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JUL 14 2021

**JOAN M. GILMER
CIRCUIT CLERK, ST LOUIS COUNTY**

**IN THE CIRCUIT COURT OF ST. LOUIS COUNTY
STATE OF MISSOURI**

BG OLIVE & GRAESER LLC, et al.,)	
)	
Plaintiffs,)	Cause No. 20SL-CC04674
)	
v.)	Division 21
)	
CITY OF CREVE COEUR, MISSOURI,)	
)	
Defendant.)	

ORDER AND JUDGMENT

This Cause comes before the Court on Plaintiffs’ Petition for Judicial Review. Plaintiffs BG Olive & Graeser LLC and Forsyth Investments LLC seek de novo review, pursuant to § 536.150¹, of Defendant City of Creve Coeur, Missouri’s refusal to issue a conditional use permit (“CUP”) for a QuikTrip convenience store and service station at the corner of Olive Boulevard and Graeser Road. Specifically, the proposed use is a 24-hour Quik Trip gas station with 16 fueling stations and a 5,000 square foot convenience store which includes fast food restaurant services. The proposal includes consolidation of six lots of record into two, with the Quik Trip replacing one retail strip center on the eastern/corner lot and another strip center to remain and be upgraded on the western lot. Under Creve Coeur’s ordinances, the proposed site is zoned General Commercial (GC) and may by right be developed for many permitted uses. However, the proposed Quik Trip requires issuance of a CUP under the City’s Code of Ordinances.

The parties appeared by counsel and evidence was presented on June 15 and 16, 2021. Pursuant to Section 536.150 the Court conducted a trial de novo to determine whether Plaintiffs are entitled to the issuance of the CUP. The court has thoughtfully and carefully considered the

¹ All statutory references are to RSMo (2016) unless otherwise provided.

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claims of the parties and hereby makes the following findings of fact and conclusions of law and enters judgement in accordance therewith.

I. STANDARD OF REVIEW

The parties agree that Creve Coeur's CUP application process is a noncontested proceeding governed by § 536.150. See *450 N. Lindbergh Legal Fund, LLC v. City of Creve Coeur, Missouri*, 477 S.W.3d 49 (Mo. App. 2015). When reviewing a noncontested case, "[t]he trial court does not review the agency record for competent and substantial evidence, but instead conducts a de novo review in which it hears evidence on the merits, makes a record, determines the facts, and decides whether the agency's decision is unconstitutional, unlawful, unreasonable, arbitrary, capricious, or otherwise involves an abuse of discretion." *Id. at 53; Phipps v. Sch. Dist. of Kansas City*, 645 S.W.2d 91, 95 (Mo. App. 1982) ("[T]he circuit court under § 536.150 ... does not review evidence but determines evidence, and on the facts as found adjudges the validity of the agency decision."). Pursuant to the de novo standard of review, this Court must now make its own determination of the salient facts and look to whether, in its own view of those facts, the agency's ministerial action was proper. *Id at 100*.

In this case, that ultimate ministerial action is the City's granting of QuikTrip's CUP. *State ex rel. Kugler v. City of Maryland Heights*, 817 S.W.2d 931, 933 (Mo. App. 1991) ("The issuing of a permit is a ministerial act, not a discretionary act, which may not be refused if the requirements of the applicable ordinance have been met."). Section 405.1070(E) of Creve Coeur's Zoning Ordinance delineates six standards that the City must consider when determining whether to issue a CUP. Under the ordinance, the City Council must look to whether the proposed use:

1. Complies with all other applicable provisions of this Chapter including environmental performance standards presented in Section 405.550, the criteria in Section 405.470 and the standards of this Chapter in regard to yard and setback, parking and loading areas, screening and buffering, refuse, storage and service areas and signs;

2. Will contribute to and promote the community welfare and convenience at the specific location;
3. Will not cause substantial injury to the value of neighboring property;
4. Meets the applicable provisions of the City's Comprehensive Plan and any applicable neighborhood or sector plans and complies with other applicable zoning district regulations and provisions of this Chapter, unless good cause exists for deviation there from;
5. Will provide, if applicable, erosion control and on-site stormwater detention in accordance with the standards contained in this Chapter; and
6. Will be compatible with the surrounding area and thus will not impose an excessive burden or have a substantial negative impact on surrounding or adjacent users or on community facilities or services.

See Creve Coeur City Ordinances Section 405.1070(E).

In a decision involving the same Creve Coeur ordinance, the Court of Appeals stated that the City of Creve Coeur “**shall** approve a conditional use” if it finds that the enumerated standards have been met. *450 N. Lindbergh Legal Fund*, 477 S.W.3d at 54 (emphasis added). The City itself established those standards. Accordingly, if the enumerated criteria in the ordinance are satisfied, the City lacks the discretion to reject the proposed conditional use. Any such rejection would inherently be “unlawful, unreasonable, arbitrary, capricious, or otherwise involve[] an abuse of discretion” warranting reversal under the statute.

II. THE EVIDENCE PRESENTED AT TRIAL ESTABLISHES THAT EACH OF THE SIX STANDARDS HAS BEEN SATISFIED

The City of Creve Coeur has conceded in this proceeding that Standards 1 and 5 have been satisfied and the parties filed a joint stipulation to that effect. Accordingly, only Standards 2, 3, 4, and 6 still are at issue. The evidence adduced at trial establishes that each of the standards has been satisfied.

A. Standard 2: The use “[w]ill contribute to and promote the community welfare and convenience at the specific location.”

Plaintiffs adduced testimony and evidence at trial from four expert witnesses and one lay witness. These witnesses testified that the proposed use contributes to and promotes the community welfare and convenience at the specific location because it will: (1) drastically improve the appearance of the area, (2) replace a physically and economically obsolete building, (3) provide for increased tax revenues to the City, (4) improve the sidewalks and pedestrian access, (5) increase the buffering from residential properties, (6) improve the onsite landscaping and streetscape appearance, (7) provide convenient products and services to the community, (8) support an underserved South side of Olive Boulevard, (9) provide numerous ancillary philanthropic services to the community, and (10) will not have any significant impact on traffic operations.

The Court finds the testimony of each of these witnesses to be credible. The Court further finds the proposed use will contribute to and promote the community welfare and convenience at the specific location. The Court therefore finds that Standard 2 has been satisfied.

B. Standard 3: The use “[w]ill not cause substantial injury to the value of neighboring property.”

Plaintiffs adduced expert testimony from Linda Atkinson, an appraiser and real estate consultant. Ms. Atkinson testified that she performed two different studies to determine any impact the proposed QuikTrip development would have on surrounding property values. Based on her findings and analysis, Ms. Atkinson concluded that the proposed development would not cause any injury – let alone substantial injury – to surrounding property values. Plaintiffs also presented expert testimony from John Brancaglione, a city planner, who testified that, based on his knowledge and expertise, the kind of development at issue will not cause any injury to surrounding property values.

The Court finds the testimony of these witnesses to be credible. The Court further finds the proposed QuikTrip development will not cause substantial injury to surrounding property values. Accordingly, the Court finds that Standard 3 has been satisfied.

- C. Standard 4: The use “[m]eets the applicable provisions of the City's Comprehensive Plan and any applicable neighborhood or sector plans and complies with other applicable zoning district regulations and provisions of this Chapter, unless good cause exists for deviation there from.”**

Mr. Brancaglione testified that he has drafted numerous comprehensive plans for municipalities over his five decades of city planning experience. Mr. Brancaglione testified that the proposed QuikTrip development is consistent with the Comprehensive Plan and vision for the East Olive Corridor because it: (1) achieves the plan’s goal of redeveloping older, underutilized properties, (2) promotes the plan’s vision for the East Olive Corridor of developing medium to low density commercial, retail, and neighborhood service businesses, (3) promotes the plan’s goal of encouraging pedestrian access and walkability while accommodating car access, (4) meets or exceeds the zoning requirements and development factors for the corridor, and (5) is supported by current retail development trends. The Court finds this testimony to be credible.

Additionally, the City’s Director of Community Development and Corporate Representative, Jason Jaggi, testified. He stated the Properties could benefit from redevelopment and that the proposed QuikTrip development is consistent with the Comprehensive Plan.

The evidence presented at trial establishes that the proposed QuikTrip development “[m]eets the applicable provisions of the City's Comprehensive Plan and any applicable neighborhood or sector plans and complies with other applicable zoning district regulations and provisions....” The Court therefore finds that Standard 4 has been satisfied.

- D. Standard 6: The use “[w]ill be compatible with the surrounding area and thus will not impose an excessive burden or have a substantial negative impact on surrounding or adjacent users or on community facilities or services.”**

In support of their position that Standard 6 has been satisfied, Plaintiffs adduced testimony at trial from four expert witnesses and one lay witness. These witnesses testified that the proposed use will be compatible with the surrounding area and not impose an excessive burden or have a substantial negative impact on surrounding or adjacent users or on community facilities or services because (1) the area is already zoned commercial, (2) the use is compatible with other preexisting uses on Olive Boulevard, (3) the data – including a memorandum from the police department – shows the use will not have an impact on crime or police services, (4) the development eradicates outdated and obsolete buildings from the area, (6) the use improves streetscape and buffering which renders the site better for pedestrians and nearby residential properties, and (7) that the project does not present any material concerns with respect to traffic. The Court finds this testimony to be credible.

Evidence was also presented as to the numerous concessions QuikTrip agreed to incorporate at the City's behest in order to ensure that the development would be compatible with the surrounding area.² In fact, there was testimony that QuikTrip made every single concession that the City asked of it in order to ensure the site was compatible with the surrounding area. The Court again finds this testimony to be credible.

The testimony presented at trial clearly establishes that the proposed QuikTrip “[w]ill be compatible with the surrounding area and thus will not impose an excessive burden or have a

² These concessions included, among numerous others, (1) using unique Sonoma Stone on the store building and canopy, (2) removing the distinctive red band – QuikTrip's signature branding mark – from the canopy, (3) financing the reorientation of portions of Olive Boulevard and Graeser Road, (4) adding additional landscaping and fencing in the rear of the site, (5) and resurfacing all existing surface parking areas for a consistent appearance.

substantial negative impact on surrounding or adjacent users or on community facilities or services.” The Court therefore finds that Standard 6 has been satisfied.

Based on the evidence adduced at trial, this Court finds that each of the six standards has been satisfied and that the City’s refusal to issue the CUP was therefore unlawful, unreasonable, arbitrary, capricious, and constitutes an abuse of discretion. The City of Creve Coeur is hereby instructed to issue the CUP, subject to the conditions set forth in the proposed ordinance attached as Exhibit 1, within 30 days of the date hereof.

ORDER AND JUDGMENT

Accordingly, it is hereby ORDERED, ADJUDGED, AND DECREED that each of the standards appearing in Section 405.1070(E) has been satisfied, and the Creve Coeur City Clerk is therefore ORDERED to issue a CUP to QuikTrip with the same conditions and terms as set forth in the proposed Bill No. 5831, attached as Exhibit 1 to the contemporaneously issued Writ of Mandamus. It is further ORDERED that Plaintiffs recover their costs in this action.

Date: 7/14/2021


Hon. Nancy Watkins McLaughlin
Division 21