IN THE
SUPREME COURT OF MISSOURI

Appeal No. SC91539

ST. CHARLES COUNTY,
MISSOURI,

Respondent/Plaintiff,

v.

LACLEDE GAS COMPANY,

Appellant/Defendant.

On Appeal from the Eleventh Judicial Circuit, St. Charles County, Missouri
Hon. Jon A. Cunningham, Circuit Judge, Division 5
Circuit Court Case No. 0811-CV08506

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

The Appellant's Statement of Facts contains argument, as well as some incorrect and unsupported factual assertions. A complete statement of facts is set forth below, followed by a response to specific portions of the Appellant's statement of facts.

A. Respondent's Statement of Facts

The facts essential to the determination of this case are clear and not in dispute. Pitman Hill Road is a public road in St. Charles County, Missouri that is maintained by the Respondent St. Charles County ("County"). Legal File ("LF") 76, 161. The County has planned a project to widen and improve a section of this road (the "Project"). *Id*. The planned improvements are necessary to improve public safety and convenience for the users of the road. LF 76. The Appellant Laclede Gas Company ("Laclede"), along with other public utilities, has existing utility lines installed in the Pitman Hill Road corridor that will need to be moved to accommodate the Project, and the County has notified Laclede of the need for certain relocations. LF 8, 21.

Some of Laclede's lines that need to be relocated were installed within areas noted as dedicated public streets and/or roadways on five different subdivision plats. *Id.* These plats are: Muirfield Plats One, Two and Three (recorded at St. Charles County Plat Book 27, pages 168-169, Plat Book 27, pages 170-171, and Plat Book 28, pages 72-73, respectively); Crosshaven Estates (recorded at Plat Book 36, page 318); and The Summit at Whitmoor (recorded at Plat Book 36, page 390). *Id*. These five subdivision plats (hereinafter collectively referred to as the "Subdivision Plats") were attached as Exhibits A through E to the County's Petition (LF 12-19) and also to the Affidavit filed in support

of the County's Motion for Summary Judgment (LF 83-90).

Each one of the Subdivision Plats contains language dedicating the streets and roadways shown thereon to the County, or to the City of Weldon Spring, Missouri ("Weldon Spring") as public streets and roadways. The first three plats (the three Muirfield plats) contain language stating that the owner of the subdivided land "hereby designates the streets and roadways shown … [and] the 15 foot wide dedication strip along the East line of Pitman Hill Road" on the plats "as public streets and roadways". LF 8, 13, 15, 16, 21. Each of the three Muirfield plats depicts a hachured area adjacent to Pitman Hill Road containing the label(s) "15' Dedication Strip". LF 12, 14, 17. The fourth plat (Crosshaven Estates) contains language stating that the owner of the subdivided land "hereby designates the street and roadway as shown hatched … hereon, as a public street and roadway and are hereby dedicated to the City of Weldon Spring, Missouri for public use forever …." LF 9, 18, 21. The Crosshaven Estates plat depicts a hachured area adjacent to Pitman Hill Road containing the label "15' W Road Dedication". LF 18. The fifth plat (The Summit at Whitmoor) contains language stating: "The area shown hatched hereon, for the widening of Pitman Hill Road, is hereby dedicated to the City of Weldon Spring, Missouri, for public use." LF 9, 19, 21. The Summit at Whitmoor plat depicts a hachured area adjacent to Pitman Hill Road containing the label "City of Weldon Spring Dedication Strip 16,801 sq. ft." LF 19. The County, by contract with Weldon Spring, maintains certain public roads, streets and rights-of-way in said city, including the portions of Pitman Hill Road located therein. LF 76, 91-95; Appellant's Opening Brief, p. 3.

Each of the Subdivision Plats also contains language stating that it "further designates these streets as utility easements" (in the cases of the first four of the Subdivision Plats) or that the "area for the widening of Pitman Hill Road is hereby established as a utility easement" (in the case of The Summit at Whitmoor). LF 12-19, 83-90. The dedicators of the Subdivision Plats, without exception, placed the language dedicating the streets and roadways, and the specific dedication strips, as public *before* the language regarding utility use. *Id.*

After St. Charles County notified Laclede of the Project and began communicating with Laclede about what relocations would be necessary, Laclede asserted that it was entitled to be reimbursed for its cost to relocate facilities within the disputed areas. LF 10, 22. Laclede has estimated the amount of reimbursement costs in dispute at $120,000.00. *Id.* St. Charles County refused to recognize any right of Laclede to be reimbursed for relocating its facilities from within these areas that have been dedicated as public streets and roadways. *Id.*

This dispute led to the County filing a Petition for Declaratory Judgment on September 15, 2008 that sought to determine the rights, obligations and liabilities that exist between the parties in connection with the Subdivision Plats. LF 7-19. The parties filed cross motions for summary judgment, and on November 5, 2009, the Honorable Jon A. Cunningham entered a Judgment granting the County's Motion for Summary Judgment and denying Laclede's Motion for Summary Judgment. LF 213-232. Laclede noted an appeal to that decision on December 1, 2009. LF 233.

B. Response to Appellant's Statement of Facts

On page 1 of its Substitute Brief, Laclede argues that it "installed the gas lines at issue in easements specifically granted to Laclede (or its predecessor) by the subdivision owners ...." Laclede cites pages 28 and 47 of the Legal File, which are pages from its motion for summary judgment and supporting affidavit, apparently in support of the factual assertions contained in this argument. The County, however, specifically denied this assertion in its response to Laclede's motion for summary judgment, admitting only that "at some point in time prior to the present dispute, Laclede installed gas lines in the areas noted as **dedicated public streets and/or roadways** on the Subdivision Plats. LF 119 (Response #12).

On page 3 of its Substitute Brief, Laclede asserts that "Each subdivision plat contains the proviso that the County did not accept any dedication strip until roadway construction was completed per County specifications." This statement is incorrect. First, the Summit at Whitmoor plat contained no such language. LF 19. Second, it misstates the language of the other four plats. The other plats contain language stating 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 [certain St. Charles County standards]". This language does not use the words "dedication strip". Acceptance of a piece of land described as a "dedication strip" is not the same as accepting the physical streets, curbs, storm sewers, and other improvements for public maintenance of such improvements.

On page 4 of its Substitute Brief, Laclede asserts that "The Subject Gas Lines have

never been located underneath the existing right-of-way (*i.e.*, the actual paved roadway of Pitman Hill Road). Laclede cites to page 206 of the Legal File in support of this assertion, however that merely points to an affidavit which states: "None of the Subject Gas Lines was [*sic*] installed under the pavement of then-existing Pittman [*sic*] Hill Road" and that the gas lines "remain outside the pavement of Pittman [*sic*] Hill Road at the present time." This factual assertion confuses the boundaries of a right-of-way with the boundaries of the pavement contained therein. These are not the same things; and it is the same mistake some homeowners in subdivisions make when they assume their property lines extend all the way to the curb of the street in front of their house. It is analogous to making an assumption that the property boundaries of a residential tract of land are limited to the footprint of the house and its driveway, or that a railroad right-of-way is only as wide as its tracks. Nothing in the record supports an assertion that the right-of-way of Pitman Hill Road is limited to the boundaries of its existing pavement.

On page 4 of its Substitute Brief, Laclede asserts that "There is no evidence that the County has ever used, improved or accepted the easement dedication strips . . . ." None of the plats label the areas in question as "easement dedication strips" so this language is argumentative. More significantly, though, this assertion is wrong. It ignores several pieces of evidence in the record, including that the acceptances of the appropriate governmental body are shown on the face of each plat and that Laclede has admitted these are valid public roads during the course of this litigation, all of which is discussed in detail in Section III.B of this Brief, *infra*. The assertion also relates solely to an issue that is not preserved for appeal, which is discussed in detail in Section III.A of this Brief,

infra.

On page 6 of its Substitute Brief, Laclede makes the assertion that the Thaemert Affidavit (the one filed with the trial court on September 10, 2009, referred to herein as the "Supplemental Affidavit") "disputes the factual assertions in the Bostic Affidavit by noting that the other lines and pipes referred to in the Bostic Affidavit, which Laclede relocated at its own expense, were not located in the dedication strip depicted on the pertinent plats." This broad claim leaves a reader with the impression that the Supplemental Affidavit disputed the facts related to *all* of "the other lines and pipes referred to in the Bostic Affidavit". In fact, the Bostic Affidavit contained descriptions of seven examples of past instances where Laclede relocated its facilities from the same types of dedication strips as those at issue in the present case without reimbursement of its expenses. LF 77-81. The Supplemental Affidavit only even attempted to contradict **three out of seven** of these examples. LF 206-207. Therefore, four of the examples of past relocations from these types of dedicated areas have remained factually undisputed for the entire duration of this litigation.

Finally, also on page 6 of its Substitute Brief, Laclede states: "On September 16, 2009, the Court granted leave to Laclede to file [the Supplemental Affidavit]. LF 0005, 0201-04, App. 025-28." Yet, these three citations are devoid of any record of a ruling by the trial court granting leave for Laclede to file its untimely affidavit. The only entry in the trial court docket sheet for September 16, 2009 (LF 5), does not mention the motion for leave or Supplemental Affidavit. The other citations are to the motion for leave (LF 201-204) and the affidavit itself (App. 24-27). (Laclede's citation to "App. 025-28" is

apparently an oversight, since the Appendix ends at page 27.) This matter is discussed further in Section VI, *infra*. Nothing in the record other than the Supplemental Affidavit stated the amount of time the gas lines have been installed, except to state that they were installed some time prior to the present dispute. *See, e.g.,* LF 28, 47, 119.

ARGUMENT

I. INTRODUCTION

A. Standard of Review Applicable to Summary Judgments

An appellate court reviews the trial court's grant of summary judgment *de novo*. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp* ., 854 S.W.2d 371, 376 (Mo. banc 1993). An appellate court can sustain the trial court's judgment on any ground as a matter of law, even if different than one posited in the order granting summary judgment. *Id.* at 387-88. To prevail on a motion for summary judgment pursuant to Rule 74.04, the moving party must demonstrate, on the basis of facts 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) (citation omitted). "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." *Id.* (emphasis added).

B. Summary of Arguments

Laclede asserts, in the introduction to its argument, that this case "does not involve the County's power to require relocation of the Subject Gas Lines" and "Laclede is

willing to relocate its lines." Appellant's Substitute Brief ("App. Subst. Br."), p. 9. Laclede then states "this appeal presents the constitutional questions of whether the County can exercise that power without compensating Laclede for its relocation costs, and whether Laclede is entitled to a jury trial on these issues." *Id.* The internal inconsistency of this argument is apparent. If the Subdivision Plats did vest constitutionally protected property rights in Laclede, it would be well within those rights to refuse to move its lines altogether, and then the government could only force removal through the exercise of the power of eminent domain. Any use of the power of eminent domain is taxed by additional costs and delays. It must be duly authorized, exercised only upon proper authorization and notice, and is subject to various other rules in any given case. *See* Missouri Supreme Court Rule 86.01 *et seq.* Laclede's claim of willingness to relocate in the present matter amounts to no more than a thinly veiled effort to conceal the startling impact of the ruling it seeks.

Judge Romines' dissent in the Court of Appeals opinion revealed what that true impact would be. He stated "I would reverse and remand this case to the trial court for dismissal so that St. Charles County can file a condemnation case." Dissent, Eastern District Court of Appeals Opinion, pp. 5-6. To hold that a local government must condemn the right to improve a road within areas specifically dedicated as widening strips for a public roadway contravenes § 445.070 RSMo. and public policy as established by an abundance of case law and treatises, as discussed below. The dissent also casts aside the true intention that is apparent from the face of each plat. In doing so, however, he implicitly acknowledges that Laclede's claim of willingness to relocate is

irrelevant to resolving the present dispute. If Laclede's novel proposition of law were to be accepted by a court, it would create new property rights in favor of Laclede and other utilities, thereby enabling any utility to refuse to move from such areas until its newly created rights are extinguished through the government's use of eminent domain.

Laclede cites a U.S. Supreme Court case, *Panhandle E. Pipe Line Co. v. State Highway Comm'n.*, 294 U.S. 613 (1935), as the primary support of its claim of an unconstitutional taking. That case, however, perfectly illustrates one of the County's main points. It involved a pipeline company that in 1930 **purchased** rights-of-way for its pipes from private property owners, and then **three years later, well after the purchase and after the pipes were in operation**, the highway commission made plans to place a new highway across various parts of the company's pipeline rights-of-way. The commission bought the fee interest for the new roadway from the private property owners, but did not purchase any interest or otherwise obtain any release from the pipeline company. The pipeline company objected, as it had every right to do since its rights preexisted the commissions' rights in the same ground. The distinction between those circumstances and the present case is apparent, and it further illustrates that Laclede must have **preexisting** rights in ground that is later established as a roadway to avoid responsibility for its relocation expenses. *Panhandle* is the standard by which a utility company's claim of an unconstitutional taking must be measured, and even when taken in the light most favorable to Laclede, the facts here fall well short of that time-tested mark.

Well established Missouri law—plus the overwhelming weight of authoritative treatises—contradicts Laclede's novel interpretation of the meaning of dedications in

plats in this case. Public policy in the state of Missouri excludes incidental uses from vesting in private entities when public roads are dedicated. *See City of Camdenton v. Sho-Me Power Corp.*, 237 S.W.2d 94, 98 (Mo. 1951). Public authorities cannot be deprived, and indeed cannot even deprive themselves, of the full extent of their police power to control public roads. Any attempt to restrict a public authority's ability to regulate the use of an area in the future while also dedicating it as a public road is therefore an improper condition to a dedication, and must be declared invalid. It is beyond dispute that the areas Laclede now questions became part of the public road system, and these principles alone are sufficient to determine the outcome of this case.

Statutory analysis yields the same result. The dedications in this case complied with § 445.070 RSMo., so the doctrine of common law dedication does not apply, nor do other forms of conveyances apply. This statute expressly states that the only recipients of interests dedicated by plat in Missouri are governmental entities—here, the County and the City of Weldon Spring. The utility rights spelled out in the plats were, pursuant to this statute, conveyed to the County and City as an inherent part of the public roadway dedication. Thus, simply applying the plain language of the statute provides a basis to affirm the trial court's judgment that is independent of the improper conditions issue or even any of the issues raised by Laclede.

Even without the literal application of this statute, a complete analysis of the plats reveals the dedicators' intentions that public streets and roadways were the primary purpose of the areas in question, and other uses were intended to be incidental and subservient, even though the plats are silent on how to resolve specific conflicts. To the

extent this silence creates ambiguity on the face of the plats, the past conduct of the parties is highly probative and reveals that these same parties have interpreted one of the same plats and others with the same operative language as creating public roads subject to the County's full police power. In those instances, Laclede agreed to move its lines to accommodate road improvement projects at its own cost, even though it was seeking reimbursement for its relocation work in other areas where it was being displaced from true private easements.

Finally, Laclede raises certain other issues that have not been preserved for appeal. With respect to Laclede's claim that the County has not accepted the dedications in question, the Court of Appeals specifically considered this issue and agreed. Eastern District Court of Appeals Majority Opinion, p. 10 (FN 9). Laclede complains that admission of the Bostic Affidavit precluded entry of summary judgment, however that issue is similarly unpreserved. Laclede never withdrew its own motion for summary judgment, even after its motion to strike the Bostic Affidavit was denied. Laclede did argue to the trial court that certain factual contradictions precluded entry of summary judgment, however they ignored the facts that there were other uncontradicted examples covering the same issue, so that argument alone was insufficient to preserve their broader claim that admission of the affidavit in general precluded summary judgment. Finally, Laclede makes the claim in its Substitute Brief that it has been deprived a right to trial by jury. This claim also was never made to the trial court or to the Court of Appeals, so it was not preserved for appeal.

II. ANY ATTEMPTED LIMITATIONS OF THE PUBLIC RIGHT-OF-WAY DEDICATIONS WERE VOID AS AGAINST PUBLIC POLICY OF THE STATE OF MISSOURI, AND ARE SUPERSEDED BY THE GOVERNMENT'S POLICE POWERS OVER ITS ROADS.

A. Public Policy

The essence of Laclede's novel claim is that at the same time the Subdivision Plats dedicated public roads to the County, Laclede somehow received title to a utility easement in the same ground without that easement being subservient to the public road interest. It asserts that the public road dedications were limited or burdened by the designation of the utility easements. This argument, however, directly contravenes existing law, including the binding precedent of this Court.

> The general rule is that a dedicator cannot attach conditions or limitations inconsistent with the legal character of the dedication, or contrary to public policy, or which exclude public control of the property, but if he does so, the dedication is otherwise valid. … The dedication of property for the purpose of a highway carries the right to public travel and also the use for all present and future agencies commonly adopted by public authority for the benefit of the people, such as sewer, water, gas, lighting and telephone systems. **A condition in a deed of dedication prohibiting the uses above stated or circumscribing the future freedom of action of the authorities to devote the street to the wants and convenience of the public is void, as against public policy or as inconsistent with the grant.**

City of Camdenton v. Sho-Me Power Corp., 237 S.W.2d 94, 98 (Mo. 1951) (citations omitted, emphasis added). When considering the same issue ultimately presented in the present case—whether roads can be dedicated as public while also creating separate utility easement rights in the same ground—the Missouri Supreme Court upheld the trial court's determination that "the attempt of the dedicators in the plat of the original town of Camdenton, to reserve control over the utility rights in the streets …, and the subsequent mesne conveyances of such purported rights, were illegal and void." *Id.* at 97. Laclede's attempt to claim control of the utility rights in the streets dedicated in the Subdivision Plats is illegal and void for precisely the same reason—public policy of the State of Missouri prohibits any encumbrance of road dedications by improper conditions.

Sho-Me Power Corp. is cited in *McQuillin, Municipal Corporations* (3rd Ed., 2000 Revised Volume), Vol. 11A, § 33.10.20—Dedication—Improper conditions, which states in pertinent part:

> The dedicator cannot attach a condition or reservation that will destroy the chief characteristic of the purpose of the dedication or take the property from the control of, or impose burdens on, the duly authorized public officers. The dedicator may not attach a condition which is against public policy. …If a condition or a reservation in the dedication of lands for streets tends to hamper public control, it is usually regarded as against public policy and invalid.

This section of *McQuillin* goes on to state "there cannot be a dedication to only a part of the public unless a statute or charter provision authorizes it" and "[a]n invalid or void

condition or reservation in an instrument of dedication will not of necessity cause the dedication to fail." Additional authorities overwhelmingly support this same principle.

> A grantor is limited in the types of restrictions that can be placed on a dedication of property for public use. The dedicator cannot attach to the dedication any conditions or limitations inconsistent with the legal character of the dedication, or which take the property dedicated from the control of the public authorities, or which interfere with the exercise of the police power or are against public policy. If an improper condition is attached, the dedication will take effect regardless of the condition, which is construed as void.

26 C.J.S. Dedication § 35 (Westlaw, database updated Apr. 2011).

> [A dedicator of land to the public] cannot attach to the dedication any conditions or limitations inconsistent with or repugnant to the grant, that take the property from the control of the public authorities, or that are against public policy.

23 Am. Jur. 2d Dedication § 6 (Westlaw, database updated Feb. 2010). Finally, *City of Bisbee v. Arizona Water Co.*, 153 P.3d 389, 396 (Ariz.App. 2007) (emphasis added), listed the following examples of this premise (including *Sho-Me Power Corp.*):

> **[S]everal other courts have ruled that attempted reservations of underground street rights for utility purposes were void and unenforceable.** *See West Texas Utils. Co. v. City of Spur*, 38 F.2d 466, 467-68 (5th Cir.1930) (reservation clause that attempted to give utility right "to make all necessary excavations, dig all necessary holes, and do all things necessary to construct, maintain, operate and repair ... [telephone and electric poles and lines] over and across any and all streets

and alleys ... should it at any time desire to do so," was void as against public policy); *Village of Grosse Pointe Shores v. Ayres*, 254 Mich. 58, 235 N.W. 829, 831-32 (1931) (dedication of roads that limited utility installation "circumscrib[ed] the future freedom of action of the authorities to devote the street to the wants and convenience of the public" and was therefore "void as against public policy"); *Kuehn v. Village of Mahtomedi*, 207 Minn. 518, 292 N.W. 187, 190 (1940) ("**an individual [may not] by reservation withhold from the municipality the sovereign power incident to the public use of streets and highways**"); *City of Camdenton v. Sho-Me Power Corp.*, 361 Mo. 790, 237 S.W.2d 94, 97 (1951) (affirming trial court's declaration that "the attempt of the dedicators ... to reserve control over the utility rights in the streets ... [was] illegal and void"); *Bradley v. Spokane & I.E.R. Co.*, 79 Wash. 455, 140 P. 688, 690 (1914) ("The reservation in the dedication to general municipal purposes such as the laying of 'water and gas pipes ...' would be so repugnant to the character of these streets and alleys as public ways, by seeking to take away from the city the power to exercise control over these streets, as to contravene a sound public policy, and for this reason we think it must be held absolutely void").

Sho-Me Power Corp. is long-established Missouri law, supported by an unshakable foundation of multiple persuasive authorities that continue to add to the strength and persuasiveness of its holding. It is binding precedent that controls the outcome of this case.

Despite this case being cited and discussed in the Circuit Court pleadings (LF

191), and cited and presented as binding precedent in the Respondent's Brief in the Court of Appeals (at pp. 6, 8, 10, 11 and 38), Laclede fails to even mention this case or even the broader public policy issues in its Substitute Brief. It has attempted in the past to argue that *Sho-Me Power Corp*. does not apply to the present facts since it involved an attempted reservation of rights by the original dedicator, instead of an attempted conveyance of rights to a utility company. Such an argument is defeated by the general rule of improper conditions to dedications, however, which *Sho-Me Power Corp.* cites with approval and is not restricted to the limited circumstances of a dedicator attempting to make specific reservations. It also fails to acknowledge the complete scope of the holding of *Sho-Me Power Corp.*, which applied not only to the original reservation, but also to the intermediate **conveyances** that ultimately led to a utility company: "the attempt of the dedicators in the plat of the original town of Camdenton, to reserve control over the utility rights in the streets …, **and the subsequent mesne conveyances of such purported rights**, were illegal and void." *Id.* at 97 (emphasis added).

Further indication of the public policy of the State of Missouri that counties and cities should have unfettered control over their public roads can be found in other Missouri cases as well as Missouri statutes. In general terms, Chapter 229 RSMo. gives the County dominant authority over county roads. In discussing the predecessor statutes to Chapter 229, this Court stated in *State ex rel. St. Louis County v. St. Johns-Overland Sanitary Sewer Dist.*, 185 S.W.2d 780, 783 (Mo. 1945), "[c]ities and counties are by statute given governmental supervision over highways with power to locate, establish, construct, repair and vacate." That case involved a sewer district contending it had no

obligation to repair a road it had disturbed, but the court stated that the sewer district "does not have the same power over streets and roads that cities or counties have." *Id.* Laclede asserts an easement right that is directly interfering with the County's right to reconstruct its road to make it safer and more convenient. This assertion fails to recognize the inherent authority counties have over their roads. Counties are responsible for keeping their roads reasonably safe, and must not be permitted to be inhibited in performing that vital governmental function.

The case of *Public Water Supply Dist. No. 2 of Jackson Co. v. State Highway Comm'n.*, 244 S.W.2d 4 (Mo. 1951), further illustrates the general dominance of the public's interest in a public road over utilities using the same ground. That case involved the same dispute that the County and Laclede have—who is responsible for the cost to relocate utility facilities due to a road project. Referring to *State ex rel. St. Louis County v. St. Johns-Overland Sanitary Sewer Dist., supra*, and its statement of the power of cities and counties over their roads, this Court stated that the "State Highway Commission is likewise a political subdivision of the state with jurisdiction over the 'state-wide connected system' of highways" and it "has the dominant, primary and superior dominion over highways". *Public Water Supply Dist. No. 2 of Jackson Co. v. State Highway Comm'n.* at 6. The court referred to various constitutional and statutory provisions giving the Commission authority over roads and stated they "plainly indicated the legislative intention of the highway commission's superior dominion over the highways of this state." *Id.* In that case, as in the present dispute with Laclede, it does not appear that the utility's "right to occupy parts of the right of way is superior to that of

any other authorized occupancy by a public utility, or that its occupancy is not subject to changes and conditions necessitated by improvements by the appropriate dominant governmental agency having jurisdiction of highways …. If the district's rights and occupancy are no greater than the rights and occupancy of private public utilities there can be no doubt but that the burden of the cost of removing or relocating the installations would fall upon the district." *Id.* at 7 (citations omitted).[1]

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[1] A South Carolina case also cited this *Public Water Supply District* case with approval in a dispute over utility relocation costs, in a case where, as here, there was no specific agreement as to who would bear the cost of relocating utility lines if such relocation became necessary by reason of the construction or maintenance of the public road. *South Carolina State Highway Dept. v. Parker Water and Sewer Subdistrict,* 146 S.E.2d 160, 163 (S.C. S.Ct. 1966). There, as in the present case, it "is fundamental to the solution of the present problem that the public road existed for the benefit of the general public and was subject to the police power of the State, in which the ultimate authority with respect to the control and management of all streets and highways is placed. …**Public policy requires that highways be maintained for the general public and primarily for the passage of travel thereover … and any other use granted of the highway is at all times subject to the exercise by the State of this paramount right.**" That court went on to state that "in the absence of a statute or agreement to the contrary, the cost of relocating utility lines placed in the right of way of public streets or highways must be paid by the owner of the utility when the relocation is necessitated by road

The various provisions of Chapter 229 RSMo. reflect the same legislative intention with respect to the County's superior dominion over its roads. For example, county approval is required to perform any of the following activities within the right-of-way: excavation or placement of any poles, wires, mains or pipes (§ 229.300), connection of private driveways (§ 229.150), or even removal of any plants or plant parts (§ 229.475). The City of Weldon Spring's superior dominion over its roads is conveniently evidenced in one statute: "Cities of the fourth class shall have and exercise exclusive control over all streets, alleys, avenues and public highways within the limits of such city." § 88.670 RSMo.

In *St. Johns-Overland, supra*, as is also the case with Laclede's use of the roads in question, the utility "has a right to occupy parts of the highway, but its right to do so is not absolute," its right is "incidental to the primary and dominant purpose of highways and the public's right in highways," and its occupancy is "subject to changes and conditions necessitated by improvements by the appropriate dominant governmental agency having jurisdiction of highways." *Id.* at 6-7. *St. Johns-Overland* held the utility responsible for the cost of the relocation of its facilities necessitated by the road project, and the trial court ruling reaching the same result in the present case should be affirmed.

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maintenance or construction" and "**such use was subservient to the reasonable exercise of the paramount right of the State to reconstruct the road to meet the changing needs of highway traffic.**" *Id.* (emphasis added).

B. Police Power

Treatises and case law discussing the inherent governmental police power over public roads lend further support to the principle enunciated in *Sho-Me Power Corp.* "The use of highways and streets may be limited, controlled, and regulated by the public authority in the exercise of the police power, whenever and to the extent necessary to provide for and promote the safety, peace, health, and general welfare, calculated to secure to the general public the largest practical benefit from the enjoyment of the easement and to provide for its safety while using it." 39 Am. Jur. 2d Highways Streets, and Bridges § 235 (Westlaw, database updated Nov. 2010). This general police power is broad and not subject to even self-imposed attempts to limit it. "Government power to control and regulate the use of highways in the public interest may not be surrendered or impaired by contract, particularly where municipalities are involved, since municipalities have a continuing duty to exercise legislative control over their streets. Municipal corporations do not have the power, by contract, ordinance, or bylaw, to yield their powers in this regard." 39 Am. Jur. 2d Highways Streets, and Bridges § 238 (Westlaw, database updated Nov. 2010). In Missouri, a charter county can exercise municipal police power, so this principle applies equally to all five of the Subdivision Plats. *Meyer v. St. Louis County*, 602 S.W.2d 728, 737 (Mo.App. E.D. 1980) ("a charter county … is endowed with some of the powers and functions of a municipal corporation in the area outside incorporated cities and is empowered to exercise legislative power pertaining to public health, police and traffic, building construction, and planning and zoning in such area," citing Art. VI, Sec. 18(c), Constitution of Missouri, 1945); and *State ex rel.*

American Eagle Waste Industries v. St. Louis County, 272 S.W.3d 336, 341 (Mo.App. E.D. 2008) ("charter counties possess wide authority under Missouri Constitution Article VI, Section 18(c), to regulate municipal functions as they see fit").

Laclede cannot deny the County's rights under the Subdivision Plats to maintain and, if the government deems it necessary, reconstruct the dedicated roads. Laclede claims, however, that it somehow has constitutionally protected rights of subsurface use. This assertion fails to recognize the full extent of the County's authority in its roads, and not just under the Missouri law discussed above. As early as the case of *New Orleans Gaslight Co. v. Drainage Comm'n. of New Orleans*, 197 U.S. 453, 461 (1905), the U.S. Supreme Court recognized the governmental control of the surface of the streets, and then stated:

> We see no reason why the same principle should not apply to the subsurface of the streets, which, no less than the surface, is primarily under public control. The need of occupation of the soil beneath the streets in cities is constantly increasing, for the supply of water and light and the construction of systems of sewerage and drainage; and every reason of public policy requires that grants of rights in such subsurface shall be held subject to such reasonable regulation as the public health and safety may require.

The Supreme Court held 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. These views are amply sustained by the authorities." *Id.* (citations omitted). The applicability of that case to the present

facts are clear:

> The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the state, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement 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.

In addition to the cases discussed above, authoritative treatises give further guidance on the application of general police power over roads to the specific situations of utility placement and relocation.

> Municipal corporations ordinarily may and do exercise police control over the erection and maintenance of poles, wires, pipes and similar apparatus of utility companies or others in streets, alleys and public ways. They can, in this respect, where they act reasonably, compel all generally accepted improvements which tend to decrease the obstruction of the streets or increase the safety or convenience of the public in their use. Municipal police power in this respect and for these purposes is not precluded by the fact that such structures have been erected and maintained under franchise or permission, the fact that the power to grant the franchise is vested in the legislature or the fact that the utility company has a sole and exclusive privilege ….

7A McQuillin Mun. Corp. § 24:595 (3rd Ed., Westlaw, database updated March 2011). Furthermore, "[i]t is within municipal police power to designate on what parts of streets poles, lines and pipes or other apparatus may be erected or, in proper cases, to require their relocation … [and] courts will presume that this power has been exercised reasonably by a municipality, and they will not interfere unless the exercise has been manifestly arbitrary and unreasonable." *Id.* Additionally, "the grantee of a right to make special use of the public highways and streets, such as a public service company, may be required to abandon the use granted, or to remove or change the location of structures erected under the grant, when demanded by public necessity, convenience, and welfare, or when highway use makes this necessary, and may further be required to bear the expense of such removal or relocation." 40 Am. Jur. 2d Highways, Streets, and Bridges § 318 (Westlaw, database updated Nov. 2010).

Laclede presents the argument in its Substitute Brief that these rules apply only to situations where specific franchise agreements control the utility's right of placement in roads. *See* App. Subst. Br. 9-10, 31-33. This argument ignores the established principle of general governmental police power over roads. The authorities cited here, which enunciate this principle, are not in any way limited in their application to the terms of specific franchise agreements or other types of contracts. This police power over roads exists under general common law.

Laclede is, at the most, the grantee of a right to make special use of the streets shown on the Subdivision Plats as stated therein. This "special right" must be reconciled with the County's police power over its roads. "The right of a public utility company to

excavate in a public highway or street in the exercise of a franchise is necessarily subject to reasonable municipal regulation, **unless specifically excluded by the act conferring the right**." 39 Am. Jur. 2d Highways, Streets, and Bridges § 298 (Westlaw, database updated Nov. 2010, emphasis added). None of the Subdivision Plats mention any exclusion of utilities from governmental regulation. Laclede's arguments rest on a fictitious foundation that such exclusion is implicit in the language. The applicable rule, however, plainly requires **specific** exclusion, which would have needed to be **explicitly stated** on the face of the plats.

Laclede's "special right," when reconciled with public policy and the broad extent of governmental police power over roads, amounts to no more than the type of "license or privilege to occupy a certain location, subject to modification, under an implied obligation to make way for a proper governmental use of the right of way" that is described in *Jackson County Public Water Supply District No. 1 v. State Highway Comm'n.*, 365 S.W.2d 553, 557 (Mo. 1963). In that case, as with Laclede's situation, the utility provider availed itself of free use of right of way, "thereby avoiding acquisition costs for right of way through private property," and the utility provider "received a benefit, assumed the risk, and must be held to have occupied the right of way subject and subordinate to the implied obligation to relocate its facilities at its own expense should relocation become necessary in the interests of the traveling public … [t]his was an implied condition of the grant." *Id.* at 557-558 (citations omitted). This demonstrates the properly implied rules applicable to the construction of the Subdivision Plats.

To the extent the dedicators of the Subdivision Plats attempted to limit the public

road dedications by simultaneously creating equivalent or dominant easement rights in various utility companies, they effectively attempted to hamper public control of the roads. Such attempts are improper conditions to a dedication. In Missouri as well as under general municipal common law, such attempts violated public policy and are superseded by the government's general police power over roads, and are therefore void.

III. THE COUNTY'S ACCEPTANCE OF THE DEDICATIONS IS NOT AT ISSUE IN THIS APPEAL.

A. Laclede's argument that the County has not accepted the dedications was never presented to the trial court so it was not preserved for appeal.

A point Laclede attempts to assert on appeal, which is central to many of the arguments in its brief, is that there is no evidence in the record that the County accepted the public road dedications. App. Subst. Br. 4, 11, 12, 15, 26-28, 30, 38. A thorough review of the record reveals that Laclede never made this contention in its own motion for summary judgment, its response to the County's motion for summary judgment, or any of the other pleadings in the case. This issue was not expressly decided by the trial court in its final judgment (LF 213 *et seq.*) or any other ruling, because none of the pleadings had raised it as an issue to be decided.

"In Missouri, an issue which is not presented [to] or *expressly* decided by a trial court is not preserved for appellate review." *Zundel v. Bommarito*, 778 S.W.2d 954, 957 (Mo.App. E.D. 1989) (emphasis added). In *Lincoln Credit Co. v. Peach*, 636 S.W.2d 31,

36 (Mo. banc 1982) (citations omitted), this Court applied this principle when affirming a summary judgment, finding that the appellant raised contentions not presented to the trial court, and explaining that "it has long been stated that this Court will not, on review, convict a lower court of error on an issue which was not put before it to decide."

Laclede argues in its Substitute Brief (at pp. 28-29) that it did in fact preserve this issue for appellate review. It begins this argument by stating: "The requirement that a dedication must be accepted was thoroughly addressed in Laclede's summary judgment papers. *See, e.g.*, LF 0035-36, 136." These two citations point to instances in where Laclede claimed it had accepted dedications of easements. They do not mention any issue of acceptance or non-acceptance by the County. Laclede further argues "A point is preserved for appellate review when implicit in an express ruling by the trial court." Substitute Brief, p. 28. This argument is defeated by the language in *Zundel, supra*, which requires an issue to be *expressly* decided by the trial court in order to be preserved for review. Laclede cites two cases to support its argument, but the present facts are outside of their relatively narrow scope. In *Walls v. City of Overland*, 865 S.W.2d 839 (Mo.App. 1993), the plaintiff argued at trial that it had complied with a specific statute requiring notice to the defendant of its claim within a certain time. On appeal, the plaintiff argued that the statute did not apply. These two positions were logically consistent. The plaintiff's position remained unchanged that the statute did not bar the action. Thus, the plaintiff was not attempting to inject a new issue into the appeal. The facts of that case do not apply here, since Laclede is very plainly attempting to raise an entirely new issue on appeal. In *Segraves v. Consolidated Elec. Coop.*, 891 S.W. 2d 168,

171 (Mo.App. 1995), the court properly noted: "Review on appeal is limited to theories heard by the trial judge." The court specifically found there had been testimony at trial regarding the same theory that was raised on appeal. *Id.* This case does not support Laclede's position either.

This Court should accept the conclusion of the Court of Appeals that Laclede's contention was not preserved for appellate review. Eastern District Court of Appeals Majority Opinion, p. 10 (FN 9). The Majority implied it may have had the discretion to review the matter for plain error, but that implication is unfounded and should also not be entertained in this Court. "Plain error does not apply to factual issues which are raised for the first time on appeal." *Zundel, supra.*

B. Even if the issue would have been presented to the trial court, decided adverse to Laclede, and preserved for appeal, the County's acceptance of the dedications is apparent from evidence in the record including Laclede's own admissions.

As discussed above, Laclede attempts to assert in its brief that the record contains no evidence that the County accepted the dedications made in the Subdivision Plats. This assertion conveniently overlooks several pieces of evidence in the record and also contradicts Laclede's own admissions. Laclede has continued to ignore such evidence and admissions in its Substitute Brief despite a thorough discussion of this point in the Respondent's Brief in the Court of Appeals.

Each of the Subdivision Plats bears the written approval of the relevant government officials. Muirfield Plat One (LF 12-13) and Muirfield Plat Two (LF 14-15),

were each signed by the three members of the County Commission on December 15, 1987, before being recorded in the office of the Recorder of Deeds on December 16, 1987. The date of signing by the County Commissioners is difficult to read on Muirfield Plat Three (LF 16-17), but it does appear that was done on May 10, 1988, before the plat was recorded on May 11, 1988. For all three of these plats, the execution by the County Commissioners was in addition to the written approval of the St. Charles County Planning and Zoning Commission, which is also indicated in writing on the face of each plat. The Crosshaven Estates subdivision plat (LF 18) bears the statement of the City Clerk of the City of Weldon Spring that identifies the City ordinance that approved the plat and states that the ordinance directed her to endorse the plat. The City Clerk's endorsement was made on November 23, 1999, and the plat was recorded with the Recorder of Deeds on November 24, 1999. The Summit at Whitmoor plat (LF 19) also bears a statement of the same City Clerk that identifies the City ordinance that approved the plat and states that the ordinance directed her to endorse the plat. The City Clerk's endorsement was made on March 28, 2000, and the plat was recorded with the Recorder of Deeds on April 24, 2000.

Section 445.070 RSMo. states that maps or plats, when "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."[2] The statute goes on to state that "the fee of such lands conveyed as aforesaid shall be vested in the property county in like trust" for maps or plats of areas that are not incorporated. In discussing this statutory language, this Court has stated "by virtue of the recorded plat the county acquired title to the land within the designated boundaries of the public road for use as such" and "[i]n other words, the statute cited undertook to vest title to the streets in the county when there was no municipal entity to accept." *Winschel v. St. Louis Co.*, 352 S.W.2d 652, 653-654 (Mo. 1962). This Court found that title vested upon filing of plat, despite the fact that the

[2] Section 445.070 RSMo. states in its entirety:

1. If any person shall sell or offer for sale any lot within any city, town or village, or any addition thereto, before the plat thereof be made out, acknowledged and recorded, as aforesaid, such person shall forfeit a sum not exceeding three hundred dollars for every lot which he shall sell or offer to sell.

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.

county in that case "had never spent any money or labor for the construction of [the street] at the place in question." *Id.* at 653. *See also Hatton v. City of St. Louis*, 175 S.W. 888, 889 (Mo. 1915) ("The dedication … as was shown on the properly executed, acknowledged, and recorded plat … was in strict statutory form, and vested title to the streets and alleys therein designated, without any act on the part of the city …."); and *City of Poplar Bluff v. Knox*, 410 S.W.2d 100, 103 (Mo. App. 1966) ("The recording of the plat vested the fee of the land described or intended for public use in the city 'in trust and for the uses therein named, expressed or intended, and for no other use or purpose' [citing § 445.070]. Land dedicated to a public use as a street cannot be diverted from that use …. The neglect or failure of a city to physically open and improve a dedicated street to make its actual use possible does not diminish the public easement vested in the city in trust ….") (some citations omitted). Furthermore, the Southern District of the Missouri Court of Appeals has cited the established principle that "[w]hen the dedication of streets within a city complies with the statutory provisions, the dedication is valid and irrevocable without acceptance by the city," and applied this same principle to a plat in an unincorporated area that dedicated roads to a county. *Old Farm Homeowners' Ass'n. v. Lindgren*, 13 S.W.3d 711, 718 (Mo.App. S.D. 2000) (citation omitted). Section 445.070 RSMo., along with these cases, establishes that the title to the public street dedications shown on each of the Subdivision Plats vested in the County (or the City of Weldon Spring) upon the recording of each plat; not in any other entity.

Some additional requirements apply to plats of land within incorporated areas. Section 445.030 RSMo. states that if a plat is of land within an incorporated city, "it shall

not be placed of record until it shall have been submitted to and approved by the common council of such city, town or village, by ordinance, duly passed and approved by the mayor, and such approval endorsed upon such map or plat under the hand of the clerk and the seal of such city, town, or village" and lists some other requirements. These requirements must be considered along with the provisions of Section 445.060 RSMo., which states in pertinent part:

> Any recorded plat or plan of any town or city, and of any addition thereto or subdivision thereof … which was not properly or fully made, certified or executed or was not properly or fully acknowledged, according to law, at the time of the making, certifying, executing or acknowledgment of same, according to law, but which shows or describes the real estate correctly or in such a manner that the lines of same may or can be laid or located from such plat, plan or survey upon the ground, and has been recorded in the recorder's office … of the county in which the law directs it shall be recorded, for ten years, shall have the same force and effect as though properly and fully made, certified, executed or acknowledged, according to law, and shall be received in evidence in all courts of the state, in any cause, and shall be prima facie evidence of the correctness of same and of the showing thereof.

The three Muirfield plats (LF 12-17) had all been recorded for much more than ten years when this matter was before the trial court. The Crosshaven Estates (LF 18) and Summit at Whitmoor (LF 19) plats had been recorded for slightly less than ten years at the time of the final order of the trial court in this case, but as of now, each has been recorded for

longer than ten years.

The three Muirfield plats subdivided land in the unincorporated area of St. Charles County. They were each signed by the three persons who were, at that point in time, the presiding officials of the St. Charles County government. (The plats were made before St. Charles County began operating under its present Charter form of government in 1995.) They were also accepted for recording by the Recorder of Deeds. For the two remaining plats, which subdivided land within the incorporated area of the City of Weldon Spring, the City Clerk signed each plat and specified the precise City ordinances that approved them. These two plats were also accepted for recording by the Recorder of Deeds. All of these signatures constitute official acts of the respective governments with respect to approving and accepting these plats. In Missouri, "it is to be presumed that everything done by an officer, in connection with the performance of an official act in the line of his duty, is legally done, and, a fortiori, absent proof to the contrary, all things are presumed to have been rightfully and lawfully done." *United Missouri Bank of Kansas City v. March*, 650 S.W.2d 678, 680 (Mo.App. W.D. 1983). "It is to be presumed that everything done by an officer in connection with the performance of an official act in the line of his or her duty was legally done, whether subsequent or prior to the act, such as … determining the existence or performance of conditions prescribed as a prerequisite to legal action. Where some preceding act or pre-existing fact is necessary to the validity of an official act, the presumption in favor of the validity of the official act is presumptive proof of such preceding act or pre-existing fact. … The inference of regularity acquires additional force where persons whose interests are adversely affected by an official act do

not question its validity for a long period." 31A C.J.S. Evidence § 245 (Westlaw, database updated Mar. 2011, citations omitted). Therefore, the presumption of validity of these official acts "may be regarded as evidence and prevails until it is overcome by clear and convincing evidence to the contrary." 31A C.J.S. Evidence § 248 (Westlaw, database updated Mar. 2011, citation omitted). There is no evidence whatsoever in the record to overcome these presumptions in this case, much less clear and convincing evidence. The fact that ten years or more have elapsed conclusively establishes the presumptions of validity pursuant to § 445.060.

Laclede's assertion also contradicts certain admissions made in its own trial court pleadings. In its Memorandum in Support of its Motion for Summary Judgment, Laclede states: "There is no material dispute of fact in this case." LF 32. This is of course expected of any party seeking entry of summary judgment. In the same document, Laclede states: "Both Laclede and the County **derive their title** to the gas utility easement and the public roadway, respectively, from subdivision plats which specifically dedicate easements to Laclede for gas utility purposes and **convey public roadways to St. Charles County**." LF 31-32 (emphasis added). Laclede also stated in its motion that the "County alleges that it plans to construct road improvements **in these public roadways**" (LF 32); "The gas utility easements which are the subject of this action are **located in public roadways** along and in the area of Pittman [*sic*] Hill Road in St. Charles County" (LF 31); "By certain subdivision plats … the grantors **dedicated public streets** and utility easements" (LF 33); and "The County plans to widen and improve a portion of Pittman [*sic*] Hill Road, including portions represented by the **public**

roadways dedicated in the Subdivision Plats" (LF 34) (emphasis added in all citations). All of these factual admissions establish that the dedication of the public roads by the Subdivision Plats was complete. To assert now that some element of such dedication was missing contradicts these admissions. Additionally, in its response to the County's statement of facts, Laclede admitted that "Pitman Hill Road is a public road in St. Charles County, Missouri that is maintained by the County." LF 161. Public maintenance can establish acceptance, and **acceptance of a portion of a street is equivalent to acceptance of the whole tract platted**. *See Heitz v. City of St. Louis,* 19 S.W. 735, 736 (Mo. 1892) ("The fact that a portion of that street, owing to the nature of the ground, was not capable of being traveled, militates nothing against the idea of acceptance by the public …").

This principle, that acceptance of a portion of a street is equivalent to acceptance of the whole tract platted, further demonstrates the fallacy of Laclede's assertion that the right-of-way of Pitman Hill Road is limited to the boundaries of its existing pavement (*see* App. Subst. Br. 4). In *Heitz v. City of St. Louis*, 19 S.W. 735, 736 (Mo. 1892) this Court said: "The fact that a portion of that street, owing to the nature of the ground, was not capable of being traveled, militates nothing against the idea of acceptance by the public …." This same principle is also commonly recognized in other contexts, such as in examining liability for conditions in a right-of-way, but outside of the traveled portion of the road within that right-of-way. "The government has no duty to keep its roads in a reasonably safe condition for public travel outside of that portion of the road which is set aside for travel." *Hauck v. Kansas City Public Service Co.*, 200 S.W.2d 608, 612

(Mo.App. 1947) (cited with approval in *Watson v. Kansas City*, 499 S.W.2d 515, 518 (Mo. banc 1973)). *See also* 19 McQuillin Mun. Corp. § 54:47 (3rd Ed.), Chapter 54– Municipal Liability for Defective Streets, III. Parts of Ways to Which Liability Extends, stating in pertinent part: "If only part of the width of a street has been opened for travel, only that part is required to be kept in condition."

Laclede's admissions indicate any issue of acceptance was not contested at that time. If Laclede had questioned the County's acceptance of the public roads in any way in its pleadings before the trial court, the County would have had the opportunity to respond by providing some detailed evidence, simple enough to obtain, of how the County has maintained Pitman Hill Road, instead of a general admitted statement of it being maintained as a public road. Such evidence was unnecessary at the time since the issue was not in dispute. Laclede cannot be permitted to convert this to a disputed issue at this late stage. It must be bound by its admissions and the evidence in the record to which it took no exception at the time, and indeed still cannot since much of it is apparent on the face of each plat.

Finally, Laclede asserts in its opening brief that it has constructed, operated, and maintained gas lines with the areas in question, and also that "[i]t is of critical importance for subdivision developers to make provisions for delivery of utility services to their residents … [w]ithout full utility service, subdivision homes are practically unmarketable." App. Subst. Br. 34. Roads providing access to homes are certainly of greater and more immediate importance to prospective purchasers. There can be no reasonable doubt that, if gas service is being provided to the homes built on the lots

shown in the subdivision plats, roads have been constructed to provide access. This is further evidence of the completed dedication of roads on plats, since acceptance of some of the roads shown on plats operates to accept all of them. *State ex rel. Rhodes v. City of Springfield*, 672 S.W.2d 349, 353-354 (Mo.App. S.D. 1984) ("The conduct of the city in accepting and maintaining [certain streets] constituted an acceptance of all of the streets marked on the plat …") (citations omitted). Also, ironically, Laclede's own act of installing utility lines is sufficient, even by itself, to act as the acceptance of the ground as a public road. "Public use of a highway is not confined to travel in vehicles. A telephone line in a road is a public use, and the maintainance [*sic*] of the telephone pole line as close to the hedge as it conveniently could be placed would justify the conclusion as one of fact that the public, with the acquiescence of the landowner, had accepted and was using the right of way as defined by the hedge." *State v. Auffart*, 180 S.W. 571, 572 (Mo.App. 1915).

IV. LACLEDE HAS RAISED ADDITIONAL ISSUES THAT WERE NOT PRESERVED FOR APPEAL AND SHOULD THEREFORE NOT BE CONSIDERED.

A. Laclede's argument that it was deprived of a right to a jury trial was never presented to the trial court so it was not preserved for appeal.

Until it filed its Substitute Brief in this Court, Laclede had not made a claim in this litigation that summary judgment in the County's favor would unlawfully deprive it of a right to a jury trial. Nor did Laclede request a trial by jury in its Answer (LF 20-25) or any of its other pleadings. The argument is circular in any event, dependent upon the

faulty premise that Laclede has constitutionally protected property rights in the ground in question, so it would not be dispositive of the appeal. Nevertheless, pursuant to the principles of appellate practice cited in Section III.A., *supra*, the claim should not be considered.

B. The arguments that admission of the Bostic Affidavit, or any finding of ambiguity, automatically precluded entry of summary judgment were never presented to the trial court so they were not preserved for appeal.

Laclede argued to the trial court very clearly that at least some portion of the Bostic Affidavit (LF 75-114) was inadmissible and irrelevant. LF 146-159. It also argued clearly that there were factual discrepancies between the Bostic Affidavit and the Supplemental Thaemert Affidavit (LF 205-208), and that those disputed questions of fact precluded the entry of summary judgment in the case, even though such argument was made for the limited purpose of seeking leave to file the Supplemental Affidavit. LF 202. What Laclede failed to recognize at that time (and has continued to fail to recognize in the appeal) is that the Supplemental Affidavit only even attempted to contradict three of the examples of other utility relocations between the parties in areas platted in the same way, while the Bostic Affidavit recited the facts of seven such examples. Even if the trial court completely accepted Laclede's argument that there were indeed factual discrepancies relevant to the ultimate questions to be determined, it had the option of entirely disregarding those three instances and instead considering only the other four, thus avoiding the stated basis for Laclede's complaint in its entirety.

In addition, the Bostic Affidavit contained more information than just the past examples. It was the basis for the admission of the Subdivision Plats themselves, so at least some portions of it were essential to determining the issues. Nothing in the record shows that Laclede presented any argument to the trial court that admission of the Bostic Affidavit in general, even without consideration of the limited parts of it for which there were factual challenges, precluded entry of summary judgment. Likewise, the record does not contain any instance of Laclede presenting any argument to the trial court that any finding of ambiguity in the Subdivision Plats would, in and of itself, preclude entry of summary judgment.

Laclede cannot claim it had no opportunity to raise these arguments to the trial court, especially since the trial court provided ample warning, in its Order dated August 4, 2009, that it had not yet made a finding that the plat language was ambiguous, but could do so when deciding the motions for summary judgment. LF 200. This Order was entered over a month before the parties argued the summary judgment motions, and in that intervening time Laclede filed its motion for leave to file the Supplemental Affidavit (LF 201-203). It could have asserted the arguments then, or in another filing, or better yet it could have raised the arguments to the trial court at the time of arguing the competing summary judgment motions to the trial court and also placed those arguments on the record to preserve them for appellate purposes, but it did none of those things. Yet, these are the very arguments that Laclede now asserts in Section V of its Substitute Brief (pp. 45-49). Pursuant to the appellate principles cited in Section III.A. *supra*, this argument was never made to the trial court, and should not be considered on appeal.

V. SPECIFIC RESPONSES TO APPELLANT'S POINTS RELIED ON

A. In response to Point I, the Subdivision Plats dedicated public roads, not individual utility easements.

1. The dedications in this case complied with § 445.070 RSMo., so the doctrine of common law dedication does not apply, nor do other forms of conveyances apply.

Laclede begins its discussion of its points relied on by claiming it is a matter "beyond dispute" that the plats conveyed easements to Laclede and points out that the Dissenting Opinion below agreed. App. Subst. Br. 14-15. Both Laclede and the dissent, however, ignore the plain language of § 445.070 RSMo. in straining to reach this result, as well as the law regarding improper conditions to a dedication and the police power, all as discussed above. Laclede goes on to state "the majority also found it didn't matter whether the County had property rights in the dedication strips." App. Subst. Br. 15. Laclede cited page 10 of the Court of Appeals Majority Opinion to support this odd statement, yet neither that page nor any other part of the Majority Opinion makes any such finding. In fact, the Majority Opinion found on page 11 that the County did obtain rights in the property, and on page 13 it specified what those rights were by finding that Laclede's lines were placed in **public right-of-way**, and that the "subdivision plats **dedicated** certain streets and roads for public use and then designated the streets as a 'utility easement' or 'utility easements"" (emphasis added). Pursuant to § 445.070, the only possible recipients of any dedication by the Subdivision Plats were the County or the

City of Weldon Spring. The Majority therefore found the County (and the City) had property rights in the dedication strips.

In advancing its theory that rules of common law dedications should apply in this case, Laclede cites *Anderton v. Gage,* 726 S.W.2d 859, 862 (Mo.App. S.D. 1987), stating: "A common law dedication may be accomplished *when the plat does not comply with the statutory requirements* …" (emphasis added). The very case Laclede relies upon reveals that common law dedication does not apply, since the authorities discussed in Section III.B. of this Brief, *supra,* as well as the plain language of § 445.070, establish that statutory dedication applies in this case to vest the public dedications of the Subdivision Plats **only** in the County or the City of Weldon Spring. Missouri courts have also followed this principle as a matter of common law: "There is no such thing as a 'dedication' between an owner and individuals. **The public is the only party to a dedication**." *Marks v. Bettendorf's Inc.*, 337 S.W.2d 585, 593 (Mo.App. 1960) (emphasis added). Laclede also cites *Nowotny v. Ryan*, 534 S.W.2d 559, 561 (Mo.App. 1976), but that case involved two streets that were not even shown on a subdivision plat and to which a plat's dedication language was held not to apply. That case has no relevancy here.

Ignoring the consistency between § 445.070 and the case law that the title to the easements shown on plats vest in the city, town, village or county, Laclede (at p. 16 of its Substitute Brief) makes the following erroneous and unsupported assertion of law: "Maps or plats commonly dedicate easements to public utilities and other non-governmental entities so long as the dedication serves a public purpose." Laclede then

cites three cases that purportedly support this proposition, yet those cases contain no such holding.

The first case Laclede cites is *Trustees of Green Trails Estates Subdivision v. Marble*, 80 S.W.3d 841, 846 (Mo.App. E.D. 2002). That case involved a dispute over the responsibility to maintain a retaining wall along a drainage channel. The subdivision trustees presented an argument that the relevant subdivision plats "specifically dedicated all easements, except those designated for other specific purposes, to St. Louis County and various utility companies." *Id.* However, neither St. Louis County nor the various utility companies named on the plat were parties to the case on appeal, having been dismissed by a summary judgment order the trustees did not appeal. *Id.* The court therefore ruled against the trustees' argument. This is much closer to being authority against, rather than in support of, Laclede's position.

The second case Laclede cites is *State ex rel. Rhodes v. City of Springfield*, 672 S.W.2d 349 (Mo.App. S.D. 1984). That case did not deal with utility easements in any way. It involved a determination of whether a city had accepted a portion of a street shown on a plat by common law dedication. Whether utility easements had been dedicated to and/or accepted by anyone was not an issue in the case.

The third and final case Laclede cites for this purported statement of law is *Goad v. Bennett*, 480 S.W.2d 77, 79 (Mo.App. 1972), which was a case involving a plat that created **private, not public**, roads, in which the landowner who originally platted the land "further reserved to herself an easement for utilities over and across all roadways shown on the plat." *Id.* (Note that *Sho-Me Power Corp.*, *supra*, would not have

precluded such a reservation, since the roads were not being dedicated as public.) This was not even an attempt to dedicate easements to utility companies; it merely reserved the owner's rights to place utility lines in the **private** subdivision roads in the future. Overall, these three questionable citations of authority reveal the extent to which Laclede is attempting to stretch the law to cover its otherwise indefensible position, which amounts to an attempt to hijack the rights the Subdivision Plats create in favor of the general public which must remain in the County's control. Laclede cites *Red-E-Mix, Inc. v. Parade Park Homes, Inc.*, 919 S.W.2d 1, 2 (Mo.App. 1996) for the proposition that use of property for utility purposes is a public use. It is interesting to note the utility easement in that case was owned and therefore controlled by the City of Kansas City. This provides another example of how cities, towns, villages and counties can hold title to utility easements while also permitting utility facilities, which they do not own, to be placed within them.

Laclede also cites *MHTC v. London*, 824 S.W.2d 55 (Mo.App. 1991), for the proposition that "subdivision plats may convey easements to public utilities," (App. Subst. Br. 17), but that assertion ignores language from within the very passage of *London* cited, which states: "In such case, the interest acquired is held by the city, town, village, or county in trust for the public uses set forth." *London* at 60. As was discussed in Section III.B. of this Brief, *supra*, a utility's act of installing utility lines is sufficient to act as the acceptance of ground dedicated as a public road. *See State v. Auffart*, 180 S.W. at 572. The interest accepted, however, vests not in any utility company, but **only** in a city, town, village or county pursuant to § 445.070 and *Marks v. Bettendorf's Inc.*,

supra.

On page 17 of its Substitute Brief, Laclede recites the elements of common law dedication and asserts that process somehow results in it obtaining property rights, yet again one of the cases cited in support of this proposition defeats the argument. The cited case of *Patterson v. Null*, 751 S.W.2d 381, 386 (Mo.App. 1988), states that a claim of common law dedication may apply "**absent a formal dedication**". Of course, a formal dedication applies in the present case, which thus precludes common law dedication. Laclede cites this case again on the following page of its Substitute Brief—stating "*see also Patterson*, 751 S.W.2d at 386 (holding that intention to dedicate was shown by recordation of a plat containing language of dedication)"—but this citation is indecipherable. The case did not involve the construction of any plat nor did it even mention recordation of any kind of instrument.

Laclede further makes the novel proposal that the Subdivision Plats could operate as deeds, but it does not cite any case that supports such a proposition. If such a broad premise is the law in Missouri, there should be some cases on point. Laclede cites *Nolte v. Corley*, 83 S.W.3d 28, 33 (Mo.App. 2002), but that case involved language of certain access rights included in a deed in the chain of title to the property in question. It did not involve any plat, and therefore does not apply. Laclede further lists the "essential elements of a deed" and includes in that list the requirement of "delivery by the grantor". App. Subst. Br. 19 (citation omitted). Laclede examines the other elements of a deed that it lists, but it does not present any explanation of how the Subdivision Plats might satisfy the requirement of delivery by the grantor to Laclede or to any other utility company.

Subdivision plats, including the ones at issue in this case, are "delivered" to the County and recorded by the Recorder of Deeds, who is a County official. Laclede was not the recipient of any delivery of the original Subdivision Plats. The County (or the City of Weldon Spring) was the recipient. To the extent this is analogous to a real estate closing, utility companies have no seat at this closing table, nor are they even in the building when it occurs. Neither the law nor the facts that Laclede cites demonstrates how subdivision plats can operate as deeds, nor do they overcome the plain language of § 445.070.

2. The public road dedication language precedes the language regarding utilities in each of the Subdivision Plats, plainly indicating the primary purpose of creating public roads making all other considerations secondary, and the trial court properly acknowledged and construed this readily apparent evidence.

For each of the Subdivision Plats, the language that dedicated public roadways precedes any language regarding utility easements. Citing this fact, the trial court found "that the public road dedication was the primary consideration while the dedications of the utility easement[s] were secondary objectives." LF 214. The support for this finding is apparent on the face of the Subdivision Plats, and it should be upheld on appeal. These areas are, first and foremost, public roads.

The precise language of the clauses designating the utility easement uses provides further probative evidence of the primary purpose of the areas in question. The three Muirfield plats and the Crosshaven Estates plat use the language "further designates these

streets as utility easements". The Summit at Whitmoor plat states that the "area for the widening of Pitman Hill Road is hereby established as a utility easement". These very clauses Laclede relies upon for the creation of private easements not subject to a dominant roadway use each explicitly recognize that the primary purpose of the areas is for streets (in the first four plats) or "the widening of Pitman Hill Road" (in the fifth plat). This provides additional evidence that each dedicator intended the areas in question to be, first and foremost, public roadways. For the first four plats, it is noteworthy that the language does *not* state "designate these *areas* as utility easements" although that is essentially the construction Laclede asserts in this litigation. That construction ignores the words "further" as well as "streets". The express language of these plats makes any use of the easements subject to the use of the area as a street. The fifth plat not only makes similar reference to the use of the area in question as a public road, but goes further in recognizing the very plan to widen Pitman Hill Road that the County is now in the process of implementing. It expressly makes any use of the same area subject to the future widening of Pitman Hill Road.

"In interpreting easements and deeds affecting land, we must ascertain the intention of the grantor from the whole of the instrument … in line with the intent of their faces as gathered from the everyday, good sense of their language." *Blackburn v. Habitat Development Co.*, 57 S.W.3d 378, 386 (Mo.App. S.D. 2001) (citations omitted). "We reject an interpretation that involves unreasonable results when a probable or reasonable

construction can be adopted." *Id.* (citation omitted).[3] The language used in these provisions explicitly indicates the primary use of the areas is for roads, and any utility easement use is subject to the road use. (This is also consistent with County's police power over its public roads, discussed in detail in Section II.B., *supra*.)

In discussing the fact that the Subdivision Plats made public road dedications before adding any language "further designating" utility easements, Laclede attempts to claim the plats created co-existing easements, yet it properly points out that easements may not co-exist "if the second easement interferes with enjoyment of the first." App. Subst. Br. 36 (citation omitted). It claims that exception does not apply in this case, but, if Laclede's claimed rights did not interfere with the County's planned road improvements, the County would not have been forced to pursue this case. Laclede also overlooks the law that utility easements are already an inherent part of the bundle of rights controlled by the government in road rights-of-way, as previously discussed. Additionally, Laclede cites *State ex rel. State Hwy. Comm'n. v. Green*, 305 S.W.2d 688, 690 (Mo. 1957) claiming it supports the proposition that "plats commonly dedicate property for use as a public roadway and, concurrently, for use as utility easements."

[3] *Blackburn* also states that "in a strict sense, 'the term dedication is properly applied to the creation of easements in favor of the general public.'" *Id.*, citing *Anderton v. Gage*, 726 S.W.2d 859, 862 (Mo.App. S.D. 1987). Laclede's insistence that the Subdivision Plats dedicated easements directly to Laclede, instead of in favor of the general public, runs contrary to this fundamental principle.

App. Subst. Br. 36. This citation is misleading. The facts of the case are that a plat was filed which "contained the following recital: 'The owners hereby create roadway and utility easements as indicated in plat below, the same being dedicated to public use forever.'" *State ex rel. State Hwy. Comm'n. v. Green* at 690. There is **no indication whatsoever** that the dedicated roadway and the dedicated utility easements overlapped at all. Nothing in the opinion supports Laclede's contention that the same piece of property was concurrently dedicated as a roadway and also as a utility easement. In addition, although it is not absolutely clear from the facts of the case, it appears that the dedications of both the roadway and the utility easements would have been to the City of Rolla for public use, consistent with § 445.070 RSMo. This case does not support Laclede's position.

No reasonable reading of the language used in the Subdivision Plats is consistent with the fictitious dominant utility easement interests that Laclede has attempted to assert. Nor can Laclede claim it has been unfairly surprised by having to relocate its lines at its own expense when it placed them in areas plainly subject to a dominant roadway use. This Court must recognize and affirm the lawful dominance of the public road uses in the areas in question.

3. Laclede fails to recognize the proper scope of the general rule of utility relocations, which stems from the government's police power over its roads and is not limited to franchise grants.

In its brief, Laclede mentions the general rule regarding utility relocations: "utility facilities placed within public roads are subject to the general rule that the utility must

relocate, at its own expense, when changes are required by public necessity, or public convenience and security require it." App. Subst. Br. 31, citing the Judgment (LF 214-215), which cited *McQuillin Municipal Corporations* (3rd Ed., 1995 Revised Volume), Vol. 12, § 34.74.10—Relocation of Facilities; *Bridgeton v. Missouri American Water Co.*, 219 S.W.3d 226, 232 (Mo. banc 2007); and *Union Electric Co. v. Land Clearance for Redevelopment Authority of St. Louis*, 555 S.W.2d 29, 32 (Mo. banc 1977) (citing *McQuillin*). Laclede goes on to assert that this general rule applies only to franchises, but in doing so it overlooks the established principle of general governmental police power over roads. The authorities cited in Section II.B., *supra*, which enunciate this principle, are not limited in their application to the terms of specific contracts. This police power over roads exists under general common law, and does not depend on the terms of specific franchise agreements. Laclede correctly points out that *Bridgeton v. Missouri American Water Co.* and *Union Electric Co. v. Land Clearance for Redevelopment Authority of St. Louis* both involved application of the rule to cases involving franchise agreements. Just because the facts of those two cases involved franchise agreements, however, does not mean the general rule has been limited to those instances in Missouri. Laclede can cite no case to support such a proposition, nor does it attempt to distinguish the other authorities supporting the general rule that are discussed in Section II.B.

Laclede also cites the cases of *Riverside-Quindaro Bend Levee Dist. v. Missouri American Water Co.*, 117 S.W.3d 140 (Mo.App. W.D. 2003) and *Panhandle E. Pipe Line Co. v. State Highway Comm'n.*, 294 U.S. 613 (1935), in support of its claim that it is constitutionally required to be compensated for its relocation expenses in this case.

Panhandle is analyzed in Section I.B., *supra*, and as discussed there, the case provides ample support to the County's position while contradicting Laclede's. *Riverside-Quindaro* is no different. The portions of that case upon which Laclede attempts to rely dealt with what the court labeled as a "Private Easement" over a ten-foot wide area that had been specifically granted to the water company. *Id.* at 144-145. This is the same type of pre-existing easement discussed in *Panhandle*—the precedent does not apply to situations like the present case where the utility's interest does not pre-exist a public road dedication. Laclede makes the curious argument in its brief that "neither *Panhandle* nor *Riverside-Quindaro* requires that the utility's easement *predate* the government's interest in order to be compensable" and points to the Dissent's statement that "the determination is meaningless." App. Subst. Br. 24. Yet, the facts of *Panhandle* and *Riverside-Quindaro* plainly appear in the opinions; they are undeniable. The private utility easements predated the government's interest in each case, which is why the private interests affected were determined to be compensable. Laclede's argument, as well as the Dissent's, must therefore be that the facts upon which an appellate opinion is based are irrelevant to applying it as legal precedent. Of course, common law and common sense dictate otherwise.

To justify its claim of a constitutional taking, the relevant standard is clear: Laclede must be able to show it had easement rights that preexisted the dedication to the public. The Majority opinion agreed, even citing an additional treatise to support the result. Eastern District Court of Appeals Majority Opinion, p. 13, citing James W. Ely, Jr. & Jon W. Bruce, The Law of Easements & Licenses in Land, section 7.16. The

present facts amount to a case of *damnum absque injuria* as held in *New Orleans Gaslight Co. v. Drainage Comm'n. of New Orleans*, 197 U.S. 453, 461 (1905) (discussed in Section II.B., *supra*).

4. The doctrine of merger applies directly to the facts of this case, consistent with the provisions of § 445.070 RSMo., the County's police powers, and the public policy of Missouri.

Laclede asserts that the trial court erred when it made its finding that the doctrine of merger applies in this case, although Laclede's quotation is inaccurate. *See* Appellant's Opening Brief, p. 26. The correct quotation from the Judgment is: "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." LF 216 (emphasis added to the portion omitted, without use of an ellipsis or other reference, from Laclede's quotation). This same error was contained in the Opening Brief in the Court of Appeals, which the County pointed out in its Respondent's Brief, yet for some reason Laclede continues to use the same quotation without reference to its alteration from the source. *See* Appellant's Opening Brief, p. 26., and Respondent's Brief, p. 36. In any event, the trial court's **multiple findings** on this issue—that title to the utility easements vested in the County, that those utility easement uses are in fact subordinate, that the County's use of the ground as a public road is the dominant use, and that therefore the utility easement uses merged into the County's title—are well supported by directly applicable authorities and should be followed on appeal.

Laclede, in demanding reimbursement for relocating its facilities to accommodate a public road improvement, asserts 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) (emphasis added). 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 easement 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) (emphasis added) ("[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 a public highway … such ***subordinate*** uses must have been contemplated in the original grant"); and *New Orleans Gaslight Co. v. Drainage Comm'n. of New Orleans*, 197 U.S. 453, 461 (1905) (discussed in detail in Section II.B., *supra*, as holding that the subsurface rights in streets are subject to the same full police powers as the surface).

Therefore, as the trial court found, "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." LF 217. The trial court went on to state:

"[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 easements, because a person cannot have an easement on land that he or she owns." *Id.*, quoting from 25 Am.Jur.2d Easements and Licenses § 100—Merger of dominant and servient estates (Westlaw, database updated Nov. 2010).

Laclede correctly cites that "[i]n order for the doctrine of merger to operate to eliminate the lesser title, there must be a unity of title and a unity of possession, both in the same person." App. Subst. Br. 37-38 (citations omitted). The facts demonstrate satisfaction of the unity of title requirement, since § 445.070 vests title in the County of both the road and easements. As to the unity of possession requirement, the County possesses the ground (including the subsurface as recognized in *New Orleans Gaslight Co. supra*). It exerts its statutory authority and inherent police power over and under the ground, due to the dedications made in the Subdivision Plats and the County's use of the areas in dispute as public road right-of-way, as discussed in Section III.B., *supra*.[4] This application of the general rule of merger supplements and further supports the County's reliance on *Marks v. Bettendorf's Inc.*, which more specifically addresses mergers that occur with dedications.

[4] As pointed out in that discussion, even if there was evidence that only Laclede that possessed the areas in question, a utility's possession alone satisfies the element of possession not for a non-governmental utility's use, but for **public road purposes in general**, which include such use. *See State v. Auffart*, 180 S.W. at 572.

Laclede insists that no part of a plat may be rejected as meaningless. This concept is a general rule of construction, but it is superseded by the specific public policy of the State of Missouri and the County's police power. As discussed in detail in Sections II.A. and II.B., *supra*, *Sho-Me Power Corp.* and the other authorities cited therein explicitly reject the premise that subordinate or incidental uses may interfere in any way with the needs of the public in a dedicated road. Any attempt to do so can, and in fact must, be rejected as an improper condition to a public dedication under the binding precedent established by this Court. Void conditions to a dedication are meaningless as a matter of law.

B. In response to Point II, evidence of past interpretations was relevant to resolving facial ambiguities in the subdivision plats, however the same result is reached even if the plats are considered to be unambiguous and the evidence of past interpretations is disregarded.

Laclede alleges that the trial court's "admission" of the Bostic Affidavit, which the County filed as the sole affidavit in support of its Motion for Summary Judgment, was prejudicial error.[5] As an initial matter, the scope of Laclede's objections go only to the portion of the Bostic Affidavit that describe the parties' past agreements about prior relocations in areas dedicated in the same or similar manner as the areas in question on

[5] The action Laclede complains of is more accurately described as a failure of the trial court to strike the affidavit. Rule 74.04 provides parties with the option of filing affidavits supporting motions for summary judgment.

the Subdivision Plats. The most significant evidence presented by the Bostic Affidavit was the Subdivision Plats themselves and evidence related to the Project and the County's maintenance of Pitman Hill Road, none of which falls within the scope of Laclede's objections. Yet, Laclede's motion to strike the affidavit sought only an order striking the Bostic Affidavit in its entirety. LF 146-148. The trial court could have denied the motion on this ground alone.

Even ignoring the evidence that the parties have repeatedly in the past treated the same or similarly dedicated areas as public roads, not privately-acquired utility easements, the Bostic Affidavit along with the admissions of the parties in the record provides ample evidence to support the trial court's ruling. Indeed, much of the trial court's Judgment does not relate to the evidence of the past agreements in any way. The trial court made at least the following rulings that are completely independent of the evidence of the past agreements related to past relocations: "Each Subdivision Plat in question contains unequivocal language of dedication creating public roads … [and] the public road dedication was the primary consideration while the dedications of the utility easement were secondary objectives" (LF 214); "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 …" (LF 214-215); "Laclede 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 … [and the] rights of the respective parties in this case vested in the same documents" (LF 215); "The Subdivision Plats state no provisions that would deprive the County of its police power

over the public roadways" (*Id.*); "As a matter of common law, the County could not surrender its power in its public roads even if it attempted to do so …" (LF 216); "[T]he 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" (LF 217); and "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 …" (LF 219). Unless every one of these rulings that are independent of the scope of Laclede's objections are erroneous, and no other law supports the Judgment, any error alleged in Laclede's objections is harmless under the standard of review as set forth in *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp* ., 854 S.W.2d 371, 376 (Mo. banc 1993).

Of course, there is a convincing and consistent basis for this Court to affirm the Judgment that is entirely independent of any need to resolve whether the plat language at issue is ambiguous. The binding precedent of *Sho-Me Power Corp.*, *supra*, and the public policy and police power doctrines, as discussed in Section I of this Brief, mandate the same result reached by the trial court and the Eastern District Court of Appeals without needing to parse any plat language. Given the weight of the authorities on this point, it is an inescapable conclusion that the words "utility easements" on the faces of the plats, to the extent they attempted to create easement rights separate from the road right-of-way being dedicated, were improper conditions to the dedications that must be disregarded as a matter of law, not fact.

Even if this Court determines that it must review the merits of Laclede's objections to portions of the Bostic Affidavit, the objections are unfounded. It is clear that they depend entirely upon the premise that not only do the Subdivision Plats create private easements for Laclede equivalent in stature to easements that Laclede obtained by deed well before any road dedication, but that the plats do so *unambiguously*. A review of the Subdivision Plats in their entirety reveals the faults in this premise. The Subdivision Plats contain no explicit language controlling how to resolve disputes between competing uses in the same ground. The only guidance they provide on resolving any such conflict between competing uses is (a) the order in which the dedications or designations are made in each plat, and (b) the use of the terms "further designates these streets as utility easements" (for the first four plats) or the "area for the widening of Pitman Hill Road is hereby established as a utility easement" (for The Summit at Whitmoor plat). Also, the language of the Subdivision Plats is inconsistent with the requirements of § 445.070 RSMo., Missouri public policy, the County's police power, and case law, all of which have been discussed in detail in the preceding sections. Finding this to be ambiguous or confusing is reasonable.

The construction of these plats on this point creates immediate questions of how to reconcile conflicts between competing uses. The absence of any way to reconcile these conflicts using the language on the face of the plats creates ambiguity in each one of them. Therefore, the actions of the parties to this case regarding one of the Subdivision Plats (Muirfield Plat One), as well as regarding identical language in other plats, is not only relevant but also highly probative.

> [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) (citations omitted).

The trial court cited *McQuillin* at § 34.45—Construction, stating that it "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*.'" LF 218 (emphasis in original). The trial court also quoted *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 obligations 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." LF 218. (For further discussion of this "familiar rule of law," *see also* the following cases cited by *Joplin v. Wheeler*: *St. Louis Gaslight Co. v. St. Louis*, 46 Mo. 121; *Depot Co. v. Railroad*, 131 Mo. 291, 305, 31 S.W.

908; *City of St. Louis v. Laclede Gas Light Co.*, 155 Mo. 1, 19, 55 S. W. 1003; *Sedalia Brewing Co. v. Sedalia Water Works Co.*, 34 Mo. App. 49; and *Meyer v. Christopher*, 176 Mo. 580, 75 S. W. 750.) The legal basis for the trial court's consideration of the evidence of prior actions on a particular meaning is sound.

Laclede further states that the "Judgment does not find that the Subdivision Plats were unclear or ambiguous or otherwise justify consideration of the ... Bostic Affidavit." App. Subst. Br. 41. The trial court was quite aware of the legal issues raised—that such evidence could only be considered if it determined ambiguity existed—since such issues were briefed and argued in the context of Laclede's motion to strike the Bostic Affidavit. Also, in its Order dated August 4, 2009, the trial court stated: "This Court has not made a determination at this point as to whether the language in the Subdivision Plats is ambiguous. If the Court were to decide that the language in the Subdivision Plats was unambiguous at the time of deciding the motions for summary judgment it is capable of disregarding the evidence of how the dedications were treated by the parties without having to separately strike such evidence." LF 200. Given its awareness of the issue, the trial court's inclusion of examples of prior interpretations by the parties in its Judgment (*see* LF 217-218) makes its finding of ambiguity in the Subdivision Plats self-evident.[6]

[6] Had the trial court been ever been presented with argument and citations to authority that any finding of ambiguity, in and of itself, precluded entry of summary judgment, perhaps the trial court would have taken other action, or decided the matter on other grounds. As discussed in Section IV.B., *supra*, this was not presented to the trial

None of the cases Laclede cites relate to a conflict between road use and utility use within the same right-of-way. Admittedly, such cases appear to be rare. Perhaps this is because the public policy and legal precedent cited in *Sho-Me Power Corp., McQuillin* and other authorities, *supra,* and the County's broad police power over its roads, all act to resolve all such conflicts in favor of the road use.

In discussing the instance of a prior relocation arising from one of the Subdivision Plats (Muirfield Plat One), Laclede implies (on p. 44 of its Substitute Brief) that its facilities were located in different kinds of property rights than are now at issue. This fails to recognize paragraphs 18 and 19 of the County's Statement of Undisputed Material Facts (LF 51-52), and ¶¶ 13 and 14 of the Bostic Affidavit (LF 77) that state Laclede performed utility relocation work, at its own cost, within an area marked as a dedication strip on Muirfield Plat One. This area has identical property rights to the dedication strip adjacent to Pitman Hill Road that is shown on the same plat, since the dedication language of Muirfield Plat One pertains to *both* the dedication strip along Towers Road and the dedication strip along Pitman Hill Road. The point that Laclede misses is that it agreed to perform, and then in fact performed, its utility relocation work within the dedication strip *at its own expense*. The referenced Utility Agreement (LF 96-103) provided for reimbursement by the County **only** for facilities located **outside** of the dedication strip and even older right-of-way. Laclede and the County treated the dedication strip exactly the same as they treated the older right-of-way, and specifically

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court, so we will never know what it might have done.

left the work that was to take place within the dedication strip out of the areas for which the County was responsible for reimbursing Laclede for its costs. In other words, Laclede is asserting a position in the present litigation that directly contradicts its earlier, documented interpretation of one of the same plats. This presents a perfect example of the kind of evidence that, in the case of any doubt as to the meaning of the dedications, is entitled to great weight pursuant to *City of California v. Burke, McQuillin*, and the other cases cited above.

Laclede also complains that the examples stemming from subdivision plats other than those listed in the County's Petition are irrelevant since they involved different dedicators and different property. The present case, though, does not involve the interpretation of or the actions taken in reliance upon the plats by the dedicators. Rather, the issue is the interpretation of rights as between the County and Laclede. All of the examples listed in the Bostic Affidavit involve past interpretations of plats with the same language that is at issue here by the County and Laclede, and the actions that each party took as evidence of those interpretations. The identity of the dedicator of each plat is immaterial. The argument regarding the property being different is likewise flawed. The issue to be determined in this case is the nature of the dedications and the rights that the County and Laclede have therein. The examples from other subdivision plats present the exact same types of dedications, with the same rights at issue, as presented by the Subdivision Plats.

Finally, pleading in the alternative is permissible and parties are entitled to pursue multiple theories. The County is not required to bind itself at the summary judgment

stage to a position that the Subdivision Plats are either ambiguous or not; it was entitled to support its position that it was entitled to summary judgment in its favor in either case and is still entitled to do so on appeal. Even if this Court reaches the determination that the Subdivision Plats are unambiguous, it can at that time disregard evidence of how the parties have treated the dedications. In addition, as already discussed, other theories support the trial court's Judgment that are completely independent of this issue.

C. Response to Point III

Section IV.B., *supra*, explains how Laclede's third point relied on has not been preserved for appellate review. There is no manifest injustice that will result from not considering it. There are ample theories to support the trial court's Judgment, discussed in detail in Sections II.A., II.B., and V.A., *supra*, that do not rely on any finding of ambiguity in the Subdivision Plats. Indeed, the trial court included at least some of them in its Judgment, providing multiple bases of support for its ultimate ruling. Laclede's claim that the simple admission of the Bostic Affidavit requires remand for trial (and it insists such trial must be by jury, even though it never demanded a jury trial) is overbroad, giving far more significance to the portions of the affidavit it challenges than is merited.

Aside from those issues, however, it is significant to note that all of the cases Laclede cites in support of its argument that any ambiguity precludes summary judgment are contract cases. The theories from these contract cases are not binding precedent. Laclede is not even a party in interest to the Subdivision Plats pursuant to § 445.070 and *Marks v. Bettendorf, supra.* Construing the terms of the these plats presents a different

factual situation than the contract cases, which involve a determination of what the parties then before the court agreed to in the past in writings signed by both parties.

Also, Laclede states that the Supplemental Affidavit contradicts the Bostic Affidavit "regarding these prior instances" (App. Subst. Br. 47) and states "Two distinctly different accounts of what occurred in those past dealings were entered into evidence in this matter" (App. Subst. Br. 49). These statements fail to recognize that at most the Supplemental Affidavit only attempted to contradict three out of seven of the examples. Its claim that this issue is material and dispositive is therefore unfounded.

VI. THE SUPPLEMENTAL AFFIDAVIT FILED BY LACLEDE HAS NEVER RECEIVED LAWFUL LEAVE FOR ITS UNTIMELY FILING AND SHOULD NOT BE CONSIDERED IN ANY EVENT.

As discussed in the Statement of Facts, *supra*, the portions of the record on appeal cited by Laclede do not reflect that it ever received any leave to file the Supplemental Affidavit. The trial court Judgment (LF 213-232), which was the only order the trial court entered from September 16, 2009 until it lost jurisdiction to take any further action affecting the case due to Laclede noting its appeal, makes no reference to it.

Well after Laclede had filed its appeal, and while the case was pending before the Eastern District of the Court of Appeals, Laclede filed a motion directly with the trial court for it to enter an order retroactively granting it leave for the late filing of the Supplemental Affidavit. (Laclede had also filed a motion in the Court of Appeals for an order directing the trial court to supplement the record on appeal, which the County opposed, and the Court of Appeals had at that time taken the motion with the case.) The

County made a limited appearance in the trial court in response to the motion to contest jurisdiction of the trial court to act. The trial court, without explaining any basis for jurisdiction to take such action, purportedly entered an order in August, 2010 "ratifying the prior oral order" granting leave to Laclede for the late filing of the Supplemental Affidavit, and then of its own initiative forwarded a copy of the order to the Eastern District Court of Appeals. Trial Court Order dated August 2, 2010.

The trial court had no jurisdiction to even consider, much less grant, Laclede's motion for entry of such an order. "When a party files a notice of appeal from a final judgment, the trial court loses jurisdiction over the cause until the appellate court revests the trial court with jurisdiction by the issuance of its mandate." *Lardinois v. Lardinois*, 852 S.W.2d 872, 873 (Mo.App. E.D. 1993). There is an exception to the rule that the trial court loses jurisdiction in a case when a notice of appeal is filed: the "trial court has continuing jurisdiction **to perform ministerial acts** involving the case **so long as those acts do not affect the appeal**". *Id.* (emphasis added). That exception did not apply in this case, however, since the action sought was not ministerial and the express purpose of Laclede's motion was to affect the appeal. This is also consistent with the law regarding nunc pro tunc entries. "An appeal, except for limited purposes, divests the trial court of jurisdiction." *State ex rel. Manning v. Hughes*, 174 S.W.2d 200, 202 (Mo. en banc 1943). A trial court does retain jurisdiction "to be able to make nunc pro tunc entries, from written data, and certify them to [the appellate court] as part of the record …." *Id.* (emphasis added). There was no "written data" in the present case, however, upon which to base a nunc pro tunc entry. "Nunc pro tunc proceedings may be used only to correct

clerical mistakes in recording the judgment rendered, and may not be used to correct judicial mistakes, or to show what the court intended to do but did not do. …To constitute a valid correction nunc pro tunc, the entry must show that it is based on some record supplying the facts which authorize the corrective entry." *Overby v. Overby*, 682 S.W.2d 872, 873-4 (Mo.App. E.D. 1984). "**[N]o such entries can be made from the memory of the judge, nor on parol proof derived from other sources**." *Warren v. Drake*, 570 S.W.2d 803, 806 (Mo.App. 1978) (citations omitted, emphasis added). Laclede's motion sought the trial court to supplement the record from its own memory and/or from parol proof derived from its representations to the court. In other words, it sought precisely the type of entry that *Warren v. Drake, supra*, along with the other cases cited, expressly prohibits.

Nor can the action Laclede sought, for the trial court to enter a written order for the first time in the case granting a particular motion, be fairly construed as a ministerial act. Laclede's extra-jurisdictional trial court motion, as well as its pleadings filed in the Court of Appeals, asserted that the trial court made an "oral ruling" on its motion, however, this assertion ignores the established premise that a trial court speaks only through its orders or a transcript. "It is an aphorism that **a court must speak through its records in revealing what has transpired before it**." *State ex rel. Miller v. Judge of the St. Louis Housing Court*, 498 S.W.2d 819, 822 (Mo.App. 1973) (emphasis added, citations omitted). "Where the court record fails to show that the trial court actually rendered any judgment ..., an effort to read into the original record or correct it to provide for a judgment ... is void and ineffective." *Id.* This is because "**[a] court speaks only**

through its records . . ., and extraneous evidence will not be permitted to impeach the records." *Wakefield v. Thorp*, 283 S.W.2d 467, 471 (Mo. banc 1955); see also *Brown v. General Motors Assembly Div*., 695 S.W.2d 501, 502 (Mo.App. E.D. 1985) ("**A court of record speaks only through its records**") (emphasis added in both).

In *Wakefield, supra*, the Missouri Supreme Court dealt with the same issue that Laclede presented in this case: a party seeking recognition in an appellate court of a "verbal order" of a trial judge. *Id.* at 469. In fact, the allegation in *Wakefield* was not only that the trial judge made a verbal order, but that both parties agreed to abide by it. *Id.* The record here shows the County never agreed to Laclede's motion for leave to file its untimely supplemental affidavit. The County filed a memorandum in opposition to the motion, with detailed grounds that continue to remain valid reasons to impart no weight to the affidavit and disregard it. LF 209-212. Hence, the facts of *Wakefield* presented a more compelling basis for an appellate court to recognize a verbal ruling of a trial judge than Laclede can in the present case. Even with the facts in *Wakefield*, though, this Court ruled that it "may not, in any event, consider the alleged oral directions of the [trial] court by which respondents seek to supplement or impeach the written record ...." *Id.* at 471.

The present situation is also analogous to that presented in *Daniel v. Indiana Mills & Mfg., Inc.*, 103 S.W.3d 302 (Mo.App. S.D. 2003). In that case, the trial court heard oral arguments on a motion and took it under advisement, and the appellate court found no copy of an order ruling on the motion by docket entry or other document in the record on appeal. The appellate court stated: "There being no **order** disposing of the motion

defendant presented to the trial court, the motion is a non sequitur. Absent a finding by the trial court on an issue, the issue is not for appellate review." *Id.* at 318 (citations omitted, emphasis added). The Court in *Daniel* went on to point out the established principle that "[t]he obligation to make a record in the trial court concerning issues a party may wish to present on appeal is on that party." *Daniel* at 319 (citations omitted).

The fatal flaw in Laclede's assertions of an "oral ruling" on its motion for leave, which at least relates to a time when the trial court did have jurisdiction over the case, is revealed by comparing its assertion to the two-pronged requirement for an actual, effective "ruling" set forth in Missouri cases. For there to be a "ruling" on a motion in a court of record, it must consist not only of a decision, *but also the recordation of that decision*. There was no recordation of any decision by the trial court on Laclede's motion during the time that the trial court retained jurisdiction over the case, therefore the trial court never made any valid or effective ruling on the motion. "[T]he trial judge must decide **and record** his rulings on motions in some fashion ... [s]ince lack of a specific ruling preserves nothing for review, this court will not consider a point upon which no ruling has been made." *Vandever v. Junior College Dist. of Metro. Kansas City*, 708 S.W.2d 711, 720 (Mo.App. W.D. 1986) (emphasis added). "An appellate court must take the trial record as it finds it ... [m]atters not transcripted may not be considered on appeal." *State v. Matthews*, 512 S.W.2d 248, 249 (Mo.App. 1974).

The purported order of the trial court dated August 2, 2010, is therefore void and of no effect, with the end result being that no valid trial court order was ever entered that granted Laclede leave to file its untimely Supplemental Affidavit. A copy of the

purported order itself, which is not a part of the Legal File, was transmitted from the Court of Appeals to this Court as part of the Court of Appeals file. The Eastern District Court of Appeals did grant Laclede's motion to supplement the record on appeal in its opinion (at p. 1, FN 1). For the reasons discussed herein, that ruling was in error. Furthermore, the Eastern District had no ability to convert a void trial court order, entered with no basis of jurisdiction, into a valid court order. The document forwarded to this Court as part of the Court of Appeals record has no legal effect.

Furthermore, the Supplemental Affidavit, even if considered, constituted an attempt to contradict facts that had already been admitted as a matter of law. On January 12, 2009, the County filed its Motion for Summary Judgment and Statement of Undisputed Material Facts in this case. LF 2, 48-59. Laclede was required to file a response within thirty days by Rule 74.04 (c) (2). Laclede sought and the County consented to an extension of time until February 20, 2009 for Laclede to file its response. LF 2-3, 127. Laclede filed a combined reply in support of its motion for summary judgment and response in opposition to the County's motion for summary judgment (LF 128-145), and in a separate document filed its response to the County's statement of facts in support of its motion (LF 160-177). The County's Motion for Summary Judgment and Statement of Undisputed Material Facts incorporated various factual assertions from the Bostic Affidavit that was filed contemporaneously therewith.

Rule 74.04 (c) (2) required Laclede's response to "set forth each statement of facts in its original paragraph number and immediately thereunder admit or deny each of movant's factual statements." Rule 74.04 (c) (2) also states (with emphasis added):

> A denial may not rest upon the mere allegations or denials of the party's pleading. Rather, the response shall support each denial with specific references to the discovery, exhibits or affidavits that demonstrate specific facts showing that there is a genuine issue for trial.
>
> Attached to the response shall be a copy of all discovery, exhibits or affidavits on which the response relies.
>
> A response that does not comply with this Rule 74.04 (c) (2) with respect to any numbered paragraph in movant's statement **is an admission of the truth of that numbered paragraph**.

"This procedure is not discretionary; it is mandatory and must be followed." *Margiotta v. Christian Hosp. Northeast Northwest*, 315 S.W.3d 342, 344 (Mo. banc 2010).

In the introductory paragraph of Laclede's motion for leave to file the Supplemental Affidavit, it states the affidavit was "in further response" to the County's Motion for Summary Judgment. LF 201. Such responses were complete in February, 2009. This was over six months before Laclede filed the motion for leave to file the Supplemental Affidavit, with the affidavit attached. Laclede chose to assert legal objections in its responses to the County's statement of undisputed material facts (*see* LF 164-175), and the trial court overruled those objections when it denied Laclede's motion to strike the Bostic Affidavit (LF 199-200). Laclede could have raised factual denials simultaneously with its legal objections, and indeed Rule 74.04 required Laclede to do just that, since "[f]acts set forth by affidavit or otherwise in support of a party's motion are taken as true unless contradicted by the non-moving party's response to the summary

judgment motion." *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp .*, 854 S.W.2d 371, 376 (Mo. banc 1993). Rule 74.04 governs summary judgment proceedings, and it contains no provision for filing an additional affidavit over six months after a party's responses are complete. In fact, Rule 74.04 (c) (5) states: "No other papers with respect to the motion for summary judgment shall be filed without leave of court."

Laclede did include general factual denials at the conclusion of each of its relevant responses, but those general denials were unsupported by specific references. Therefore, the responses constitute admissions of the truth of the assertions. Laclede attempts to claim that the Supplemental Affidavit directly contradicts the Bostic Affidavit, but in fact it is Laclede's own admissions that the supplemental affidavit attempted to contradict. (In addition, as discussed in the preceding sections, it only attempted to contradict three out of seven of the past examples of utility relocations, and did not contradict in any way the most significant evidence of the Bostic Affidavit, which is the Subdivision Plats themselves and the information regarding the current Pitman Hill Road Improvement Project.)

The record establishes that the trial court would have been well within its discretion to deny leave for the filing of the Supplemental Affidavit. It therefore would have been equally within its discretion if it chose to consider the content of the affidavit and then disregard it, since it makes factual assertions contrary to admissions previously made in the litigation. Laclede's protestations that the trial court did not duly consider its untimely affidavit are therefore, at best, complaints over harmless error. The facts asserted are not dispositive of this appeal. If a matter is not necessary to the disposition

of an appeal, it should not be considered. *See Rubbelke v. Aebli*, 340 S.W.2d 747, 750 (Mo. 1960).

CONCLUSION

WHEREFORE, for the foregoing reasons, St. Charles County, Missouri, respectfully requests that this Court affirm the entry of summary judgment in its favor.

Respectfully submitted,

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RULE 84.06 (b) CERTIFICATE

I certify that this brief complies with the limitations contained in Rule 84.06(b), as effective July 1, 2008, and that this brief contains 21,811 words according to the word processing system used to prepare it, exclusive of the cover, the following certificate of service page, this certificate page, signature block, and the appendix. Further, I certify that the disk served with the brief has been scanned for viruses using Computer Associates eTrust Antivirus software and, according to that software, is virus free.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing, along with a disk containing an electronic copy of the same in Microsoft Word format, was sent on the 4th day of April, 2011, by first-class mail, postage prepaid, to the following:

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APPENDIX

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Controlling Statute:

Section 445.070 RSMo. ……...A1

RSMo. § 445.070.
Penalty for selling lots before plat recorded--plat shall vest fee, when.

1. If any person shall sell or offer for sale any lot within any city, town or village, or any addition thereto, before the plat thereof be made out, acknowledged and recorded, as aforesaid, such person shall forfeit a sum not exceeding three hundred dollars for every lot which he shall sell or offer to sell.

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.