In the Missouri Court of Appeals
Eastern District

DIVISION FOUR

ST. CHARLES COUNTY, MISSOURI	)	No. ED93983
	)	
Plaintiff/Respondent,	)	
	)	Appeal from the Circuit Court
	)	of St. Charles County
v.	)	Case Number: 0811-CV08506
	)	
LACLEDE GAS COMPANY,	)	Honorable Jon A. Cunningham
	)	
Defendant/Appellant.	)	
	)	Filed: February 8, 2011

Introduction

At issue in this case is whether Laclede Gas Company (Laclede) or St. Charles County (County) should bear the expense of Laclede moving its utility lines when the County is making improvements to a public road. County and Laclede both argue that the other should pay to move the utility lines. The trial court granted County's motion for summary judgment and denied Laclede's motion for summary judgment. Laclede appeals.[1] The judgment of the trial court is affirmed. Because the issues involved are of general interest and importance, the case is ordered transferred to the Missouri Supreme Court. Rule 83.02.

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[1] Laclede's motion to supplement the record on appeal is granted and all other motions filed by the parties are denied.

Factual and Procedural Background

County filed a petition for declaratory judgment, alleging the following facts, that were admitted in an "Answer and Affirmative Defenses" filed by Laclede. County is a political subdivision of the State of Missouri and is a charter county. Laclede is a Missouri corporation that provides distribution of natural gas. County is planning to widen and improve a section of Pitman Hill Road in the County for a project known as the "Pitman Hill Road Improvement Project, Phase II" (Project). Laclede has existing utility lines installed along the Project corridor that need to be moved to accommodate the Project. Laclede's utility lines that require relocation are within areas noted as dedicated public streets on five recorded subdivision plats: Muirfield Plat One, Muirfield Plat Two, Muirfield Plat Three, Crosshaven Estates, and The Summit at Whitmoor. These plats contain language dedicating their depicted streets and roadways for public use, and then designate or establish the streets as an "utility easement" or "utility easements" for the various purposes of sanitary sewers, storm sewers, gas lines, water lines, electric lines, telephone lines and cable lines.[2] County notified Laclede, as well as

[2] None of the subdivision plats indicate that Laclede or County paid for any property interest they obtained. The dedication language is similar for the five plats. For example, the dedication language contained in Muirfield Plat One and considered by the trial court reads, in pertinent part, as follows: "MUIRFIELD DEVELOPMENT CORPORATION, hereby designates the streets and roadways shown on the plat of 'MUIRFIELD PLAT ONE' the east 15 feet of Pitman Hill Road, 30 feet wide, the 15 foot wide dedication strip along the east line of Pitman Hill Road, 30 feet wide, the 20 foot wide dedication along the south line of Towers Road, 40 feet wide, the irregular shaped parcel along the north line of Towers Road, 40 feet wide, together with all cul-de-sacs and roundings located at the streets intersections which for better identification are shown cross hatched on this plat, as public streets and roadways, and covenant and agree that County acceptance of said streets and roadways shall not be petitioned until the streets and roadways are improved in such manner as to comply with the required improvements section of Rules of Land Subdivision for St. Charles County, Missouri on November 2, 1959, and amendments thereto, and this covenant further designates these streets as utility easements for the purpose of sanitary sewers, gas lines, water lines, and as easements for electric powerlines, telephone lines and cable television lines.

All easements shown on this plat, unless designated for other specific purposes, are hereby dedicated to St. Charles County, Missouri, Missouri Cities Water Company, St. Charles Gas Company, Union Electric Company, Southwestern Bell Telephone Company, Duckett Creek Sewer District (for sanitary sewers only,) and to their successors and assigns as their interests may appear for the purposes of public utilities and sewer facilities, including cable television . . .."

other utility companies, of the Project plan and the need for the companies to relocate certain utility facilities. Thereafter, Laclede demanded reimbursement for its estimated $120,000.00 cost to relocate its utility lines.

In the prayer of its petition, County requested that the court declare that the subdivision plats had dedicated their depicted streets or roadways to County without having concurrently dedicated independent utility easements to Laclede. County also requested that the court declare that Laclede was obligated to relocate its respective utility lines from the areas dedicated as public streets or roads at no cost to County.

Laclede filed a motion for summary judgment. County also filed a motion for summary judgment, submitting the affidavit of County Highway Manager Christopher Bostic (Bostic Affidavit) as a supporting exhibit. Bostic attested that County was planning to widen and improve a section of a public road known as Pitman Hill Road, that the planned Project improvements were necessary to improve public safety and convenience for road users, and that the Project required certain Laclede utility lines located within areas dedicated as public streets or roadways to be relocated. Bostic also attested that Laclede had complied with a 2003 request by County to relocate Laclede utility facilities from one of the areas designated as a public street in Muirfield Plat One to accommodate another County road improvement project, and had done so without requesting or receiving reimbursement for its relocation costs. Bostic further attested as to past conduct of Laclede and County in connection with other relocation requests in similar plats.

Laclede filed a Motion to Strike the Bostic Affidavit, which the trial court denied. Thereafter, Laclede filed the affidavit of Kent A. Thaemert (Supplemental Thaemert

Affidavit). In this affidavit, Thaemert addressed and contradicted portions of the Bostic Affidavit regarding past conduct of Laclede.

The trial court entered its judgment and found as follows. County was in the process of making improvements to Pitman Hill Road. Laclede and other utilities have utility lines within the Pitman Hill right-of-way. These utility lines would need to be moved in certain areas for the road improvements to be completed, and County refused Laclede's request to be compensated for the costs of relocating the lines. Laclede had not asked for reimbursement for relocating from within the same or similar areas in the past. The subdivision plats provided for the dedication of public streets or roadways in the concerned areas,[3] and these plats also contained language, that "further designat[ed]" or established the streets or roads as utility easements dedicated to various utility companies. "[P]ursuant to RSMo. 445.070 and the doctrine of merger, title to the utility easements vested in the County, and as subordinate uses these easements merged into the County's title to the dominant use of a public road."[4] The subdivision developer could not have created some lesser class of public road that County itself had no power to create because "[t]o permit such a result would be to purposely circumvent the government's lawful authority over its roads, 'the exercise of which is necessary for the public welfare and the preservation of public safety.'"

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[3] "The term dedication is properly applied to the creation of easements in favor of the general public." Anderton v. Gage, 726 S.W.2d 859, 862 (Mo. App. 1987).

[4] Section 445.070 RSMo 2000 provides, in part, "2. Such maps or plats of such cities, towns, villages and additions made, acknowledged, certified and recorded, shall be a sufficient conveyance to vest the fee of such parcels of land as are therein named, described or intended for public uses in such city, town or village, when incorporated, in trust and for the uses therein named, expressed or intended, and for no other use or purpose. 3. If such city, town or village shall not be incorporated, then the fee of such lands conveyed as aforesaid shall be vested in the proper county in like trust, and for the uses and purposes aforesaid, and none other."

The trial court further found as follows. The most reasonable construction of the subdivision plats' dedication language was that the developer intended for the subdivision residents to enjoy the full benefits of public roads and this would not be possible unless County was free to exercise its normal police powers over the roads. The subdivision plats each contained unequivocal dedication language creating public roads. This language preceded any language regarding utility easements, and as between the two, the public-road dedication was the primary consideration. Laclede would prevail in the matter only if it had held title to an easement before County obtained its rights in the property. Utility facilities placed within public roads are subject to the general rule that the utility must relocate its facilities at its own expense when changes are required by public necessity, public convenience, or public security. The Missouri Supreme Court has adopted and affirmed this general rule.[5] The past conduct of Laclede and County regarding another area depicted on one of the subdivision plats, as well as their past conduct with respect to several similarly dedicated areas was consistent with the general rule of utility relocation and County's general police powers.

The trial court granted County's motion for summary judgment and denied Laclede's motion for summary judgment. Laclede appeals from the trial court's judgment.

Standard of Review

This court's review of the trial court's grant of summary judgment is *de novo*. Burns v. Smith, 303 S.W.3d 505, 509 (Mo. banc 2010); ITT Commercial Finance Corp. v. Mid-America Marine Supply Corp., 854 S.W.2d 371, 376 (Mo. banc 1993). We will

[5] The trial court cited City of Bridgeton v. Missouri-American Water Co., 219 S.W.3d 226 (Mo. banc 2007) and Union Electric Co. v. Land Clearance for Redevelopment Auth. of St. Louis, 555 S.W.2d 29, (Mo. banc 1977).

affirm where the moving party established the absence of any genuine issue of material fact and its right to judgment as a matter of law. Rule 74.04(c)(4); ITT Commercial Finance Corp., 854 S.W.2d at 380. Further, the trial court's grant of summary judgment may be affirmed under any theory supported by the record. Burns, 303 S.W.3d at 509; ITT Commercial Finance Corp., 854 S.W.2d at 387-88.

Discussion

Point I

In its first point, Laclede acknowledges that County has the power to require relocation of the utility lines to construct improvements to Pitman Hill Road. Laclede asserts that "this appeal presents the constitutional question whether the County can exercise that power without compensating Laclede for its relocation costs." Laclede argues that the trial court's judgment in favor of County results in an unconstitutional taking of Laclede's property without just compensation.

"The right to own private property is a bedrock principle in American Law." Odegard Outdoor Advertising v. Bd. of Zoning Adjustment, 6 S.W.3d 148, 149 (Mo. banc 1999). The importance of this right is reflected in the United States and Missouri Constitutions. Id. The United States Constitution provides that private property shall not "be taken for public use without just compensation." U.S. Const. amend. V. "The Fourteenth Amendment to the United States Constitution makes the Fifth Amendment's 'taking' clause applicable to Missouri." City of Excelsior Springs v. Elms Redevelopment Corp., 18 S.W.3d 53, 58 (Mo. App. W.D. 2000). Missouri's Constitution provides that "private property shall not be taken or damaged for public use without just compensation." Mo. Const. art. I, section 26.

In New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans, 197 U.S. 453 (1905), the U.S. Supreme Court set forth the common law rule regarding whether "a utility forced to relocate from a public right-of-way must do so at its own expense." Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Telephone Co., 464 U.S. 30, 34 (1983). In New Orleans Gaslight, the gas company asserted that it acquired the franchise and availed itself of the right to locate its pipes under the city streets. 197 U.S. at 458. The gas company next argued that it thereby had acquired a property right that could not be taken to accommodate a drainage system, without compensation for the required relocation of its mains and pipes. Id. The Supreme Court held that "[t]he gas company did not acquire any specific location in the streets." Id. at 461. The gas company "was content with the general right to use them; and when it located its pipes it was at the risk that they might be, at some future time, disturbed, when the state might require for a necessary public use that changes in location be made." Id. Further, "[i]t would be unreasonable to suppose that in the grant to the gas company of the right to use the streets in the laying of its pipes it was ever intended to surrender or impair the public right to discharge the duty of conserving the public health." Id. The Court also stated that "whatever right the gas company acquired was subject, in so far as the location of its pipes was concerned, to such future regulations as might be required in the interest of the public health and welfare." Id. In conclusion, the Court held that none of the gas company's property had been "taken" in complying with this requirement and the injury sustained was not compensable.[6] Id. at 462.

[6] The Court referred to the injury sustained by the gas company as "*damnum absque injuria.*" Id. This phrase refers to a loss or harm that has no legal remedy. Black's Law Dictionary 398 (7th ed. 1999).

More than seventy-five years later, the U.S. Supreme Court reaffirmed the common-law rule. Norfolk Redevelopment & Housing Auth., 464 U.S. at 34-35. In that case, the telephone company was required to relocate some of its transmission facilities because of street realignment resulting from federally funded urban renewal projects. Id. at 31. Writing for a unanimous Court, then Justice Rehnquist restated the "long-established common law principle." Id. at 34-35. "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." Id. at 35. "This rule was recognized and approved by this Court as long ago as New Orleans Gas Co. v. Drainage Comm., 197 U.S. 453, 462 . . .." Id.

Numerous other courts, including the Missouri Supreme Court, have recognized or applied the common-law rule in franchise cases. City of Bridgeton, 219 S.W.3d at 232-33; Union Electric Co., 555 S.W.2d at 32-33; see 12 McQuillin, Law of Municipal Corporations 34:92 (3d ed. rev. 2006). "'The fundamental common-law right applicable to franchises in streets is that the utility company must relocate its facilities in public streets when changes are required by public necessity, or public convenience and security require it, at its own expense.'"[7] City of Bridgeton, 219 S.W.3d at 232 (quoting Union

[7] The Missouri legislature, if it so chooses, may enact a statute abrogating the common law rule. See Ahern v. P & H, 254 S.W.3d 129, 133 (Mo. App. E.D. 2008); 39A C.J.S. Highways section 138 (Westlaw database through December 2010). The Missouri legislature has enacted "several statutes applicable to utility relocation." Home Builders Ass'n of Greater St. Louis v. St. Louis County Water Co., 784 S.W.2d 287, 290 (Mo. App. 1989). For example, section 227.240 RSMo 2000 gives the State Highway Commission complete discretion regarding the payment of costs for removal or relocating certain utility lines in a state highway. Jackson County Public Water Supply District No. 1 v. State Highway Comm'n, 365 S.W.2d 553, 556-57 (Mo. 1963).

Electric, 555 S.W.2d at 32). Under the common-law rule, Laclede must pay for relocating its utility lines.[8]

Laclede argues that the common-law rule only applies when a utility's facilities are located in the public right-of-way pursuant to a franchise or other license agreement. Laclede asserts that the trial court erred by applying the common-law rule set forth in City of Bridgeton and Union Electric Co., because those cases involved franchises and Laclede's property rights arise from "utility easements." The subdivision plats state that a "utility easement" or "utility easements" were being established or designated. Further, City of Bridgeton, Union Electric Co., and New Orleans Gaslight all involved the respective utility companies' franchises with municipalities. New Orleans Gaslight, 197 U.S. at 458; City of Bridgeton, 219 S.W.3d at 228, 230-32; Union Electric, 555 S.W.2d at 31-32.

But the reasoning expressed in New Orleans Gaslight for the common-law rule has been applied, in part, in a case where an electric company acquired "private easements." City of Perrysburg v. Toledo Edison Co., 870 N.E.2d 189, 191-94 (Ohio Ct. App. 2007). Moreover, the common-law rule comports with the paramount concern for the public's welfare and safety in public roads. As stated in New Orleans Gaslight, "whatever right the gas company acquired was subject, in so far as the location of its pipes was concerned, to such future regulations as might be required in the interest of the

[8] "Generally, the costs for relocating utility lines may be imposed on the utility if necessitated by the municipality's discharge of a governmental function, while the expenses must be borne by the municipality if necessitated by its discharge of a proprietary function." 12 McQuillin, Law of Municipal Corporations 34:92 (3d ed. rev. 2006); see Union Electric, 555 S.W.2d at 32. We are not presented with an argument that County's actions are in the exercise of a proprietary, rather than governmental function. It is undisputed that the changes requiring relocation of certain Laclede facilities in the Pittman Hill Road right-of-way "are required by public necessity, or public convenience and security require it." City of Bridgeton, 219 S.W.3d at 232-33.

public health and welfare." 197 U.S. at 461; see Public Water Supply Dist. No.2 of Jackson County v. State Highway Comm'n, 244 S.W.2d 4, 6-7 (Mo. 1951).[9]

Laclede also argues that the analysis in Panhandle E. Pipeline Co. v. State Highway Comm'n, 294 U.S. 613 (1935) and Riverside-Quindaro Bend Levee Dist. v. Missouri American Water Co., 117 S.W.3d 140 (Mo. App. W.D. 2003), applies to the present case. In Panhandle, Panhandle Eastern Pipeline Company, a private Delaware corporation, purchased "rights-of-way for pipes, telephone lines, etc." from private property owners in 1930. 294 U.S. at 615. After the pipes were in operation, the Kansas Highway Commission adopted plans in 1933 for new highways across the company's right-of-way that required changes in its pipelines. Id. at 616. The parties disputed who should pay for the changes. Id. at 616-17. The Court held that the Commission's plan "would result in taking private property for public use." Id. at 618. The Court then stated that "[o]rdinarily at least, such taking was inhibited by the Fourteenth Amendment." Id.

In Riverside-Quindaro, the water company acquired a ten-foot wide "Private Easement" for the purpose of constructing, replacing, renewing and maintaining water lines. 117 S.W.3d at 156. Thereafter, the levee district planned to construct a levy in a location where a levy had not existed and that required the water company to relocate distribution lines in seven locations including within the "Private Easement." Id. at 144-45. At the time of the levee district's proposed plan, the "Water Company's distribution

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[9] In its first point, Laclede contends that there is no evidence in the record that County ever used or accepted dedication of the strips at issue and therefore County "has no property interest at all in the dedicated strips . . .." This contention is not preserved for appellate review. As a matter of discretion, this court may review an error that has not been preserved if the error affects substantial rights, resulting in manifest injustice or a miscarriage of justice. Johnson v. Allstate Indem. Co., 278 S.W.3d 228, 234 (Mo. App. E.D. 2009). "On its face, plain error is error that is evident, obvious, and clear." Id. But plain error review is seldom granted in civil cases. Id. Finding no error that is evident, obvious, and clear resulting in manifest injustice or a miscarriage of justice, we decline to exercise our discretion to review for plain error. Id.

lines [had] been [previously] installed in these seven locations between ten to forty years." Id. at 145. On appeal, the court held that the water company could not be compelled to relocate its occupancy interest in the "Private Easement" without compensation from the levee district. Id. at 156 (discussing Panhandle, 294 U.S. at 617-18).

A critical distinction between Panhandle and Riverside-Quindaro, and the present case is that any property interest Laclede may have acquired was not prior to County obtaining its rights in the property. Panhandle E. Pipe Line Co. v. Madison County Drainage Bd., 898 F.Supp. 1302, 1310-13 (S.D. Ind. 1995); Sussex Rural Electric Coop. v. Township of Wantage, 526 A.2d 259, 261-64 (N.J. Ct. App. 1987); see Harris County Toll Road Auth. v. Southwestern Bell Telephone, 263 S.W.3d 48, 66-67 (Tex. App. 2006)(holding that the "common law principle" that a utility forced to relocate from a public right-of-way must do so at its own expense "is altered when the utility required to relocate holds a pre-existing ownership interest, such as an easement, in the property from which the utility facilities were relocated."). When the developer filed the subdivision plats, Laclede was on notice that its "utility easements" were placed **entirely** within the dedicated public road easements. "'Utilities are charged with the knowledge that if they see fit to lay their lines in public roads, they do so subject to reasonable regulation by either the County or the City, as the case might be.'" Harris County Toll Road Auth., 263 S.W.3d at 67 (citation and brackets omitted). Thus, Laclede knew that it might be required to bear the cost of moving its utility lines sometime in the future and could act accordingly. Id.

In a later case, also involving Panhandle Eastern Pipe Line Company, a U.S. District Court considered whether the pipeline company should bear the cost of a county drainage board project that required the company to bury its pipelines deeper. Panhandle E. Pipe Line Co., 898 F.Supp. at 1304. The district court held that if the "Drain" was "established" before the pipeline company acquired its easements and rights-of-way and before the pipelines were built, then Panhandle should not apply. Id. at 1312. But, under Panhandle, the county drainage board could "not impose on a pipeline owner (or other public utility) the cost of moving its equipment, at least so long as the owner's rights existed before the drain was established." Id. at 1313. Similarly stated, if the utility's property right antedates the "public's right in the public easement," it is commonly held that the public can displace the utility only by paying compensation. Sussex Rural Electric Coop., 526 A.2d at 262. Here, any property interest acquired by Laclede did not antedate County obtaining its property rights; at most Laclede can argue that its "utility easements" were granted simultaneously with the road easements.

Review fails to reveal any case relying on Panhandle that requires compensation to a utility for a taking if the utility's easement post-dates the public right-of-way or the utility's easement and the public right-of-way are conveyed simultaneously by a plat. See, e.g., Buckeye Pipe Line Co. v. Keating, 229 F.2d 795, 796 (5th Cir. 1956)(applying Panhandle where easement acquired in 1888 and construction of street in 1952); Magnolia Pipe Line Co. v. City of Tyler, 348 S.W.2d 537, 543 (Tex. Civ. App. 1961)(applying Panhandle where pipe line easements acquired in 1931 and road paved in 1958). Panhandle and Riverside-Quindaro do not apply to the present case.

We note that County argues that "any attempted limitation of the public right-of-way dedications were void as against public policy of the State of Missouri, and are superceded by the government's police powers over its roads." County also asserts that the interest conveyed by the subdivision plats vested to County and not Laclede. But we need not determine the extent, if any, of the property rights Laclede obtained by virtue of the subdivision plats. The following analysis stated in The Law of Easements & Licenses in Land is applicable for deciding whether Laclede must pay for relocating its utility lines.

> A utility easement located within a public right-of-way may be required by the government to be relocated to accommodate public needs. If the utility easement predated the public right-of-way, the relocation order constitutes a taking for which just compensation must be paid. On the other hand, if the utility easement was created within an existing public right-of-way, the relocation order does not amount to a taking of a property right of the easement holder.

James W. Ely, Jr. & Jon W. Bruce, The Law of Easements & Licenses in Land, section 7.16 (Westlaw database through March 2010)(footnotes omitted).

Laclede's "utility easements" did not predate the public right-of-way. The subdivision plats dedicated certain streets and roads for public use and then designated the streets as a "utility easement" or "utility easements." Accordingly, Laclede must pay the cost of moving its utility lines. Laclede's first point is denied.

Points II and III

Laclede's second and third points raise issues regarding the Bostic Affidavit and the Supplemental Thaemert Affidavit. In its second point, Laclede contends that the trial court erred in admitting the Bostic Affidavit because the language of the subdivision plats is clear and unambiguous and, therefore, extrinsic evidence such as the Bostic Affidavit is not admissible in interpreting the subdivision plats. In its third point, Laclede contends

that if the Bostic Affidavit is admissible for interpreting the subdivision plats, then the Supplemental Thaemert Affidavit presented issues of fact that were material, making summary judgment inappropriate.

Laclede notes that the trial court's judgment discussed past conduct including relocation of Laclede's utility lines. But it is not necessary to consider any past conduct by the parties to interpret the language of the subdivision plats. The subdivision plats' language shows, without the use of parol evidence, that Laclede's "utility easements" did not predate County's road easements. The determination of Laclede's first point is dispositive of the appeal and the affidavits do not alter the analysis. We decline to rule on Laclede's second and third points.

Conclusion

The judgment is affirmed. Because the issues involved are of general interest and importance, the case is ordered transferred to the Missouri Supreme Court pursuant to Rule 83.02.

Gary M. Gaertner, Jr., Presiding Judge

Roy L. Richter, C.J., concurs.
Kenneth M. Romines, J., dissents in a separate opinion.

In the Missouri Court of Appeals
Eastern District

DIVISION FOUR

ST. CHARLES COUNTY, MISSOURI,	)	No. ED93983
	)	
Plaintiff/Respondent,	)	
	)	Appeal from the Circuit Court of
v.	)	St. Charles County
	)	Case Number: 0811-CV08506
LACLEDE GAS COMPANY,	)	Honorable Jon A. Cunningham
	)	
Defendant/Appellant.	)	Filed: February 8, 2011

DISSENT

The following dissent was written in response to the first opinion of the majority. The Court's second opinion now concedes the interests of the parties were created simultaneously, but, after this admission, still uses the same inappropriate authority and reaches what I believe to be the same inappropriate conclusion. The Court's opinion, determined to use "predating" cases finds that the easement of Laclede did not predate the County easement, while true, – the interests were created simultaneously – the determination is meaningless.

The Court's opinion ignores the very real parol evidence rule violation and further ignores the Takings provisions of the U.S. Constitution and the Missouri Constitution. Thus I still dissent.

I dissent. I do so because I believe the majority has made two fundamental errors

in its reasoning.

Initially, the majority fails to consider the parol evidence rule. The parol evidence rule must be discussed, applied and on the basis of the rule this case reversed.

Secondarily, I believe the substantive basis on which the majority relies to be flawed. Application of the takings provisions of both the U.S. Constitution and the Missouri Constitution compels this case be reversed and dismissed by the trial court.

The circuit court in its judgment relied almost exclusively for its substantive conclusions on extrinsic evidence in clear violation of the parol evidence rule. As is repeated in case after case: the parol evidence rule is a rule of law – not a rule of evidence. Misapplication of the rule is reversible error, even if Laclede had not objected, the rule must be applied.[1]

The application of the rule in this case is compelled. The Judgment of the circuit court not only relied on the affidavit offered by the County, but does so to reach ultimate conclusions.[2] The conclusions drawn are inappropriate and violate the parol evidence rule. Three separate instances – page two, page five and page six – make clear the reliance. Even to the extent of the trial court finding the Bostic affidavit "...highly probative in construing the subdivision plats."

The plats want of ambiguity. Thus no reliance can be placed on extrinsic evidence. The interests of the several parties recipient of the devise and dedication by the several plats are clear and fully established when recorded.

The plats are unspectacular. The language is clear. The metes and bounds are

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[1] *State ex rel. Missouri Highway and Transp. Com'n v. Maryville Land P'ship*, 62 S.W.3d 485, 489 (Mo App. E.D. 2001). Judge Dowd gives a thorough analysis of the rule; and *Devino v. Starks*, 132 S.W.3d 307, 311 (Mo. App. W.D. 2004).

[2] Judgment attached; plats attached.

precise. The corners close. There was no need – and in fact a legal impediment – for reliance on extrinsic evidence.[3]

Interestingly, the Bostic affidavit goes to no ambiguity in the plats, but only to events occurring after the plats were filed. There is no legal, and no logical, reason why incidents post-dating the plat recordation should be considered and impact the property interest of the several parties contained in the plats which are fully integrated.

The parol evidence rule being a rule of law must be applied and this case reversed.

The majority – through claiming not to reach the parol evidence violation – decides this case on what I believe to be reliance on the same parol evidence as did the trial court – alleged past conduct over the several years since the recording of the plats. Neither the trial court nor this court is construing an ambiguous contract. At issue is the interest of the parties as the result of the recording of the several plats. Simply, it seems to me that all parties received the same interest, an easement – since the plats say so by their words of dedication– for their respective uses. As such, each grantee received an interest in real property that runs with the land and binds successive landowners.[4] The majority's discussion of license cases is not relevant to our facts: neither license nor franchise is at issue. The majority's conclusion that their "common-law rule of relocation" applies equally to easements as to franchises is contrary to Panhandle and flat wrong.[5] The very Court which announced the "rule" on which the majority relies explicitly limited its application in Panhandle. Even the Court in Panhandle said this

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[3] Unlike the deed at issue in *Devino, supra* note 1, at 310.
[4] Riverside-Quindaro Bend Levee Dist., Platte County, Missouri v. Missouri American Water Co., 117 S.W.3d 140, 155 (Mo. App. W.D. 2003).
[5] Panhandle E. Pipeline Co. v. State Highway Comm'n, 294 U.S. 613, 622 (1935).

analysis only applied to municipal franchises as municipal franchises are non-unilateral agreements between governments and private actors.[6] As Laclede received its interest in real property by unilateral devise and dedication from a private developer, the majority's discussion of license/franchise cases is utterly irrelevant to our facts.

The majority seems to rely on the order in which the scrivener placed the several parties on the plats to control the resolution of this case. I find this peculiar inasmuch as no interest is created until recording and when recorded the interests are created simultaneously. At least this divining of "preference" fits into the cases on which the majority relies.

Basic tenets are at issue. Though heavily regulated – and enjoying a monopoly on its product in its service area – Laclede Gas is a private corporation. The company issues stock, has a private Board of Directors, pays dividends, owns property, can sue and be sued. As such, the takings clause of the Fifth Amendment[7] and the dictates of Article I, Section 26 and Article XI, Section 4, Constitution of Missouri,[8] compel a conclusion that differs substantially from the majority.

The Fifth Amendment states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article I, Section 26 states:

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[6] 12 McQuillin, Law of Municipal Corporations 34:2 (3rd ed. Rev. 2006).
[7] U.S. CONST. amend. V.
[8] MO. CONST. art. I, § 26 & art. XI, § 4.

> That private property shall not be taken or damaged for public use without just compensation. Such compensation shall be ascertained by a jury or board of commissioners of not less than three freeholders, in such manner as may be provided by law; and until the same shall be paid to the owner, or into court for the owner, the property shall not be disturbed or the proprietary rights of the owner therein divested. The fee of land taken for railroad purposes without consent of the owner thereof shall remain in such owner subject to the use for which it is taken.

Article XI, Section 4 states:

> The exercise of the power and right of eminent domain shall never be construed or abridged to prevent the taking by law of the property and franchises of corporations and subjecting them to public use. The right of trial by jury shall be held inviolate in all trials of claims for compensation, when the rights of any corporation are affected by any exercise of said power of eminent domain.

Without any doubt on our facts, private property has been taken. St. Charles County is a First Class Charter County. St. Charles County is taking the property of Laclede Gas and is doing so by the vehicle of Declaratory Judgment pursuant to Rule 87.02(a).[9] I do not believe in light of the three Constitutional provisions cited that Rule 87.02(a) gave the circuit court jurisdiction over our facts.[10] Particularly in light of Article 1, Section 26, and Article XI, Section 4. St. Charles County should have filed a condemnation case – with the attendant right to a jury trial – not have proceeded by Declaratory Judgment.[11] I do not believe the trial court had any jurisdiction except by way of condemnation proceedings. The majority's reliance on their misreading of Panhandle ignores the constitutional provisions which dictate the use of a jury in cases when the government exercises the power of eminent domain.[12]

I would reverse and remand this case to the trial court for dismissal so that St.

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[9] Supreme Court Rule 87.02(a).
[10] The writer acknowledges *J.C.W. ex rel. Webb v Wyciskalla*, 275 S.W.3d 249 (Mo. banc 2009).
[11] *See Riverside-Quindaro Bend, supra* note 4, at 149; a condemnation case.
[12] Oddly, the rule the majority divines from *Panhandle* prevails over three specific Constitutional provisions.

Charles County can file a condemnation case.

Kenneth M. Romines, J.

APPENDIX

IN THE CIRCUIT COURT OF ST CHARLES COUNTY
STATE OF MISSOURI

ST. CHARLES COUNTRY MISSOURI, Plaintiff	
Vs.	CAUSE NO. 0811-CV08506 DIVISION NO. 5
LACLEDE GAS COMPANY, Defendant	

JUDGMENT GRANTING MOTION FOR SUMMARY JUDGMENT IN FAVOR OF PLAINTIFF, ST CHARLES COUNTY, MISSOURI AND DENYING THE MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANT LACLEDE GAS COMPANY

On September 16, 2009, Plaintiff and Defendant argued their respective motions for Summary Judgment and the Court took the matters under advisement. After considering the pleadings, memoranda of counsel, as well as arguments, the Court now grants Summary Judgment in favor of plaintiff and against defendant. Defendant's Motion for Summary Judgment is denied.

To prevail on a motion for summary judgment pursuant to Rule 74.04, the moving party must demonstrate, on the basis of fact not genuinely in dispute, a right to judgment as a matter of law. Clay County Realty Co. v. City of Gladstone, 254 S.W. 3d 859,863 (Mo. 2008) "A 'genuine issue' that will prevent summary judgment exists where the record shows two plausible, but contradictory, accounts of the essential facts and the "genuine issue" is real, not merely argumentative, imaginary, or frivolous. ... The movant bears the burden of establishing a legal right to judgment and the absence of any genuine issue of material fact required to support the claimed right to judgment." Id.

Plaintiff St. Charles County is in the process of making improvements to Pitman hill Road. Defendant Laclede Gas Company and other utilities have utility lines within the Pitman Hill right of way. These lines will have to be moved in certain areas in order for said improvements to be completed. Laclede seeks compensation for the cost of the relocation of their lines.

Subdivisions plats provide for the dedicating of public streets or roadways in the areas in question and also contain language that it "further designates" or establishes the streets or roads as utility easements and these easements were dedicated to various utility companies (including St. Charles Gas Company, now known as Laclede Gas Company). Laclede has not asked for reimbursement for relocating from within the same or similar areas in the past. St. Charles County has refused to provide reimbursement in this instance which has lead to the filing of this lawsuit.

Each Subdivision Plat in question contains unequivocal language of dedication creating public roads.

Section 445.070 RSMo. (2000) states in pertinent part:

> Such maps or plans of such cities, towns, villages and additions made, acknowledged, certified and recorded, shall be sufficient conveyance to vest the fee of such parcels of land as are therein named, described or intended for public uses in such city, town or villages, when incorporated, in trust and for the uses therein named, expressed or intended, and for no other use or purpose. if such city, town or village shall not be incorporated, then the fee of such lands conveyed as aforesaid shall be vested in the proper county in like trust, and for the uses and purpose aforesaid, and none other.

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

Utility facilities placed within public roads are subject to the general rule that the utility must relocate its facilities, at its own expense, when changes are required by public necessity, or public

convenience and security require it. *McQuillen Municipal Corporation* (3rd Ed., 1995 Revised Volume), Vol. 12, 34.74.10----Relocation of Facilities; see also *Bridgeton v. Missouri American Water Co..*, 219 S.W.3d 226,232 (Mo. banc 2007); citing *Union Electric Co. v. Land Clearance for Redevelopment Authority of St. Louis*, 555 S.W.2d 29, 32 (Mo. banc 1977) (citing *McQuillen*). This general rule of law has been adopted and affirmed by the Missouri Supreme Court and is binding precedent in this case.

The Court further finds that Lacede would only prevail in its position if they held title to an easement in this area prior to the County obtaining their rights in the property. The rights of the respective parties in this case vested in the same documents.

The Subdivision plats state no provisions that would deprive the County of its police power over the public roadways. A local government, "although having no authority to prevent the use of its streets by a public service company, has authority under its general police power to regulate the manner in which the tracks, lines or pipes shall be constructed and maintained." *Mc Quillen* at § 34.74. A public utility company does not have " an irrevocable right to have its gas mains maintained in a particular part of the street." *Id.*

The discussion of utility relocation in Mc Quillen arises in its discussion of general franchise rights between utilities and local governments. These general rules governing utility relocations and police power over roads apply even without express agreements. Section 34.03 of this volume of Mc Quillen defines "franchise" as used therein:

> Generally, a franchise is defined as a special privilege conferred by the government on individuals or corporations and that does not belong to the citizens of a country generally by common right.. A water district's right to lay and maintain pipes under city streets is a franchise---- The term "franchise includes the term 'privileges."

Thus the general rule from *McQuillen* applies to franchise rights in the general sense, such as those conferred by the Public Service Commission or the general right of public service companies not to be barred from the placement of facilities in public streets. See *McQuillen*

at §§ 34.03 and 34.74. If a franchise agreement did exist, its terms would apply, but these discussions in Mc Quillen refer to common law relationships.

As a matter of common law, the County could not surrender its power in its public roads even if it attempted to do so by contract. "[A] municipality cannot grant away or limit the police power conferred upon it.... A franchise surrendering municipal police power is void." McQuillen at § 34.74. To the extent that Laclede argues that the County's own approval process resulted in the creation of something less than public roads subject to the full exercise of its police power, the argument would be contrary to this rule. A developer could not have created some lesser class of road open to the public which the County itself has no power to create. To permit such a result would be to purposely circumvent the government's lawful authority over its roads, "the exercise of which is necessary for the public welfare and the preservation of public safety." *Id.*

The Court further finds that pursuant to RSMo. 445.070 and the doctrine of merger, title to the utility easements vested in the County, and as subordinate uses these easements merged into the County's title to the dominant use of a public road. Laclede, in demanding reimbursement for relocating its facilities to accommodate a public road improvement, asserts it's rights that are equivalent to those created in a preexisting privately granted utility easement. However, "when a dedication to public use occurs, this is wholly inconsistent with the...contemporaneous existence of a private way independent of the public right. In such instances the private right is swallowed by and merged in the public one." *Marks v. Bettendorf's Inc.*, 337 S.W. 2d 585,593 (Mo. App. 1960). The case goes on to say: "There is no such thing as a 'dedication' between an owner and individuals. The public is the only party to a dedication." *Id.* The public (acting through the County) holds the title to the public road rights as well as the utility easements rights. Public street dedications necessarily include the right of utilities, with reasonable regulations, to place facilities within them. See e.g. State ex rel Roland v. Dreyer, 129 S.W. 904, 916 (Mo. 1910) ("[A]s this court has often ruled, a street dedicated to public use for the passage of vehicles and pedestrians may in addition be used for street railways, gas, and electric light wires and poles, and subways, which do not interfere with or destroy its value for public highway... such

subordinate uses must have been contemplated in the original grant"). In the present case, though these subordinate uses were contemplated on the face of the plat, this does not change the fact that they are indeed subordinate to the public use road.

Therefore, the utility easement rights are wholly encompassed within and have merged into the public road rights, both of which were vested in the County pursuant to § 445.070. "[A]ny time the party who owns an easement right acquires legal ownership of a servient tenement, the easement associated with that parcel is extinguished. Such unity of possession destroys all existing easement, because a person cannot have an easement on the land that he or she owns." 25 Am.Jur.2d Easement and licenses § 100 ---Merger of dominant and servient estates.

Laclede and the County each have previously treated an area dedicated by the language on the same plat (Plaintiff's Ex. A) as a public road subject to the general rule that a utility must relocate at its own expense. Laclede and the County have acted the same way over the past several years with respect to the numerous similarly dedicated areas. This past conduct, referenced in more detail below, is highly probative in construing the Subdivisions plats.

> [I]n case of doubt as to any ambiguity as to the meaning of the dedicator, as expressed upon the face of the plat making the dedication, as to what is intended to be donated to the public, parol evidence may be resorted to, to show how each of the parties to the dedication have treated the dedication and what they have done under the provisions thereof. ...[I]n determining the meaning of a written instrument, the acts of the parties thereto are entitled to great weight.
>
> It has been said by an eminent chancellor, 'Tell me what the parties have done under a deed, and I will tell you what that deed means.' ...I know of no better mode of ascertaining the meaning of a writing than is shown if all the parties acted on a particular meaning.

City of California v. Burke, 292 S.W. 830, 832 (Mo.1922) (citation omitted).

This past conduct of the parties is consistent with the general franchise relationship between public utility companies and the County. In discussing franchises, *Mc Quillen* states they are to be strictly

constructed since they are "considered in derogation of the right of the public to free and unobstructed use of the street... and if the terms of the franchise are doubtful and susceptible of two or more constructions, they are to be construed strictly against the [public utility company] and in favor of the public." *Mc Quillen* at § 34.45---Construction. This section of *Mc Quillen* also echoes the reasoning of *Burke,* stating: if ambiguity exists, usually that construction will be adopted *which the parties thereto have placed upon it by their acts." Id.* (emphasis added), citing Joplin v. Wheeler, 158 S.W. 924, 930 (Mo.App. 1913) ("If we grant that this matter is a proper subject of contract, and that the present ordinance contract is ambiguous and leaves it doubtful as to the obligation of the parties in this respect, then we see no reason why we should not apply the familiar rule of law that the courts will adopt that construction of the contract which the parties themselves, by their acts and conduct have placed upon it").

When Laclede relocated its lines from the dedicated area alongside Towers Road to accommodate that road project the exact same parties were involved. This example arose under one of the exact same plats---Muirfield Plat One (Ex.A). which abuts Towers Roads well as Pitman Hill Road. It involves the exact same conduct---relocating Laclede's lines from a road widening strip to accommodate a County road improvement project. The relevant plat language the parties acted on then is the exact same language that applies now. The law as stated in *Burke, supra* requires the Court to look to the parties' past conduct as the best way to ascertain the meaning of the Subdivision Plats.

Laclede has also bound itself in the interpretation of these plats through its consistent treatment as public roads of the many other similarly dedicated areas above in Plaintiff's Exhibits H-M. Laclede's and the County's treatment of each of these area is described in the Bostic Affidavit. In all of these cases Laclede acted on the meaning of these plats consistent with the general rule of utility relocation and the County's general police powers. Furthermore, Laclede's rights to place its lines in the right-of-way in question are the same as the rights of other public utility companies, yet the County has never reimbursed any utility company for relocating its lines from areas dedicated in the same way these have been.

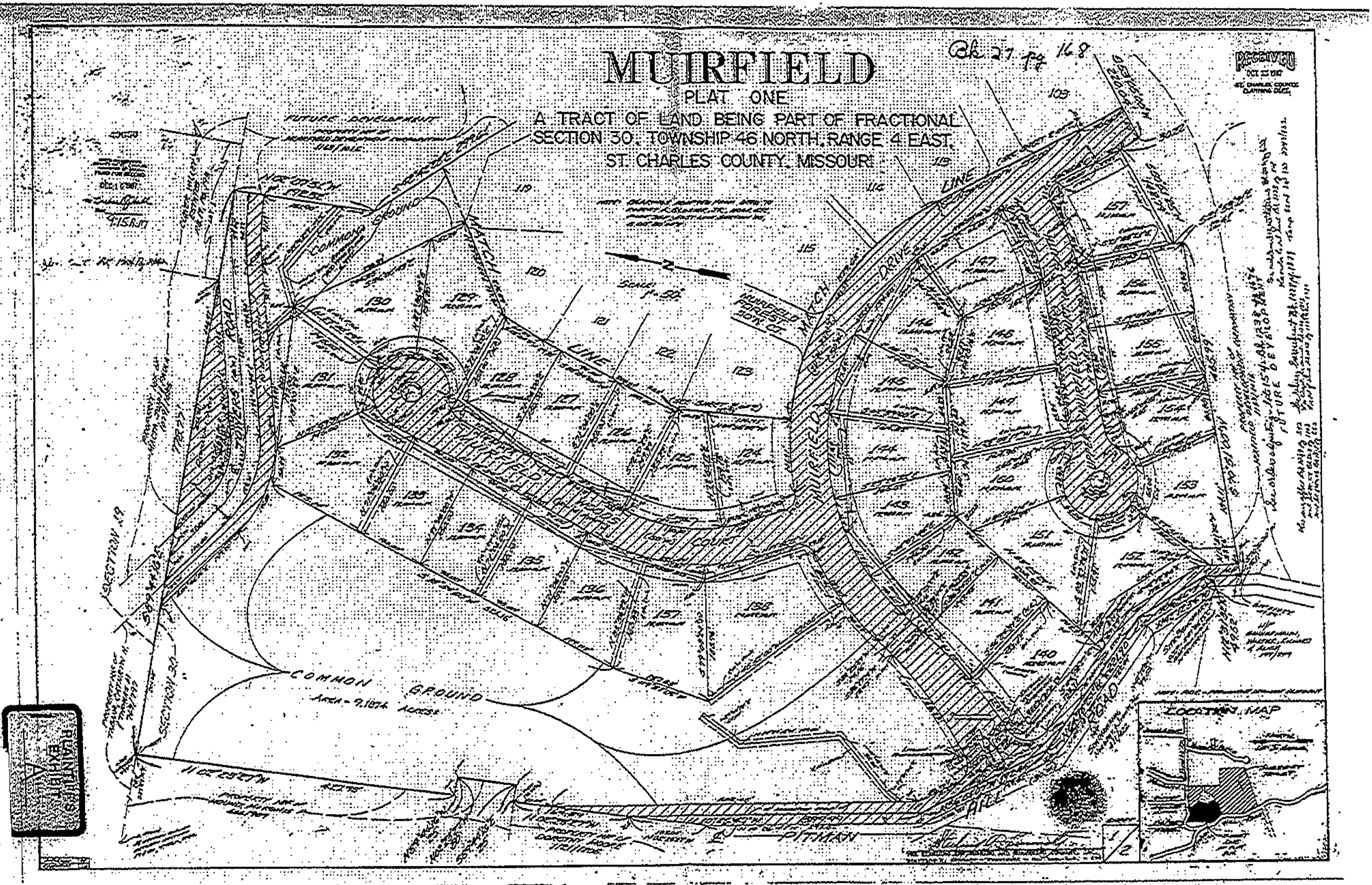
Failure to recognize the public road use as the dominant interest in the area in question will preclude the County from being able to fulfill its duty to properly maintain these roads and any others that were dedicated using similar language. Such a result would harm the public's interest and is not within the intent apparent from the dedication language used in the Subdivision Plats. The most reasonable construction of the intent is that the developer intended for the residents of the subdivision to enjoy the full benefits of public roads. Such benefits, however, are not possible unless the County is free to exercise its normal police powers over these roads. These powers enable the County to fulfill its duty to maintain the roads.

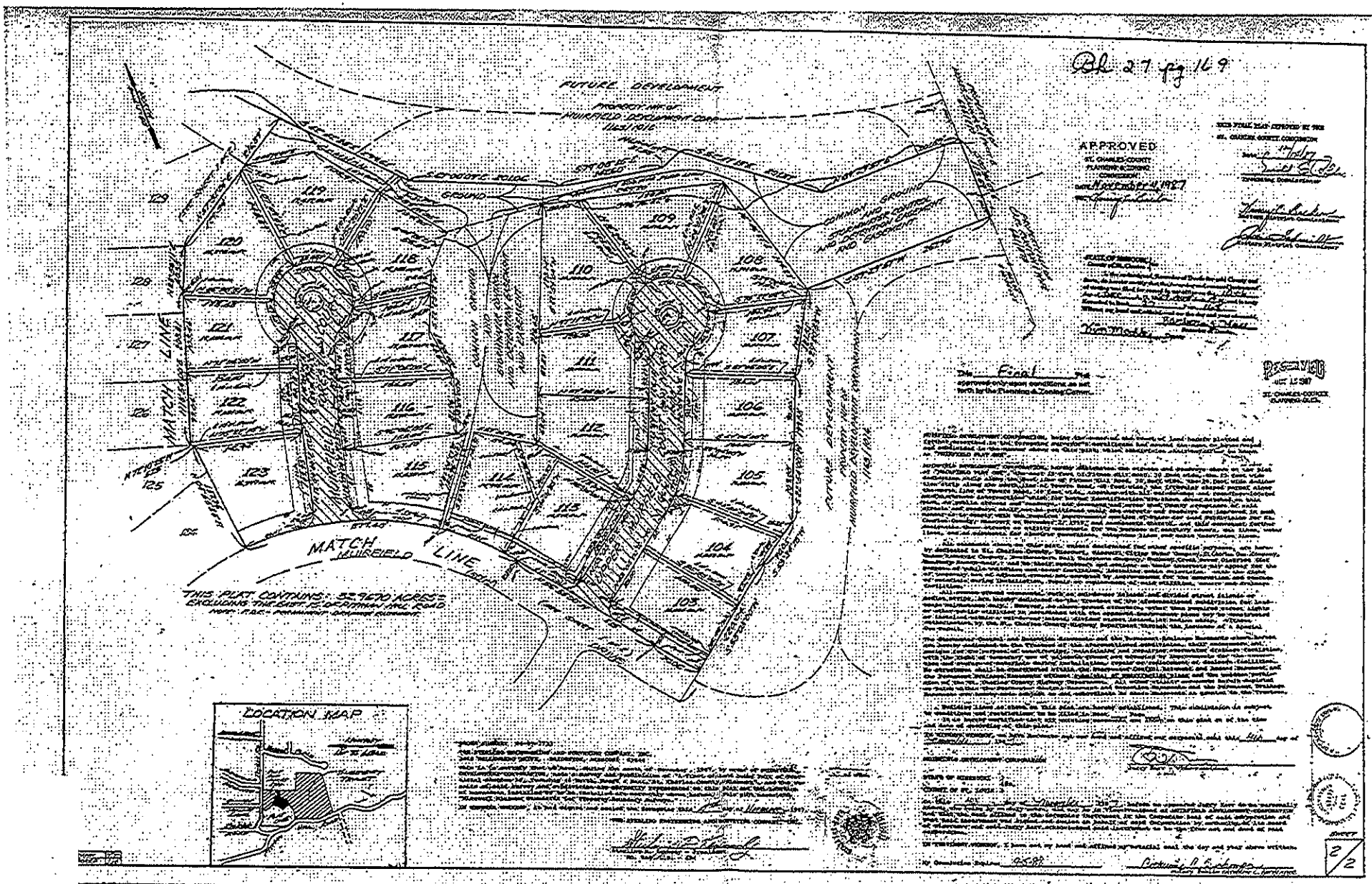
Wherefore, for the reasons stated herein, the Court grants Summary Judgment in favor of the Plaintiff, St Charles County, and against Defendant, Laclede Gas Company. The Court denies Defendant, Laclede Gas Company's Motion for Summary Judgment. Cost are taxed to defendant.

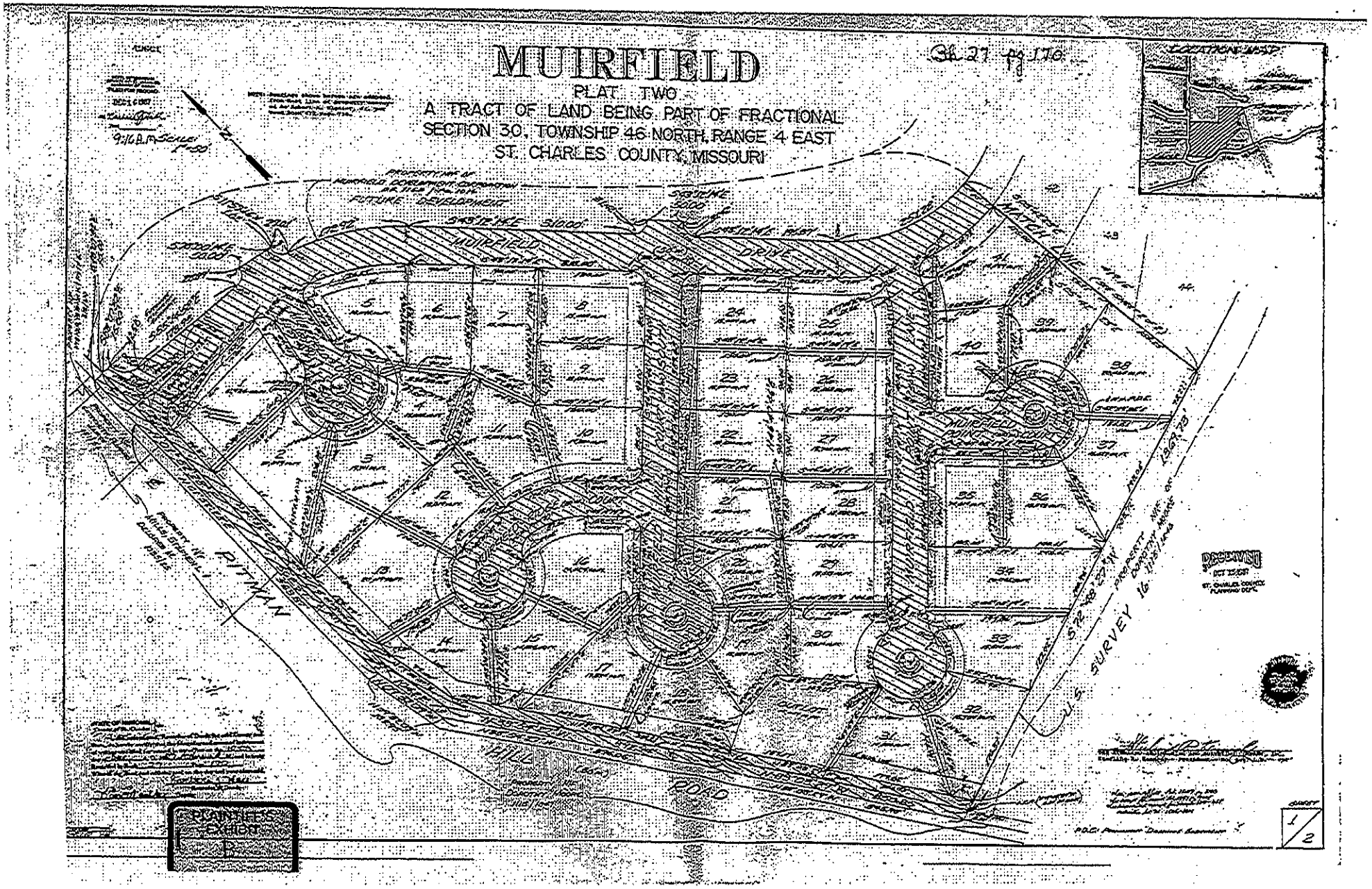
So Ordered,

Jon A. Cunningham
Circuit Judge, Division #5
November 4, 2009

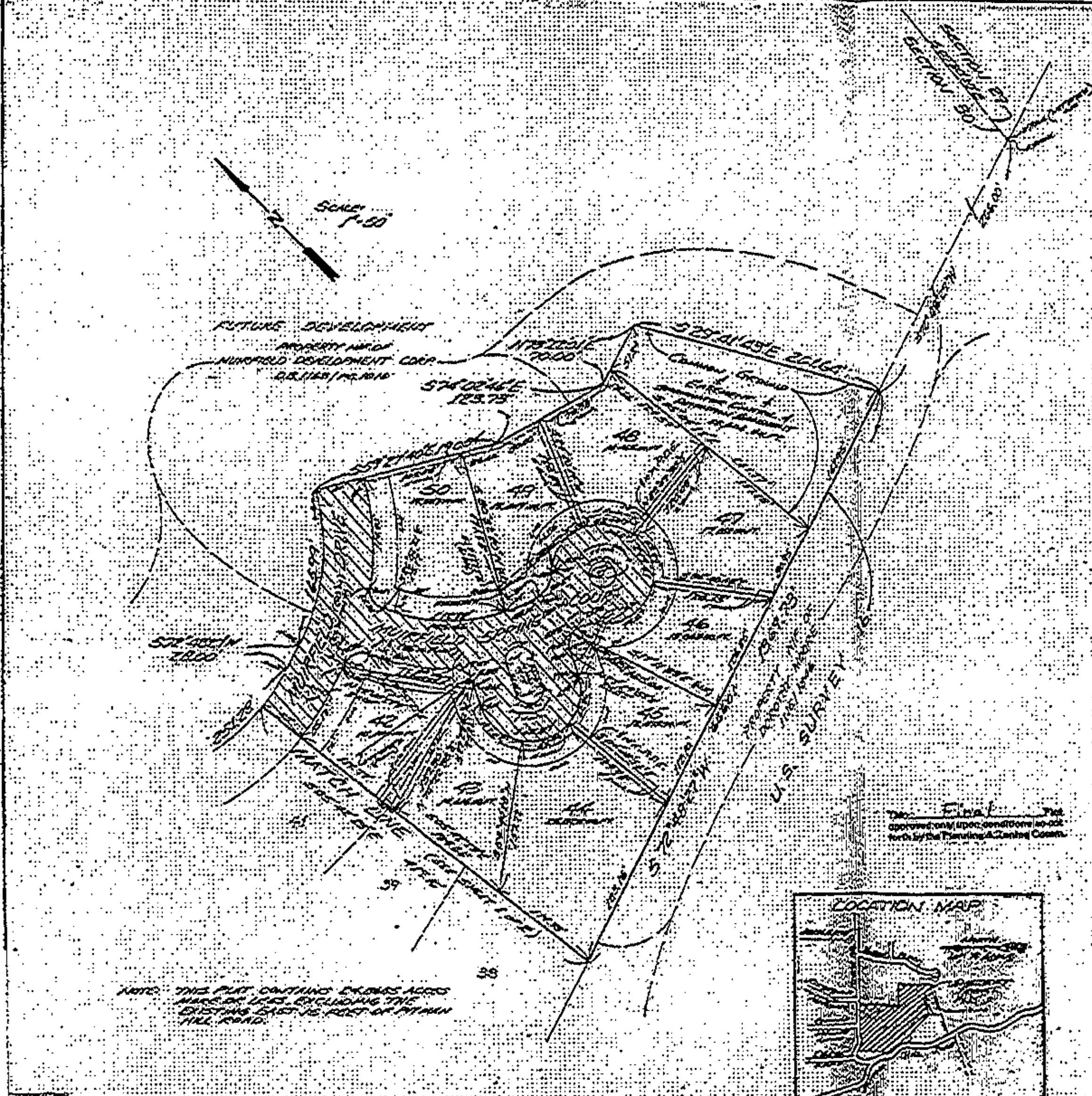
cc: Mary Bonacorsi
Greg Dohrmann


MUIRFIELD
PLAT ONE
A TRACT OF LAND BEING PART OF FRACTIONAL
SECTION 30, TOWNSHIP 46 NORTH, RANGE 4 EAST,
ST. CHARLES COUNTY, MISSOURI
Bk 27 Pg 168
FUTURE DEVELOPMENT
COMMON GROUND
COMMON GROUND
AREA - 9.1874 ACRES
MATCH LINE
MUIRFIELD DRIVE
SECTION 19
SECTION 30
PITMAN
LOCATION MAP
PLAINTIFF'S EXHIBIT A


Bk 27 pg 149
APPROVED
ST. CHARLES COUNTY
PLANNING & ZONING
COMMISSION
Date November 4, 1987
RECEIVED
NOV 12 1987
ST. CHARLES COUNTY
PLANNING DEPT.
This Final Plat approved only upon conditions as set forth by the Planning & Zoning Comm.
FUTURE DEVELOPMENT
MUIRFIELD DRIVE
MATCH LINE
MUIRFIELD
THIS PLAT CONTAINS: 32.7620 ACRES
EXCLUDING THE EAST 15' OF MUIRFIELD DRIVE
LOCATION MAP
SHEET
2/2


MUIRFIELD
PLAT TWO
A TRACT OF LAND BEING PART OF FRACTIONAL
SECTION 30, TOWNSHIP 46 NORTH, RANGE 4 EAST
ST. CHARLES COUNTY, MISSOURI
Cab 27 Pg 176
LOCATION MAP
MUIRFIELD DRIVE
PITTMAN
PLAINTIFF'S EXHIBIT
P
SURVEY 16, 1136.1 M.S.
RECEIVED
OCT 22 2007
ST. CHARLES COUNTY PLANNING DEPT.
SHEET 1/2

Bk 27 pg 171



The Final Plat approved only upon conditions as set forth by the Planning & Zoning Comm.

APPROVED
St. Charles County Planning & Zoning Commission
Date November 9, 1987

RECEIVED
OCT 22 1987
ST. CHARLES COUNTY PLANNING DEPT.

Sheet 2/2

MUIRFIELD

PLAT THREE

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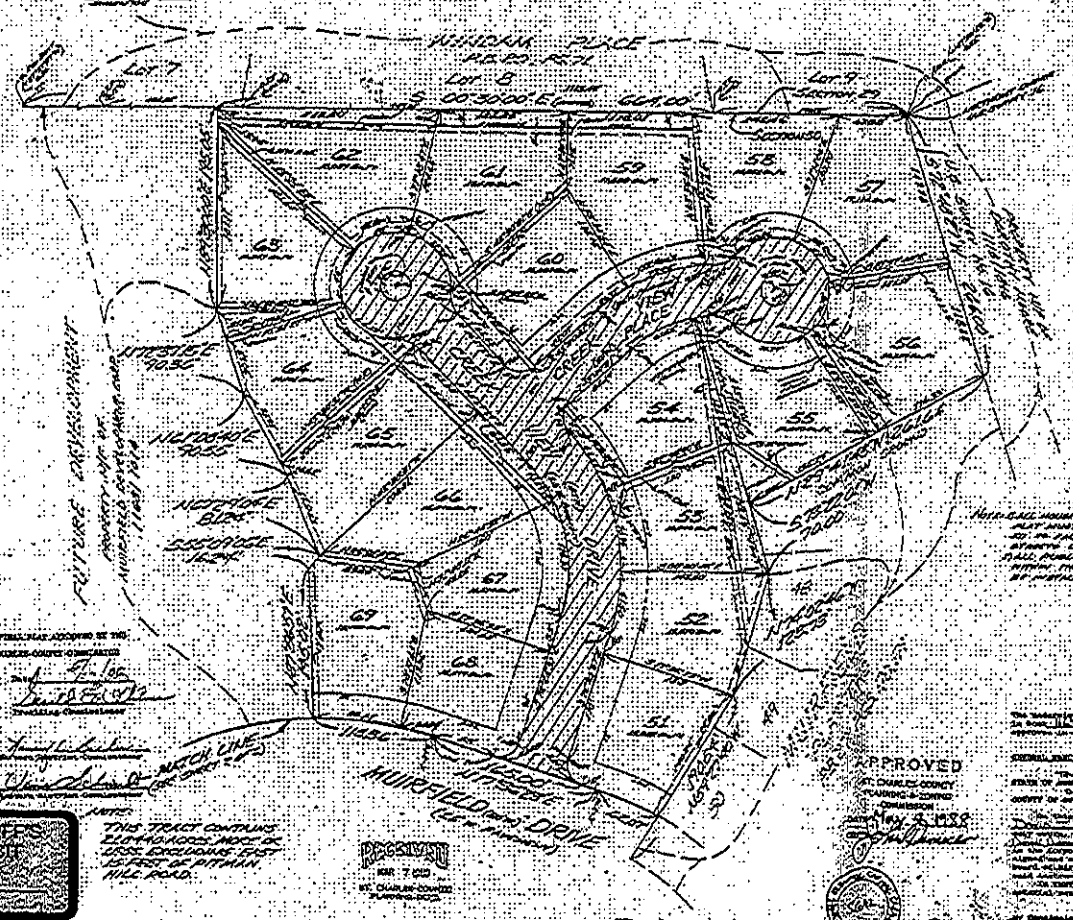


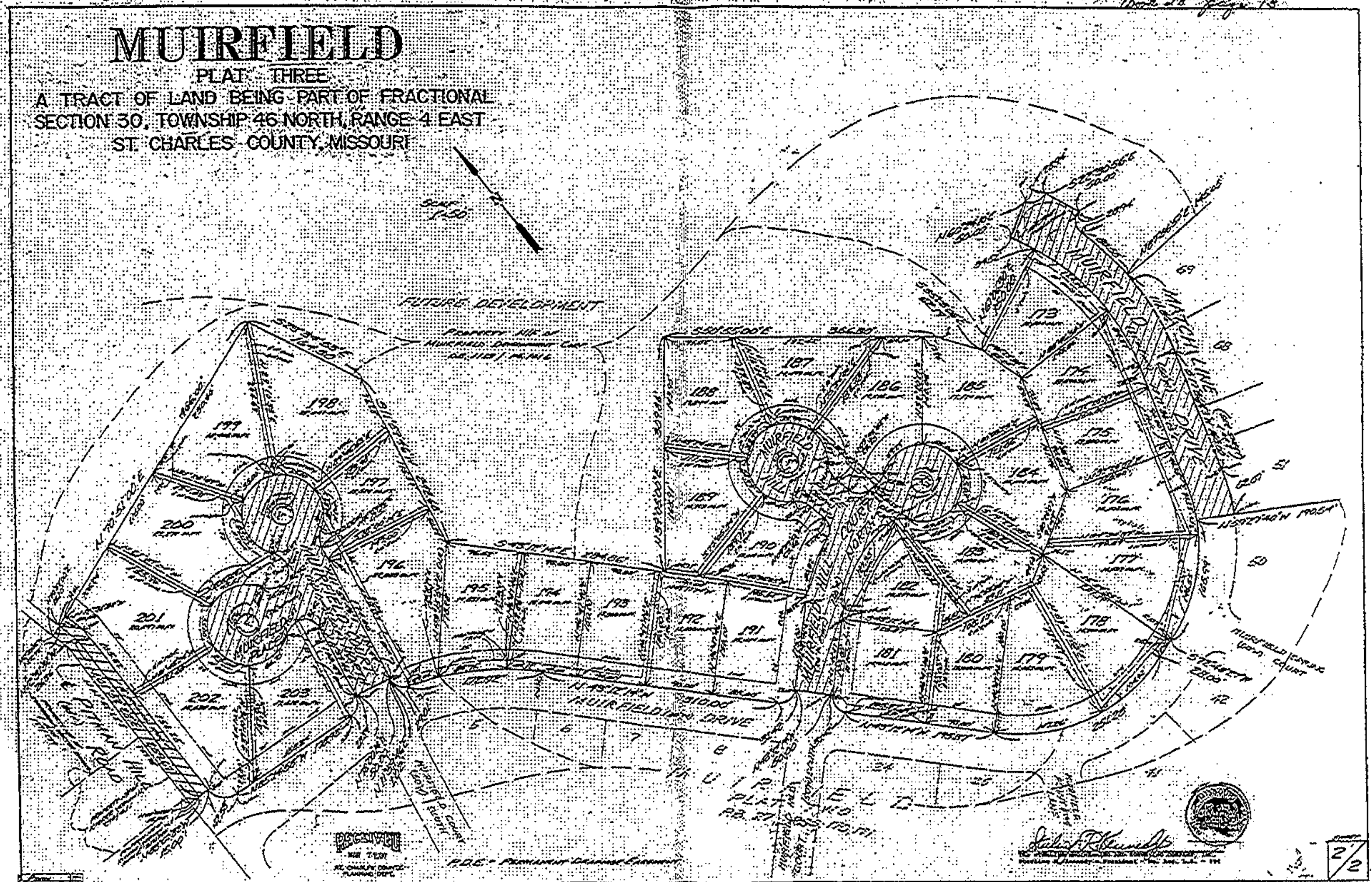
PLAINTIFF'S EXHIBIT

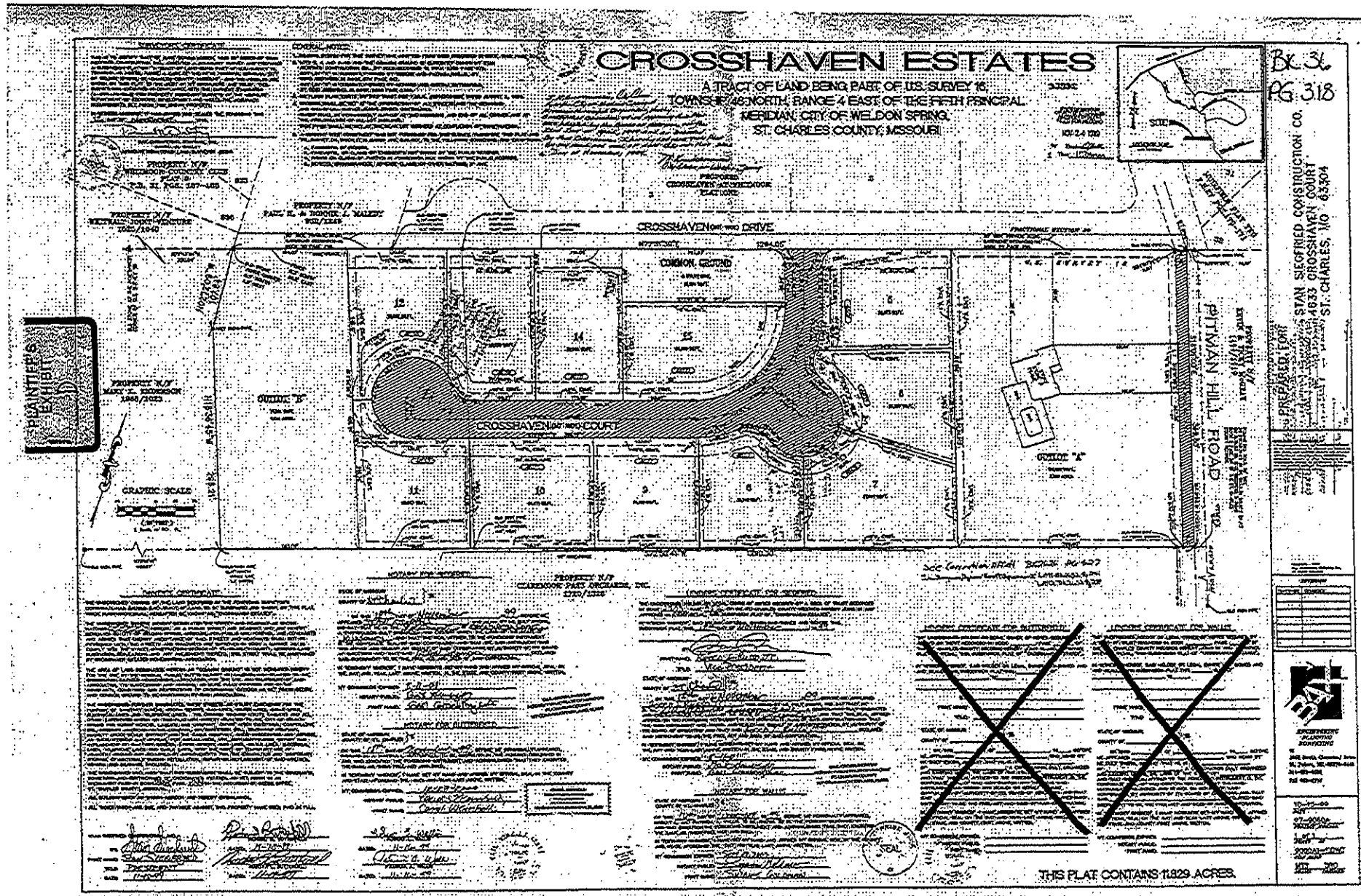
APPROVED

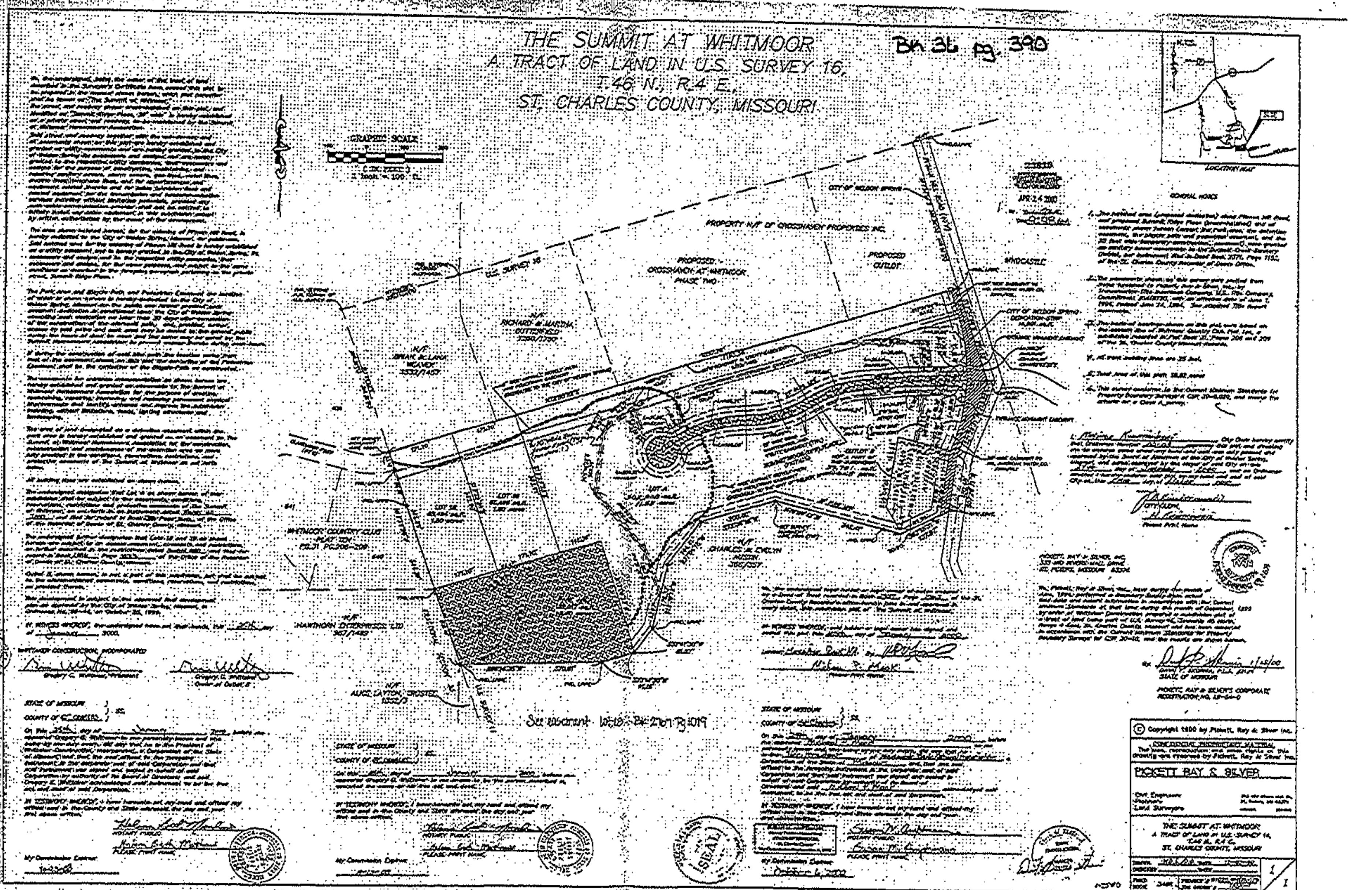
Final

LINDA G. EATHERLY

DAVID T. BROWN


MUIRFIELD
PLAT THREE
A TRACT OF LAND BEING PART OF FRACTIONAL
SECTION 30, TOWNSHIP 46 NORTH, RANGE 4 EAST
ST. CHARLES COUNTY, MISSOURI
FUTURE DEVELOPMENT
MUIRFIELD DRIVE
MATCHLINE
PLAT TWO
P.D.E. - PERMANENT DRAINAGE EASEMENT
RECEIVED
ST. CHARLES COUNTY PLANNING DEPT.
2/2


CROSSHAVEN ESTATES
A TRACT OF LAND BEING PART OF U.S. SURVEY 16, TOWNSHIP 46 NORTH, RANGE 4 EAST OF THE FIFTH PRINCIPAL MERIDIAN, CITY OF WELDON SPRING, ST. CHARLES COUNTY, MISSOURI
Bk 34 PG 318
PLAINTIFF'S EXHIBIT
CROSSHAVEN DRIVE
CROSSHAVEN COURT
COMMON GROUND
OUTLOT "A"
PITMAN HILL ROAD
GRAPHIC SCALE
PREPARED FOR: STAN SIEGFRIED CONSTRUCTION CO. 4633 CROSSHAVEN COURT ST. CHARLES, MO 63304
THIS PLAT CONTAINS 11.829 ACRES.


THE SUMMIT AT WHITMOOR
A TRACT OF LAND IN U.S. SURVEY 16,
T.46 N., R.4 E.,
ST. CHARLES COUNTY, MISSOURI
Bk 36 pg 390
GRAPHIC SCALE
LOCATION MAP
GENERAL NOTES
PROPERTY N/F OF CROSSHAVEN PROPERTIES INC.
PROPOSED CROSSHAVEN AT WHITMOOR PHASE TWO
PROPOSED OUTLOT
CITY OF WELDON SPRING
U.S. SURVEY 16
N/F RICHARD & MARTHA BUTTERFIELD
N/F BRIAN & LANA
WHITMOOR COUNTRY CLUB PLAT TEN
N/F HAWTHORN ENTERPRISES LTD
N/F CHARLES & EVELYN AUSTIN
N/F ALICE LAYTON CROSTIC
STATE OF MISSOURI
See Easement Ltr 10 Bk 2767 Pg 1019
(SEAL)
PICKETT RAY & SILVER
THE SUMMIT AT WHITMOOR
A TRACT OF LAND IN U.S. SURVEY 16,
ST. CHARLES COUNTY, MISSOURI
EXHIBIT E