

**IN THE SUPREME COURT OF MISSOURI**

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**Appeal No. SC87744**

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CITY OF BRIDGETON,

Plaintiff/Appellant

v.

MISSOURI-AMERICAN WATER COMPANY,

Defendant/Respondent.

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APPEAL FROM THE CIRCUIT COURT OF ST. LOUIS COUNTY  
HONORABLE ROBERT S. COHEN, CIRCUIT JUDGE

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**RESPONDENT'S SUBSTITUTE BRIEF**

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**TABLE OF CONTENTS**

	<b><u>Page #</u></b>
TABLE OF AUTHORITIES.....	6
STATEMENT OF FACTS.....	13
A.    Background concerning Missouri-American.....	13
B.    Missouri Water received a perpetual franchise to lay and maintain pipes in unincorporated St. Louis County in 1902, which Missouri-American currently possesses .....	14
C.    The changes to Taussig Road, requiring movement of Missouri- American’s facilities, are due to improvements proposed by TRiSTAR and would not have been made apart from TRiSTAR’s proposed construction activities .....	16
D.    Certain of Missouri-American’s facilities along Taussig Road are located within easements granted to Missouri-American or its predecessors-in- interest.....	21
E.    Bridgeton has demanded Missouri-American relocate its facilities along and under Taussig Road at its own cost .....	21
POINTS RELIED ON .....	23
ARGUMENT.....	25
Summary judgment and standard of review.....	26

I. The Circuit Court Correctly Granted Summary Judgment In Favor Of Missouri-American Because The Common-Law Rule, As Set Forth In *Union Electric*, Does Not Apply In The Present Case, Where The Utility Relocations Were Not Made Necessary By Government Action And Purely Government Purpose, And A Utility Cannot Be Required To Relocate Its Facilities At Its Own Expense Where The Relocation Is Made Necessary By An Exaction On A Developer And The Developer, Not The Municipality, Is Paying For The Improvement Project (Responds to Point I) ..... 28

A. The common-law rule, as set forth in *Union Electric*, does not apply when a utility is required to move its facilities because of an exaction on a private developer ..... 33

B. The present case is exactly like *Home Builders*, where the Court of Appeals found that the common-law rule did not apply when utility relocations were made necessary by a project agreed to by a private developer as a result of an exaction ..... 42

C. *Home Builders*' "automatic rule," under which the trial court properly granted summary judgment, applies because the relocations were made necessary by an exaction upon a developer..... 48

D. Under *Dame*'s "benefit analysis," Missouri-American would not be required to pay relocation expenses here ..... 53

E. The ratepayers of Missouri-American (and other utilities) should not be required to subsidize private development by paying utility relocation costs that, if not paid by Missouri-American, will be paid by TRiSTAR .....57

II. The Trial Court Correctly Granted Summary Judgment Because Bridgeton Failed to Establish that Missouri-American’s Facilities Are Unlawfully Located On Its Property, As Those Facilities Were Installed Pursuant To The Terms Of The Constitutionally-Protected 1902 Perpetual Franchise, Which Bridgeton Cannot Revoke, Alter or Amend..... 61

A. Missouri expressly gave St. Louis County the power to grant a franchise to Missouri Water ..... 63

B. The 1902 Perpetual Franchise is a contract between St. Louis County and Missouri Water ..... 64

C. The 1902 Perpetual Franchise is perpetual in duration..... 66

D. The 1902 Perpetual Franchise includes Taussig Road because it was part of unincorporated St. Louis County at the time such Franchise was granted..... 67

E. The 1902 Perpetual Franchise by its terms applies to all public highways in unincorporated St. Louis County in 1902, including Taussig Road, even though it was later annexed by Bridgeton ..... 69

F.	Missouri-American’s acquisition of municipal franchises from Bridgeton did not serve as a waiver of its 1902 Perpetual Franchise .....	76
G.	Bridgeton cannot require Missouri-American to move its facilities at its own expense because such action would violate Missouri- American’s constitutionally-protected rights under the 1902 Perpetual Franchise from impairment .....	81
H.	The 1902 Perpetual Franchise does not grant Bridgeton the right to order Missouri-American to move its pipes at its own expense .....	87
III.	Summary Judgment Was Appropriate Concerning Missouri-American’s Facilities Installed Pursuant To Easements (Responds to Point III).....	90
IV.	Bridgeton’s Argument Concerning “Formerly Private Land Outside The Taussig Road Right-Of-Way” Does Not Warrant Reversal of Any Portion Of The Trial Court’s Judgment Because Bridgeton Waived Any Issue Concerning That Land .....	96
	CONCLUSION .....	99
	CERTIFICATION REQUIRED BY RULE 84.06(c) .....	101
	CERTIFICATE OF SERVICE.....	102

**TABLE OF AUTHORITIES**

<b><u>Cases</u></b>	<b><u>Page #</u></b>
<i>Annbar Assocs. v. West Side Redevelopment Corp.</i> , 397 S.W.2d 635 (Mo. banc 1965).....	36
<i>Annin v. Lake Montowese Development Co., Inc.</i> , 759 S.W.2d 240 (Mo. Ct. App. 1988).....	24, 88, 89
<i>Blair v. City of Chicago</i> , 201 U.S. 400 (1906).....	72
<i>Brand v. Mathis &amp; Assocs.</i> , 15 S.W.3d 403 (Mo. Ct. App. 2000).....	61
<i>Brick House Café &amp; Pub, L.L.C. v. Callahan</i> , 151 S.W.3d 838 (Mo. Ct. App. 2004) .....	95
<i>Bueneman v. Zykan</i> , 52 S.W.3d 49 (Mo. Ct. App. 2001).....	95
<i>Calasieu Sanitation Service, Inc. v. City of Lake Charles</i> , 118 So.2d 179 (La. Ct. App. 1960).....	74
<i>City &amp; County of Denver v. Mountain States Tel. &amp; Tel. Co.</i> , 754 P.2d 1172 (Colo. banc 1988) .....	34
<i>City of Baltimore v. Baltimore Gas &amp; Elec. Co.</i> , 192 A.2d 87 (Md. 1963).....	38, 39, 51
<i>City of Bridgeton v. Northwest Chrysler-Plymouth, Inc.</i> , 37 S.W.3d 867 (Mo. Ct. App. 2001).....	78
<i>City of Des Moines v. Iowa Tel. Co.</i> , 162 N.W. 323 (Iowa 1917) .....	63
<i>City of Englewood v. Mountain States Tel. &amp; Tel. Co.</i> , 431 P.2d 40 (Colo. banc 1967) ..	66
<i>City of Excelsior Springs v. Elms Redev. Corp.</i> , 18 S.W.3d 53 (Mo. Ct. App. 2000).....	84
<i>City of Grand Rapids v. Grand Rapids Hydraulic Co.</i> , 33 N.W. 749 (Mich. 1887).....	80

<i>City of Hannibal v. Missouri &amp; Kansas Telephone Co.</i> , 31 Mo. App. 23 (1888).....	81
<i>City of Jackson v. Creston Hills, Inc.</i> , 172 So.2d 215 (Miss. 1965) .....	69
<i>City of Lansing v. Michigan Power Co.</i> , 150 N.W. 250 (Mich. 1914) .....	63
<i>City of Livermore v. Pacific Gas &amp; Elec. Co.</i> , 51 Cal.App.4 <sup>th</sup> 1410 (1997).....	54, 55
<i>City of Louisville v. Cumberland Tel. &amp; Tel. Co.</i> , 224 U.S. 649 (1912).....	61
<i>City of Owensboro v. Cumberland Telephone &amp; Telegraph Co.</i> , 230 U.S. 58 (1913) .....	65
<i>City of Westport v. Mulholland</i> , 60 S.W. 77 (Mo. 1900) .....	80
<i>Dartmouth College Case in 1819</i> , 4 Wheat 518, 4 L.Ed. 629.....	80
<i>Delmarva Power &amp; Light Co. v. City of Seaford</i> , 575 A.2d 1089 (Del. 1990).....	69, 73
<i>Dixie Elec. Membership Corp. v. City of Baton Rouge</i> , 440 F.2d 819 (5 <sup>th</sup> Cir. 1971).....	73
<i>Duckworth v. City of Springfield</i> , 184 S.W. 476 (Mo. Ct. App. 1916).....	72
<i>Feder v. Nation of Israel</i> , 830 S.W.2d 449 (Mo. Ct. App. 1992) .....	26
<i>Flair v. Campbell</i> , 44 S.W.3d 444 (Mo. Ct. App. 2001).....	24, 94
<i>Franklin Pwr. &amp; Light v. Middle Tenn. Elec. Mem. Corp.</i> ,	
434 S.W.2d 829 (Tenn. 1968).....	69
<i>Frost v. Corp. Comm'n of Oklahoma</i> , 278 U.S. 515, 49 S. Ct. 235 (1929).....	84
<i>Gilbert v. K.T.I., Inc.</i> , 765 S.W.2d 289 (Mo. Ct. App. 1988) .....	61
<i>Grand Trunk W. Ry. Co. v. City of South Bend</i> , 227 U.S. 544 (1913) .....	61
<i>Home Builders Ass'n. of Greater St. Louis v. St. Louis County Water Co.</i> ,	
784 S.W.2d 287 (Mo. App. E.D. 1989).....	<i>passim</i>
<i>Hook v. Bowden</i> , 144 Mo. App. 331 (1910).....	62

<i>Hougland v. Pulitzer Publishing Co., Inc.</i> , 939 S.W.2d 31 (Mo. Ct. App. 1997) .....	26
<i>Imperial Premium Finance, Inc. v. Northland Insurance Co.</i> ,	
861 S.W.2d 596 (Mo. Ct. App. 1993).....	26
<i>Iowa Tel. Co. v. City of Keokuk</i> , 226 F. 82 (S.D. Iowa 1915).....	76
<i>ITT Commercial Finance Corp. v. Mid-America Marine Supply</i> ,	
854 S.W.2d 371 (Mo. 1993) .....	26
<i>Jersey City H. &amp; P. St. Rwy. Co. v. Borough of Garfield</i> , 53 A. 11 (N.J. 1902) .....	69
<i>Kellogg v. Kellogg</i> , 989 S.W.2d 681 (Mo. Ct. App. 1999).....	27
<i>Kirkpatrick v. Webb</i> , 58 S.W.3d 903 (Mo. Ct. App. 2001).....	95
<i>Landvatter Ready Mix, Inc. v. Buckey</i> , 963 S.W.2d 298 (Mo. Ct. App. 1997).....	24, 94
<i>Loving v. City of St. Joseph</i> , 753 S.W.2d 49 (Mo. Ct. App. 1988) .....	40
<i>Missouri Public Service Comm'n v. Platte-Clay Elec. Coop., Inc.</i> ,	
407 S.W.2d 883 (Mo. 1966) .....	<i>passim</i>
<i>Missouri Utilities Co. v. Scott-New Madrid-Mississippi Elec. Coop.</i> ,	
475 S.W.2d 25 (Mo. 1971) .....	61
<i>Moore-Harris Abstract Co. v. Estes</i> , 495 S.W.2d 485 (Mo. Ct. App. 1973).....	27
<i>Mountains States Tel. &amp; Tel. Co. v. Town of Belen</i> ,	
224 P.2d 1112 (N.M. 1952) .....	61, 63, 80
<i>Murrell v. Wolff</i> , 408 S.W.2d 842, 851 (Mo. 1966).....	76
<i>New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans</i> ,	
197 U.S. 453 (1905).....	34

<i>Norfolk Redevelopment &amp; Housing Auth. v. Chesapeake &amp; Potomac Tel. Co. of Va.,</i> 464 U.S. 30 (1983).....	34
<i>Northwest Tel. Exch. Co. v. City of Minneapolis, 86 N.W. 69 (Minn. 1901) .....</i>	63
<i>Ohio Public Service Co. v. Ohio ex rel. Fritz, 274 U.S. 12 (1927).....</i>	62
<i>Old Colony Trust Co. v. City of Omaha, 230 U.S. 100 (1913) .....</i>	65
<i>Pa. Water Co. v. City of Pittsburgh, 75 A. 945 (Pa. 1910) .....</i>	69
<i>Pacific Gas &amp; Elec. Co. v. City of San Jose, 172 Cal.App.3d 598 (1985) .....</i>	54
<i>Pacific Gas &amp; Elec. Co. v. Dame Const. Co., 191 Cal.App.3d 233 (1987).....</i>	<i>passim</i>
<i>Panhandle E. Pipe Line Co. v. State Hwy. Comm’n.,</i> 294 U.S. 613, 55 S. Ct. 563 (1935).....	23, 83
<i>People ex rel. Woodhaven Gaslight Co. v. Deehan, 47 N.E. 787 (N.Y. 1897) .....</i>	66
<i>Peterson v. Tacoma Railway &amp; Pwr. Co., 111 P. 338 (Wash. 1910).....</i>	73
<i>Port of New York Authority v. Hackensack Water Co., 195 A.2d 1 (N.J. 1963) .....</i>	34
<i>Postal Telegraph-Cable Co. v. Railroad Comm’n of Cal.,</i> 254 P. 258 (Cal. banc. 1927) .....	63, 66
<i>Potomac Elec. Pwr. Co. v. Classic Community Corp., 856 A.2d 660 (Md. 2004)....</i>	<i>passim</i>
<i>Richardson v. Rohrbaugh, 857 S.W.2d 415 (Mo. Ct. App. 1993).....</i>	27
<i>Riverside-Quindaro Bend Levee Dist. v. Missouri American Water Co.,</i> 117 S.W.3d 140 (Mo. Ct. App. 2003).....	34, 83
<i>Russell v. Sebastian, 233 U.S. 195 (1914) .....</i>	<i>passim</i>
<i>Southern Bell Tel. &amp; Tel. Co. v. City of Meridian, 131 So. 2d 666 (Miss. 1961).....</i>	63, 67

<i>State ex inf. McKittrick ex rel. City of California v. Mo. Utilities Co.,</i> 96 S.W.2d 607 (Mo. 1936) .....	77, 78
<i>State ex inf. McKittrick ex rel. City of Lebanon v. Missouri Standard Tel. Co.,</i> 85 S.W.2d 613 (Mo. 1935) .....	62
<i>State ex inf. McKittrick ex rel. City of Springfield v. Springfield City Water Co.,</i> 131 S.W.2d 525 (1939).....	61
<i>State ex inf. McKittrick v. Southwestern Bell Telephone Co.,</i> 92 S.W.2d 612 (Mo. 1936) .....	63
<i>State ex rel. Askew v. Kopp, 330 S.W.2d 882 (Mo. 1960) .....</i>	40
<i>State ex rel. Audrain County v. City of Mexico, 197 S.W.2d 301 (Mo. 1946).....</i>	72
<i>State ex rel. Chaney v. West Missouri Pwr. Co., 281 S.W. 709 (Mo. 1926) .....</i>	23, 84
<i>State ex rel. City of Jefferson v. Smith, 154 S.W.2d 101, 104 (Mo. banc 1941).....</i>	38
<i>State ex rel. City of St. Louis v. Laclede Gaslight Co., 14 S.W. 974 (Mo. 1890).....</i>	65, 81
<i>State ex rel. Kansas City v. East Fifth St. Ry. Co., 41 S.W. 955 (Mo. 1897).....</i>	64
<i>State ex rel. McNary v. Hais, 670 S.W.2d 494 (Mo. banc 1984).....</i>	86
<i>State ex rel. Noland v. St. Louis County, 478 S.W.2d 363 (Mo. 1972).....</i>	46
<i>State ex rel. St. Joseph Water Co. v. Eastin, 192 S.W. 1006 (Mo. banc 1917) ....</i>	70, 71, 72
<i>State on inf. Dalton v. Land Clearance for Redevelopment Auth. of Kansas City,</i> 270 S.W.2d 44 (Mo. banc 1954).....	35, 36
<i>State on inf. McKittrick ex rel. City of Trenton v. Missouri Pub. Serv. Comm'n,</i> 174 S.W.2d 871 (Mo. 1943) .....	64

<i>State v. Nebraska Tel. Co.</i> , 103 N.W. 120 (Iowa 1905).....	67
<i>Stillings v. City of Winston-Salem</i> , 319 S.E.2d 233 (N.C. 1984) .....	73
<i>Town of Gans v. Cookson Hills Elec. Coop.</i> , 288 P.2d 707 (Okla. 1955) .....	80
<i>Traverse City v. Consumers Power Co.</i> , 64 N.W.2d 894 (Mich. 1954) .....	66, 76
<i>Tri-County Elec. Ass’n, Inc. v. City of Gillette</i> , 584 P.2d 995 (Wyo. 1978).....	69
<i>Union Electric Co. v. Land Clearance Redevelopment Auth. of the City of St. Louis</i> ,	
555 S.W.2d 29 (Mo. banc 1977).....	<i>passim</i>
<i>Unity Light &amp; Pwr. Co. v. City of Burley</i> , 445 P.2d 720 (Ida. 1968).....	69, 70, 73
<i>W. Union Tel. Co. v. City of Visalia</i> , 87 P. 1023 (Cal. banc 1906).....	76
<i>Washington v. Baumann</i> , 108 S.W.2d 403 (Mo. 1937).....	64
<i>Waterwiese v. KBA Const. Managers, Inc.</i> , 820 S.W.2d 579 (Mo. Ct. App. 1991) .....	75
<i>Wilson v. Owen</i> , 261 S.W.2d 19 (Mo. 1953).....	24, 90
<i>XO Missouri, Inc. v. City of Maryland Heights</i> ,	
256 F. Supp. 2d 966 (E.D. Mo. 2002) .....	63, 80, 81

**Statutes**

Act 105 of 1892 .....	73
R.S.Mo. § 393.010.....	34
R.S.Mo. § 71.520.....	64
R.S.Mo. §§ 99.300:99.660.....	35

**Rules**

La. R. S. § 12:403(11) ..... 73

Rule 84.04(f)..... 13

**Treatises**

12 McQuillin, *Municipal Corporations*, §§ 34:92 (3d ed.)..... 87

2A McQuillin, *Municipal Corporations*, § 7.46.40 (3d ed.)

    (1988 Revised Volume)..... 69, 72

**Constitutional Provisions**

Mo. Const. art I, Ch. 151 § 9431 (R.S.Mo. 1899)..... 73

Mo. Const. art I, Ch. 151 § 9549 (R.S.Mo. 1899)..... 73

Mo. Const. art. I, § 28..... 24, 37

Mo. Const. art. I, §13 (1945)..... 23, 79

Mo. Const. art. VI, § 21..... 23, 37

U.S. Const. art. I, § 10 ..... 23

U.S. Const. art. I, §10 ..... 79

## **STATEMENT OF FACTS**

The City of Bridgeton's ("Bridgeton") Statement of Facts is incomplete, misleading and frequently violates Missouri Supreme Court Rule 84.04(c).<sup>1</sup> *See, e.g.*, App. Br. at 16, 19, 20 and 22. Although the nature and effect of the 1902 franchise granted to Missouri-American Water Company's predecessor-in-interest is a major issue in the case, Bridgeton's statement of facts scarcely mentions it. Moreover, there are other factual omissions that require Missouri-American Water Company ("Missouri-American") to submit a supplemental statement of facts as permitted by Rule 84.04(f).

### **A. Background concerning Missouri-American**

Missouri-American is a public utility providing water service to approximately 1.3 million customers in over 100 communities throughout Missouri, including within Bridgeton's city limits. Legal File ("L.F.") L.F. 32, Bridgeton's Appendix ("B.A.") B.A. 31.<sup>2</sup> Missouri-American does so by means of water mains and pipes installed in accordance

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<sup>1</sup> In fact, Bridgeton cites in its Brief material that was not part of the legal file. *See* App. Br. 34, fn. 6, citing B.A. 365-66, which was not included in the legal file and was, in fact, a document filed by Missouri-American in 2006 with the Public Service Commission, more than a year after the judgment appealed from was entered by the trial court.

<sup>2</sup> Some of the citations herein refer only to Bridgeton's Appendix or Missouri-American's Appendix. These documents were exhibits to the summary judgment pleadings at the trial court below and are included in the legal file, but they do not bear an

with its state-issued perpetual franchise and pursuant to various easements, license agreements, and in public rights-of-way. *Id.*; see also *Home Builders Ass’n. of Greater St. Louis v. St. Louis County Water Co.*, 784 S.W.2d 287 (Mo. App. E.D. 1989) (“*Home Builders*”) (“St. Louis County Water Company [Missouri-American’s predecessor-in-interest] accepted and holds a perpetual franchise granted in 1902 by court order from St. Louis County, giving it the right to lay and maintain its water mains and pipes across the public highways of St. Louis County.”).

**B. Missouri Water received a perpetual franchise to lay and maintain pipes in unincorporated St. Louis County in 1902, which Missouri-American currently possesses.**

By a series of orders in 1902, the St. Louis County Court granted to Missouri-American’s predecessor-in-interest a franchise to lay its water pipes and mains throughout all unincorporated areas of St. Louis County. L.F. 44, B.A. 335-42. The orders granted to Missouri Water, Light & Traction Company (“Missouri Water”) and its successors and assigns, “Permission, authority and license ... to lay and maintain mains and pipes under, along and across” all public highways in the County “as they now exist, *or may hereafter be laid out.*” L.F. 44-45, B.A. 341 (emphasis added). The County Court acknowledged

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“L.F.” notation because Bridgeton had some initial difficulty in obtaining certified copies of these documents from the trial court clerk. As such, even though these documents are referenced as “B.A.,” they were part of the legal file considered by the Court of Appeals below (with the exception of the document discussed in Footnote 1 *supra*).

that Missouri Water had accepted the franchise and had taken all necessary steps to satisfy its conditions and make it effective. *Id.* Hereinafter, the franchise granted to Missouri Water pursuant to the February 17, 1902 and May 22, 1902 Court Orders shall be referred to as the “1902 Perpetual Franchise.”

Bridgeton did not dispute that the franchise originally granted to Missouri Water in 1902 was effectively assigned, through a corporate chain of succession, to Missouri-American and that Missouri-American is the successor-in-interest to the 1902 Perpetual Franchise. *See* L.F. 45-48, B.A. 43-46, which sets forth in detail this history of corporate succession (from Missouri Water to West St. Louis Construction Company to West St. Louis Water and Light Company to St. Louis County Water Company to Missouri-American); *Home Builders*, 784 S.W.2d 287.

Missouri-American, and its predecessors-in-interest, installed facilities throughout St. Louis County. L.F. 33, B.A. 32. Missouri-American and its predecessors-in-interest spent significant sums of money in installing these facilities pursuant to the 1902 Perpetual Franchise. *Id.* Missouri-American continues to maintain, use and rely upon those facilities in providing water service to its customers throughout St. Louis County, and spends significant money maintaining them. L.F. 33-34, B.A. 32-33. In 1902, Taussig Road lay *outside* Bridgeton city limits. Bridgeton did not annex the area that included Taussig Road until 1956. L.F. 48-51, 91-93, B.A. 46-49, 89-91.

In 1951, Bridgeton entered into a 20-year franchise agreement with Missouri-American’s predecessor to lay and maintain water mains, pipes and fire hydrants

(sometimes referred to hereinafter as “facilities”) within Bridgeton’s city limits. L.F. 50, B.A. 48; *see also* B.A. 243-49. That 1951 franchise agreement provides,

WHEREAS, said St. Louis County Water Company is now operating under the rights and privileges given by the County Court of St. Louis County to the Missouri Water, Light and Traction Company, and the West St. Louis Construction Company, which rights and privileges now belong to the St. Louis County Water Company, and

WHEREAS, *nothing herein contained shall deprive the Company of any rights to which it may be entitled under the above mentioned orders of the County Court of St. Louis County....*

*Id.* (emphasis added). Missouri-American installed water mains, pipes and fire hydrants along Taussig Road and adjoining properties primarily before 1971, before the 1951 franchise agreement with Bridgeton expired in 1971. L.F. 34, 51, B.A. 33, 49 and work ticket exhibits in support. Additionally, it is undisputed that Taussig Road is located in the public right-of-way. L.F. 6, 51-52, B.A. 1, 49-50.

**C. The changes to Taussig Road, requiring movement of Missouri-American’s facilities, are due to improvements proposed by TRiSTAR and would not have been made apart from TRiSTAR’s proposed construction activities.**

For decades, Missouri-American (and its predecessor) operated its water pipes and mains along Taussig Road, and throughout Bridgeton, without protest by Bridgeton.

Bridgeton collected Gross Receipts Taxes from Missouri-American (and its predecessor)

throughout that period (to the present). L.F. 76, B.A. 74. Bridgeton never previously claimed that Missouri-American's facilities were illegally present. This all changed when Bridgeton was approached by TRiSTAR Business Communities, L.L.C. ("TRiSTAR"), a real estate developer seeking approval for one of its projects.

In 1998, TRiSTAR approached Bridgeton seeking approval for improvements TRiSTAR proposed for Route 370 near its intersection with Missouri Bottom and Taussig Road. B.A. 299-330. TRiSTAR sought to develop a project called Park 370 in the neighboring city of Hazelwood. B.A. 297. TRiSTAR's Park 370 project included making improvements to Route 370 near its intersection with Missouri Bottom Road and Taussig Road. *Id.* (letter from TRiSTAR to Bridgeton's attorney stating, *inter alia*, that "Park 370 ... and the project plans included the construction of a new interchange on Highway 370.... A portion of the 370 interchange would be physically located in the City of Bridgeton.") To complete the development, TRiSTAR needed (or believed it needed) Bridgeton's approval for that interchange at Route 370 and Missouri Bottom Road. *Id.*

When TRiSTAR approached Bridgeton for such approval, Bridgeton agreed to grant approval, with a condition: Bridgeton required TRiSTAR to make certain improvements to Taussig Road. Missouri-American's Appendix ("M.A.") 041-42 (September 14, 1998 letter from Lawrence Chapman of TRiSTAR to Bridgeton's Mayor, Conrad Bowers); *see also* B.A. 299. Taussig Road intersects with Route 370 at the improved Route 370/Missouri Bottom Road intersection. That intersection was completed by TRiSTAR some time ago. B.A. 376.

Where a municipality conditions its approval for a developer's desired project on the willingness of the developer to conduct an additional project, as requested by the municipality, such conditional approvals are commonly referred to as *exactions*. Such exactions are “akin to zoning restrictions on the use of private property” which “impose a penalty, in the form of conditions, for approval of a desired use.” *Home Builders Assoc. of Greater St. Louis v. St. Louis County Water Co.*, 784 S.W.2d 287, 291 (Mo. Ct. App. 1989). There is no dispute that Bridgeton imposed such an exaction on TRiSTAR in the present case. *See* App. Br. 14-15, 46, 58, and 60-61; *see also* Trial Court Judgment, L.F. 216, B.A. 168 (“Nor do [the parties] dispute that an exaction was made by the City on TRiSTAR, a private developer, to improve Taussig Road as a condition for the City’s approval of TRiSTAR’s Route 370 project, a project related to the St. Louis Mills Mall.”).

In the September 14, 1998 letter from Mr. Chapman, Principal of TRiSTAR, to Mayor Bowers, which was written while the TRiSTAR Agreement was being negotiated, Mr. Chapman states, “I would like to summarize my understanding of the basic terms of *our agreement to improve Taussig Road as part of the construction of the interchange at Highway 370.*” M.A. 041 (emphasis added). On October 20, 1999, Bridgeton and TRiSTAR memorialized their contract in writing (the “TRiSTAR Agreement”) that TRiSTAR would pay for the Taussig Road project in exchange for the condition [exaction] imposed on it to get approval for its project. B.A. 299-330. The TRiSTAR Agreement also reflects that the changes to Taussig Road were imposed as an exaction upon TRiSTAR,

stating, “Whereas, Bridgeton desires Taussig Road to be improved in conjunction with TRiSTAR’s construction of certain access ramps and related improvements to Route 370 in the vicinity of such Route’s intersection with Missouri Bottom Road...” B.A. 299.

A March 13, 2003 letter from TRiSTAR to Bridgeton’s attorney similarly reflects that the changes to Taussig Road were made only as a condition of the City’s approval of TRiSTAR’s Route 370 plans and that the changes to Taussig Road would not have occurred if TRiSTAR had not sought to improve Route 370. B.A. 297-98. In that letter, Mr. Chapman states, “The facts, as I understand them, are as follows: ... *Because TRiSTAR needed an approval [for its Route 370 project], the City basically held a hammer over our head and said no approval would be granted unless you agree to help the City improve Taussig Road.*” *Id.* (emphasis added). Bridgeton similarly admitted “that the TRiSTAR letter to Bridgeton attached as Exhibit R to the Company’s Motion for Summary Judgment reflects that *the changes to Taussig Road were made as a condition of the City’s approval of TRiSTAR’s Route 370 plans.*” L.F. 98, B.A. 96 (emphasis added).

But for the exaction imposed upon TRiSTAR, Bridgeton lacked the money to make the Taussig Road improvements at this time, and it is unclear when (if ever) Bridgeton would have had the funding to make the road improvements. Bridgeton admits this in its Brief, stating, “The City was hampered in its efforts [to improve Taussig Road], however, *by a lack of funding.*” App. Br. 14 (emphasis added). Mr. Chapman similarly stated in his March 13, 2003 letter, “Unfortunately, the City has no mechanism to go to property owners along Taussig Road and require them to make the needed improvements

so they took the opportunity to deny our approval to construct the 370 interchange unless we agree to provide funds for the improvement of Taussig Road.” B.A. 298. The 2005 Affidavit of Bridgeton’s Mayor Bowers also confirms that Bridgeton did not have the funds necessary to improve Taussig Road absent TRiSTAR’s exaction, stating, “The improvements to Taussig Road would have occurred *once funded* even if TRiSTAR had not sought to improve Route 370.” B.A. 291 (emphasis added).

If Missouri-American prevails in this lawsuit, *TRiSTAR*, and *not* Bridgeton or its taxpayers, will ultimately be required to pay for the utility relocations. B.A. 308. Under the terms of the TRiSTAR Agreement, Bridgeton agreed to

... follow its usual procedure for any relocation of utility easements and lines required for the project. Bridgeton will, to the extent contractually or legally permissible, require any utility lines and easements located within the existing Taussig Road to be relocated by the applicable utility at the cost and expense of such utility.

B.A. 305.

Unless the utilities ultimately pay for the relocation of facilities along Taussig Road, TRiSTAR, not Bridgeton or its taxpayers, is contractually obligated to pay for the relocations. B.A. 305-08. Paragraph 8 of the TRiSTAR Agreement provides that

“TRiSTAR *shall* be obligated to pay for the following costs associated with the Project:  
... (5) *All cost of utility relocation not paid by the utility involved.*” *Id.* (emphasis added).

Moreover, the TRiSTAR Agreement required TRiSTAR to pay Bridgeton’s legal fees

incurred in relation to the Agreement, and TRiSTAR is paying for Bridgeton's legal representation in this litigation. *Id.*; *see also* L.F. 161, B.A. 159.

**D. Certain of Missouri-American's facilities along Taussig Road are located within easements granted to Missouri-American or its predecessors-in-interest.**

In addition to the facilities in the public right-of-way of Taussig Road, some of the facilities that would have to be moved to allow the improvements are located within written easements previously obtained by Missouri-American from private parties. These are: an easement from Hussman Refrigerator Company (M.A. 043-44) (the "Hussman Easement"); an easement from Herman W. and Irma Scholle (M.A. 045) (the "Scholle Easement"); and a "License for Underground Facility" from the Norfolk and Western Railway Company ("Norfolk") (B.A. 358-62) (the "Norfolk Agreement"). Only the Norfolk Agreement remains at issue on this appeal.

Under the Norfolk Agreement, Norfolk granted to St. Louis County Water Company "permission to construct, operate, use and thereafter maintain or remove an underground 20 inch pipe line, for the handling of water over" certain property adjoining Taussig Road. B.A. 358. The Norfolk Agreement provides that "[t]his agreement shall inure to the benefit of and *be binding upon the successors and assigns of the parties hereto, respectively.*" *Id.* (emphasis added).

**E. Bridgeton has demanded Missouri-American relocate its facilities along and under Taussig Road at its own cost.**

In setting forth the procedural history, Bridgeton leaves out any mention of its first Petition against Missouri-American filed on July 1, 2003, alleging the same claims for trespass and ejection concerning Missouri-American's facilities on Taussig Road.

The day *after* Bridgeton filed its first Petition against Missouri-American, Bridgeton passed the July 2, 2003 resolution purportedly authorizing it to proceed with the Taussig Road project. B.A. 288-89. This resolution was passed nearly *five years after* Bridgeton and TRiSTAR entered into negotiations concerning the Taussig Road project and nearly *four years after* those parties entered into the October 20, 1999 agreement between the parties. *Id.* Given the facts that the TRiSTAR Agreement was entered on October 20, 1999 and that Bridgeton did not pass a resolution authorizing the improvement of Taussig Road until four years later, Bridgeton was apparently proceeding with the Taussig Road project pursuant to its binding 1999 written agreement with TRiSTAR.

On May 5, 2004, Missouri-American filed a motion for summary judgment in the first lawsuit, arguing that it could not be required to relocate its facilities at its own expense because, *inter alia*, under *Home Builders*, a public utility cannot be required to pay for relocations of its facilities where the relocation is made necessary by an exaction on a private developer. On May 18, 2004, Bridgeton voluntarily dismissed that action and, on the next day, refiled its Petition in the present action, once again alleging the same trespass and ejection claims. L.F. 5-11, B.A. 1-6.

**POINTS RELIED ON**

- I. The Circuit Court Correctly Granted Summary Judgment In Favor Of Missouri-American Because The Common-Law Rule, As Set Forth In *Union Electric*, Does Not Apply In The Present Case, Where The Utility Relocations Were Not Made Necessary By Government Action And Purely Government Purpose, And A Utility Cannot Be Required To Relocate Its Facilities At Its Own Expense Where The Relocation Is Made Necessary By An Exaction On A Developer And The Developer, Not The Municipality, Is Paying For The Improvement Project (Responds to Point I).**

*Union Electric Co. v. Land Clearance Redevelopment Auth. of the City of St.*

*Louis*, 555 S.W.2d 29 (Mo. banc 1977)

*Home Builders Ass'n of Greater St. Louis v. St. Louis County Water Co.*, 784

S.W.2d 287 (Mo. Ct. App. 1989)

*Pacific Gas & Elec. Co. v. Dame Const. Co.*, 191 Cal.App.3d 233 (1987)

*Potomac Elec. Pwr. Co. v. Classic Comm. Corp.*, 856 A.2d 660 (Md. 2004)

Missouri Constitution, Art. VI, § 21

- II. The Trial Court Correctly Granted Summary Judgment Because Bridgeton Failed to Establish that Missouri-American's Facilities Are Unlawfully Located On Its Property, As Those Facilities Were Installed Pursuant To The Terms Of The Constitutionally-Protected 1902 Perpetual Franchise (Responds to Point II).**

*Russell v. Sebastian*, 233 U.S. 195 (1914)

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

*Missouri Public Service Comm'n v. Platte-Clay Elec. Coop., Inc.*, 407 S.W.2d 883  
(Mo. 1966)

*State ex rel. Chaney v. West Missouri Pwr. Co.*, 281 S.W. 709 (Mo. 1926)

United States Constitution, Art. I, § 10

Missouri Constitution, Art. I, § 13

Missouri Constitution, Art. I, § 28

**III. Summary Judgment Was Appropriate Concerning Missouri-American's  
Facilities Installed Pursuant To Easements (Responds to Point III).**

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

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

**IV. Bridgeton's Argument Concerning "Formerly Private Land Outside The  
Taussig Road Right-Of-Way" Does Not Warrant Reversal of Any Portion Of  
The Trial Court's Judgment Because Bridgeton Waived Any Issue  
Concerning That Land (Responds to Point III(B)).**

*Flair v. Campbell*, 44 S.W.3d 444 (Mo. Ct. App. 2001)

*Landvatter Ready Mix, Inc. v. Buckey*, 963 S.W.2d 298 (Mo. Ct. App. 1997)

*Flair v. Campbell*, 44 S.W.3d 444 (Mo. Ct. App. 2001)

*Landvatter Ready Mix, Inc. v. Buckey*, 963 S.W.2d 298 (Mo. Ct. App. 1997)

## ARGUMENT

This appeal raises three questions:

(1) Was Bridgeton's requirement that TRiSTAR pay for the improvements to Taussig Road as a condition to the City's approval of the developer's project an "exaction" within the meaning of *Home Builders Ass'n of Greater St. Louis v. St. Louis County Water Co.*, 784 S.W.2d 287 (Mo. Ct. App. 1989)?

(2) Did Missouri-American have a perpetual franchise from St. Louis County for its facilities in the public right-of-way of Taussig Road, and if so, was that franchise abrogated when Bridgeton annexed Taussig Road in 1956?

(3) Was the agreement between Missouri-American and Norfolk an easement or a license?

The undisputed facts establish that the trial court got it right. The improvements to Taussig Road that require moving Missouri-American's facilities were required as a condition to the completion of TRiSTAR's private development. This is not, at bottom, a dispute between Bridgeton and Missouri-American, despite who the formal parties are. Bridgeton's taxpayers are not going to spend a nickel on the improvements to Taussig Road (or, for that matter, on the costs of this lawsuit). TRiSTAR is required by contract to pay.

This is ultimately a dispute over who pays for moving the facilities, TRiSTAR or Missouri-American and its ratepayers. That Bridgeton will hire the contractor who improves the road does not change the underlying reason why Missouri-American's

facilities have to be moved. No matter how it is dressed up, the improvements to Taussig Road are an exaction—“a penalty, in the form of conditions, for approval of a desired use.” *Home Builders*, 784 S.W.2d at 291.

The 1902 Perpetual Franchise is, without a doubt, a perpetual franchise under Missouri law. It is undisputed that the St. Louis County Court was authorized to grant the franchise—the right to lay water pipes and other facilities in the public rights-of-way of St. Louis County. Missouri-American’s predecessor accepted this contract when it began laying pipes and servicing the area of the franchise, St. Louis County. That franchise continued despite the 1956 annexation of Taussig Road because Bridgeton could not constitutionally abrogate it.

Finally, the Norfolk Agreement is in effect an easement, not a license. The Norfolk Agreement is an easement because it “inure[s] to the benefit of and [is] *binding* upon the successors and assigns of the parties,” B.A. 358, and therefore it gives Missouri-American the same rights it would have had if the document had been entitled “easement” instead of “license.” It is the substance of the rights granted, not the name of the document, that controls its legal effect.

**Summary judgment and standard of review:**

Summary judgment procedure is designed to permit the trial court to enter judgment, without delay, where the moving party has demonstrated on the basis of facts as to which there is no genuine dispute, a right to judgment as a matter of law. *ITT Commercial Finance Corp. v. Mid-America Marine Supply*, 854 S.W.2d 371, 380 (Mo.

1993); *Imperial Premium Finance, Inc. v. Northland Insurance Co.*, 861 S.W.2d 596 (Mo. Ct. App. 1993). To raise an issue of material fact sufficient to withstand summary judgment, a party must show that one or more facts that have “probative force as to a controlling issue” are in dispute. *Feder v. Nation of Israel*, 830 S.W.2d 449, 451 (Mo. Ct. App. 1992).

In the underlying proceedings, Bridgeton did not identify any material facts in dispute, nor does it do so here. Instead, it seeks a different result based on the uncontested material facts as applied to the relevant law. A difference of opinion as to the legal effect of a document, like the 1902 Perpetual Franchise or the Norfolk Agreement, does not preclude summary judgment or raise an issue of material fact. *Hougland v. Pulitzer Publishing Co., Inc.*, 939 S.W.2d 31, 33 (Mo. Ct. App. 1997); *Moore-Harris Abstract Co. v. Estes*, 495 S.W.2d 485, 489 (Mo. Ct. App. 1973). Nor do legal conclusions or statements of opinion in affidavits raise an issue of material fact. *Richardson v. Rohrbaugh*, 857 S.W.2d 415, 418-19 (Mo. Ct. App. 1993); *Kellogg v. Kellogg*, 989 S.W.2d 681, 687 (Mo. Ct. App. 1999).

Disposition of this case by summary judgment was appropriate under *Home Builders* because, no matter which analysis this Court utilizes (the “automatic rule” or the “benefit analysis”, *see infra.*), the material fact for both analyses – that Bridgeton imposed the Taussig Road improvements as an exaction upon TRiSTAR – is undisputed. In addition, summary judgment in favor of Missouri-American was appropriate because Bridgeton failed to establish that Missouri-American’s facilities are unlawfully present on

property belonging to Bridgeton and failed to raise any issue of material fact as to that element of its claims.

The legal issues appropriate for summary judgment were: (1) the common-law rule described in *Union Electric* does not apply where the utility relocations were not made necessary by governmental action and purely governmental purpose but were undisputably made necessary by an exaction; and (2) Missouri-American's constitutionally-protected franchise and easements (Hussman, Scholle and Norfolk.)

**I. The Circuit Court Correctly Granted Summary Judgment In Favor Of Missouri-American Because The Common-Law Rule, As Set Forth In *Union Electric*, Does Not Apply In The Present Case, Where The Utility Relocations Were Not Made Necessary By Government Action And Purely Government Purpose, And A Utility Cannot Be Required To Relocate Its Facilities At Its Own Expense Where The Relocation Is Made Necessary By An Exaction On A Developer And The Developer, Not The Municipality, Is Paying For The Improvement Project (Responds to Point I).**

Bridgeton says that Missouri-American and its ratepayers throughout St. Louis County should pay for the relocation of its facilities even though the relocation is necessary because of a TRiSTAR project. In urging this result where it has no financial exposure on any utility relocation here, Bridgeton continually refers to the Taussig Road project as a “city” project. But this argument is premised upon a façade: that Bridgeton, not TRiSTAR, is responsible for the Taussig Road improvements.

There should be no mistake that when that façade is peeled back, the party whose interests are concerned is undeniably TRiSTAR. TRiSTAR, not Bridgeton or its taxpayers, is paying for the Taussig Road improvements. Taussig Road is being improved at this time only because Bridgeton required TRiSTAR to pay for the improvements as a condition for Bridgeton’s approval of TRiSTAR’s real project, Park 370. B.A. 297. TRiSTAR, not Bridgeton or its taxpayers, will pay for the relocation of utilities along Taussig Road if this judgment is affirmed. B.A. 308. TRiSTAR is even paying Bridgeton’s attorney’s fees in this litigation. *Id.* Bridgeton’s claim that this is a “city project” is further discredited by the fact that the improvements have not yet begun on a road Bridgeton claims needs immediate attention. *See* App. Br. 13-14 (indicating that improvements to Taussig Road have not yet occurred).

Bridgeton contends that no authority supports the Court of Appeals’ decision in this case that the utility should not bear the cost of facility relocations where such relocations are made necessary by a developer. This contention simply is not accurate. Every court to consider this particular issue has uniformly examined the common-law rule, discussed by this Court in *Union Electric Co. v. Land Clearance Redevelopment Auth. of the City of St. Louis*, 555 S.W.2d 29, 32 (Mo. banc 1977), and has concluded that the utility should *not* be forced to pay for such relocations. *See, e.g., Home Builders Ass’n of Greater St. Louis v. St. Louis County Water Co.*, 784 S.W.2d 287 (Mo. Ct. App. 1989), *Pacific Gas & Elec. Co. v. Dame Const. Co.*, 191 Cal.App.3d 233 (1987), *Potomac Elec. Pwr. Co. v. Classic Comm. Corp.*, 856 A.2d 660 (Md. 2004) and the Court

of Appeals below, B.A. 173-82.<sup>3</sup> In reality, Bridgeton has offered no authority setting forth a contrary rule in cases where relocations are made necessary by an exaction on a private developer.

The key factor in the case law cited above is whether the developer's private development "accelerated the need for the public improvement, thereby providing the nexus which justifies imposition of all of the costs thereof on the developer." *See, e.g., Home Builders*, 784 S.W.2d at 292. In each of the cases above, the exaction served as the "nexus," as a matter of law. It is beyond dispute that just such an exaction occurred here; Bridgeton admits throughout its brief that it imposed an exaction on TRiSTAR. *See, e.g., App. Br. 14-15, 46, 58, and 60-61; see also Trial Court Judgment, L.F. 216* ("Nor do [the parties] dispute that an exaction was made by the City on TRiSTAR, a private developer, to improve Taussig Road as a condition for the City's approval of TRiSTAR's Route 370

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<sup>3</sup> Bridgeton claims that "there is no basis in *Union Electric*, Missouri common law, Missouri statutes, or cases from other jurisdictions for creating an exception to the common-law duty of utilities to bear the cost of facility relocation occasioned by public necessity, simply because non-public funds are used to finance the required improvements." App. Br. 27. The relevant cases—*Home Builders*, *Dame*, *Potomac Electric* and the Court of Appeals below in this litigation—all state to the contrary. These cases uniformly have held that the developer and not the utility should pay for relocations made necessary by an exaction.

project, a project related to the St. Louis Mills Mall.”). TRiSTAR similarly admitted that Bridgeton seized the opportunity to get someone else to pay for a road that it believed was a problem. B.A. 299. Bridgeton “placed TRiSTAR in the unfortunate circumstance of being required to obtain Bridgeton approval to make an improvement on Hwy 370.”

*Id.*

It is important to keep in mind that the common-law rule was originally formulated to address the question of who, between a utility or a municipality’s taxpayers, should pay for utilities relocations, dictating that in such a situation, the utility should bear the relocation costs. That was the issue in *Union Electric*, where this Court held that the common-law rule applied. But it is *not* the issue here, nor was it the issue in *Home Builders, Dame, or Potomac*. Ultimately, this case is not a choice between having Bridgeton’s taxpayers and Missouri-American’s ratepayers bear the cost of the relocation. It is between the developer – TRiSTAR, a private company that agreed to pay for the Taussig Road project as part of its profit-making Park 370 development – and Missouri-American’s ratepayers – which are analogous to taxpayers under these circumstances, according to *Dame*. TRiSTAR has already agreed that it will pay for any relocations not paid for by the utilities. B.A. 305-08. Because this is a different question than that raised in *Union Electric*, the common-law rule does not apply and TRiSTAR, not Missouri-American’s ratepayers, should pay for the Taussig Road utilities relocations.

There is “no legal basis, and certainly no equitable one, for requiring a utility’s rate-paying customers to bear a cost triggered and made necessary by a private developer’s project and thus, in effect, to subsidize the cost of the development.” *Potomac*, 856 A.2d at 669. The Court of Appeals in *Home Builders* also followed this reasoning, stating that developers have a much better opportunity to anticipate and plan for the costs of relocation associated with their projects than utilities. 784 S.W.2d at 293.

Bridgeton’s reliance on *Union Electric* is misplaced. *Union Electric* applied the common-law rule in very different circumstances, where a city built a convention center on land it had purchased as part of a statutorily-authorized redevelopment project in an area legislatively declared to be blighted. 555 S.W.2d at 29-30. The project in that case was a “governmental act” and for a “governmental purpose” because of the special nature of redevelopment projects and because there was only a peripheral benefit to any private party. In contrast, *Home Builders*, *Dame*, *Potomac Electric* and the Court of Appeals below all uniformly held that in cases like the present, the private developer (TRiSTAR here) is *necessarily* the primary beneficiary of the project, as it would not have received approval for its desired project without agreeing to the exaction. Therefore, TRiSTAR, and not Missouri-American and its ratepayers, should pay for any resulting utility relocations.<sup>4</sup>

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<sup>4</sup> Contrary to Bridgeton’s claims, Missouri-American has not refused to move its facilities. Rather, based upon the present facts and applicable law, Missouri-American has consistently stated that it should be reimbursed for the costs of doing such relocations

**A. The common-law rule, as set forth in *Union Electric*, does not apply when a utility is required to move its facilities because of an exaction on a private developer.**

This Court set forth the applicable common-law rule, as well as the circumstances under which it does not apply, in *Union Electric*, 555 S.W.2d at 32. There, this Court held that only under limited circumstances may a utility be forced to move its facilities at its own expense, stating that only when “changes (to streets) are required by public necessity” or “public convenience and security.” (This is the so-called “common-law rule.”) This Court then explained that

the general rule that the utility must bear the relocation costs has been held inapplicable where the relocation of its facilities has been necessitated by the municipality’s exercise of a proprietary *rather than* a government function or purpose.

*Id.* (emphasis added). In other words, to fall within the limited range of the common-law rule, the project making the relocation necessary must have been caused by both a “government function” (other cases use the term “government act” instead) and a “government purpose.” *Home Builders*, 784 S.W.2d at 292. (As discussed *infra.*, courts undeniably caused at this time by the exaction imposed on TRiSTAR. L.F. 14, B.A. 9. Reimbursement of its costs is a far cry from Bridgeton’s claims that somehow Missouri-American is going to profit from replacing utility lines with other utility lines doing the same function to an area covered under its constitutionally-protected Perpetual Franchise.

applying the “governmental versus proprietary function” test have determined that if either a governmental purpose or a governmental act is missing, the governmental entity has not acted in a “governmental function.”) If a project does not meet both prongs of this test, the common-law rule does not apply.

There is no dispute that when a government entity is undertaking a project through government action and for a purely governmental purpose, the common-law rule applies. But as this Court has held, cases not satisfying those two elements fall outside the common-law rule and the utility cannot be forced to pay for the relocations. *Union Electric*, 555 S.W.2d at 32. The Taussig Road project is not the result of a governmental act and a governmental purpose because it is being conducted at this time because of the exaction imposed on TRiSTAR.

Bridgeton cites a large number of cases from other jurisdictions discussing the common-law rule. But each of those cases is clearly distinguishable from the present case, primarily because in none of those cases were the utility relocations made necessary by the involvement of a private developer or an exaction, nor were the projects the result of a government act and government purpose. *See, e.g., New Orleans Gaslight Co. v. Drainage Comm’n of New Orleans*, 197 U.S. 453 (1905) (city ordered sewer company to move sewer lines so city could redesign its municipal drainage system; no exaction on a private developer); *Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30 (1983) (redevelopment authority ordered telephone company to move lines as part of redevelopment project; no exaction on a private developer); *City*

*& County of Denver v. Mountain States Tel. & Tel. Co.*, 754 P.2d 1172 (Colo. banc 1988) (city ordered telephone company to move lines when city constructed new sewer; no exaction on a private developer); *Port of New York Authority v. Hackensack Water Co.*, 195 A.2d 1 (N.J. 1963) (port authority ordered water company to move lines when it conducted repairs to bridges, roads and tunnels; no exaction on a private developer); and *Riverside-Quindaro Bend Levee Dist. v. Missouri American Water Co.*, 117 S.W.3d 140 (Mo. Ct. App. 2003) (levee district, a public authority, ordered water company to move lines when it constructed new levees; no exaction on a private developer).<sup>5</sup>

In each of these cases, the language recited by the City of Bridgeton applies only because the common-law rule applies; that is, the utility relocations were made necessary

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<sup>5</sup> Bridgeton also cites R.S.Mo. § 393.010 in support of its discussion of the common-law rule. *See* App. Br. 36. But Bridgeton fails to show how this statute, which merely notes that utilities cannot “incommode” the public’s use of roads when they install facilities, specifically applies to the present case. Even if this statute applied to the present case, which it does not, municipalities cannot rely on this statute to take away rights that a utility otherwise possesses. *See, e.g., Union Elec. Co. v. City of Crestwood*, 499 S.W.2d 480, 484 (Mo. 1973) (municipality could not rely on 393.010 to pass ordinance that violated the terms of the utility’s franchise). The right to be reimbursed for facilities relocations made necessary by private development is one such right. *See* discussion of Missouri-American’s 1902 Perpetual Franchise *infra*.

because those projects met the common-law test. But these cases do not apply to the present case because the common-law rule does not apply. A careful examination of the facts and law cited by this Court in *Union Electric* (which is noticeably absent from Bridgeton’s brief) demonstrates how different the present case is from *Union Electric* and from the kinds of situations in which the common-law rule applies.

In *Union Electric*, the Land Clearance for Redevelopment Authority (the “Authority”) acquired two blighted city blocks for redevelopment pursuant to the Land Clearance for Redevelopment Authority Law, R.S.Mo. §§ 99.300 to 99.660, in order to construct a convention center and accompanying properties. *Id.* at 31. Sections 99.300 to 99.660 authorize public bodies to declare certain “blighted” and “insanitary” areas to be a menace and injurious to the public and permit the public body to acquire those properties by eminent domain and thereafter redevelop those areas pursuant to certain requirements. *State on inf. Dalton v. Land Clearance for Redevelopment Auth. of Kansas City*, 270 S.W.2d 44, 48 (Mo. banc 1954).

When the Authority demanded that Union Electric move its facilities in the area, Union Electric claimed that it was entitled to compensation. *Id.* Union Electric argued that part of the area would be used by a hotel, a private entity, and that the relocation was thus due to the exercise of a proprietary rather than a government function. *Id.* at 33.

The reasons this Court rejected Union Electric’s argument demonstrate how different that case is from the present. There, the redevelopment project constituted a “public purpose” because of its special status as such under the Missouri Constitution and

relevant statutes. This Court had specifically set forth the rule, on at least two prior occasions, that Section 99 redevelopment projects are by definition “for a public purpose,” and any benefits to private individuals are “merely incidental to the public purpose.” *Dalton*, 270 S.W.2d at 53; *see also Annbar Assocs. v. West Side Redevelopment Corp.*, 397 S.W.2d 635, 646 (Mo. banc 1965). This Court cited both *Dalton* and *Annbar* in finding that the *Union Electric* redevelopment project was for a public purpose.

In stark contrast, the Taussig Road project holds no such special status. The “public purpose” attributed to the project in *Union Electric* came from its special authorization under state statute and from special recognition as such by this Court on previous occasions. These factors can hardly be compared to the present case, where the Taussig Road project is being conducted at this time solely because TRiSTAR wanted approval for its Park 370 private development and had to agree to do the Taussig Road project to get that approval. This Court has not given exactions the same “public purpose” recognition as redevelopment projects.

In attempting to find some basis to impart this “public purpose” designation on the Taussig Road project, Bridgeton makes much of the fact that five years *after* it started negotiating the terms of the exaction and four years *after* it and TRiSTAR had entered their Agreement, Bridgeton passed a resolution calling the Taussig Road project a city project. B.A. 288-89. That resolution was passed the *day after* Bridgeton originally filed suit against Missouri-American on July 1, 2003 wherein it asserted the same claims

against Missouri-American as they are in this present action. *Id.* Bridgeton attempts to give its resolution the same weight as the legislative declaration of “public purpose” in *Union Electric*. But again, a careful examination of *Union Electric* shows how different the legislative determination there was from Bridgeton’s belated resolution in the present case.

Bridgeton argues that *Union Electric* stands for the proposition that a project is for a “government purpose” if any legislative body merely declares it to be for such purpose. *See, e.g.*, App. Br. pp. 39-40. The legislative determination of “public purpose” in *Union Electric*, however, was made under special Constitutional authorization to do so. *Dalton*, upon which this Court relied on this point, held that under Article I, § 28 and Article VI, § 21 of the Missouri Constitution, a legislature’s designation of a Section 99 redevelopment project as being “for a public purpose” should be given deference by a court (although the court can still find that the legislature’s determination was in error). 270 S.W.2d at 52.

Bridgeton has pointed to no similar source of deference for its resolution in the present case. Bridgeton’s late-dated resolution was self-serving, came four years after the exaction had been imposed on (and agreed to by) TRiSTAR, and lacks the constitutional authorization held by the legislative determination in *Union Electric*. *Compare State ex rel. City of Jefferson v. Smith*, 154 S.W.2d 101, 104 (Mo. banc 1941) (calling a city’s false claim that a building project was for a municipal purpose a “subterfuge”).

The final case primarily relied upon by this Court in *Union Electric* further confirms how different the present case is and why the common-law rule should not apply here. In *City of Baltimore v. Baltimore Gas & Elec. Co.*, 192 A.2d 87 (Md. 1963), the highest court of Maryland set forth a list of factors, all of which must be met before a project is held to be governmental rather than proprietary in nature:

Where the act in question is sanctioned by legislative authority, is solely for the public benefit, with no profit or emolument inuring to the municipality, and tends to benefit the public health and promote the welfare of the whole public, and has in it no element of private interest, it is governmental in its nature.

*Id.* at 91 (emphasis added). There, the Maryland court found that a housing project was governmental in nature, but the city's construction of a market was not a governmental project, and consequently, the gas company had to be compensated for moving its utility lines in relation to the market project. *Id.*

The Taussig Road project does not satisfy the factors of this test. The project is not "solely" for the public benefit and indeed has a heavy (if not exclusive) element of "private interest" in it. By Bridgeton's own admission, if TRiSTAR's had not agreed to make the Taussig Road improvements because of the exaction, the improvements would not be occurring at this time. B.A. 291 (Mayor Bowers' affidavit). It was on this basis that the Court of Appeals held that "[a]lthough the general public benefits from the improvements to Taussig Road, these benefits are incidental. The primary beneficiary of the work is TRiSTAR, which would not have been permitted to pursue its project without

agreeing to perform the work.” B.A. 177; *see also Home Builders*, 784 S.W.2d at 292; *Dame*, 191 Cal.App.3d at 240; and *Potomac*, 856 S.W.2d at 669.

The Taussig Road project fails the *City of Baltimore* test utilized by this Court in *Union Electric* because it is primarily, if not solely, for the benefit of a private party and has a significant element of private interest in it. The Taussig Road project does not satisfy the “governmental purpose” test and therefore does not fall within the common-law rule. Likewise, when the highest court of Maryland applied the *City of Baltimore* test to the same facts as here (utility relocations made necessary by exaction on a developer), it concluded that the utility cannot be forced to pay for the relocations. To this end, it stated, “The rule applied in *City of Baltimore* necessarily *must apply with even greater force* when the relocation is made necessary by the actions of a private developer for its own economic benefit.” *Potomac Electric Pwr. Co. v. Classic Comm. Corp.*, 856 A.2d 660, 668 (Md. 2004) (emphasis added). (*Potomac Electric* is discussed at greater length *infra*.) And to this end, *City of Baltimore* looked only at the “governmental purpose” prong of the test. For the reasons discussed in connection with *Home Builders infra*, this case also presents a situation where no governmental act is present either.

Bridgeton introduces a straw argument here, claiming that the “governmental function/governmental purpose” test of *Union Electric* is no longer valid because, it alleges, courts have questioned the applicability of the governmental-proprietary distinction outside the governmental tort liability area. *See* App. Br. 38-39. Bridgeton identifies the 1960 decision of *State ex rel. Askew v. Kopp*, 330 S.W.2d 882, 890 (Mo.

1960) as the point in time at which it claims Missouri abandoned the distinction in cases other than tort liability, citing *Loving v. City of St. Joseph*, 753 S.W.2d 49, 51 (Mo. Ct. App. 1988) for that proposition. However, *Askew* was decided seventeen years *before* *Union Electric*, yet this Court continued to use the proprietary-government distinction. Certainly this Court was aware of the substantially older *Askew* decision when it retained the governmental-proprietary distinction for use in *Union Electric*. *Askew* stands only for the proposition that the governmental-proprietary distinction is “usually” invoked in tort liability cases, far weaker than the interpretation being suggested in Bridgeton’s brief. 330 S.W.2d at 890; 753 S.W.2d at 51.

Notwithstanding Bridgeton’s attempt to question the applicability of the governmental-proprietary distinction, the applicable test in this case to fall within the limited range of the common-law rule is whether the project making the relocation necessary was caused by both a “governmental function” (other cases use the term “governmental act” instead) and a “governmental purpose.” Clearly the analysis dictates that the road improvements must be the result of a governmental act and for a governmental purpose before the utility can be forced to pay for utility relocations; absent these findings, this common-law rule does not apply. *See, e.g. Home Builders*, 784 S.W.2d at 291-92. This Court applied the common-law rule in *Union Electric* because Section 99 redevelopment projects are, by definition and by previous declaration of this Court, for a government purpose and constitute government action. In contrast, as *Home Builders*, *Dame* and *Potomac Electric* demonstrate, the common-law rule clearly does not

apply in cases like the present, where utility relocations are made necessary by an exaction on a private developer.

**B. The present case is exactly like *Home Builders*, where the Court of Appeals found that the common-law rule did not apply when utility relocations were made necessary by a project agreed to by a private developer as a result of an exaction.**

The facts of the present case – a case in which road improvements requiring utility relocations were made necessary by an exaction forced upon a private developer by a municipality – are exactly the same as those upon which the Court of Appeals held that the common-law rule did not apply in *Home Builders*.

*Home Builders* involved five different road relocation projects. In each project, the appropriate governmental authorities required the developer to complete specified road improvements as a condition to obtaining permission to construct that project, and in each project, road improvements required relocation of the Water Company’s right-of-way facilities. 784 S.W.2d at 289. The requirement to make improvements to the roads were “exactions.” Each of the exaction projects either abutted or was “*in the vicinity of*” (though not necessarily adjacent to) the developer’s project for which it sought the approval. *Id.* at 288 (emphasis added).

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

*private actions, the road improvements and consequent facility relocations would not occur at this time or perhaps at any time.” Id. at 291 (emphasis added). Home Builders* offers a simple analysis: follow the money. If the utility relocations are made necessary because of an exaction, and would not have occurred at that time absent the exaction (and the developer’s contribution of funds), then the project is not “for a purely governmental purpose” and the utility cannot be forced to pay for the relocations.

*Home Builders* also held that there is no “government act” (or “government function,” as *Union Electric* states it) where, like here, the relocations are made necessary because of an exaction. 784 S.W.2d at 291. Although there is a “government act” when the governmental authority imposes the exaction, *Home Builders* held that the *final act* is a private act, by the developer’s acceptance of the exaction. That is, when a developer accepts the exaction, “the exaction generates no acts by a governmental entity,” and “by complying with the exaction, ... [the developers] are performing no governmental acts.” *Id.* There, just as here, the relevant “final act” was the developer’s acceptance of the exaction. For that reason, no “government act or function” was present, meaning that neither prong of the *Union Electric* test is met in the case of an exaction.

*Home Builders* did not identify as relevant whether the exactions were actually necessary because of increased traffic, required ingress or egress, or some other factor. Instead, the mere fact that exactions were accepted by the developers was enough to make the improvement a private, not a governmental project, at bottom.

*Home Builders* put the cost on the developers because the ... Appellant Developers, by their private development decisions, have triggered the need for road improvements and thus for facility relocations. They are in a position, when making those development decisions, to factor the cost of utility relocations into their project plans. They can accept those costs, if feasible, and proceed to complete their projects. Or, they can decline to undertake a project if the relocation costs are beyond their present resources. Developers thus have a better opportunity than the Water Company to anticipate and to plan for the costs of relocation associated with their proposed projects. The Water Company, if forced to bear the costs whenever a developer's project requires facility relocations, has no similar opportunity to anticipate, much less to plan, the allocation of its resources to meet those costs.

*Id.* at 292-93.

The key factor in the *Home Builders* analysis is whether the developer's private development "provide[s] the nexus which justifies imposition of all of the costs thereof on the developer." *Id.* at 292. There is no question that TRiSTAR's development of the Route 370 project served as the "nexus." As TRiSTAR admitted, Bridgeton seized the opportunity to get someone else to pay for a road that it believed was a problem. B.A. 261. Bridgeton exacted the road improvement from TRiSTAR, as TRiSTAR stated it "was placed in the unfortunate circumstance of being required to obtain Bridgeton

approval to make an improvement on Hwy 370.” *Id.* Finally, Bridgeton admits this nexus in its Brief, stating that Bridgeton “tied” approval for the Park 370 project to TRiSTAR’s assistance with the Taussig Road project. App. Br. at 46.

Despite the clear nexus here between the exaction and the project requiring utility relocations, Bridgeton attempts to distinguish *Home Builders* by claiming that the projects in the present case (Taussig Road and Park 370) are unrelated. But in doing so, Bridgeton hangs its hat on a misrepresentation of the facts of *Home Builders*. Bridgeton claims that “there was no public need for the improvements before the developers began their development” in *Home Builders*, whereas in the present case, Bridgeton alleges, the “need” for improvements to Taussig Road existed before the exaction was imposed on TRiSTAR. *See, e.g.*, App. Br. at 41-42, 44, 47. In other words, Bridgeton claims that in *Home Builders*, if the private development had never been proposed, *the road improvements would not have been necessary*, whereas here, the alleged need for improvements to Taussig Road existed before the exaction related to TRiSTAR’s Park 370 development.

But Bridgeton’s version of the *Home Builders* facts is inconsistent with both the actual court opinion and the Stipulation of Facts filed in *Home Builders*. For some of the *Home Builders* projects, the roads at issue needed upgrading before the developer and its project ever came along. *Home Builders* noted, “Other authorities plan eventually to undertake the road improvements using public resources.” 784 S.W.2d at 289. This is

even more clearly demonstrated by the Stipulation of Facts upon which *Home Builders* was decided, which states that

such authorities plan eventually to do the road improvements themselves, using public resources. In those instances, such authorities require the developer to do the work instead because the developer is developing its project before the authorities have scheduled the particular road improvements involved.” B.A. 353-54, ¶ 50.

In other words, for some of the *Home Builders* projects, the need to improve the road had existed for some time (like Bridgeton claims about Taussig Road) though the governmental authority could not presently afford to pay for it (like Bridgeton); but when the developer asked for approval of its desired private project, the authority imposed the exaction and seized upon the opportunity to make the developer pay for a project the authority already intended and needed to do (like Bridgeton did in imposing the exaction on TRiSTAR). B.A. 353-54, ¶¶ 48, 50. In both cases, the governmental authority had identified a road it wanted to upgrade and intended to do so but could not until funds became available. And in both cases, the authority obtained funding from a developer who sought approval for its private project. Bridgeton is incorrect when it claims the facts of this case are different from *Home Builders*. The two cases present exactly the same material facts.

*Dame* addressed the same situation as here. There, the county had also planned on conducting the road improvements necessitating utility relocation prior to the developer’s

involvement. 191 Cal.App.3d at 240. Like *Home Builders*, the county in *Dame* sent a letter to the utility demanding that the utility move its lines. *Id.* And like *Home Builders* (and here), the authority used an exaction to obtain the funds it lacked to conduct the road project it had wanted to do for some time. *Id.* There, like *Home Builders* (and here), the alleged preexisting need for the road improvements was a non-factor and, even if true, certainly did not mean there was no nexus between the developer's real project and the exaction. According to the clearly-stated law in *Dame*, *Home Builders* and *Potomac*, the nexus is a legal one.

Bridgeton's claim that the Taussig Road and Park 370 projects are not related is further unavailing because TRiSTAR could have made this argument before agreeing to the exaction but *chose not to do so*. Under *State ex rel. Noland v. St. Louis County*, 478 S.W.2d 363 (Mo. 1972), a developer can challenge a governmental authority's imposition of an exaction under constitutional grounds if the exaction is not related to the project for which the developer seeks approval. TRiSTAR did not do so. TRiSTAR's opportunity to challenge the relatedness of the projects has come and gone. Bridgeton has no standing here to say that its imposition of the exaction is unrelated to TRiSTAR's project, nor should it, as that would in effect be an admission that its imposition of the exaction violated TRiSTAR's constitutional rights (hardly the type of conduct that should be condoned in an equity matter like the case at issue). Notwithstanding, TRiSTAR must now abide by the terms it agreed to with Bridgeton on October 20, 1999 (in the TRiSTAR Agreement) and pay for the Taussig Road utility relocations.

In an argument it has not raised until now, Bridgeton suggests that the Court of Appeals may have created a new exception to the common-law rule in *Home Builders*. Even a cursory reading of *Home Builders*, however, demonstrates to the contrary. The *Home Builders* court held, “No governmental act is presented in this case. Thus, *neither the common law rule nor the Missouri statutes discussed earlier apply to the factual situation in this case.*” 784 S.W.2d at 292. *Home Builders* specifically cited *Union Electric* with approval, but found that the common-law rule described therein did not apply to an exaction.

*Home Builders* and *Union Electric* both looked at the same issue: whether the common-law rule *applied to the facts in those cases*. Applying the same rule to the facts in their factually different cases, *Union Electric* said “yes,” while *Home Builders* said “no.” This Court should hold that in exaction cases like the present, *Home Builders* correctly answered this issue.

**C. *Home Builders*’ “automatic rule,” under which the trial court properly granted summary judgment, applies because the relocations were made necessary by an exaction upon a developer.**

*Home Builders* endorses what has been called the “automatic rule,” which the highest court of Maryland discussed at length in *Potomac*, 856 A.2d at 660. In *Potomac*, like here, a project arising out of an exaction on a developer required relocation of a utility’s equipment. *Id.* at 661-62. In analyzing the question of who must pay for the relocation, *Potomac* examined *Home Builders* and *Dame*. *Id.* at 668-69. *Potomac* first

notes that *Dame* followed a “benefit analysis,” determining who must pay for the utility relocation based upon to whom the primary benefit from the project extended (*Dame* held that the primary benefit in such a case was to the developer because without the exaction, the developer would not be able to complete its project). *Id.* at 668. *Potomac* then contrasts *Dame’s* approach with the *Home Builders* analysis. *Id.* at 669.

After comparing the two approaches, *Potomac* adopts what it calls the “automatic rule,” which states, “where the relocation is triggered and made necessary by a private development, the common law rule does not apply and the developer must pay the cost of the relocation.” *Id.* After reviewing facts nearly identical to the present case, *Potomac* concluded, “We find no legal basis, and certainly no equitable one, for requiring a utility’s rate-paying customers to bear a cost triggered and made necessary by a private developer’s project and thus, in effect, to subsidize the cost of the development.” *Id.*

*Potomac* adopted the automatic rule for several obvious and logical reasons. First, because the automatic rule avoids the “prospect of extensive litigation and endless discovery,” particularly concerning who primarily benefits from a project (though *Potomac* ultimately concluded that when a developer agrees to a project because of an exaction, the developer is the primary beneficiary and the analysis ends there). *Id.* The present case demonstrates the reasoning behind this rule. Both at the trial court and on appeal, Bridgeton cited traffic studies<sup>6</sup> to suggest that the utilities should be required to

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<sup>6</sup> Bridgeton now claims that Taussig Road is unrelated to the Park 370 development and will receive little new traffic from that project because there are other routes to get to

pay for the relocations. The automatic rule avoids a situation involving competing traffic studies and expert witnesses and at the same time protects the utilities' ratepayers by requiring the developer to pay for utility relocations when the relocations are made

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Park 370 and the adjacent mall known as St. Louis Mills Mall. Bridgeton's position on what these traffic studies reveal has completely reversed over the course of this dispute. Bridgeton initially maintained that TRiSTAR's Route 370 project would (significantly) increase traffic on Taussig Road. *See, e.g.*, Affidavit of Doug Shatto (admitting that according to his company's 1998 traffic study for Bridgeton, "a significant amount of traffic would be added to Taussig Road as a result of the construction of Route 370."). B.A. 293, ¶ 7. Based on this same witness, Bridgeton now maintains the opposite, claiming that "TRiSTAR's project did not materially increase the amount of traffic on Taussig Road, or otherwise increase the need for the Taussig Road project." App. Br. 46.

Notwithstanding Bridgeton's changing story on whether the Park 370 development would change traffic demands on Taussig Road, the perceived concern about traffic demands is irrelevant to the present discussion, for the reasons described in *Home Builders* and other cases, which clearly find dispositive the legal nexus between the Park 370 project and Taussig Road. Bridgeton does not dispute the exaction and instead offers an irrelevant matter (a late generated opinion of an "expert" on the issue of his perception of traffic). Bridgeton's admission of the exaction ends the analysis here. *See, e.g., Home Builders*, 784 S.W.2d at 292-93, and *Potomac*, 856 A.2d at 660.

necessary by an exaction upon the developer.

Second, the automatic rule avoids situations, like the present case, where a municipality and a developer attempt to disguise an exaction in order to avoid the *Home Builders* rule. Here, the undisputed facts show that the Taussig Road project occurred *at this time* only because TRiSTAR had the money to pay for it and because Bridgeton required TRiSTAR to complete the project to get approval for TRiSTAR's Route 370 project. Yet TRiSTAR and Bridgeton create the charade that the project was a municipal construction project. In fact, in the parties' letter memorializing the basic terms of their agreement, TRiSTAR states that "[t]he road improvement project will be carried out as a City of Bridgeton project" so that the utilities, instead of TRiSTAR, would be required to pay. M.A. 041. The automatic rule prevents cities and developers from circumventing the *Home Builders* rule by structuring a project to look like a municipal construction project, when in reality it is an exaction on a developer.

To this end, Bridgeton makes much that it, not TRiSTAR, is the plaintiff in this lawsuit. This observation overlooks the overwhelming facts to the contrary: TRiSTAR is paying for the Taussig Road project, any utility relocations not paid for by the utilities, and even Bridgeton's legal bills in this litigation to prosecute Missouri-American. Although the plaintiff's name on this lawsuit may read "Bridgeton," everything else underlying that name reads "TRiSTAR." *Home Builders* was no different; even though the developers were technically the plaintiffs in that lawsuit, the relevant governmental

authorities made the formal demand upon the water company to move its facilities. 784 S.W.2d at 289.

Moreover, *Dame* rejected *exactly the same argument*. 191 Cal.App.3d at 238. There, the developer argued that its project was a county project because the county (like Bridgeton with its demand here) had demanded that the utilities relocate. *Id.* The *Dame* court responded that this argument “places far too much emphasis on the actual request to perform the work. The fact that the county’s request was directed to [the utility] ... does not bear significantly on the question of which should be made responsible for paying for the work.” *Id.* The automatic rule focuses on the substance of the arrangement of who is paying for the project—in this case, TRiSTAR.

*Potomac* is especially significant because, as stated above, it relied on the same case, *City of Baltimore*, that this Court did in deciding *Union Electric*. After examining *City of Baltimore*’s application of the test described *supra.*, *Potomac* noted that “the rule applied in *City of Baltimore* necessarily must apply with even greater force when the relocation is made necessary by the actions of a private developer for its own economic benefit.” 856 A.2d at 668. Adhering to the same precedent and test as this Court did in *Union Electric*, the highest court of Maryland in *Potomac* adopted the automatic rule in determining that the common-law rule does not apply in exaction cases. Because the trial court and Court of Appeals, both in *Home Builders* and here, reached the same conclusion, this Court should affirm the trial court’s decision.

**D. Under *Dame*'s "benefit analysis," the same result is reached and Missouri-American would not be required to pay relocation expenses here.**

Utilizing the "benefit analysis," as the Court of Appeals apparently did, yields the same result as *Potomac*'s automatic rule, because the primary benefit from the Taussig Road project extends to TRiSTAR, not to Bridgeton or its residents. In *Dame*, addressing the same arguments as here, the court stated, "The evidence amply supports the trial court's finding that while the general public would also benefit from the road widening, *the primary beneficiary of the work was Dame, which would not have been permitted to develop its land without agreeing to widen the adjacent boulevard.*" 191 Cal.App.3d at 240 (emphasis added). The notion that TRiSTAR is not the primary beneficiary of the Taussig Road project cannot be sustained.

As in *Dame*, TRiSTAR would not have obtained approval for its desired project without agreeing to pay for the Taussig Road improvements. Even though *Potomac* ultimately applied the automatic rule, it too expressly noted that the result would have been the same under the benefit analysis approach, because using either approach, "the end result ... will, in almost all instances, be the same." 856 A.2d at 669. When a relocation is necessitated by an exaction on a developer, the developer is the primary beneficiary, with its benefit coming in the form of approval for its desired project. *Id.* at 668. With either approach, the result is the same: Missouri-American should not be

required to pay for relocations because they were made necessary by Bridgeton's exaction upon TRiSTAR.

Bridgeton suggests that *Dame* concluded that the developer was the primary beneficiary of the project because of some physical proximity between the exaction and the developer's desired project. *See* App. Br. 44. But Bridgeton looks afield for an answer that *Dame* clearly provides: the developer is the primary beneficiary not because of some traffic- or geography-related connection between the projects but because of the legal connection between the projects – without agreeing to the exaction, the developer would not have gotten the necessary approval to complete its desired project, and in that single fact lies the legal nexus that connects Park 370 and Taussig Road. 191 Cal.App.3d at 240.

Bridgeton also argues that the primary benefit is a public one because, in imposing the exaction upon TRiSTAR, Bridgeton allegedly performed a “governmental,” rather than a “proprietary,” function. Bridgeton claims that a “proprietary” function is one “performed for the special benefit or profit of the municipality acting as a corporate entity,” citing cases where a city sells water to its customers. App. Br. 39. By imposing an exaction upon TRiSTAR, however, Bridgeton did just that; rather than selling water or electricity, Bridgeton “sold” approval for TRiSTAR's Route 370 project, at a cost -- the Taussig Road project. And in doing so, Bridgeton clearly profited from the sale; it obtained a road improvement project, free of charge, which it admitted it could not otherwise afford at this time.

Bridgeton and its amicus parties argue that any benefit to TRiSTAR from the Taussig Road project is unclear and unmeasurable. The facts and law state otherwise. According to *Dame*, “the primary beneficiary of the work was Dame, which would not have been permitted to develop its land without agreeing to widen the adjacent boulevard.” 191 Cal.App.3d at 240. The Court of Appeals reached the same conclusion in the present case, holding that the primary beneficiary of the exaction was TRiSTAR. B.A. 177. None of the cases discussed give any weight to the alleged effects on traffic or the general public in determining who is the primary beneficiary of the project. Rather, *Home Builders*, *Dame* and *Potomac* all conclude, *as a matter of law*, that the primary beneficiary of an exaction project is the developer—in this case, TRiSTAR.

Finally, in attempting to portray the Taussig Road project as a governmental project, Bridgeton relies on a number of cases involving condemnation proceedings and tax proposals. App. Br. 51. Condemnation cases involve a completely different legal standard, looking at whether a project has a “public purpose” and arises out of “public necessity,” and for this reason do not apply. Moreover, in such cases, the property owner *receives compensation* from the governmental entity. Bridgeton, however, attempts to graft this legal standard—where a party *will be* compensated for having to move—upon this case, to argue that Missouri-American *should not be* compensated for having to move its pipes.

Bridgeton incorrectly contends that *City of Livermore v. Pacific Gas & Elec. Co.*, 51 Cal.App.4<sup>th</sup> 1410 (1997) dictates that *Dame* does not apply to the present case. App.

Br. 50-51. In *Livermore*, the improvements necessitating utility relocation were paid from special assessments on property owners in the area of the project, as well as through funds generated by the city through fees paid by the recipients of building permits for developments throughout the city, rather than by the developer alone, like here. 51 Cal.App.4<sup>th</sup> at 1412-13. *Dame* distinguished cases involving special assessment districts, like in *Livermore*, as irrelevant to the situation where “the private developer agreed to ... finance the improvements in question in order to meet a requirement imposed by the [government entity] as a condition of private development.” 191 Cal.App.3d at 240 (stating that *Pacific Gas & Elec. Co. v. City of San Jose*, 172 Cal.App.3d 598 (1985), the decision upon which *Livermore* relied in large part, did not apply when improvements occurred as a result of a developer-funded exaction). The present case, much unlike *Livermore*, is not a case where Bridgeton created a special assessment district to fund the project. Rather, exactly like *Dame*, the present case *is* a case where the project was funded through an exaction on one particular developer. *Livermore* pertains to a completely different factual situation and does not affect the present analysis.

Whether this Court applies the automatic rule or a benefit analysis, *Home Builders*, *Dame*, and *Potomac* unanimously direct that the outcome is the same. Missouri-American must move its facilities because of road improvements arising out of the consequences of Bridgeton’s exaction upon a developer, TRiSTAR. Under the automatic rule, because TRiSTAR is paying for the road project as the result of an exaction, Missouri-American cannot be required to pay for the utility relocations. Under

the benefit analysis, because TRiSTAR is the primary beneficiary of the project (the primary benefit being Bridgeton's approval for its desired Route 370 project), Missouri-American cannot be required to pay for the relocation of its facilities. Under either approach, the trial court correctly entered judgment in favor of Missouri-American.

**E. The ratepayers of Missouri-American (and other utilities) should not be required to subsidize private development by paying utility relocation costs that, if not paid by Missouri-American, will be paid by TRiSTAR.**

Sound policy considerations support the rule that, in the case of an exaction imposed on a developer, the developer and not the utility (and, ultimately, its ratepayers) should be required to pay for utility relocations. It must be kept in mind that the common-law rule was originally adopted because, as between taxpayers and utilities, the cost of relocations should be borne by utilities. *Dame*, 191 Cal.App.3d at 237. There is no such choice here. Ultimately, this is not a choice between having Bridgeton's taxpayers and Missouri-American's ratepayers bear the cost of the relocation. It is between the developer and Missouri-American, because TRiSTAR has already agreed it will pay for any utilities relocations not paid for by the utilities. B.A. 305-08.

Under these circumstances, *Dame* holds that the utilities' ratepayers are analogous to taxpayers, and, therefore, "analogous reasoning favors the imposition on [the developer] of liability for the costs to protect [the utility's] ratepayers, who are comparable to taxpayers, from having to bear the burden." 191 Cal.App.3d at 237. The

Court of Appeals in *Home Builders* adopted the same policy considerations, citing this reasoning from *Dame*. 784 S.W.2d at 292. Maryland’s highest court similarly agreed, stating that there is “no legal basis, and certainly no equitable one, for requiring a utility’s rate-paying customers to bear a cost triggered and made necessary by a private developer’s project and thus, in effect, to subsidize the cost of the development.” *Potomac*, 856 A.2d at 669.

These cases all recognize that the common-law rule was originally adopted to address the question of who should be required to pay for utility relocations when the choice is between taxpayers and a utility. But that choice does not exist here. The voice here is whether utility’s ratepayers or TRiSTAR will pay for the relocations.

The utilities’ ratepayers should not be required to contribute to TRiSTAR’s profits on the Park 370 project by bearing the costs of the exaction TRiSTAR agreed to pay (and, indeed could have legally challenged but chose not to do so). *Dame* and the other cases make clear that in the present situation, for the same reasons the common-law rule was originally adopted, the utilities’ ratepayers should be protected from contributing to a private developer’s profits.

The fact that no taxpayer will contribute a penny to the Taussig Road utility relocations renders Bridgeton’s “rich city/poor city” discussion misplaced and inapplicable. *See* App. Br. 51-52. Bridgeton claims that requiring TRiSTAR, a private developer, to pay for the utility relocations will divert funds from municipalities’ coffers and from other “essential government functions” like schools, police and fire services,

and that poorer cities will somehow be harmed. That cannot possibly be the case, however, where it is *undisputed* that *no municipal funds will be used for utility relocations* no matter how this Court ultimately decides this case. As the TRiSTAR Agreement makes clear, either Missouri-American (along with the other utilities, and all their ratepayers) or TRiSTAR will pay for the relocations, not Bridgeton or its taxpayers.

The Court of Appeals correctly observed in *Home Builders* that developers (and not utilities) are in the best position to anticipate and factor in the costs of utility relocations when considering projects. 784 S.W.2d at 293. The court there stated that developers “can accept those costs, if feasible, and proceed to complete their projects. Or, they can decline to undertake a project if the relocation costs are beyond their present resources.” *Id.*

Bridgeton suggests that if this Court affirms the trial court’s decision in the present case and TRiSTAR is required to pay the utility relocation costs, this Court’s decision would drastically change cities’ ability to impose exactions on developers. But the October 20, 1999 Agreement between TRiSTAR and Bridgeton itself demonstrates that developers *are already factoring in the cost of utility relocations*, as TRiSTAR signed an agreement nearly five years before this lawsuit stating that it would pay any utility relocation costs not paid by the utilities. B.A. 305-08; *see also Dame*, wherein the court was “convinced it is economically and otherwise fair that [Developer] bear these costs because they had reason to anticipate it would have to do so.” *Id.* at 241. In support, *Dame* noted Paragraph 8 to the contract with the county that the developer “shall pay

when due, *all costs of the work*, including ... *relocating existing utilities required thereby.*” *Id.* (emphasis in original). Similarly, Paragraph 8 of the TRiSTAR Agreement reflects a comparable commitment by the developer. B.A. 308. (“TRiSTAR shall be obligated to pay for the following costs associated with the Project: ... (5) All costs of utility relocations not paid by the utility involved.”)

Moreover, the sophisticated business people who make up these developers already consider the cost of the exaction as a whole when determining whether to undertake their projects. When Bridgeton demanded that TRiSTAR agree to the Taussig Road project before getting approval for its Park 370 project, TRiSTAR had three options: (1) abandon its Park 370 project entirely; (2) file suit against Bridgeton and legally challenge the constitutionality of the exaction under *Noland*; or (3) proceed with the project and accept the exaction. TRiSTAR chose the third option, no doubt because it believed that the costs, even with the cost of the exaction and even if it paid the utility relocation costs, made the Park 370 project attractive and profitable to it and its members. The costs of utility relocations was just one cost among the much larger cost of the Taussig Road project that TRiSTAR already considered when it accepted the exaction in 1999, and in completing its project thereafter. If this Court holds that Missouri-American cannot be forced to pay for the Taussig Road relocations, such a holding will not change, in any respect, this cost-benefit analysis already routinely performed by developers.

## **II. The Trial Court Correctly Granted Summary Judgment Because Bridgeton Failed to Establish that Missouri-American’s Facilities Are Unlawfully**

**Located On Its Property, As Those Facilities Were Installed Pursuant To The  
Terms Of The Constitutionally-Protected 1902 Perpetual Franchise  
(Responds to Point II).**

Missouri-American and its predecessor companies have existed as public utilities in St. Louis County for over 100 years. L.F. 219, B.A. 171. In 1901, Missouri's General Assembly gave Missouri counties, through the courts, the power to authorize utility companies to lay and maintain facilities on public roads. *Id.* These grants of power to public utilities are known as franchises. *Id.* In 1902, Missouri-American's predecessor obtained a perpetual franchise from St. Louis County, granted by court order, to lay and maintain its water mains and pipes across the public highways of St. Louis County. *Id.*

This 1902 Perpetual Franchise was a contract that gave Missouri-American the right to place its facilities in the public rights-of-way as they existed in St. Louis County as of that date. As a contract, the 1902 Perpetual Franchise could not later be impaired by governmental action because it was protected by the U.S. and Missouri Constitutions. By attempting to require Missouri-American to relocate from the public right-of-way *at its own cost*, Bridgeton has attempted to impair the contract evidenced by the 1902 Perpetual Franchise.

Bridgeton does not take issue with the impairment of contracts analysis as a legal proposition, but claims that the 1902 Perpetual Franchise was abrogated by operation of law when Bridgeton annexed Taussig Road in 1956, and that Bridgeton can order Missouri-American to move its facilities because its succeeded to the authority of the St.

Louis County Court (which granted Missouri-American the franchise) when it annexed the Taussig Road area and can therefore enforce the terms of the franchise. Neither proposition is correct.

A mere annexation of the property into the city limits of the municipality does not affect the right to use the public right-of-way previously granted by the franchise, regardless of the other powers that a city may gain over the annexed area. Moreover, as Bridgeton itself argued before the trial court, the St. Louis County Council, not Bridgeton, is the successor to the St. Louis County Court. *See* L.F. 109, B.A. 107 (wherein Bridgeton argued to the trial court that “[t]he St. Louis ‘County Court’ was replaced by the St. Louis County Council....”). Therefore, only the County Council, and not Bridgeton, has the authority to exercise any rights retained by the County Court under the terms of the franchise, including the right to exercise the limited provisions of the franchise under which the County Court could direct that pipes be relocated.

Bridgeton’s Petition asserted two causes of action, trespass and ejectment. (Bridgeton’s third “cause of action” in sought injunctive relief, which is a remedy dependent upon the merits of the first two causes of action.) To state a cause of action for trespass, a plaintiff must show “the unlawful entry on another man’s ground causing damage, however slight.” *Brand v. Mathis & Assocs.*, 15 S.W.3d 403, 406 (Mo. Ct. App. 2000). “Ejectment is a possessory action testing the right to possession of real property.... By statute, an action for the recovery of the possession of premises may be maintained in all cases where the plaintiff is legally entitled to the possession thereof.”

*Gilbert v. K.T.I., Inc.*, 765 S.W.2d 289, 293 (Mo. Ct. App. 1988). In other words, both causes of action depend on a common factor: the defendant’s unlawful presence on the property at issue. Because of the existence of the 1902 Perpetual Franchise, Bridgeton cannot show that Missouri-American was unlawfully present on the property at issue.

**A. Missouri expressly gave St. Louis County the power to grant a franchise to Missouri Water.**

The authority to grant a public utility company the right to use the public roads is retained by the state at common law. *Missouri Utilities Co. v. Scott-New Madrid-Mississippi Elec. Coop.*, 475 S.W.2d 25, 29 (Mo. 1971); *State ex inf. McKittrick ex rel. City of Springfield v. Springfield City Water Co.*, 131 S.W.2d 525 (1939). When the state exercises this power to allow a public utility company the right to use the public roads, the grant is known as a “franchise.” The state can transfer this power to grant franchises for the use of the public roads to a county or a municipality. *See, e.g., Grand Trunk W. Ry. Co. v. City of South Bend*, 227 U.S. 544 (1913); *City of Louisville v. Cumberland Tel. & Tel. Co.*, 224 U.S. 649 (1912); *Mountains States Tel. & Tel. Co. v. Town of Belen*, 224 P.2d 1112 (N.M. 1952).

In 1901, the Missouri General Assembly gave County Courts the power to authorize utility companies to lay and maintain facilities on public roads. Section 1 of that Act provided that “No . . . corporation shall . . . lay and maintain pipes . . . mains, . . . for any purpose whatever, through, on, under or across public roads or highways of any county in this state without first having obtained the assent of the county court of such

county therefore . . .” (Missouri Session Laws, 1901 at 233). While this statute appears to be merely prohibitory toward the utility company and to not specifically grant any powers to the County Court, courts have interpreted such statutes to constitute a grant of authority to issue franchises. *See, e.g., Ohio Public Service Co. v. Ohio ex rel. Fritz*, 274 U.S. 12 (1927); *State ex inf. McKittrick ex rel. City of Lebanon v. Missouri Standard Tel. Co.*, 85 S.W.2d 613, 618 (Mo. 1935); *Hook v. Bowden*, 144 Mo. App. 331 (1910).

Bridgeton discusses at length the alleged inferior status of counties as compared to municipalities. App. Br. 72-74. But under the statutes and cases cited above, the St. Louis County Court received an express grant of authority *from the state* to issue franchises like the 1902 Perpetual Franchise, just as any authority possessed by a municipality is similarly derived from the state. The St. Louis County Court therefore had no less authority than any municipality in this respect.

**B. The 1902 Perpetual Franchise is a contract between St. Louis County and Missouri Water.**

By entering the Order granting the 1902 Perpetual Franchise to Missouri Water, St. Louis County extended an “offer” to Missouri Water to form a contract with it to provide water service to the residents of St. Louis County. B.A. 299-303. Numerous courts have recognized that by constructing and maintaining facilities in any part of the franchised area, a utility “accepts” the provisions of the order, ordinance or statute, thereby entering into a contract with the government entity. *See, e.g., Russell v. Sebastian*, 233 U.S. 195, 205-08 (1914); *XO Missouri, Inc. v. City of Maryland Heights*,

256 F. Supp. 2d 966, 971 (E.D. Mo. 2002); *Postal Telegraph-Cable Co. v. Railroad Comm'n of Cal.*, 254 P. 258, 261 (Cal. banc. 1927); *City of Des Moines v. Iowa Tel. Co.*, 162 N.W. 323, 327 (Iowa 1917); *Northwest Tel. Exch. Co. v. City of Minneapolis*, 86 N.W. 69, 73 (Minn. 1901); *City of Lansing v. Michigan Power Co.*, 150 N.W. 250, 252-53 (Mich. 1914); *Southern Bell Tel. & Tel. Co. v. City of Meridian*, 131 So. 2d 666, 670 (Miss. 1961); *Mountain States*, 244 P.2d at 1112.

“Consideration” from the utility for this contract comes from the utility’s establishment and maintenance of utility service for the public. *XO Missouri, Inc.*, 256 F. Supp. 2d at 971 (“As consideration for its contract with Missouri, SWBT expended considerable sums of money in establishing and maintaining adequate telecommunications services which benefited the citizens of the State of Missouri.”). In finding adequate consideration for the franchise contract, courts focus on the “expenditure of large sums of money and benefit to the public” in establishing and maintaining the utility. *City of Lansing*, 150 N.W. at 253.

A franchise of this type provides a “public benefit—consideration” sufficient to sustain a contract. In *State ex inf. McKittrick v. Southwestern Bell Telephone Co.*, this Court stated that because the telephone company “is a public utility engaged in furnishing telephone service to the general public,” and “[w]hile the benefit may not be said to be a formal consideration, as that term is generally understood, yet it is that benefit and that consideration which takes this grant out of the class of grants prohibited by the Constitution.” 92 S.W.2d 612 (Mo. 1936). Thus, the benefit was found to constitute

consideration. *Id.*; see also *Washington v. Baumann*, 108 S.W.2d 403, 406 (Mo. 1937); *State ex rel. Kansas City v. East Fifth St. Ry. Co.*, 41 S.W. 955, 956 (Mo. 1897).

**C. The 1902 Perpetual Franchise is perpetual in duration.**

Bridgeton suggests that the 1902 Franchise was not perpetual because it does not contain a specified duration, by referring to the limited ability of municipalities to grant franchises no longer than twenty years in length under R.S.Mo. § 71.520. See, e.g., App. Br. 66-67 and 72. First, Bridgeton’s suggestion directly contradicts the holding of the Court of Appeals, which stated in 1989 that St. Louis Water Company “*accepted and holds a perpetual franchise granted in 1902 by court order from St. Louis County*, giving it the right to lay and maintain its water main and pipes across the public highways of St. Louis County.” *Home Builders*, 784 S.W.2d at 287.

Second, the statute Bridgeton refers to is inapplicable because it does not apply to county-granted franchises like the 1902 Perpetual Franchise. Rather, by its terms, it only limits municipality-granted franchises to a term of twenty years. For these reasons, R.S.Mo. § 71.520 does not indicate any disfavor among Missouri lawmakers concerning county-granted perpetual franchises.

Finally, this Court has clearly held that county franchises not stating a duration, like the 1902 Perpetual Franchise, are perpetual franchises. This Court held, “[T]he grant of a franchise ... without specifying a period of duration, *is a grant in perpetuity.*” *Missouri Public Service Comm’n v. Platte-Clay Elec. Coop., Inc.*, 407 S.W.2d 883, 889 (Mo. 1966) (emphasis added), *citing State on inf. McKittrick ex rel. City of Trenton v.*

*Missouri Pub. Serv. Comm'n*, 174 S.W.2d 871, 879 (Mo. 1943). Because the 1902 Perpetual Franchise does not contain a specified period of duration, it was granted in perpetuity.

Missouri courts recognize that when rights are granted to a corporation, “its successors and assigns,” those rights are presumed to extend beyond the corporate life of the original grantee. *State ex rel. City of St. Louis v. Laclede Gaslight Co.*, 14 S.W. 974, 978 (Mo. 1890); *Old Colony Trust Co. v. City of Omaha*, 230 U.S. 100 (1913) (holding that franchise granted to electric company and its assigns was perpetual); *City of Owensboro v. Cumberland Telephone & Telegraph Co.*, 230 U.S. 58, 64 (1913) (holding that franchise granted to telephone company “its successors and assigns” was perpetual). Here, the County Court granted the 1902 Perpetual Franchise to Missouri Water and “its successors and assigns.” B.A. 335-42. This language makes the franchise a perpetual franchise.

**D. The 1902 Perpetual Franchise includes Taussig Road because it was part of unincorporated St. Louis County at the time such Franchise was granted.**

Bridgeton does not dispute that a road need not have existed at the time the 1902 Perpetual Franchise was granted to fall squarely within the scope of that Franchise. The 1902 Perpetual Franchise expressly extends to all public highways in St. Louis County whether in existence in 1902 or constructed later. For example, in *Russell*, the U.S. Supreme Court held that a franchise for gas lines “[w]hen accepted and acted upon,

... would become binding — *not foot by foot as pipes were laid — but as an entirety.*” 233 U.S. at 207 (emphasis added). *Russell* also cited with approval New York’s highest court’s holding that “a grant of authority to lay conduits for conveying gas through the streets of a town, so as to render service to the people of the town was held to extend as a property right, not only to the streets then existing, but to those subsequently opened.” *Id.* at 209 (citing *People ex rel. Woodhaven Gaslight Co. v. Deehan*, 47 N.E. 787 (N.Y. 1897)). The rule set forth in *Russell* is supported by sound policy reasons, because the utility there “by its investment, had irrevocably committed itself to the undertaking, and its acceptance of the offer of the right to lay its pipes, so far as to necessary to serve [the area of its franchise] was complete.” 233 U.S. at 210.

To accept the franchise and gain the contractual right, Missouri Water did not have to place its facilities in all public highways. When Missouri Water accepted the franchise by installing its facilities in some public highways, it became vested with the contractual right to place its facilities in the entire area covered by the franchise. *See, e.g., Postal Telegraph*, 254 P. at 262; *City of Englewood v. Mountain States Tel. & Tel. Co.*, 431 P.2d 40, 43 (Colo. banc 1967); *Traverse City v. Consumers Power Co.*, 64 N.W.2d 894, 899 (Mich. 1954). These courts focus on the broad and unrestricted terms of the offer contained in the statute or ordinance and “find no ground for the contention that each act of constructing a telegraph line, or an extension of service was to constitute an acceptance pro tanto.” *Postal Telegraph-Cable*, 254 P. at 262. As explained by the Supreme Court of Iowa,

The grant to use the streets was without limitation as to territory, and under its authority there can be no questions as to the right to extend the service to meet the demands of the public. The very nature of the business demands the use of many streets, and may demand the use of every street in the city, and this was doubtless contemplated by the Legislature when the unlimited grant was made.

*State v. Nebraska Tel. Co.* 103 N.W. 120 (Iowa 1905); *see also Southern Bell Tel. & Tel. Co.*, 131 So. 2d at 674 (“[T]he scope of the grant is not measured by the use of the streets at any given time, but as an entirety, by the undertaking invited and encouraged by the grant.”).

**E. The 1902 Perpetual Franchise by its terms applies to all public highways in unincorporated St. Louis County in 1902, including Taussig Road, even though it was later annexed by Bridgeton.**

In 1902, there were five incorporated cities in St. Louis County: Bridgeton (though much smaller than its present size<sup>7</sup> and which did not include Taussig Road in 1902), Webster Groves, Kirkwood, Ferguson and St. Ferdinand. L.F. 69, B.A. 67. Because the 1902 Perpetual Franchise applies to public highways in unincorporated St. Louis County, it applies perpetually to all parts of St. Louis County that were unincorporated in 1902,

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<sup>7</sup> As the trial court noted in its Judgment, “... in 1950, Bridgeton had a population of 276 and covered an area of 186 acres.” L.F. 219, B.A. 171.

regardless of whether the geographic area in question has since been annexed by a municipality.

This Court has clearly held to this effect. In *Platte-Clay*, a municipality (Kansas City) argued that a particular area no longer fell within an electric utility's perpetual franchise to serve unincorporated Platte and Clay County when that area was annexed by the city. 407 S.W.2d at 889. This Court rejected that argument, stating, "The annexation, however, did not terminate the power of the cooperative to continue to furnish service to its members within the annexed areas by and through its lines and facilities previously installed pursuant to the rights granted by the county franchises." *Id.* In other words, even though the area in question had been annexed by a municipality, this Court held that the utility could continue to provide service in that annexed area under its perpetual county franchise.<sup>8</sup>

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<sup>8</sup> *Platte-Clay* involved a somewhat different issue in that the utility could continue to serve its present customers in the annexed area, but not new customers there, because the statute granting the utility its franchise *specifically* limited the utility to serving its customers *as of the time of annexation*. 407 S.W.2d at 888. Ignoring this important distinction, the briefs filed by Bridgeton and its amici attempt to use the terms of the franchise issued to the defendant in *Platte-Clay* to change the terms of the franchise issued to Missouri-American's predecessor. The 1902 Perpetual Franchise, however, does not limit Missouri-American to its customers as of 1902 and instead gives Missouri-American the right "to lay and maintain mains and pipes under, along and across" all public

This fundamental principle applies the same to the present case. Just as here, a utility had a franchise to serve unincorporated county areas, and a municipality claimed that the franchise no longer applied to an area when it later annexed that area. By the same reasoning as in *Platte-Clay*, Taussig Road still falls within the scope of Missouri-American's franchise even though it was later annexed by Bridgeton. The determinative fact is that Taussig Road was part of the area over which Missouri-American's predecessor was granted a perpetual franchise, unincorporated St. Louis County as of 1902. L.F. 48-51, 91-92, B.A. 46-49, 89-90.

The law of other states also supports this point. In *Delmarva Power & Light Co. v. City of Seaford*, 575 A.2d 1089 (Del. 1990), a municipality argued that a utility's franchise no longer applied to an area once that area was annexed by the city. The Delaware Supreme Court rejected that argument, stating, "While annexation affects many property rights, it may not impair vested rights," citing 2A McQuillin, *Municipal Corporations*, § 7.46.40 (3d ed.) (1988 Revised Volume). *Id.* at 1101. The court further stated, "Many courts have held that annexation does not authorize an ouster of a franchisee from the annexed area without compensation," citing *Tri-County Elec. Ass'n, Inc. v. City of Gillette*, 584 P.2d 995 (Wyo. 1978); *Unity Light & Pwr. Co. v. City of Burley*, 445 P.2d 720 (Ida. 1968); *Franklin Pwr. & Light v. Middle Tenn. Elec. Mem.*

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highways in the County "as they now exist, *or may hereafter be laid out.*" L.F. 44-45, B.A. 42-43 (emphasis added).

*Corp.*, 434 S.W.2d 829 (Tenn. 1968); *City of Jackson v. Creston Hills, Inc.*, 172 So.2d 215 (Miss. 1965); *Pa. Water Co. v. City of Pittsburgh*, 75 A. 945 (Pa. 1910); *Jersey City H. & P. St. Rwy. Co. v. Borough of Garfield*, 53 A. 11 (N.J. 1902).

*Unity Light, supra*, is particularly instructive. There, the Idaho Supreme Court held that “it is our conclusion that once [the utility] lawfully entered into an area to serve its members, annexation of that area by [the municipality] does not (in the absence of condemnation) authorize an ouster of [the utility] from that area.” 445 P.2d at 723. Similarly, Missouri-American’s predecessors long ago “entered into the area” of unincorporated St. Louis County (which originally included Taussig Road) to serve the public therein. By the same reasoning, Missouri-American cannot be ousted from any such area without compensation for relocating its facilities.

Bridgeton claims that Taussig Road does not fall within the above-recited rule because Missouri-American had not laid pipes along Taussig Road until after that area was annexed. Such an argument fails. When Missouri-American’s predecessors began laying pipes and mains—*any* pipes and mains—pursuant to the 1902 Perpetual Franchise, the franchise became binding *for the entire area to which it pertained*, not just those areas in which pipes had already been laid. The United States Supreme Court clearly made this point in *Russell*, when it held that a franchise for gas lines “[w]hen accepted and acted upon, . . . would become binding — *not foot by foot as pipes were laid — but as an entirety.*” 233 U.S. at 207 (emphasis added). There is no dispute that Taussig Road was in unincorporated St. Louis County at the time Missouri-American’s predecessors

accepted the franchise. According to *Russell*, Missouri-American (or its predecessors) need not have already laid pipes along Taussig Road before the 1902 Perpetual Franchise applied to that area. The franchise applied to the Taussig Road area from the outset. Bridgeton could not abrogate or revoke that franchise by annexing the area.

*State ex rel. St. Joseph Water Co. v. Eastin*, 192 S.W. 1006 (Mo. banc 1917), which Bridgeton claims stands for a different rule, actually only further demonstrates that the 1902 Perpetual Franchise was *not* abrogated as to the Taussig Road area after Bridgeton's annexation. In *Eastin*, a water utility company had entered a franchise with the City of St. Joseph to provide water to its residents for six cents per gallon. *Id.* at 1006. The water company had also entered a contract with a hospital in nearby unincorporated county territory to provide water service to the hospital at ten cents per gallon. *Id.* When St. Joseph annexed the area in which the hospital was located, this Court held that the water company's contract with the hospital was *not* abrogated, and that the water company could continue to charge the hospital ten cents per gallon. *Id.* at 1007-08.

In holding that the city's annexation of the area did not affect the previously existing contract, this Court stated that

the annexing city's ordinances [apply] automatically and immediately to the annexed territory, *save and except in such matters wherein application of the rule would affect existing private contracts by impairing or abrogating them.* [citations omitted] An ordinance which would, by the construction put on it, have the effect

to annul an existing private contract ... *would be void because violative of the provision of the organic law forbidding the passage of a law violating the obligation of contracts.*

*Id.* at 1009-10. For the same reasons, Bridgeton’s attempt to invalidate Missouri-American’s 1902 Perpetual Franchise constitutes an unconstitutional abrogation of the contract.<sup>9</sup>

A number of the other cases cited by Bridgeton in support of its claim that Taussig Road no longer falls within Missouri-American’s 1902 Perpetual Franchise relate to *jurisdiction* over an area, an issue entirely unrelated to *franchise rights*. These cases include *Duckworth v. City of Springfield*, 184 S.W. 476, 478 (Mo. Ct. App. 1916); *State ex rel. Audrain County v. City of Mexico*, 197 S.W.2d 301, 303 (Mo. 1946); and *Blair v. City of Chicago*, 201 U.S. 400, 489 (1906). As McQuillin states, “While annexation

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<sup>9</sup> The language from *Eastin* cited by Bridgeton on pages 70-71 of its brief pertains specifically to a situation not present here, in which the annexing municipality has “the power to regulate public service rates.” 192 S.W. at 1009. In such cases, this Court has held that the annexing municipality has the authority to *set rates* in the annexed area (though not to abrogate the contract entirely). *Id.* Because Bridgeton cannot argue here that it has the authority to set Missouri-American’s rates (such rates are instead approved by the Public Service Commission), the portion of *Eastin* quoted by Bridgeton is irrelevant.

affects many property rights, *it may not impair vested rights,*” such as franchise rights. McQuillin, *Municipal Corporations*, §7.46.40 (3d ed.) (1988 Revised Volume). No one disputes that Bridgeton has legal jurisdiction over Taussig Road in the sense that it can set speed limits or zoning restrictions for property along the road; the applicable question here is whether Missouri-American still possesses its *franchise rights* concerning that area. *Platte-Clay, Delmarva Power*, and *Unity Light* have all unambiguously answered that question in the affirmative. Bridgeton’s cases referring to jurisdiction are therefore inapplicable.

The remainder of the cases cited by Bridgeton in support for its claim that Bridgeton’s annexation of Taussig Road terminated Missouri-American’s franchise thereto are factually distinguishable. For example, in *Dixie Elec. Membership Corp. v. City of Baton Rouge*, 440 F.2d 819, 821 (5<sup>th</sup> Cir. 1971), the statute under which the utility’s franchise was granted, La. R. S. § 12:403(11), *specifically provided* that the utility’s franchise was “subject, however, to the requirements in respect to the use of such thoroughfares and lands that are imposed by law, i.e. the police power of the municipalities....” *Id.* at 820-21. The statutes under which the 1902 Perpetual Franchise was granted, however, (Article I, Chapter 151 §§9431 and 9549 (R.S.Mo. 1899)), as well as the governing sections of the Missouri Constitution at the time, contained no such provisions. On that basis, and unlike here, the *Dixie* court held that the franchise rights were specifically subject to “Act 105 of 1892 ..., which was the law permitting municipalities to extend their boundaries.”

Bridgeton's other cases cited in support fail for similar reasons. *See, Peterson v. Tacoma Railway & Pwr. Co.*, 111 P. 338, 341 (Wash. 1910) (holding that railway was required to charge the lower rates it had contracted with a city when the city annexed an area in which the railway charged higher rates); *Stillings v. City of Winston-Salem*, 319 S.E.2d 233, 237 (N.C. 1984) (holding that garbage collection company was required to charge its contracted rate with the city when the city annexed a new area); *Calasieu Sanitation Service, Inc. v. City of Lake Charles*, 118 So.2d 179, 180 (La. Ct. App. 1960) (same). These cases, which merely involved what *rate* applied to an annexed area, are different than the present, which involves whether Missouri-American is legally present along Taussig Road in the first place. Certainly, these cases do not support Bridgeton's claim that Missouri-American's franchise terminated with respect to Taussig Road when that area was annexed by Bridgeton.

**F. Missouri-American's acquisition of municipal franchises from  
Bridgeton did not serve as a waiver of its 1902 Perpetual Franchise.**

Bridgeton suggests that because Missouri-American's predecessor obtained a 20-year municipal franchise agreement with Bridgeton, it could not have been relying on the 1902 Perpetual Franchise when it installed its facilities along Taussig Road.

This argument makes no sense. First, Missouri-American is not relying upon the 1951 franchise agreement for its right to use the Taussig Road right-of-way. In 1951, Taussig Road was still outside Bridgeton's city limits. Bridgeton had no power to grant or deny a franchise for Taussig Road at that time under anyone's interpretation of the

law. Missouri-American, then and now, had the right to put facilities in the Taussig Road right-of-way because the County Court gave it that right in 1902.

Second, the ordinance granting St. Louis Water Company the 20-year franchise agreement in 1951 *expressly recognized* the existence of the 1902 Perpetual Franchise and expressly stated that the ordinance *did not waive any rights granted under the 1902 Perpetual Franchise*. B.A. 243-49. Even if one were to say that the annexation would otherwise have invalidated the 1902 Perpetual Franchise (an untenable position under Missouri law, as discussed above), Bridgeton *by an express provision* agreed that the 1951 franchise agreement would not have such an effect.

Moreover, Missouri-American explained that it obtains municipal franchises in addition to the 1902 Perpetual Franchise because it gives investors in the company's bond issues comfort to see that it has them. As Missouri-American told the Public Service Commission in 2000, it "endeavours to acquire franchises from all municipalities (largely because municipal franchises are expected by institutional Bond purchasers, and acquisition of the franchises is more convenient than an explanation of why those franchises are unnecessary)...." L.F. 139-40, B.A. 137-38. Missouri-American has found that the more municipal franchises it possesses, the easier the institutional bonding process becomes. *Id.* Bridgeton made no effort to contradict this justification.

Accepting the 1951 franchise agreement with Bridgeton could hardly have been a waiver of Missouri-American's rights under the 1902 Perpetual Franchise. There cannot be a waiver unless a party's actions are "so manifestly consistent with and indicative of

an intention to renounce a particular right or benefit that no other reasonable explanation of [its] conduct is possible.” *Waterwiese v. KBA Const. Managers, Inc.*, 820 S.W.2d 579, 585 (Mo. Ct. App. 1991). Reserving its rights under the 1902 Perpetual Franchise cannot constitute evidence of an intention to renounce those very same rights.

Moreover, several courts have concluded that a utility operating under a state-granted franchise contract does not waive its rights under that contract by accepting local franchise agreements. *See, e.g., Iowa Tel. Co. v. City of Keokuk*, 226 F. 82 (S.D. Iowa 1915); *W. Union Tel. Co. v. City of Visalia*, 87 P. 1023 (Cal. banc 1906); *Traverse City*, 64 N.W.2d at 899 (finding that an electric company’s election to extend a city franchise agreement to a predecessor company was not a waiver of state franchise rights).

If waiver should be applied to any party, it should be Bridgeton.<sup>10</sup> Bridgeton has

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<sup>10</sup> Notwithstanding the waiver issue, Bridgeton cites cases for the principle that equitable estoppel is generally inapplicable to municipal corporations. Missouri courts have, in fact, applied the doctrine of equitable estoppel against municipal corporations. *See, e.g., Murrell v. Wolff*, 408 S.W.2d 842, 851 (Mo. 1966), wherein this Court applied the doctrine of equitable estoppel against the City of Ballwin because “honesty and fair dealing” required its application. There, the City of Ballwin initially gave implicit approval for the construction of an apartment building and then, after the building was constructed, changed its mind and enforced a zoning restriction prohibiting the apartment building. *Id.*

collected Gross Receipts Taxes from Missouri-American since at least 1974 (and likely since before then) *until the present*. L.F. 76, B.A. 74. (Gross Receipts Taxes are paid by Missouri-American based upon the presence of its facilities within Bridgeton.) If Missouri-American's facilities were located illegally within Bridgeton, presumably Bridgeton would not have collected Gross Receipts Taxes based on the presence of such alleged illegal facilities. Instead, Bridgeton's continued collection of Gross Receipts Taxes until the present demonstrates that, other than for purposes of the present lawsuit, it considers Missouri-American to be lawfully present within its limits.

Bridgeton incorrectly argues that *McKittrick ex rel. City of California v. Mo. Utilities Co.*, 96 S.W.2d 607 (Mo. 1936) dictates a different result. That case, however, presented entirely different facts from those in the present case. In *City of California*, this Court rejected the argument that a city's collection of property taxes, income taxes or sales taxes served as recognition of a business' lawful operation within the city. *Id.* at

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The facts are similar in the present case, where Bridgeton has allowed Missouri-American to maintain pipes along Taussig Road and has even charged Missouri-American gross receipts taxes for doing business in Bridgeton. Now, despite Missouri-American having spent significant amounts of money maintaining its pipes along Taussig Road and elsewhere in Bridgeton over many decades, Bridgeton claims Missouri-American is illegally present along Taussig Road. Bridgeton should be equitably estopped from making this claim in this equity suit for trespass, ejection and injunctive relief.

618. This Court went on to state, however, that the rule would have been different if the city *had charged a license tax.* *Id.*

The Gross Receipts Tax, which Bridgeton continues to impose on Missouri-American, *is in fact such a license tax.* In *City of Bridgeton v. Northwest Chrysler-Plymouth, Inc.*, 37 S.W.3d 867, 872 (Mo. Ct. App. 2001), Bridgeton took that position before the Court of Appeals. There, the court held concerning Bridgeton’s Gross Receipts Tax, “[g]ross receipts are merely a means to calculate the occupational license tax; what is being taxed is the privilege of doing business in [the municipality].” *Id.* Based upon that rule, Bridgeton’s gross receipts tax was “a tax for the privilege of doing business in Bridgeton”—a license tax. *Id.* This fact renders *City of California* inapplicable, because this Court specifically noted that no license tax was present there, Bridgeton’s imposition of a Gross Receipts Tax on Missouri-American recognized that Missouri-American was lawfully doing business in Bridgeton and, moreover, served as a tax upon Missouri-American’s lawful business there.

The simple fact remains that, for decades, Missouri-American and its predecessors served (and continues to serve) Bridgeton’s residents with water service, with Bridgeton

never objecting that Missouri-American's facilities were illegally located.<sup>11</sup> Taking Bridgeton's current argument of trespass to its extreme, it could later argue that Missouri-American should remove all its facilities in Bridgeton, leaving its residents without water service. The trial court properly held that

[t]he Water Company and its predecessors have existed as public utilities in St. Louis County for over one-hundred years. ... By the time the City granted its franchise to the Water Company in 1951, the Water Company was operating in the area for fifty years. It is inconceivable that a Court of Equity could conclude that the Water Company's operations along Taussig Road constitute trespass .... The Water Company is certainly not a trespasser.

L.F. 219, B.A. 171.

**G. Bridgeton cannot require Missouri-American to move its facilities at its own expense because such action would violate Missouri-American's constitutionally-protected rights under the 1902 Perpetual Franchise from impairment.**

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<sup>11</sup> Bridgeton has not claimed in this lawsuit that the miles of other lines installed by Missouri-American and its predecessors in Bridgeton are illegally present, but only the ones it is demanding be moved on Taussig Road in conjunction with its exaction imposed on TRiSTAR.

The 1902 Perpetual Franchise constitutes a constitutionally-protected contract right possessed by Missouri-American. Because a franchise granted by a government entity, such as a county, is a contract, it is protected from impairment by the Contracts Clauses of the U.S. and Missouri Constitutions, which prohibit state or local government entities from enacting any law “impairing the obligation of contracts.” Art. I, §10 U.S. Const.; Art. I §13 Mo. Const. (1945). It is universally accepted that the creation of a franchise to a public utility company by a state, city or county, when accepted by the utility company through the construction and operation of a public utility, results in a valid contract secured by the U.S. Constitution against impairment by state legislation or local government ordinances. For example, this Court noted in *City of Westport* that

That the city could not by its ordinance deprive the railroad company of its franchise, or impair the obligation of its contract with the county court, treating the grant of the franchise and its acceptance as a contract, is a proposition of law that has not been gainsaid in this country since the decision in the *Dartmouth College Case in 1819*, 4 Wheat 518, 4 L.Ed. 629.”

60 S.W. at 77.

This Court has held that attempts by a municipality to revoke the rights granted to a utility by a county court violate the Contracts Clause of the U.S. Constitution and deprive the utility of its property without due process of law. *City of Westport v. Mulholland*, 60 S.W. 77 (Mo. 1900); *see also City of Grand Rapids v. Grand Rapids Hydraulic Co.*, 33 N.W. 749 (Mich. 1887) (holding that where a corporation was granted

the privilege of supplying a village with water the subsequent incorporation of the village as a city did not destroy or abridge the privileges conferred); *Mountains States*, 224 P.2d at 1112; *Town of Gans v. Cookson Hills Elec. Coop.*, 288 P.2d 707 (Okla. 1955).

By attempting to require Missouri-American to move its facilities from the public right-of-way *at its cost*, Bridgeton has attempted to impair the contract evidenced by the 1902 Perpetual Franchise. Recently, the United States District Court for the Eastern District of Missouri faced a similar type of claim by a municipality in *XO Missouri*, 256 F.Supp.2d at 971. In that case, the City of Maryland Heights enacted an ordinance requiring utilities to pay a fee for using the public right-of-way to install cable. *Id.* at 969. The court held that the ordinance was invalid because a state-granted perpetual franchise granted to a utility was constitutionally protected from being impaired by municipal action. *Id.* at 971-72.

This Court has similarly held with respect to corporate charters, no statute or municipal ordinance can impair or impact a franchise formed pursuant to a contract between a utility and the state or county. *Laclede Gaslight*, 14 S.W. at 974. In *Laclede Gaslight*, a gas company's special charter granted it the privilege of laying its pipes and fixtures throughout a portion of the City of St. Louis, with no condition as to the price to be charged. *Id.* at 979. When St. Louis attempted to impose a price restriction on gas company, it refused to comply, arguing that the restriction violated the terms of its state-granted charter. *Id.* This Court agreed with the gas company, holding that the company's charter was a "contract" with the state, protected from impairment by the city under

“constitutional provisions.” *Id.*; see also *City of Hannibal v. Missouri & Kansas Telephone Co.*, 31 Mo. App. 23, 29-30 (1888) (holding that, where a city sought to require a telephone company to move its poles which were installed pursuant to a franchise granted by the state, the city lacked the power to require the telephone company to move the poles).

The exact same situation exists in the present case. Missouri-American possesses a perpetual franchise pursuant to which a contract was formed between it and St. Louis County. That franchise and contract applies to Taussig Road because it was part of unincorporated St. Louis County (the scope of the 1902 Perpetual Franchise) at the time the 1902 Perpetual Franchise was granted. L.F. 48-51, 91-93, B.A. 46-49, 89-90. Missouri-American’s predecessors-in-interest installed facilities pursuant to that franchise, thereby accepting the contract offered with the franchise. L.F. 33-34, B.A. 32-33. Bridgeton, by declaring that Missouri-American’s facilities are unlawfully located and by ordering Missouri-American to move them at its cost, has attempted to impair and impact the contract and 1902 Perpetual Franchise.

It is important to remember that the “impairment” in this case refers to Bridgeton’s attempt to force Missouri-American to move its facilities *without compensation*. If Bridgeton requested that Missouri-American move its facilities and offered to pay for the move, there would be no impairment of the contract because it can continue to service the area and is not assessed the additional cost to move its facilities. Additionally, Missouri-American has already consented to relocate its pipes if it is reimbursed the actual costs of

such work. But in attempting to impose on the 1902 Perpetual Franchise an additional condition not included in the original franchise (Bridgeton’s requiring Missouri-American to move its pipes at Bridgeton’s demand and without compensation), Bridgeton has attempted to impair the contract.<sup>12</sup> Requiring that Missouri-American be compensated for its move (in this case by TRiSTAR, which agreed to pay for the relocations if Missouri-American could not be forced to do so) eliminates the issue of impairment of Missouri-American’s constitutionally-protected contract.

Bridgeton’s attempts to make Missouri-American move its facilities, at its own expense, within the public right-of-way constitutes an impairment of Missouri-American’s contractual property right, even though Bridgeton may not be forcing

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<sup>12</sup> Bridgeton references (out of context) a provision in the 1902 Perpetual Franchise stating that “the determination by the *County Court* of the necessary repairs or improvements along the public line or lines of said Company ... shall be conclusive and binding on said Company....” B.A. 338 (emphasis added). From this provision, Bridgeton attempts to argue that Missouri-American must move its pipes whenever Bridgeton, in its “sole discretion,” thinks that road improvements are in the public interest. App. Br. 76. Putting aside the first obvious problem with this argument—that Bridgeton is not the County Court and has not succeeded to the authority of the County Court (see *supra.*)—utility relocations made necessary by TRiSTAR’s private development cannot possibly be the kind of “necessary repairs” contemplated and agreed to by the parties to the franchise.

Missouri-American out of the right-of-way entirely. It is undisputed that Bridgeton cannot force Missouri-American to move at its own expense its facilities located in easements. For example, in *Panhandle E. Pipe Line Co. v. State Hwy. Comm'n.*, 294 U.S. 613, 617-18, 55 S. Ct. 563 (1935) the United States Supreme Court held that forcing a pipeline company to move or otherwise alter the location of pipes within an easement comprises an unconstitutional taking of private property without compensation.

Similarly, in *Riverside*, the Court of Appeals held that “when a utility’s right to construct and maintain its utility equipment is premised upon an easement, the utility is not responsible for the costs of relocating its equipment,” even where the relocation was “in the Private Easement area.” *Riverside*, 117 S.W.3d at 156. Bridgeton likewise makes this concession, admitting that Missouri-American must be compensated for moving its facilities located within easements. App. Br. 80.

Similarly, a franchise, when accepted and acted upon by the utility, *is an easement and an interest in real property*. In *State ex rel. Chaney v. West Missouri Pwr. Co.*, 281 S.W. 709, 714 (Mo. 1926), this Court held that when a franchise is granted to a utility, “the right so acquired *was an easement in the streets and as such an interest in land.*” (emphasis added); *see also Russell*, 233 U.S. at 520 (“That the grant [of a franchise], resulting from an acceptance of the state’s offer, constituted a contract, and *vested in the accepting individual a property right*, protected by the Federal Constitution, is not open to dispute in view of the repeated decisions of this court.”) (emphasis added); and *Frost v. Corp. Comm’n of Oklahoma*, 278 U.S. 515, 519, 49 S. Ct. 235 (1929) (holding that a

franchise “constitutes a property right within the protection of the Fourteenth Amendment”). Because Missouri-American’s 1902 Perpetual Franchise is an easement, Bridgeton cannot interfere with it without compensating Missouri-American. This Court in *West Missouri Pwr.* held that when a franchise “is accepted and the expenditures contemplated by it [are] made, property rights are thereby created which are within the protection of the federal Constitution.” 281 S.W. at 714; *see also City of Excelsior Springs v. Elms Redev. Corp.*, 18 S.W.3d 53, 59 (Mo. Ct. App. 2000) (holding that franchises are property and a taking of such must be compensated).

For the same reasons as the protections afforded to other easements, Bridgeton cannot force Missouri-American to move its facilities located within the public right-of-way pursuant to its 1902 Perpetual Franchise, even if the move is only within the right-of-way, without compensating Missouri-American. Under the cases cited above, Bridgeton’s demand constitutes an attempt to impair Missouri-American’s contract and to take Missouri-American’s property without compensation. Should Bridgeton desire that Missouri-American move its facilities located in the right-of-way pursuant to the 1902 Perpetual Franchise, Bridgeton must compensate Missouri-American for the move, no different than any other situation where Bridgeton might attempt to take or interfere with real property.

**H. The 1902 Perpetual Franchise does not grant Bridgeton the right to order Missouri-American to move its pipes at its own expense.**

Bridgeton also argues that because the 1902 Perpetual Franchise contains certain provisions concerning the St. Louis County Court's authority over Missouri-American's facilities (or those of its predecessors), "Bridgeton has succeeded to the jurisdiction and powers of the County Court" and therefore Bridgeton can order Missouri-American to move its pipes and mains under the terms of the Franchise. App. Br. 78. This argument *directly contradicts* those made by Bridgeton at the trial court, where Bridgeton argued that the *St. Louis County Council*, not Bridgeton itself, had succeeded the St. Louis County Court and had taken assignment of its authority. See L.F. 109, B.A. 107. ("The St. Louis 'County Court' was replaced by the St. Louis County Council..."). Bridgeton's argument before the trial court (rather than its present one) was correct, as this Court has previously recognized that the St. Louis County Council has assumed the duties and authority previously held by the St. Louis County Court. *State ex rel. McNary v. Hais*, 670 S.W.2d 494, 495-96 (Mo. banc 1984). In contrast, Bridgeton cites no legal source supporting its current position that it has succeeded the County Court.

Although it is true the 1902 Perpetual Franchise contained provisions relating to the water company's installation and maintenance of pipes, those provisions simply do not apply to Missouri-American's relationship with Bridgeton and instead pertained only to the authority of the St. Louis County Court. Logically, if any party is entitled to enforce those provisions, it would be the successor to the St. Louis County Court (the St. Louis County Council) and not an outside third party like Bridgeton. As *Platte-Clay* states, the annexation of an area by a municipality does not give the municipality the right

to impair a utility's county-issued franchise as to that area, even if the county no longer has a property interest in the area. 407 S.W.2d at 889.

More importantly, Bridgeton failed to produce any evidence that Missouri-American ever failed to comply with the terms of the 1902 Perpetual Franchise. Although the 1902 Perpetual Franchise does include conditions for Missouri-American's maintenance of its pipes, those provisions simply do not apply to Bridgeton. For the reasons stated in Section I above, they do not apply all the more where relocations are made necessary because of the actions of a private developer.

Nor does the common-law rule discussed in *Union Electric* give Bridgeton the right to order Missouri-American to move without compensation. In *Union Electric*, the governmental entity ordering the utility to move its facilities—the City of St. Louis—was also the governmental entity that *granted the franchise in the first place*. 555 S.W.2d at 31. Therefore, there was no issue of an unconstitutional impairment of a contract when the City demanded that the utility move. The City was merely exercising rights it possessed under the franchise it granted to the utility.<sup>13</sup> In contrast, in the present case

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<sup>13</sup> McQuillin, which Bridgeton also cites for the common-law rule, also implicitly demonstrates that no unconstitutional impairment of contracts issue is invoked in cases like *Union Electric*. See 12 McQuillin Mun. Corp. § 34:92 (3d ed.). McQuillin's work applies to municipalities, and therefore the common-law rule described therein applies when a municipality *which granted the franchise in the first place* tells a utility operating under that franchise that it must move its facilities. *Id.* Impairment of a contract occurs

Bridgeton is attempting to impose additional terms and conditions on a franchise granted by a separate governmental body, St. Louis County. The cases discussed above demonstrate that when a governmental authority separate from the one that originally granted a franchise attempts to impair the franchise, such attempts are unconstitutional and cannot be upheld.

**III. Summary Judgment Was Appropriate Concerning Missouri-American's Facilities Installed Pursuant To Easements (Responds to Point III).**

In addition to Missouri-American's facilities located within the public right-of-way along Taussig Road, certain other of its facilities located in the Taussig Road area are located in easements. Bridgeton conceded below that, with respect to the easement rights held by Missouri-American over private properties, "Missouri-American must be compensated for the cost of relocating those facilities...." Bridgeton's Appellant's Brief before Court of Appeals at 51; *see also* App. Br. 80. Accordingly, such concessions prevent any finding of trespass or ejectment for the Hussman and Scholle Easements.

Bridgeton only contests the effect of the April 18, 1967 agreement entered between Missouri-American's predecessor and Norfolk and Western Railway Company ("Norfolk"), granting Missouri-American "permission to construct, operate, use and thereafter maintain or remove an underground 20 inch pipe line, for the handling of water

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in a different situation where, like here, a governmental entity (Bridgeton here) attempts to impair a franchise previously granted by a different governmental entity (St. Louis County here).

over” the Norfolk property. B.A. 358. Similar to its acknowledgments about the Hussman and Scholle Easements, Bridgeton would presumably concede that if this Norfolk Agreement is an easement, Missouri-American must be compensated for moving its facilities located within that easement. Having granted summary judgment *in toto*, the trial court concluded that these facilities were located within an easement and therefore Missouri-American could not be required to move them without compensation.

Although the agreement granting Missouri-American is titled “License for Underground Facility,” it operates as and is worded like an easement and thus is in fact an easement. “Missouri law recognizes that some ‘licenses’ are in fact easements; and thus different rights and obligations are created.” *Annin v. Lake Montowese Development Co., Inc.*, 759 S.W.2d 240, 241 (Mo. Ct. App. 1988). Missouri law recognizes that such “licenses” can become irrevocable. *Id.*

The Norfolk Agreement, which is irrevocable on its face, expressly states that it applies not just to St. Louis County Water Company but also to its successors and assigns (Missouri-American). B.A. 358-60. Paragraph 12 states, “This agreement shall inure to the benefit of and be binding upon the *successors and assigns of the parties hereto, respectively.*” B.A. 360 (emphasis added). This grant stands in stark contrast to a true license, which “grants the licensee the privilege to go onto the premises for a certain purpose and it does not vest in the licensee any title, interest or estate.” *Annin*, 759 S.W.2d at 241.

The grant in the Norfolk Agreement can be transferred or assigned to successors and assigns and is binding on the parties *and their successors and assigns*. In contrast to a license, which is “personal” and extends only to the grantee, the rights granted in the Norfolk Agreement run with the land and bind the successors and assigns of the parties. Regardless that the agreement is titled “License Agreement,” its terms demonstrate that the parties intended it to operate as an easement and intended the privileges conveyed therein would run with the land like an easement and to apply to the parties’ successors and assigns. B.A. 360. Yet Bridgeton would have this Court look only at the title of the Norfolk Agreement, but not its substance, to determine its true nature.

As stated in *Annin*, Missouri law will treat a “license” that operates like an easement as an easement. Moreover, a license may be treated as an easement by operation of law under certain circumstances, which are also present here. “Even a license is irrevocable when coupled with an interest and supported by a valuable consideration, or when it is necessary to the possession or enjoyment of a right or privilege which arose from the act or contract of the person who created or reserved the power.” *Id.*

For example, in *Wilson v. Owen*, 261 S.W.2d 19, 23-24 (Mo. 1953), the plaintiff purchased a lot in a subdivision solely for purposes of the rights of access to the subdivision lake that were conveyed with the lot. The defendant contended that the access rights were only a license and terminated upon plaintiffs’ attempted transfer of the property. *Id.* However, this Court held that the access rights constituted an easement and

could not be terminated. *Id.* at 25. In support, this Court noted that plaintiffs purchased the lot specifically for the lake access rights; that the deed contained no reservation of power to terminate the privileges; and that the privilege was enjoyed in a series of acts extending over a period of time.

All the same factors are present here. St. Louis County Water Company purchased the rights specifically for the purpose of laying pipe in the easement. B.A. 326. In addition to the deed containing no provision for termination, it expressly applies to the parties themselves and their successors and assigns. B.A. 360. Finally, Missouri-American's privileges under the Agreement were enjoyed in a "series of acts" over time, as it placed pipe pursuant to the Agreement and then maintained the pipe over thirty years since. Moreover, as in *Wilson*, Missouri-American paid valuable consideration for the privileges. For these reasons, the "license agreement" operates to give Missouri-American an affirmative easement for the purposes mentioned in the agreement. Because Missouri-American's pipes are present pursuant to the Norfolk Agreement, which cannot be terminated unilaterally by Bridgeton, Bridgeton cannot demonstrate that those pipes are unlawfully present. Consequently, Bridgeton's claims fail with regard to those particular facilities.

Bridgeton also argues that it "stands in the same shoes" as the Railroad originally did with respect to the ability to direct relocation of Missouri-American's facilities within the easement. This argument, however, relies upon a reading of the Agreement's terms

taken out of context. Bridgeton fails to refer to any specific Agreement term allegedly giving it authority to unilaterally revoke the easement (no such provision exists).

Instead, the Norfolk Agreement contains the following provision pursuant to which the original grantor, the Norfolk and Western Railway Company, could request that Missouri-American move its pipes for purposes of changes *to the railway*:

It is understood and agreed by and between the parties hereto that if at any time or times hereafter the Railway *shall desire to construct railroad tracks* of any use or nature including spur tracks over said pipe line or make any changes whatever in, to, upon, over or under the premises owned, controlled, or leased by the Railway, and crossed or in any way affected by said pipeline, then the Water Company shall, at its own cost and expense, upon ... notice in writing to that effect from the Railway make such changes in the location or construction of said pipe line *as in the judgment of the Chief Engineer of Railway may be necessary to accommodate any future construction, improvements or changes of the Railway.*

B.A. 358-59 (emphasis added).

The Norfolk Agreement provides that Missouri-American must move its pipes at its cost only in very particular circumstances: only when changes are to be made to the railroad tracks within the area and after the Chief Engineer of the railway has approved the changes. Bridgeton has not requested that Missouri-American move its pipes in order to make changes to the railroad tracks (but rather to Taussig Road) and it has not obtained

the Chief Engineer's approval for any changes. For these reasons, Bridgeton cannot invoke the very limited "revocation" provision within the Norfolk Agreement.

In addition and probably most telling is that when the Taussig Road project is concluded, the railroad tracks will be relocated in the same place as before the project began. B.A. 331. The fact that the tracks will be put back essentially as they were before further indicates that the changes to this area were made because of TRiSTAR's Taussig Road project, not because of some change to the railway.

Finally, in a footnote in its Brief, Bridgeton attempts to draw some distinction between "railway" (lower-case "r") and "Railway" (capital "R"), inferring that the changes referred to in the Norfolk Agreement were any changes that the "Railway" desired. Bridgeton then claims, as successor to the Railway's interest, it can order Missouri-American to move its facilities. This argument again fails to take into context the relevant portions of the Norfolk Agreement, which states that these provisions specifically apply when the "Railway *shall desire to construct railroad tracks.*" B.A. 358-59. Moreover, any such changes must be approved by the chief engineer of the railroad. *Id.* Bridgeton has not argued that it has a chief engineer in charge of overseeing railroad operations. Finally, the only business conducted by the "Railway" in and through the property is operation of the "railway," so Bridgeton's distinction between the two is an artificial one.

Because Bridgeton failed to show that the Norfolk Agreement is not an easement and that it had any right to unilaterally revoke the Agreement, the trial court properly granted summary judgment on this point.

**IV. Bridgeton’s Argument Concerning “Formerly Private Land Outside The Taussig Road Right-Of-Way” Does Not Warrant Reversal of Any Portion Of The Trial Court’s Judgment Because Bridgeton Waived Any Issue Concerning That Land (Responds to Point III(B)).**

At the trial court, Bridgeton failed to demonstrate that Missouri-American was not entitled to summary judgment because it did not allege, let alone present any evidence, to establish that Missouri-American was illegally present on the parcel of property identified as “Taussig Road STA 186+00RT to 186+00LT” on page 83 of its Brief. The Court of Appeals recognized this, noting that “[a]s for the area with allegedly no easement, Bridgeton has presented insufficient evidence to demonstrate that Missouri-American’s pipe is illegally present there.” B.A. 181.

Notwithstanding that Bridgeton failed to meet its burden to withstand summary judgment, Bridgeton has waived any argument concerning this particular piece of property. In an argument not raised before the trial court, Bridgeton contends that summary judgment was not appropriate with respect to property it refers to as “Taussig Road STA 186+00RT to 186+00LT” because that property is “not covered by any license or easement.” App. Br. 83. It is axiomatic that appellate courts reject issues “that are raised for the first time on appeal [because] the litigant is deemed to have waived the

right to pursue that issue by not raising it before the trial court.” *Flair v. Campbell*, 44 S.W.3d 444, 453 (Mo. Ct. App. 2001; *Landvatter Ready Mix, Inc. v. Buckey*, 963 S.W.2d 298, 303 (Mo. Ct. App. 1997). Bridgeton did not raise this issue at the trial court, and therefore has waived the right to pursue it on appeal.

Indeed, the only citation to the record given by Bridgeton in reference to this issue is to Ex. 14 (A) to its Memorandum in opposition to summary judgment, which was an affidavit of Douglas Bruns, an engineer on the project. B.A. 331. Mr. Bruns was charged with drafting documents to show where the proposed new road should be located. His affidavit contains no reference to the specific tract of land discussed by Bridgeton, nor does it establish that Bridgeton has fee simple title to the property. Bridgeton does not cite a deed to demonstrate that it owns that property. Bridgeton implicitly admits that it does not own the entire property at issue, stating instead that only a “portion” of one pipe is on private property now allegedly belonging to Bridgeton. App. Br. 83.

Even if Bridgeton’s allegation that it has a fee interest in the property were true (which it certainly does not appear of record anywhere in the legal file), such fact alone does *not* establish that Missouri-American’s pipe in that location is present illegally. For example, the work tickets in the record show that the pipes in this particular property were installed in 1966 and 1967. M.A. 046-047. That work was done on a private party’s property in an open and notorious manner (it can hardly be otherwise in putting pipes underground), and if it was done without the property owner’s consent, a prescriptive easement would have arisen no later than 1977, well before Bridgeton

acquired any title to the property. *See, e.g., Brick House Café & Pub, L.L.C. v. Callahan*, 151 S.W.3d 838, 841 (Mo. Ct. App. 2004); *Kirkpatrick v. Webb*, 58 S.W.3d 903, 906 (Mo. Ct. App. 2001).

Moreover, even if Bridgeton currently owns fee title to the property adjoining the current roadway, those allegations do *not* demonstrate that Missouri-American's pipes are not still located in the right-of-way. When Missouri-American installed the pipes in question in 1966 and 1967, it installed them in the right-of-way as it existed at that time. M.A. 046-047. Although Taussig Road has moved since those pipes were installed, Bridgeton has not shown that the right-of-way in which the pipes were installed has also moved, that the right-of-way was abandoned, that a utility right-of-way was not reserved when the road moved, or that Bridgeton properly laid claim to the abandoned right-of-way, if in fact (though it has not been shown) that such right-of-way was abandoned.

Bridgeton cited at the trial court, at most, the very general legal principle that when a right-of-way is abandoned, the property may revert back to the original landowner—and nothing more. Bridgeton failed to show how the general legal principle applied in the present case. In so doing, Bridgeton proposed a hypothesis, unsupported by any evidence, that Missouri-American's pipes *might* be illegally located in this particular piece of property. Such unsupported conjecture is not sufficient to withstand summary judgment. *Bueneman*, 52 S.W.3d at 54. The trial court therefore properly granted summary judgment on this newly raised point.

**CONCLUSION**

For the foregoing reasons, Missouri-American requests that this Court affirm the judgment of the trial court in all respects, and grant such other and further relief as the Court deems proper in the circumstances.

Respectfully submitted,

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**CERTIFICATION REQUIRED BY RULE 84.06(c)**

The undersigned hereby certifies that this Brief complies with Rule 55.03(b) and with the limitations in Rule 84.06(b), and that it contains 24,449 words (exclusive of the cover, certificate of service, this certification, signature block and appendix) as counted by Microsoft Word 2003.

Respondent has filed herewith a diskette containing the Brief using Word 2003, and certifies that the diskette has been scanned for viruses using McAfee Virus Scan and that it is virus-free.

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two copies of Respondent's Brief and a virus-free diskette were mailed, first-class mail postage prepaid, this 27<sup>th</sup> day of October,

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