

IN THE MISSOURI COURT OF APPEALS
EASTERN DISTRICT

CITY OF CREVE COEUR, MISSOURI,)	
)	
Appellant,)	
)	No. ED109879
v.)	
)	
BG OLIVE & GRAESER, LLC, et al.,)	
)	
Respondents.)	

APPLICATION FOR TRANSFER

Pursuant to Rule 83.20, Appellant moves for transfer to the Supreme Court of Missouri because this appeal raises these questions of general interest and importance:

- (1) What does § 536.150 instruct a court to do? Make its own decision based on its own record? Or make a factual record, then determine whether the challenged decision was permissible based on that record? In other words, should the court review the challenged decision, or make its own?
- (2) Does § 536.150 impose on an executive or legislative agency a requirement that it state or show the basis for its decision? Or does the challenger bear the burden of showing that there was no permissible basis?

REASONS FOR TRANSFER

The court should transfer this case to the Supreme Court of Missouri because it presents questions that go to the heart of the noncontested case review process. Unfortunately, courts have not directly addressed these questions, instead issuing opinions that leave circuit courts in a position where they must make, rather than review, “decision[s that are] not subject

to administrative review, determining the legal rights, duties or privileges of any person.” And this Court’s opinion leaves administrative officers or bodies uncertain as to their obligation to state or prove the basis for their decisions. Both are questions of general interest and importance: they are implicated in every administrative decision subject to and during § 536.150 review.

Two reasons to transfer this appeal to the Supreme Court of Missouri, then, are:

1. To revisit the nature of § 536.150 review to consider whether the existing precedent – which has the circuit court make the decision for the administrative officer or body, not just review the decision already made – is what is specified and intended by that statute.

Rejecting appellant City’s Point I, the Court relied on *Furlong Co., Inc. v. City of Kansas City*, 189 S.W.3d 157, 165 (Mo. 2006), and *Phipps v. Sch. Dist. of Kansas City*, 645 S.W.2d 91, 94-95 (Mo. App. W.D. 1982), to rule that it was acceptable for the circuit court not just to make an entirely new record, but to make its own decision based on that record. In other words, this Court read precedent to allow, if not compel, a circuit court not to review the decision of the City Council, but to make its own decision, which the court then substitutes for that of the City Council.

Perhaps that is a fair reading of *Furlong* and *Phipps*. But in neither case did the court explain how it could be in accordance with the language of § 536.150. And in neither did the court attempt to articulate a policy basis, grounded in the Missouri Administrative Procedures Act (MAPA) or the Missouri Constitution, that would justify reading § 536.150 to give the courts such expansive authority in noncontested cases.

As the City explained in Point I of the Appellant’s Brief, § 536.150 provides for the creation of a record and then directs the circuit court to

decide whether, on that record, the decision being reviewed was “unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion.” But the way the law under § 536.150 has developed, that is not what circuit courts do. Instead, courts make the decision anew, as the circuit court did here.

That is not the normal role of a court. A court is not a legislative creation like the Administrative Hearing Commission, which can be assigned by statute to make a decision that “becomes the decision of the department,” “step[ping] into the [decisionmaker’s] shoes.” *State Bd. of Registration for the Healing Arts v. Trueblood*, 368 S.W.3d 259, 266 (Mo. App. W.D. 2012) (internal citations and quotation marks omitted). Courts review agency decisions; courts do not make them.

Section 536.150 should be read so as to limit courts to the realm of judicial review. And this case is an appropriate vehicle for clarifying the judicial role and addressing the fundamental meaning of § 536.150 – a question of importance to every decisionmaker in every non-judicial governmental entity in the State of Missouri, and to those whose “rights, duties or privileges” are affected by those decisionmakers.

2. To consider whether § 536.150 requires an administrative officer or body to either state the reasons for each decision at the time of the decision, or later bear the unattainable evidentiary burden of showing those reasons.

On its face, § 536.150 does not require a decisionmaker such as a city council to set out the reasons for its decision in an uncontested proceeding. Nor does the MAPA require that the decisionmaker prove those reasons in trial at the circuit court, which would not be possible short of having the elected officials all explain their votes from the witness stand. Nor do the precedents on which this Court relies impose either requirement.

Nonetheless, this Court has effectively declared that absent such an explanation, the decisionmaker will necessarily lose in the circuit court.

That new rule is a significant development in Missouri administrative law – one that merits review by the Missouri Supreme Court. It affects all decisionmakers in Missouri.

CONCLUSION

For the reasons stated above, should the Court deny the motion for rehearing being filed herewith, the Court should transfer this appeal to the Supreme Court of Missouri.

Respectfully submitted,

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