipal authorities thereof under such reasonable regulations as such authorities may prescribe." RSMo § 393.010. Section 393.010 further states that the facilities of a public utility corporation must not "incommode the public in the use of [public] roads, streets and waters." *Id.* The language of this section mirrors the language in *New Orleans Gaslight* and *Port of New York Authority*. By conditioning the utility's occupancy of the public right-of-way on the local government's consent and regulation, and by explicitly stating that a public utility may not "incommode" the public's use of the public roads and streets, the General Assembly made clear that the public's right to use and improve public rights-of-way is superior to the public utilities' interest in occupying them.

Thus, Bridgeton's rights and Missouri-American's obligations with respect to utility relocation costs are the subject of long-standing common law jurisprudence and

statute. Missouri-American has not shown why it should not be required to operate within that well-established and controlling legal framework.

B. The Circuit Court erred when it interpreted *Home Builders* as having created a new exception to the common-law rule stated in *Union Electric,* when, in fact, *Home Builders* is consistent with *Union Electric* and holds only that the common-law rule is not triggered without the involvement of governmental action and does not apply where a private entity is solely responsible for a project's necessity.

1. The Court of Appeals in *Home Builders* did not create a new exception to the common-law rule, but noted unique factual circumstances to which the common-law rule does not apply, that is, when the roadway project is not a public project.

Missouri-American has not gone so far as to assert that the common-law rule, as recognized in *Union Electric*, no longer applies in Missouri. Nor has either court below so hold. Instead, what was urged by Missouri-American, and embraced by both courts below, was the creation of a new exception to the common-law rule – one based solely on the means by which a public project is financed. However, there is no basis in *Union Electric*, Missouri common law, Missouri statutes, or cases from other jurisdictions for creating an exception to the common-law duty of utilities to bear the cost of facility relocation occasioned by public necessity, simply because non-public funds are used to finance the required improvements.

In *Union Electric*, this Court applied the long-standing common-law rule that a utility must pay to relocate its facilities in the public right-of-way when the relevant governmental authority determines that "public necessity or public convenience and security require [relocation]." 555 S.W.2d at 32. In *Union Electric*, this Court noted a possible exception to the common-law rule, stating that the rule "has been held inapplicable where the relocation . . . has been necessitated by the municipality's exercise of a proprietary rather than a governmental function or purpose." *Id.* (internal edits and quotation marks omitted). That is the only exception this Court has previously recognized; and its applicability has not been argued here by Missouri-American, or established by the holding of either court below, all of which have asserted only one ground for the alleged inapplicability of the common-law rule here, that is, the source of funding for this admittedly public project.[7]

---

[7] The applicability of the proprietary-governmental distinction outside the governmental tort liability area is itself questionable. *Union Electric* quotes the then-extant version of McQuillin for the proposition that the common law rule does not apply where the government acts in a proprietary capacity. 555 S.W.2d at 32. McQuillin still includes similar language, but now notes that some jurisdictions have found the governmental-proprietary distinction inapposite "in the context of utilities relocation law." 12 McQuillin, THE LAW OF MUNICIPAL CORPORATIONS (3d ed., rev. vol. 2006) § 34:92 at 330. *See, e.g.*, *City and County of Denver*, 754 P.2d at 1174-75; *Port of N.Y. Auth.*, 195 A.2d at 8. This Court has expressly noted that the governmental-proprietary

Nonetheless, this Court's discussion of the "proprietary exception" in *Union Electric* demonstrates how broadly this Court has viewed "public necessity" for purposes of enforcing utility relocation obligations. In *Union Electric*, the utility was required to move its facilities from a public right-of-way as part of the City's vacation of the right-of-way in connection with its redevelopment of a blighted area. Because the vacated right-of-way was part of a parcel that ultimately was to be used for the construction of a hotel that would be privately owned and operated, the utility argued that the City was acting in a proprietary capacity, and that the utility should not, therefore, bear the costs of moving its facilities. *Id.* at 32. This Court rejected that argument, holding that the redevelopment plan for the blighted area served a public purpose because the renewal of

---

distinction is a policy-driven vehicle for "imposing some tort liability upon municipalities." *City of Springfield v. Clouse*, 206 S.W.2d 539, 546 (Mo. banc 1947). *Accord State ex rel. Askew v. Kopp*, 330 S.W.2d 882, 890 (Mo. 1960) (the distinction developed because of the need for "[a] limitation upon the old rule of governmental immunity from liability for personal injuries inflicted by governmental agencies."). After *Askew*, "the distinction between governmental and proprietary functions has little, if any, application outside the tort liability of municipalities." *Loving v. City of St. Joseph*, 753 S.W.2d 49, 51 (Mo. App. W.D. 1988). At all events, proprietary functions are those "performed for the special benefit or profit of the municipality acting as a corporate entity," which is not the case here. *See Junior College Dist. of St. Louis v. City of St. Louis*, 149 S.W.3d 442, 447 (Mo. banc 2004).

blighted urban areas had been "declared legislatively to be a public purpose." *Id.* at 33. Because redevelopment served a public purpose, "[t]he vacation of this block of the city thoroughfare and the requirement that Union Electric remove its facilities therefrom to make the thoroughfare available for use as a part of [the urban renewal] project were acts of the City . . . in the exercise of a governmental rather than a proprietary function." *Id.* This Court held that the common-law rule applied and Union Electric was required to bear the relocation costs.

Despite the broad application that this Court gave to the common-law rule in *Union Electric*, both the Circuit Court and the Court of Appeals, at Missouri-American's urging, relied in this case on the Court of Appeals' prior decision in *Home Builders*, and the California Court of Appeal's decision in *Pacific Gas & Electric Co. v. Dame Construction Co.*, 191 Cal. App. 3d 233 (1987), to narrow its application through the creation of a new exception which focuses on the source of funding, rather than public necessity.[8]

In *Home Builders*, the Missouri Court of Appeals acknowledged the relevance of the common-law rule, expressed in *Union Electric*, that a utility must pay to relocate its facilities for roadway improvements necessary to accommodate the needs of the public or

[8] *Home Builders* was based on the Missouri Court of Appeals' understanding of the California Court of Appeal's decision in *Dame*. As we show below (*see* pages 50-51, *infra*), the California Court of Appeal has itself repudiated the *Home Builders* court's understanding of *Dame*.

to further public convenience and security. *See* 784 S.W.2d at 289. The Court of Appeals further described the common-law rule as "requir[ing] a valid governmental act and a governmental purpose before the utility must bear the costs of relocation." Although the Court of Appeals' language in *Home Builders* differed slightly from that used by this Court in *Union Electric*, the *Home Builders'* language must be construed consistently with this Court's opinion in *Union Electric* because, whatever else might be said of it, a "governmental act" in furtherance of a "governmental purpose" cannot be deemed to be proprietary – the only exception to the common-law rule that this Court has recognized. The consistency of *Union Electric* and *Home Builders* is underscored by the Court of Appeals' acknowledgement in the latter case that the common-law rule does not apply where there is no governmental action at all, 784 S.W.2d at 292, or where the governmental act is "proprietary rather than governmental." *Id*.

In *Home Builders*, the court simply found that the roadway improvements at issue in that case did not fall within the common-law rule. In *Home Builders*, unlike the case at bar, there was no pre-existing need for the right-of-way improvements, and those improvements were, again unlike the case at bar, planned and executed by the developers, not the City. Unlike the case at bar, therefore, *Home Builders* simply "fail[ed] to present a situation in which a public entity . . . exercis[ed] its police power to make road improvements necessitating facility relocations." *Id.* at 291. The court noted:

> [T]he actions of private developers constructing their projects, not the actions of a governmental entity, have caused the need for right-of-way improvements and have, in turn, necessitated water facility relocations.

> Absent these private actions, the road improvements and consequent facility relocations would not occur at this time or perhaps at any time. While the right-of-way improvements incidentally accomplish a public purpose, they primarily accomplish private sector purposes, that is, providing convenience and security to owners, lessees, customers, and residents of the Developer's projects.

Id. at 291.

In other words, there was neither a public necessity nor a governmental act involved in *Home Builders*, and there was no public need for the improvements before the developers began their development. The road was adequate for the purposes it previously served and became inadequate only because of the new demands placed on it by private development. When the *Home Builders* court said that "[a]bsent these private actions, the road improvements . . . would not occur at this time or perhaps any time," what the court meant was that, absent these private actions, there would have been no *need* for the improvements, at this time or perhaps at any time in the future.

Similarly, the road improvements in *Home Builders* were neither planned nor executed by the municipality, but by private developers who were doing so in direct aid of their projects, and who had accepted "exactions . . . that required them to construct certain public right-of-way improvements in order to complete their projects." *Id.* In other words, the projects in *Home Builders* directly *caused* the need for the improvements, and the developers agreed to create the improvements in exchange for permission to proceed. That, too, is not the case here. The Park 370 Project did not

cause the need for the Taussig Road improvements, which was a need that was long-standing and unaffected by the Park 370 Project.[9]

In *Home Builders*, the Court of Appeals relied on the California Court of Appeal's decision in *Dame* for the proposition that "[n]o governmental act . . . was presented in this case . . . [so that] neither the common-law rule nor the Missouri statutes . . . apply." *Id*. *Home Builders* then adopted *Dame's* benefits analysis to determine whether the relocation costs should be borne by the utility or the developers. *Id.* at 292-93. But the Missouri Court of Appeals misunderstood *Dame*, which is inapposite and does not support Missouri-American's suggested "follow the money" rule.

The conclusion in *Dame* – that the developers should pay because they were the primary beneficiaries – rested on the proposition that the common-law rule applied "only when the relocation is made necessary by a valid governmental act." 191 Cal. App. 3d at 237. The developer, embroiled in a dispute with a public utility over which of the two

---

[9] Indeed, under the particular facts of *Home Builders*, as the parties explained in their Stipulation of Facts in that case, "[w]henever Plaintiff Builders [were] required to make road improvements contemporaneously with their respective Projects, they perform[ed] the work through their own employees or subcontractors, and the *work [was] not done under the supervision or control of any public authority*." (A.356; emphasis added.) Therefore, the governmental entities were quite literally removed from the "action" by the fact that the developer, if it chose to accept an exaction, undertook the roadwork itself with no "supervision or control of any public authority."

was required to bear the facility relocation costs, argued that the street-widening was a governmental act because the government's insistence that the developer widen the street to accommodate the additional demands placed on the street by the development made it so. The court, however, noting that the need for the street-widening was caused by the developer's construction of hundreds of houses, and that the work was performed and paid for by the developer, concluded that "[u]nder these circumstances, to characterize [the street-widening] work as a governmental act would stretch the meaning of the phrase far beyond common understanding." *Id.* Because there was no governmental act, and the common-law rule therefore did not apply, the court looked to other areas of law to determine which party should bear the relocation costs. *Id.* at 238. Using a benefits analysis, the court concluded that the developer, as the primary beneficiary of the street-widening, should bear the relocation costs. *Id.* at 239-40.

Thus, both *Home Builders* and *Dame* were addressing unique factual circumstances, not present here, to which the common-law rule did not apply. In those cases, the roadway improvements (and the incidental required removal of the facilities of the respective utilities) were necessary to meet the needs of private developers, and would not have been *needed* absent the private development; the roadway improvements were planned and carried out by private developers without governmental oversight or direction; and the roadway improvements were paid for by the private developers. In addition, the issue was raised in both cases in the context of litigation between private parties. Far difference circumstances are presented by the case at bar. Where, as here,

the public necessity of a roadway project has been established, the common-law rule must apply, and Missouri-American must pay to relocate its pipes.

2. The courts below misinterpreted *Home Builders* when they relied on it to fashion a new exception to the common-law rule which focuses solely on the source of the project's funding.

The Circuit Court acknowledged that under Missouri common law, a utility must pay to relocate its facilities "to accommodate right-of-way improvements, provided those improvements are necessitated by a governmental action for a governmental purpose." (A.169; L.F.217.)[10] Nonetheless, the Circuit Court, purporting to rely on *Home Builders* and *Dame*, held that Missouri-American was not obliged to pay to relocate its pipes in this case because the improvements to Taussig Road "were resultant from an exaction on

---

[10] As previously noted (*see* pages 29-30, *supra*), there is no serious question that this case involves a governmental body undertaking improvements required to meet an existing public need. This fact was evidenced by the City Council's passage of a resolution determining that "the plans and actions of the City of Bridgeton to expand and improve Taussig Road are public governmental acts in the public interest and safety to serve the traveling public, encourage business and industrial activity and growth throughout the St. Louis County region." (A.288.) In addition, the City Council chose to exercise its police power by directing "the Mayor and the staff of the City of Bridgeton to take all lawful and proper actions to carry out the expansion of Taussig Road." (A.288.)

a private developer, *as opposed to* public necessity." (A.171; L.F. 219; emphasis added.)[11] The Circuit Court treated "public necessity" (which has to do with the *need* for the project) and "resultant from an exaction on a private developer" (which has to do with the *method* of funding) as if these two categories were mutually exclusive. But there is no sense in which these two categories must be deemed to be mutually exclusive. Whether there is a public need for a project has nothing to do with the way in which it is funded. A needed project may be funded with public or private funds; the source of funding tells nothing about the public's need for the project, and vice versa. Thus, it makes no sense to conclude, as the Circuit Court did, that the clear and pre-existing public need for the Taussig Road Project necessarily evaporated when the City was able to find private funding for its completion.

---

[11] As the Court of Appeals found, the Taussig Road improvements were factually unrelated to the Park 370 Project. (A.176.) TRiSTAR's project did not materially increase the amount of traffic on Taussig Road, or otherwise increase the need for the Taussig Road project. (A.176.) For purposes of its *Home Builders* analysis, however, the Circuit Court found that "[t]he nexus between the private development and the public improvement was established when the City of Bridgeton tied the Taussig Road project to TRiSTAR's Route 370 interchange project, the latter intended to facilitate ingress and egress to and from TRiSTAR's St. Louis Mills Mall." (A.171; L.F.219.) Of course, the "tie" was not a factual connection; the City simply "tied" approval for one project to TRiSTAR's assistance with an unrelated project.

The Court of Appeals reached the same result, albeit with somewhat more circuitous reasoning. Like the Circuit Court, the Court of Appeals acknowledged that "[t]he common-law rule in Missouri is that a utility company must relocate its facilities in public streets at its own expense when changes are required by public necessity, or public convenience and security require it." (A.175.) Unlike the Circuit Court, the Court of Appeals went on to find "that the improvements [were] necessary for the safety and benefit of the public" and were "necessary and contemplated by Bridgeton for some time." (A.176.) "If our analysis ended here," the Court of Appeals acknowledged, "then Missouri-American would clearly be responsible for the costs of relocating the pipes and hydrants." (A.176.) But the court did not end its analysis there.

Despite both the clarity of the common-law rule and the court's finding that the improvements would satisfy a long-standing public need, the Court of Appeals held that the general rule did not apply. It did so by invoking a tautology. Simply because Bridgeton used non-public funds, the court found that "a more comprehensive analysis of the situation" was required. (A.176.) Citing *Home Builders* and *Dame*, the court purported to apply "cost-benefit analysis," looking to the distribution of benefits that would flow from the necessary improvements. (A.177.) But the cost-benefit analysis collapsed into a bare tautology with the court's declaration that TRiSTAR was "[t]he primary beneficiary of the [Taussig Road improvements because] TriSTAR [sic] . . . would not have been permitted to pursue its [own] project without agreeing to perform the improvements." (A.177.) Under the Court of Appeals' reasoning, the mere fact of a private contribution will always be sufficient to show that the private party received the

greater benefit. Thus, whenever there is a private contribution, it follows (in the court's view) that the private party *necessarily* was the "primary beneficiary," and the benefits to the public were *necessarily* "incidental." (A.177.) The Court of Appeals closed the circle when it held that, regardless of public necessity, the common law rule does not apply where the private entity providing the funding for public improvements is the primary beneficiary of those improvements. (A.177.)

To say that TRiSTAR was the "primary beneficiary" in that attenuated sense is not to engage in analysis, but to apply a tautology which is not defensible, even as a matter of pure logic. The fact that a developer or other private party is willing to contribute funding says nothing about the comparative benefits to be gained by the private party and the public. The most that it shows is that the private party has determined that the contribution is worth making because the value he places on the benefit he expects to gain (whether as a financial matter, as a matter of public-spirited or altruistic satisfaction, or gauged by some other measure) is greater than the value he places on the cost of the contribution. Whether the private party will benefit more or less than the public from the contribution is, strictly speaking, a matter of indifference to him. What matters to him is simply his appraisal of the value of the benefit that he expects to gain from making the contribution, and the fact that he weighs that value more highly, for whatever reason and in whatever hard or soft currency, than the value of the loss or cost he expects to suffer from making the contribution.

The Circuit Court and the Court of Appeals used different rationales to reach the same holding: the common law rule that utilities must bear relocation costs when

relocation is required to facilitate improvements that serve public necessity does not apply if the improvements are financed in part with non-public funds. No other Missouri case – indeed, no other case known to Bridgeton from any jurisdiction – adopts a similar exception to the common-law rule. In *Union Electric*, for example, this Court held that the common-law rule applied because the "relocation of facilities required of Union Electric was necessitated by an urban renewal project" which "ha[d] been declared legislatively to be a public purpose." 555 S.W.2d at 33. This Court did not consider relevant the source of the funding needed to execute the urban renewal project.

The Circuit Court interpreted *Home Builders* as having created a new exception to the common-law rule – one based on funding alone, but not recognized by this Court in *Union Electric* or any subsequent cases. However, *Home Builders* does not create any such funding exception to the common-law rule, and *Home Builders* is not inconsistent with *Union Electric*. At most, *Home Builders* stands for the proposition that the common-law rule allocating relocation costs to the utility does not apply if the relocation is not necessitated by a governmental act, and the resulting dispute (to which the government is not a party) is between two private parties, each of whom seeks to have the other pay.

Subsequent case law confirms that neither *Home Builders* nor *Dame* created a new exception to the common law rule. Indeed, in *Riverside-Quindaro Bend Levee District v. Missouri-American Water Co.*, 117 S.W.3d 140 (Mo. App. W.D. 2003), the Court of Appeals specifically distinguished *Home Builders*, explaining that the road improvements in that case were planned and executed by "private developers [rather than by] public

entities exercising police power." *Id.* at 150. In contrast to *Home Builders*, *Riverside-Quindaro* "involve[d] a quasi-governmental entity condemning Water Company's licenses," not an act by a private party or a dispute between private parties. *Id.*

Moreover, the one court to have addressed the viability of Missouri-American's "funding exception" – which is the same court that previously had decided *Dame* – refused to recognize an exception to the common-law rule based on the source of funding in circumstances analogous to those presented here. In *City of Livermore v. Pacific Gas & Electric Co.*, 51 Cal. App. 4th 1410 (1997), the California Court of Appeal was required to decide whether PG&E should pay to relocate its facilities for a municipal street-widening project that was financed *entirely* through assessments against private developers. *Id.* The city had acquired the funds for the road-widening project in exchange for its approval of certain adjoining developments and through assessments against other city developers based on the extent to which their developments would increase traffic. *Id.* The court rejected PG&E's argument that the fact of private funding relieved PG&E of its responsibility to pay to relocate its facilities. "[A] city's decision to create an assessment district as a funding mechanism," according to *Livermore*, "does not justify an exception to the established rule that a utility's franchise to operate in public streets includes the obligation to pay for relocating its equipment when required by municipal improvements." *Id.* at 1417. Indeed, "[s]uch methods of raising funds for public improvements benefit taxpayers by reducing their general tax burden." *Id.*

In addition, the *Livermore* court explained that it was "not presented with a dispute between a private developer and a utility," as in *Dame*, but "a dispute between a city and

a utility operating under a city franchise." *Id.* at 1415. Significantly, the *Livermore* court noted that its conclusion in *Dame*, "that privately instigated development must bear the costs of utility relocation is limited by the premise from which the court began: the common-law and statutory rules governing payment for utility relocation do not apply when a *private party* seeks to make a utility pay for relocation." *Id.* (emphasis original). Where, as here, the suit is between a city exercising its police power and a utility, however, the utility remains "subject to well-settled common-law and statutory obligations" to pay for relocation of its facilities. *Id.*

The Circuit Court's interpretation misses what the courts in *Home Builders* and *Dame* took to be the central point, that is, that a public improvement project made necessary by the actions of a private entity, designed and executed by a private entity, and funded by a private entity is not a governmental act. Where the public improvement project itself is not a governmental act, the required facility relocation is not the product of a governmental act, and the common-law rule does not apply. Viewed in this way, *Home Builders'* holding is not inconsistent with *Union Electric*, which assumes that the relocation must result from a "municipality's exercise of . . . a governmental function or purpose" for the common-law rule to apply. 555 S.W.2d at 32.

3. An exception to the common-law rule based on the source of the project's funding is contrary to sound public policy.

As a matter of public policy, the false division of substantively identical projects into two categories based solely on source of funding, which underlies the extraordinary

exception created by the courts below, will have profoundly negative consequences for Missouri government. First, the distinction based on source of funding will have dramatically different consequences for units of local government, depending on their respective wealth. Wealthy municipalities with available tax revenues will be able to undertake public improvements, and the common-law rule will compel utilities to pay for relocating their facilities. But, perversely, the common-law rule will not apply if poor communities undertake factually indistinguishable public projects financed in part through private funding. In effect, the distinction makes the extent of the utilities' obligations hinge on whether they are dealing with rich or poor governmental units, not on whether a particular project is undertaken as a matter of public necessity.

Similarly, the imposition of these additional costs on municipalities will necessarily reduce the total number of worthy public projects that will be financed using non-public funds because it increases the cost of each individual project. This, too, will impact poor communities more seriously than wealthy communities, for whom the additional costs may be more manageable. Even there, however, these additional costs will divert public funds from other essential governmental functions, such as fire and police protection and education. In sum, the false distinction drawn by both courts below would impede local government's ability to develop creative means of financing and thereby ameliorate the constant struggle to find sufficient funds, not only to maintain essential services such fire and police protection and education, but also to make necessary upgrades to streets and roads during a time of low funding levels for all types of local governmental activity.

Finally, to the extent that the new exception actually requires a comparative benefits analysis to determine whether a greater share of the benefits goes to the private entity providing the funding or to the general public, this vague and uncertain exception will clearly invite protracted, expensive, and time-consuming litigation, creating routine delay with respect to the accomplishment of essential public improvements, and reducing the total resources available to achieve their completion. Moreover, the litigation will interject the courts into controversies regarding funding decisions by local governmental units and compel the courts to review what are essentially political decisions – how and when to fund particular public improvement projects.

In sum, the new exception to the common law rule created by the courts below in this case, that public utilities need not bear relocation costs wherever the improvements demanded by public necessity are financed with non-public funds, has no basis in Missouri law as articulated by this Court in its case law or by the General Assembly in statutory law, and it is contrary to sound public policy.

C. If *Home Builders* did create a new exception to the common-law rule, the new exception would be inconsistent with *Union Electric* and other Missouri law, and this Court should decline to adopt it.

As previously shown (*see* pages 37-45, *supra*), *Home Builders* can and should be read consistently with *Union Electric*. It is conceivable, however, that *Home Builders* could be read to create a new exception to the common-law rule. If so, this Court should reject that reading as inconsistent with well-established law and sound policy.

Notwithstanding the particular facts presented in *Home Builders*, the Court of Appeals included in its opinion a pronouncement unsupported by Missouri law and far more sweeping than necessary to decide the case:

> [A] utility within a public right-of-way must relocate its facilities at its own cost when the right-of-way improvement necessitating the relocation is made necessary by the actions of a governmental entity *and* those governmental actions accomplish a *purely* governmental purpose.

784 S.W.2d at 291 (emphasis added). The Court of Appeals did not explain what it meant by a "purely" governmental purpose, but focused on the distribution of benefits flowing from the actions. Because the private developers received the greater benefit, the court found that the improvements "primarily accomplish private sector purposes, that is, providing convenience and security to owners, lessees, customers, and residents of the Developer's projects." *Id.*

Of course, the only exception that this Court acknowledged in *Union Electric* was the proprietary exception. As we have shown (*see* pages 37-51, *supra*), there is no reason to read *Home Builders* as creating another, different exception. If there were some reason to read *Home Builders* in that way, however, there would be no good reason for this Court to follow it. Under *Union Electric*, if the government is not acting in a proprietary capacity when it orders relocation, the only inquiry is whether the utility relocation is required by public necessity or convenience. The emphasis *Home Builders* places on both non-proprietary governmental action and "purely" governmental purpose might be construed in a way that expands the inquiry, and requires a showing that *all* of the

project's benefits (as a proxy for measuring the purity of the public purpose), accrue to the public, with none going to private entities. Such a requirement is plainly inconsistent with *Union Electric*, where this Court held that the common-law rule applied because the urban renewal project served a public purpose, notwithstanding the fact that a private entity – the company building and operating a hotel within the renewal district – clearly would benefit from the project. 555 S.W.2d at 32-33.

Furthermore, conditioning the application of the general rule on the existence of *Home Builders'* alleged requirement of a "purely" governmental purpose (as evidenced by the distribution of benefits) is inconsistent with established Missouri law in two analogous areas. That is not the way in which it is determined whether, in eminent domain cases, a proposed taking is for "public use." Nor is it the way in which courts determine, in tax cases, whether a proposed tax or revenue bond serves a "public purpose." In both contexts, this Court has upheld the governmental character and purpose of the relevant governmental act (the taking or the proposed tax), even if a significant benefit will accrue to a private party, so long as a benefit also accrues to a "considerable number" of members of the general public. In other words, the benefits-analysis does not turn on the value of the benefit received by a private party, but on the existence of some substantial benefit to the public.

In *City of Kansas City v. Kindle*, 446 SW.2d 807, 815 (Mo. banc 1969), this Court noted that "[i]t is not necessary that the whole community or any large [part] of the community be benefited by the condemnation. It is sufficient if there is a benefit to any considerable number." Thus, the Court held that a zoning with compensation ordinance

that restricted all residences in a particular subdivision to single-family homes benefited a large number of property-owners in the subdivision and therefore met the public use criterion even though some property-owners were injured and no benefits accrued to those outside the subdivision. *Id.* at 816.

This Court has applied the same analysis in determining whether a proposed tax or bond issue serves a public purpose. In this area, a "primary effects" test is used "to determin[e] whether there is a sufficient public purpose behind a grant of public money." *Churchin v. Mo. Indus. Dev. Bd.*, 722 S.W.2d 930, 934 (Mo. banc 1987). Under the primary effects test,

> [i]f the primary object of a public expenditure is to subserve a public municipal purpose, the expenditure is legal, notwithstanding it also involves as an incident an expense, which, standing alone, would not be lawful. But if the primary object is not to subserve a public municipal purpose, but to promote some private end, the expense is illegal, even though it may incidentally serve some public purpose.

Id.

In *Churchin*, the Court struck down a statute allowing a state agency to issue tax credits for unpaid amounts of the industrial revenue bonds because the statute's primary effect was to benefit the bondholders, not the general public. *Id.* at 935. In *Moschenross v. St. Louis County*, 188 S.W.3d 13, 22-23 (Mo. App. E.D. 2006), however, the court (the same court that decided *Home Builders*) applied the primary effects test to hold that a

public bond issue to raise money for a new stadium for the St. Louis Cardinals served a public purpose because the "incidental private benefits did not take away from the primary purpose of the participation of the county and city in the financing, which was to increase conventions and sports activity in the areas."

Even under this line of analysis, the courts below could not properly decide this case by focusing on TRiSTAR's *motivation* in providing its funds for the project. As this Court's cases show, the proper course of analysis is to evaluate the distribution of the actual benefits of the improvements and determine whether a "considerable number" of the public would enjoy the benefits of the project, which clearly was the case here. Bridgeton's method of securing financing for the improvement – and TRiSTAR's purpose in providing the financing for them – is simply irrelevant.

D. Even if *Home Builders* created a new exception to the common-law rule that warranted adoption by this Court, Missouri-American could not avoid paying to relocate its facilities because the Taussig Road Project overwhelmingly benefits the public and affords virtually no private benefit to TRiSTAR.

In *Home Builders*, the Court of Appeals approved the reasoning of the California court in *Dame* that, "[h]aving found the common-law rule inapplicable" (because the project was privately undertaken, and the resulting dispute was between two private parties), the costs of facility relocation should be allocated under a "benefit analysis" to "those who are beneficiaries of the improvement." 784 S.W.2d at 292 (*citing Dame*, 191

Cal. App. 3d at 238). The *Home Builders* court justified requiring the private developers to pay for the facility relocation in that case because the "right-of-way improvements . . . primarily accomplish[ed] private-sector purposes, that is, providing convenience and security to owners, lessees, customers, and residents of the [developers'] projects." *Id.* at 291.

Unlike *Home Builders*, where the need for the road improvements was created by the developers' projects, and the roads were "expected to be used by the owners, lessees, customers, and residents of the [developments]," 784 S.W.2d at 289, the record evidence in the case at bar overwhelmingly shows that virtually no one associated with TRiSTAR's Park 370 development is expected to use Taussig Road. The explanation is simple: geography. TRiSTAR's Park 370 development is located in the City of Hazelwood, Bridgeton's northern neighbor. (A.378.) With very few exceptions, Park 370's patrons will gain access to the development by Route 370, the major east-west highway that runs just to the south of Park 370. (A.270, 297-98.) Given Taussig Road's location, and the fact that the population centers of the County lie west and east of Park 370, it is very unlikely that traffic to and from Park 370 will use Taussig Road. Indeed, the record includes the opinion of an expert traffic engineer that "Route 370 would act as the primary access route for Park 370," and that "relatively little . . . industrial park traffic would be added to Taussig Road." (A.293-94.) The record also contains a traffic study which concludes that only three percent of the total traffic associated with Park 370 will use Taussig Road. (A.270.)

Because TRiSTAR does not stand to benefit in any significant way from the Taussig Road improvements, and those improvements will benefit the public generally, the costs of relocating Missouri-American's facilities to make way for the Taussig Road Project should fall to the utility. *See Pine Belt Chevrolet, Inc. v. Jersey Cent. Power & Light Co.*, 626 A.2d 434, 444-45 (N.J. 1993) (allocating to the utility the cost of facility relocation made necessary by private developer's road-widening projects "imposed by [the State] on plaintiffs' [highway] access permits," because those projects "primarily benefited the public, not the plaintiffs," and "[l]iability for the costs of relocations necessitated by highway improvements that further the public welfare is a risk the utility companies run and a price they must pay for the privilege of locating within a public right-of-way.").

The fact that the Taussig Road Project may benefit a small percentage of the users of TRiSTAR's development does not mean that the Project as a whole does not serve a "governmental purpose." As in the eminent domain context, "the fact that a private company would also benefit from the use [does] not preclude finding the use to be a public one." *City of Kansas City v. Hon*, 972 S.W.2d 407, 413 (Mo. App. W.D. 1998). Instead, "[w]hen a legislative action performed for a public purpose also has a private benefit, Missouri [applies] the 'primary purpose' test for determining which effect will be decisive in the characterization of the legislative action." *J.C. Nichols Co. v. City of Kansas City*, 639 S.W.2d 886, 892 (Mo. App. W.D. 1982); *State ex rel. City of Jefferson v. Smith*, 154 S.W.2d 101, 102 (Mo. 1941) ("If the primary object of a public expenditure is to subserve a public municipal purpose, the expenditure is legal, notwithstanding it also

involves as an incident an expense, which, standing alone, would not be lawful.”). There can be no doubt that a project benefiting only three percent of the users of a private development (and, even then, only as members of the public) is one that *primarily* benefits the public.

The benefit analysis suggested in *Home Builders* as an exception to the common-law rule is logically unworkable. It is virtually impossible to measure the benefit that flows to the public from a public works project that will improve the safety and convenience of a dangerous, substandard road. Nor is it easy to imagine how such a benefit is to be compared to the benefit experienced by a private party, who may be acting for financial reasons, or even for altruistic or psychological reasons, that are difficult to predict or quantify. In such cases, the anticipated benefits are simply incommensurable. The court would need to discern each private party’s benefit from a municipal project, gauge whether, through taxes, financial incentives, or other creative financing, a private party participates in the funding, and then, if there is any benefit to a private party, rule that the project is really a non-governmental act. The inappropriateness and unworkability of the role assigned to the courts in such a scheme simply underscores the wrong-headedness and the errors inherent in trying to undertake this type of “public policy accounting.”

Here, the analysis is even more complicated because the Taussig Road project provides no direct benefit to TRiSTAR; the only benefit that TRiSTAR obtains from the Taussig Road Project is the authority to proceed with an entirely different project. Undoubtedly, TRiSTAR is receiving a benefit from the *government* of Bridgeton, but

TRiSTAR is not receiving any benefit from the Taussig Road Project itself. Focusing on this indirect benefit, rather than on benefits alleged to be gained directly from the project where the utility's facilities actually are located, will strain even further the courts' ability to act as public policy accountant.

In sum, summary judgment should be reversed. If the Circuit Court had properly analyzed the case as one involving a municipal road project, albeit one funded primarily by private assessments, it could not have granted summary judgment in favor of Missouri-American. In undertaking the Taussig Road Project, Bridgeton has exercised its "paramount right" to improve its streets, *Kansas City, St. Joseph and Council Bluffs Railway Company v. Morley*, 45 Mo. App. 304, 307 (1891), and there is no legal support for the Circuit Court's apparent conclusion that the use of non-public funding for a governmental road project automatically destroys the public necessity for the project. But even if one could put aside the fact that Bridgeton undertook the Taussig Road Project as a matter of public necessity, the grant of summary judgment still would be error. If *Home Builders* were interpreted so that it required the Circuit Court to allocate the costs of facility relocation to those who benefit from them, the overwhelming record evidence shows that TRiSTAR will not materially benefit from the Taussig Road Project and that the principal, indeed, overwhelming, benefit will go to the public. Consequently, even under a misstatement of the common law that allows an exception based on a benefits analysis, because of the clearly superior benefit which accrues to the public here, the common law obligates Missouri-American to bear the relocation costs.

II. The Circuit Court also erred in granting summary judgment in favor of Missouri-American because Missouri-American did not prove that it has an unqualified right to occupy the Taussig Road right-of-way and refuse to relocate its facilities, in that: (1) the grounds offered by the Circuit Court are insufficient to show such a right as a matter of law; (2) the 1902 County Franchise upon which Missouri-American relies could not grant the utility a right to occupy a right-of-way that belonged to Bridgeton, rather than to the County, at the time the first pipes were installed; and (3) even the County Franchise requires by its terms that the utility pay to relocate its facilities whenever the relevant governmental unit determines – in its sole discretion – that such relocations are necessary.

The Circuit Court's basis for upholding Missouri-American's unqualified right of occupancy – that Missouri-American has operated in the area for many years, and has sometimes obtained franchises from various governmental authorities – is insufficient as a matter of law to show that Missouri-American has the present right to occupy the Taussig Road right-of-way, let alone to show that it is entitled to refuse to move its facilities when requested to do so. By itself, Missouri-American's continuing occupation of Bridgeton property cannot establish its valid right to remain there.[12] Nor did

[12] Missouri statute has long precluded acquisition by adverse possession "to any lands given, granted, sequestered or appropriated to any public . . . use." RSMo § 516.090. *See City of Columbia v. Bright*, 79 S.W. 151, 155 (Mo. 1904) ("[S]ince [RSMo

Missouri-American even advance that position below, where it based its argument entirely on the 1902 County Franchise that the St. Louis County Court granted to the utility's predecessor.

According to Missouri-American, the 1902 County Franchise gave it a perpetual right to occupy the Taussig Road right-of-way. In its decision, the Circuit Court did not address Missouri-American's argument. Even if it had done so, however, the court could not have granted summary judgment based on the County Franchise. The County Franchise could not have given Missouri-American any right to occupy the Taussig Road right-of-way that could have survived the time, in 1956, when Bridgeton's annexation of the area removed it from the County's dominion and control, before Missouri-American ever had laid any facilities along the Taussig Road right-of-way. Finally, even if the County Franchise could be deemed to apply to this case, its express terms would require Missouri-American to relocate its facilities at its own expense whenever the relevant governmental body determines – in its sole discretion – that relocation is necessary.

---

§ 516.090 went into effect in 1865] no person can acquire title by adverse possession to a part of a public street."). Section 516.090 is "not concerned with the corporeal thing, the land; but with the incorporeal, a specified use of land." *Anson v. Tietze*, 190 S.W.2d 193, 196-97 (Mo. 1945). For those reasons, the statute applies equally to the acquisition of easements in public rights-of-way. The Circuit Court's conclusion that a longstanding occupation of a public right-of-way is sufficient to demonstrate a current right to occupy the right-of-way is contrary to Missouri law.

A. The grounds the Circuit Court gave for holding that Missouri-American has a right to occupy the Taussig Road right-of-way are insufficient to establish that right as a matter of law.

The Circuit Court's grounds for granting summary judgment in favor of Missouri-American are insufficient as a matter of law. The mere fact that Missouri-American and its predecessors "have existed as public utilities in St. Louis County for over one-hundred years," or have obtained some "[f]ranchises, easements and licenses . . . from various public authorities over the years" (A.171; L.F.219), is not sufficient to establish that Missouri-American has any *present* right to occupy the Taussig Road right-of-way, and to refuse to move its facilities to accommodate a needed roadway improvement, at least without proof of a specific franchise or agreement that remains in effect and so provides. Assuming that Missouri-American never had authority to lay and maintain its pipes on Bridgeton property, or that any such authority which previously existed has expired, Missouri-American's continued occupation of Bridgeton's right-of-way is unlawful and cannot provide any basis for asserting a present possessory interest. As this Court has held, an expired franchise agreement cannot establish a present right to occupy a public right-of-way. Thus, "when [a] city limits the life of the franchise granted to 20 years, as it must, and that period expires, the privilege of so using the city's public places comes to an end. The continued use is illegal." *McKittrick ex rel. City of California v. Mo. Utilities Co.*, 96 S.W.2d 607, 613 (Mo. 1936).

Nor did Missouri-American argue otherwise below. Instead, Missouri-American relied exclusively upon the 1902 County Franchise for its alleged entitlement to occupy

Bridgeton's right-of-way as a matter of perpetual right. That argument is unpersuasive, as we show below. (*See* pages 65-76, *infra*.) The only other argument that Missouri-American made below consisted of a single footnote asserting, in essence, that Bridgeton should be estopped from challenging the legality of Missouri-American's occupation of city property because of Bridgeton's "continued collection of Gross Receipts Taxes from Missouri-American." (A.154.) In Missouri, however, the doctrine of equitable estoppel is "generally not applicable" to cases involving municipal corporations and is only applied "in exceptional circumstances." *See Coalition to Pres. Educ. on the Westside v. School Dist. of Kansas City*, 649 S.W.2d 533, 539 (Mo. App. W.D. 1983) (*quoting State ex rel. Walmar Inv. Co. v. Mueller*, 512 S.W.2d 180, 184 (Mo. App. 1974)). Such exceptional circumstances do not exist here. Moreover, the Supreme Court expressly rejected this precise argument in *City of California*, stating: "We are at a loss to see how the mere imposition of a general property or income tax or of a sales tax could be construed as an admission that the business so taxed was a lawful one. . . . Whether this respondent was doing business in [the City of] California legally or illegally, it would still owe the state, county, and city a tax thereon." 96 S.W.2d at 618.

Therefore, the Circuit Court erred in granting summary judgment because the grounds upon which it relied fail as a matter of law.

B. Summary judgment cannot properly be based on Missouri-American's contention that the County Franchise affords it a present, unqualified right to occupy a Bridgeton municipal right-of-way.

In the Circuit Court, Missouri-American principally relied on the 1902 County Franchise for its purported authority to occupy the Taussig Road right-of-way, and to refuse the City's request that it relocate its facilities to permit the necessary improvement of Taussig Road. The Circuit Court did not analyze Missouri-American's argument, but even if it had, it could not have granted summary judgment against Bridgeton on this ground: the County Franchise simply does not afford Missouri-American a *present* right to locate its facilities on a roadway that belonged to Bridgeton, rather than the County, from the time Missouri-American laid its very first pipes there. Indeed, Missouri-American's own past actions belie its present litigating position.

In 1951, long before anyone laid pipes along the Taussig Road right-of-way, Missouri-American's predecessor negotiated and secured from Bridgeton a 20-year franchise, giving the utility the right to lay and maintain its facilities in the streets of Bridgeton as then "bounded, *and within any future extensions of [the City's] limits*." (A.244; emphasis added.) Indeed, the 1951 franchise recites that it was not the first franchise between Bridgeton and Missouri-American's predecessor, but that it followed, and superseded, a previous 20-year franchise the utility had obtained from Bridgeton in 1931. (A.243, 249.) But if Missouri-American were correct that the 1902 County Franchise already afforded it the right to occupy any area that was in the unincorporated part of St. Louis County in 1902 (regardless of its present status), there would have been no need to provide in the 1951 Bridgeton franchise for authority to lay or maintain facilities in any area that Bridgeton annexed after 1902, let alone areas that Bridgeton annexed after 1931 or 1935. *See Dixie Elec. Membership Corp. v. City of Baton Rouge*,

440 F.2d 819, 822 (5th Cir. 1971) (holding that a county franchise did not give the utility any rights against a later annexing city, in part because the application the utility made to the City of Baton Rouge "would have been a useless step if the [county] franchise of 1939 had been of continuing force and effect" after annexation).

In fact, Missouri-American's actions in twice obtaining a 20-year franchise from Bridgeton simply reflect reality: the County Franchise did not, and could not, grant Missouri-American a right to lay pipes a half century later on a road which, by that time, belonged to Bridgeton, not the County. The County Franchise did not by its terms grant Missouri-American's predecessor any right as against a later annexing city, and even if it had purported to do so, the County would have had no authority to grant such a right. Finally, even if it did apply, the County Franchise explicitly requires Missouri-American to pay to relocate its facilities.

1. By its terms, and according to Missouri law, the County Franchise is limited in geographical scope to areas that remain unincorporated parts of St. Louis County, and the County Franchise therefore no longer applied to Taussig Road by the time Missouri-American first laid its pipes there.

The County Franchise provides no basis for the granting of summary judgment because, both by its own terms and by operation of Missouri law, it affords Missouri-American only a right to lay and maintain pipes in rights-of-way that remain in unincorporated areas of St. Louis County, not in areas that are within the limits of any

city. Because Bridgeton acquired Taussig Road by annexation in 1956, and thereby terminated the County's jurisdiction over the road, the County Franchise cannot be the source of any present right that Missouri-American may have to occupy Bridgeton's Taussig Road right-of-way.

The County Franchise grants the Company's predecessor "authority and license" to "lay and maintain mains and pipes" only in rights-of-way that are "public highways . . . *of the County of St. Louis*." (A.341; emphasis added.) But a road ceases to be a public highway "of the County of St. Louis" when it is annexed and incorporated into a city. Thus, when a road over which a county has control "by the extension of the corporate limits of some city comes within such city . . . the control over such highway passes by virtue of the state law from one political subdivision of the state to the other accordingly as the highway is in the one or the other." *Duckworth v. City of Springfield*, 184 S.W. 476, 478 (Mo. App. 1916). "The jurisdiction of the city attaches and that of the county ceases when rural or county territory is annexed to a municipality." *State ex rel. Audrain County v. City of Mexico*, 197 S.W.2d 301, 303; *see also Blair v. City of Chicago*, 201 U.S. 400, 489 (1906) ("Upon annexation there ceased to be any town or village authorities entitled to the benefits of the contract or authorized to demand or receive them, and it could not have been understood that the grant could continue, discharged of the obligation annexed to it. . . . The ordinances of the city extended over the annexed territory immediately upon annexation."); 2A McQuillin, THE LAW OF MUNICIPAL CORPORATIONS § 7.46.70 (3d ed., rev. vol. 1996) ("On change of municipal

limits the control over highways passes by virtue of law from one political subdivision of the state to the other accordingly as the highways are in the one or the other.”).

As Missouri-American acknowledged below, “[o]n September 5, 1956, the City of Bridgeton enacted an ordinance which annexed Taussig Road itself and made Taussig Road and the property adjoining it part of the city of Bridgeton.” (A.47; L.F.49.) *See* A.48; L.F.50 (“[A]fter the September 5, 1956 annexation by the City . . . Taussig Road [came] within the city limits of the City of Bridgeton.”) Thus, when Bridgeton annexed Taussig Road and the surrounding area in 1956 (A.250-53), Taussig Road became a public highway of Bridgeton, and accordingly ceased to be a public highway “of the County of St. Louis.” Because the County Franchise applies only to “public highways . . . of the County of St. Louis,” Missouri-American had no authority under the County Franchise to “lay [or] maintain mains and pipes” in Bridgeton’s Taussig Road right-of-way after 1956, and its continued occupation of municipal property cannot be authorized by the County Franchise.[13]

---

[13] Arguably, a utility might have some post-annexation right to maintain facilities already put in place, but not to expand its facilities or service beyond what existed at annexation. *See, e.g.*, *Mo. Pub. Serv. Comm’n v. Platte-Clay Elec. Coop.*, 407 S.W.2d 883 (Mo. Div. 1 1966). *But see McKittrick ex rel. City of California*, 96 S.W.2d at 613 (holding that there is no right to occupy a right-of-way once franchise has expired). But that rule has no application here because no facilities had been placed along Taussig Road prior to annexation.

That the County Franchise was not intended to apply to areas subsequently annexed by a city is further evidenced by the fact that Missouri-American's authority to lay pipes under that agreement is predicated on the granting of approval by a county body which could not conceivably have authority, as a matter of law, to grant approval with respect to activities in an area which already had passed by annexation to the jurisdiction of another governmental body. The County Franchise provides that "before laying any main or pipe[, a] map showing the location and size thereof shall be filed with the County Clerk and the location of said pipes upon any portion of the public highways shall first be approved by the County Court of St. Louis County." (A.336.) But the jurisdiction of the former County Court (or any other county body) over Taussig Road necessarily "cease[d] when [Taussig Road was] annexed to a municipality." *City of Mexico*, 197 S.W.2d at 303.

The same would be true even if the County Franchise were not explicitly limited to unincorporated areas. That is the case because, as a matter of Missouri law, a county franchise no longer applies to an area annexed by a city. In *State ex rel. St. Joseph Water Co. v. Eastin*, 192 S.W. 1006 (Mo. banc 1917), this Court held that "the annexation . . . of territory outside the city limits [does] not have the effect of abrogating *individual contracts* made by [a] water company before annexation, *with private consumers* residing in such annexed territory." *Id.* at 1009 (emphasis added). However, this Court was careful to distinguish that holding from the rule it explained would apply in cases in which the water company claims rights (as here) under "a franchise, contract, or ordinance, with either the county in which the annexed territory lay before annexation, or

with the town itself which was annexed." *Id.* In such cases, as the Court stated in *Eastin*, upon annexation, "the contract of the utility company with the *absorbed* town [or the county] . . . was abrogated." *Id.* at 1008 (emphasis in original).

Eastin's rule that county franchises apply only to areas that remain unincorporated is consistent with the law in other states. *See Dixie Elec.*, 440 F.2d at 822 ("[T]hose accepting [county] franchises did so with knowledge of the right of municipalities to annex and thereafter to control the streets and other public thoroughfares within the annexed areas," and thus "Dixie has suffered no impairment of contract, [nor] has it been deprived of any property without due process of law."); *Peterson v. Tacoma Ry. & Power Co.*, 111 P. 338, 342 (Wash. 1910) (cited with approval in *Eastin*) (holding that a railway franchise granted by a county "died with annexation, and the right to operate must be held to be amenable to the will of the constituted authorities of the [annexing] city"). *See also Stillings v. City of Winston-Salem*, 319 S.E.2d 233, 237 (N.C. 1984) (holding that exclusive garbage collection franchises issued by a county "terminated and the police power of the City became operative" by virtue of "the annexation of the property in question"); *Calcasieu Sanitation Serv., Inc. v. City of Lake Charles*, 118 So. 2d 179, 180 (La. Ct. App. 1960) (holding that an "exclusive franchise granted by the garbage district when the area was still outside of the city limits" does not remain in force after annexation because "the [franchise] was entered into . . . subject to the [statutory] right of the city and the inhabitants to annex portions of the area included in the garbage district"); 2A McQuillin, THE LAW OF MUNICIPAL CORPORATIONS § 7.46.40 (3d ed., 1996 rev. vol. 1996) ("[I]f the power of a franchise as granted by a county extends to all

areas of the county not within a municipality, the annexation of territory by a municipality may work to exclude the rights of the franchisee in that area.”).

The rule in *Eastin* is also consistent with Missouri’s delegation to cities, towns and villages of the primary responsibility for regulating roads within their respective jurisdictions. Thus, by statute, “*[a]ny city*” may “by ordinance authorize *any person*, or *any [water] company* . . . to excavate for, install, and maintain water mains . . . and to maintain and operate the same along, across or under any of the public roads . . . within such city . . . for a period of twenty years or less.” RSMo § 71.520 (2000) (emphasis added); *see* RSMo § 71.530 (2000) (“*Any city*, town or village may contract with *any corporation* organized under the laws of Missouri, or doing business as a foreign corporation in the state of Missouri, for the purpose of supplying it with gas, electricity or water.” (emphasis added)). Indeed, Bridgeton’s Charter gives the City Council “power by ordinance” to “[f]urnish all public services; purchase, hire, own, lease, construct, maintain, and operate public utilities,” as well as the power to “grant public utility franchises and permits and regulate the exercise thereof and establish the fees for such franchises and permits.” (A.236-37.) In exercising this delegated authority, Bridgeton, like all cities, acts as “a miniature state.” *City of Mexico*, 197 S.W.2d at 304 (internal quotation marks omitted).

Unlike cities, counties generally are “involuntary quasi public corporations” that “come into existence without regard to the wishes or consent of their respective inhabitants,” and thus “do not have political and legislative powers for local self-government” and “rank low in the grade of corporate existence.” *Id.* at 303. Because

counties generally have not been delegated the police powers granted to municipalities, it "is inconsistent with the purposes of their creation that counties exercise jurisdiction over [cities'] affairs," particularly in the cities' "exercise of governmental police power." *Id.* Counties "have not been delegated authority to regulate traffic over city streets within their boundaries." *Id.* at 304. It is for this reason that St. Louis County's statutory authority at the time it granted the 1902 County Franchise was expressly limited to public highways "*outside of any incorporated city, town or village*." RSMo § 9431 (1899) (emphasis added).[14]

Consequently, Missouri-American's argument that the County had express or implied authority in 1902 to grant Missouri-American a franchise to use public streets

---

[14] It was only in 1945, when Missouri adopted its present Constitution, that counties became entitled to adopt a "charter for their own government" making it a "body corporate and politic." Mo. Const. art. VI, § 18(a). And it was only upon the adoption of such a charter in March 1950 that St. Louis County was authorized "to exercise legislative power pertaining to public health, police and traffic, . . . and planning and zoning," which are powers "ordinarily vested in municipal corporations." *State on Info. Dalton ex rel. Shepley v. Gamble*, 280 S.W.2d 656, 660 (Mo. banc 1955); *see also id.* (explaining that unlike other counties, "charter counties are endowed with some of the powers and functions of a municipal corporation in the area outside incorporated cities"); *City of Mexico*, 197 S.W.2d at 303 ("counties rank low in the grade of corporate existence").

within the boundaries of a later annexing city is untenable, even if the street in question was in an unincorporated area in 1902. Indeed, the conflict between the dead hand County Franchise and Bridgeton's present exercise of its powers as a "miniature state" to control its municipal rights-of-way is the very "[d]ual authority [that] tend[s] to create confusion" and which Missouri law seeks to avoid. *City of Mexico*, 197 S.W.2d at 303.

As we have noted (*see* page 69, note 13, *supra*), the analysis might arguably be different if Missouri-American or its predecessor had already installed and maintained pipes in Taussig Road prior to annexation. But that analysis would not help Missouri-American in this case, because it is uncontested that Missouri-American's predecessor did not install pipes in the Taussig Road area until after annexation had brought the road within Bridgeton's jurisdiction. Missouri-American's statement of uncontroverted facts states that most of the facilities under and along Taussig Road were installed in the 1960s and 1970s. (A.46; L.F.51; *see also* A.22 (stating that the "majority of pipes located along Taussig Road were installed in the 1960s and 1970s").)

In any event, even when the legislature has seen fit to "grandfather" franchise rights concerning existing facilities, it has not given the utility authority to expand its services without the annexing city's approval. For example, the Missouri legislature adopted a specific statute to provide that the right of electric cooperatives (consumer-owned membership companies serving "rural areas," *i.e.*, unincorporated areas with 1,500 or fewer inhabitants) to serve their members will continue after the relevant area has been annexed by a town or city. *See* RSMo § 394.080(1) (2000). Under this statute, "when a rural area served by a cooperative is annexed into a city, the cooperative has the

authority to continue selling electricity to its members in the formerly rural area." *Farmers' Elec. Coop. v. Mo. Dept. of Corrections*, 977 S.W.2d 266, 270 (Mo. banc 1998). However, the cooperative's "grandfather rights" do not permit it to extend its services to new customers after annexation. "Once the land [is] annexed, [the cooperative utility] no longer [has] the right to provide electric services to any new structures built on the land," and any contract permitting the expansion of the utility's services after annexation "became illegal as it applied to any new structures built on the land after annexation." *Id.* at 271; *see St. Joseph Light & Power v. United Elec. Coop.*, 43 S.W. 3d 330, 334 (Mo. App. W.D. 2001) ("[T]he [statutory] grandfather provisions . . . provide that a rural electric cooperative may continue to provide service to structures it was serving prior to annexation, but . . . the cooperative does not have the right to provide electricity to any new structures built after the date of annexation.").

Here, all of Missouri-American's services along Taussig Road were installed after Taussig Road became a Bridgeton right-of-way in 1956. (*See* pages 15-16, *supra.*) Thus, even if the approach used in the electric cooperative statute applied here, Missouri-American's installation and maintenance of pipes and hydrants in the Taussig Road right-of-way could not be authorized by the County Franchise, since none of the relevant pipes and hydrants were in place at the time the former county road was annexed by Bridgeton. After annexation, Missouri-American was required by statute to obtain Bridgeton's permission to install its facilities. *See* RSMo § 393.010.

In sum, the Circuit Court's grant of summary judgment cannot be upheld on the basis of the County Franchise. By its terms, the County Franchise applies only to "public

highways . . . of the County of St. Louis," and Taussig Road has been a Bridgeton street since before Missouri-American's predecessors began using it. Similarly, the County Franchise cannot continue to operate according to its terms with respect to Taussig Road because the County Court had no continuing jurisdiction or authority over the road once it was annexed by Bridgeton.

2. Under the terms of the 1902 County Franchise that Missouri-American invokes, it would not be entitled to compensation for relocating its facilities in any event.

Even if Missouri-American were correct in asserting that the 1902 County Franchise is the source of whatever authority it now has to continue to occupy the Taussig Road right-of-way with its pipes, mains, and hydrants, Missouri-American still would be obligated to pay for relocating its facilities. That is the common-law rule, and it would apply even if the 1902 County Franchise were silent. But the County Franchise is not silent; it makes clear that Missouri-American, in exchange for the privilege of using the public highways, must pay to relocate its facilities whenever the governmental owner of a relevant right-of-way determines in its sole discretion that road improvements, and any consequent pipe relocations, are necessary in the public interest.

The County Franchise expressly provides that "the determination by the County Court of the necessary repairs or improvements along the public line or lines of said Company, its successors or assigns, shall be conclusive and binding on said Company, its successors and assigns." (A.338.) Clearly, the costs of such "necessary repairs or

improvements" were to be borne by the Company under the County Franchise. That fact is further evidenced by the continuation of the same sentence, which provides that "the amount of money to be paid for work done and materials furnished in making repairs . . . shall not exceed the amount paid by the County . . . for similar kind of work done and materials furnished in places adjoining where said repairs are being made." (A.338.) In other words, the Company may itself perform the work deemed necessary by the governmental body, or it may, if it chooses, allow the governmental body to arrange for the work to be done, in which case the governmental body may recover its costs from the Company.

This provision is also consistent with another provision of the franchise, which relates to compensation for repairs made necessary because of damage done to streets by the Company's "occupancy of the public highway." (A.338.) Under that provision, the Company must be given 10 days in which to make the repairs deemed necessary by the governmental body. If the Company does not do so, the governmental body may make the repairs, and the Company will be liable for the costs. To this end, the Company must keep $1000 on deposit with the County, "to be drawn upon by order of the County Court to pay for making repairs to the damage done," and the Company is obliged to "supply the deficit occasioned by any disbursement from [that] fund . . . so that there shall always be the sum of [$1000] in the Treasury of the County of St. Louis, for the use hereinabove mentioned." (A.338.) As these provisions make clear, the County Franchise requires that the Company must pay the amount that the County customarily pays for any "repairs

or improvements along [its] public lines" that the County – in its sole judgment – deems necessary.

Thus, if the County Franchise were deemed to apply to this case, it would also necessarily follow that Bridgeton has succeeded to the jurisdiction and powers of the County Court as to territory annexed from the County. That is so because the County Court had these powers by virtue of the fact that the County had dominion over the roads in unincorporated St. Louis County. When Taussig Road was annexed by Bridgeton, that dominion necessarily passed to Bridgeton, as we have shown. (*See* pages 67-76, *supra.*) At that point, Bridgeton was empowered, to the same extent as the County Court previously had been, to make "conclusive and binding" determinations with respect to necessary changes to Missouri-American's pipes and other facilities. (*See* page 76, *supra*.) Bridgeton has effectively exercised that authority in this case: the City Council has determined that the Taussig Road improvements are "public governmental acts in the public interest and safety," and the Mayor has expressly averred that the "repairs and expansion of Taussig Road are being done in the public interest and for a governmental purpose." (*See* page 17, *supra*; A290.)

At all events, Missouri-American cannot prevail by arguing that the Taussig Road Project is not a "governmental act" undertaken for a "governmental purpose," because this argument is foreclosed by the very terms of the County Franchise that Missouri-American invokes. As the words of the County Franchise make clear, Missouri-American's predecessor, when it accepted the County Franchise, specifically relinquished

any right to challenge any such determination. Thus, Missouri-American cannot justify its refusal to move its pipes to accommodate the Taussig Road Project.

In sum, the granting of summary judgment was improper because Missouri-American's purported right to occupy the Taussig Road right-of-way is based exclusively on the 1902 County Franchise, which cannot be construed to give Missouri-American any right to occupy Bridgeton's Taussig Road right-of-way after the 1956 annexation. Moreover, even if the County Court's 1902 County Franchise were still valid with respect to property within the boundaries of a successor jurisdiction such as Bridgeton, the County Franchise would not afford Missouri-American with any basis for the relief it seeks. The County Franchise explicitly requires Missouri-American to pay to alter its facilities in any way that the relevant governmental entity, in its sole discretion, deems necessary. Summary judgment should be reversed for this reason as well.

III. The Circuit Court erred in granting summary judgment in favor of Missouri-American with respect to facilities located on formerly private property because Missouri-American was obliged to relocate those facilities at its own expense, in that Bridgeton has title to the property and has exercised its common-law and contractual rights to revoke Missouri-American's authority to occupy that property.

The grant of summary judgment cannot stand for an additional reason: the Circuit Court granted summary judgment without expressly addressing the question whether Missouri-American must pay to relocate those facilities that are located on property that

was private property before Bridgeton acquired it for the Taussig Road Project. If the Circuit Court had addressed this issue, it could not have granted summary judgment in favor of Missouri-American. Missouri-American must be compensated for the cost of relocating facilities located within written easements on such property, but it is not entitled to compensation with respect to facilities located pursuant to the so-called "License for Underground Facilities" granted by the Norfolk and Western Railway Company in 1967 or with respect to facilities that were located on the property without either an easement or a license.

A. The Norfolk and Western "License for Underground Facility" explicitly provides that the utility's right to maintain its pipes in a particular place may be revoked at the will of the grantor, and Bridgeton, as successor to the grantor, has properly exercised that right.

Some of Missouri-American's facilities are located on property which Bridgeton now owns, and which Missouri-American claims to have a right to occupy under a 1967 "License for Underground Facilities" (the "License") granted by Bridgeton's predecessor-in-interest, the Norfolk and Western Railway Company ("Norfolk"), to Missouri-American's predecessor. (A.358-62.) The License, like any other license, grants Missouri-American "permission [only] to do an act or a series of acts" on the land, and, most important, may be revoked "at the mere will or desire" of the licensor. *Wilson v. Owen*, 261 S.W.2d 19, 25 (Mo. banc 1953); *Annin v. Lake Montowese Dev. Co.*, 759

S.W.2d 240, 241 (Mo. App. E.D. 1988). Bridgeton, as successor to Norfolk, has exercised its absolute, unilateral right to revoke the License (A.334), although Bridgeton remains willing to grant Missouri-American a further license to move its pipes to alternative locations. (A.2.; L.F.7.)

Notwithstanding the title and precise terms of the License, Missouri-American claims that the License is actually an easement, which, according to Missouri-American, is irrevocable. Although "some 'licenses' are in fact easements," *Annin*, 759 S.W.2d at 241, the License in this case is just what it purports to be – a license revocable at Bridgeton's "mere will or desire." Indeed, the License is not only called a "license" in its title, but it provides in its terms that "the Railway . . . grants unto the Water Company the *license* and permission" to maintain a water pipeline on the Railway's property, and the License repeatedly refers to the rights granted to Missouri-American as a mere "license." (A.359-60; emphasis added.)

Moreover, the License specifically provides that if:

> at any time . . . the Railway shall desire to . . . *make any changes whatever in, to, upon, over or under* [its land,] then the Water Company shall, at its own cost and expense . . . make such changes in the location or construction of said pipe line as in the judgment of the Chief Engineer of Railway may be necessary to accommodate any future construction, improvements or changes of the Railway.

(A.358; emphasis added.) By its terms, the License expressly "inure[s] to the benefit of [Norfolk's] successors and assigns," (A.360), and therefore Bridgeton stands in the same shoes as Norfolk with respect to its right to demand that Missouri-American relocate its pipes "at its own cost and expense," whenever the relocation is deemed by Bridgeton to be "necessary to accommodate . . . future construction, improvements or changes" on the land.[15]

The Circuit Court did not expressly address Bridgeton's rights under the License, although it granted summary judgment to Missouri-American on all counts. Because Missouri-American is plainly required by the terms of the License to pay to move some of its pipes, that portion of the court's summary judgment decision also clearly warrants reversal.

---

[15] Missouri-American argued below that Bridgeton's power to require it to move its pipes applies only in limited circumstances, namely "only when changes are to be made to the railway." (A.165; L.F.167.) However, the License refers to the "Railway," meaning the Railway Company as an entity, not the railroad tracks. Indeed, it is only by using the word "railway" (the word used in Missouri-American's brief), rather than the word "Railway" (the word used in the License), that Missouri-American's argument could make any sense. But it is the License, not Missouri-American's brief below, that is controlling here. Bridgeton, as the assignee of the Railway, has that entity's full power to demand that Missouri-American move its pipes for any purpose Bridgeton "desire[s]."

B. Summary judgment also must be reversed with respect to those facilities not covered by any easement or license on formerly private land outside the Taussig Road right-of-way.

A significant portion of at least one pipe section that must be relocated to accommodate the Taussig Road Project is on private property now belonging to Bridgeton, but not covered by any written easement or license. The eastern portion of this pipe section – identified as Taussig Road STA 186+00RT to 186+00LT on the map produced by Project engineers Stock & Associates (*see* Pl. Ex. 14 (Exhibit A thereto)) – falls outside the existing right-of-way on what is labeled Parcel 21, and it is not within any easement or covered by any license. The pipe continues west and crosses the existing right-of-way. At its western end, the pipe again falls outside the right-of-way on Parcel 22, where it also occupies land not with any easement or covered by any license. (*See id.*)

Bridgeton established below that it has title to these parcels, and therefore has the right to order Missouri-American, at its own expense, to relocate facilities in these parcels. (A.127-28; L.F.129-30.) Missouri-American simply ignored that showing. Given Missouri-American's failure to produce any evidence to show that it has any right to occupy these parcels, the grant of summary judgment in its favor cannot stand. *See Macios v. Hensley*, 886 S.W.2d 749, 752 (Mo. App. E.D. 1994) ("Plaintiffs . . . were operating outside the scope of the easement . . . . Under an ejectment theory defendants are entitled to possession and damages.").

CONCLUSION

The Circuit Court erred in granting summary judgment in favor of Missouri-American, and the judgment below should therefore be reversed.

Respectfully submitted,

CITY OF BRIDGETON

By: _____
One of Its Attorneys

Robert Schultz # 35329
SCHULTZ & LITTLE, LLP
640 Cepi Drive, Ste. A
Chesterfield, MO 63005
(636) 537-4645
(636) 537-2599 (Fax)
rschultz@sl-lawyers.com

Carl Hillemann # 35230
LASHLY & BAER, P.C.
714 Locust Street
St. Louis, MO 63101
(314) 621-2939
(314) 621-6844 (Fax)
chillemann@lashlybaer.com

Barry Sullivan
(admitted *pro hac vice*)
Gabrielle Sigel
(admitted *pro hac vice*)
JENNER & BLOCK LLP
330 North Wabash
Chicago, IL 60611
(312) 222-9350
(312) 923-2752 (Fax)
bsullivan@jenner.com
gsigel@jenner.com

Dated: September 21, 2006

CERTIFICATE OF COMPLIANCE

The undersigned certifies pursuant to Supreme Court Rule 84.06(c) that (1) this brief includes the information required by Rule 55.03; (2) the brief complies with the limitations contained in Rule 84.06(b); and (3) the brief contains 19,505 words (exclusive of the cover, certificates of service and compliance, signature blocks, and tables of contents and of authorities) as calculated by Microsoft Word 2002, the software used to prepare the brief.

The undersigned further certifies that a disk containing an electronic copy of the brief, in compliance with Supreme Court Rule 84.06(g), has been scanned for viruses, and is virus-free.

By: _____
Attorney for Appellant City of Bridgeton

Robert Schultz # 35329
SCHULTZ & LITTLE, LLP
640 Cepi Drive, Ste. A
Chesterfield, MO 63005
(636) 537-4645
(636) 537-2599 (Fax)
rschultz@sl-lawyers.com

Carl Hillemann # 35230
LASHLY & BAER, P.C.
714 Locust Street
St. Louis, MO 63101
(314) 621-2939
(314) 621-6844 (Fax)
chillemann@lashlybaer.com

Barry Sullivan
(admitted *pro hac vice*)
Gabrielle Sigel
(admitted *pro hac vice*)
JENNER & BLOCK LLP
330 North Wabash
Chicago, IL 60611
(312) 222-9350
(312) 923-2752 (Fax)
bsullivan@jenner.com
gsigel@jenner.com

Dated: September 21, 2006

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 84.07(a), the undersigned certifies that two copies of this brief and appendix, along with a disk containing an electronic version of the brief complying with Supreme Court Rule 84.06(g), were served upon Respondent Missouri-American Water Co.'s counsel Carl J. Pesce by delivery on September 21, 2006 to UPS for next day delivery.

Attorneys for Missouri-American
Water Co.

Carl J. Pesce #39727
Paul D. Lawrence #53202
THOMPSON COBURN, L.L.P.
One US Bank Plaza
St. Louis, Missouri 63101
(314) 552-6000

By: _____
Attorney for Appellant City of Bridgeton

Robert Schultz # 35329
SCHULTZ & LITTLE, LLP
640 Cepi Drive, Ste. A
Chesterfield, MO 63005
(636) 537-4645
(636) 537-2599 (Fax)
rschultz@sl-lawyers.com

Carl Hillemann # 35230
LASHLY & BAER, P.C.
714 Locust Street
St. Louis, MO 63101
(314) 621-2939
(314) 621-6844 (Fax)
chillemann@lashlybaer.com

Barry Sullivan
(admitted *pro hac vice*)
Gabrielle Sigel
(admitted *pro hac vice*)
JENNER & BLOCK LLP
330 North Wabash
Chicago, IL 60611
(312) 222-9350
(312) 923-2752 (Fax)
bsullivan@jenner.com
gsigel@jenner.com