IN THE SUPREME COURT OF MISSOURI

No. SC99619

CITY OF CREVE COEUR, MISSOURI,

Appellant,

v.

BG OLIVE AND GRAESER, LLC., et al.,

Respondents.

Appeal from the Circuit Court of St. Louis County, Missouri
21st Judicial Circuit
Circuit Court Case 20SL-CC04674

The Honorable Nancy Watkins McLaughlin Circuit Judge

APPELLANT'S SUBSTITUTE BRIEF

TUETH KEENEY COOPER
MOHAN & JACKSTADT, P.C.

James R. Layton
MoBar No. 45631
34 N. Meramec Avenue, Ste. 600
St. Louis, MO 63105
Phone: (314) 880-3600
Fax: (314) 880-3601
jlayton@tuethkeeney.com

ATTORNEYS FOR APPELLANT

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JURISDICTIONAL STATEMENT

This is an appeal from a July 14, 2021, Order in Mandamus and the accompanying final judgment in a case brought pursuant to § 536.150.1. That section provides for judicial review of administrative decisions that are not "contested cases" reviewable under § 536.140. The notice of appeal to the Court of Appeals was timely filed on August 13, 2021. The appellate opinion was issued on April 5, 2022 and timely post-opinion motions were filed thereafter.

Because the appeal does not involve any of the matters reserved for appeal to the Supreme Court of Missouri, it fell within the jurisdiction of the Missouri Court of Appeals. But this Court now has jurisdiction, having ordered transfer pursuant to Mo. Const. Art. V, § 10.

STATEMENT OF FACTS

Actions at the City

Conditional use permits in the City of Creve Coeur are governed by ordinance, § 405.1070. A copy of that ordinance, admitted as Exhibits 1 and A, is in the Appendix ("App.") pp.A18-A22.

On January 27, 2020, QuikTrip Corporation, through the property owner, initiated with the City of Creve Coeur an application for a conditional use permit under § 405.1070 for a new gas station and convenience store, to replace a strip shopping center at the intersection of Olive Boulevard and Graeser Road. Exhibit 6 p.1. The owner of the property was respondent BG Olive & Graeser LLC. *Id*. QuikTrip pointed out that the "location is along a well-traveled area of the City" – *i.e.*, Olive Boulevard, State Highway 340 – and that a service station at the site would serve "[p]eople who drive this corridor." *Id.* p.3. Along with that application, an affiliated entity Forsyth Investments LLC filed a site development plan for an adjoining parcel, another strip shopping center. *Id*. p.2.

Staff responded with a "Notice of Incomplete Application" and a list of items to be provided. Exhibit 7. Staff and QuikTrip then conferred on changes to the application. *E.g.*, Exhibits 8 and 9.

The application was considered by the City of Creve Coeur Planning and Zoning Commission at its meetings on June 1 (Exhibits 11 and 14[1]), June 15 (Exhibit 12), and July 6, 2020 (Exhibit 13). At the July 6 meeting, a

[1] Exhibit 14 consists of PowerPoint slides used by staff at the June 1 meeting. The record also includes as Exhibit 15 "the PowerPoint presentation that [Ms. Gwen Keen of QuikTrip] made to the Planning and Zoning Commission and the City Council." Keen Deposition at 39. The record does not show at which Planning and Zoning Commission and City Council meetings she made that presentation.

motion to recommend approval of the conditional use permit application to the City Council was defeated. Exhibit E p.5.

At its meeting on August 10, 2020, the City Council took up Bill No. 5831 to approve the conditional use permit application for QuikTrip. Exhibit D pp.2-6. (The bill was introduced, witnesses were heard, and the bill was discussed at a prior Council meeting.) The bill failed.

Action at the Circuit Court

On September 9, 2020, a petition for judicial review was filed in the circuit court for St. Louis County by BG Olive & Graeser LLC and Forsyth Investments LLC (Respondents – or collectively, with the name on the application, QuikTrip) (D.2). The case was tried to the court on June 15-16, 2020. On July 14, 2020, the court entered an Order and Judgment (D.6[2]; App. pp. A1-A8) and an Order in Mandamus (D.7; App. p.A9-A16).

Testimony at the June trial mentioned in passing what happened before the Planning and Zoning Commission and the City Council. But QuikTrip's focus was not on what happened at the City. Instead, QuikTrip created a record intended to provide the basis for a decision *de novo* of the sort required for a decision under § 405.1070. That record consists of the parties' exhibits (some of which had been presented to the Planning and Zoning Commission and the City Council) and the testimony of various witnesses (some of whom had testified before the Planning and Zoning Commission and the City Council).

In its Judgment, rendered after the trial, the court did not address most of the ordinance. Rather it cited a single subsection, 405.1070(E) (D.6

[2] Documents in the Legal File are identified with the document number, such as D.6 here for Document 6.

p.3), then quoted a portion of that subsection that lists "six standards that the City must consider when determining whether to issue a" conditional use permit. D.6 pp.3-4. Dividing its factual comments to fit the "standards" to be "considered," the circuit court drew the following from the trial record:

> 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 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. 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 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 ….

D.6.

The court entered a final judgment (D.6; App. p.A-1-A-8) and an Order on Mandamus (D.7; App. p. A-9-A-16) requiring the City Council to enact a bill like the one it had rejected in August 2020, approving the QuikTrip conditional use permit.

POINTS RELIED ON

I. The circuit court erred in entering an Order in Mandamus requiring the City Council of the City of Creve Coeur to enact an ordinance granting a conditional use permit as set forth in Bill #5831 because in doing so the circuit court exceeded its authority under § 536.150.1 in that rather than reviewing the decision of the City Council of the City of Creve Coeur or finding any error in that decision, the circuit court made its own, independent decision with regard to whether the conditional use permit application should be granted.

§ 536.150.1, RSMo.

Sanders v. City of Columbia, 602 S.W.3d 288 (Mo.App. W.D. 2020).

II. The circuit court erred in entering an Order in Mandamus requiring the City Council of the City of Creve Coeur to enact an ordinance granting a conditional use permit as set forth in Bill #5831 because in doing so the circuit court exercised discretion contrary to its authority under § 536.150.1 and went beyond the scope of permissible mandamus relief in that Section 405.1070(A) and (E) of the ordinances of the City of Creve Coeur create and preserve to the City Council discretionary authority.

§ 536.150.1, RSMo.

City of Creve Coeur Ordinance § 405.1070

III. The circuit court erred in entering an Order in Mandamus requiring the City Council of the City of Creve Coeur to enact an ordinance granting a conditional use permit as set forth in Bill #5831 because that decision was against the weight of the evidence in that the evidence clearly showed that QuikTrip's business was not a "neighborhood service business," *i.e.*, it was a business designed and intended not to serve the neighborhood, but to attract and serve passing highway traffic, and thus did not meet the applicable provisions of the City's Comprehensive Plan.

City of Creve Coeur Ordinance § 405.1070

STANDARD OF REVIEW

This was a court-tried case. "In a court-tried case, an appellate court must affirm the circuit court's judgment 'unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.'" *Empire Dist. Elec. Co. v. Scorse*, 620 S.W.3d 216, 224 (Mo. 2021), quoting *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

This case was brought by Respondents to the circuit court pursuant to § 536.150.1. Thus the "appellate court 'reviews the circuit court's judgment to determine whether its finding that the agency decision was or was not unconstitutional, unlawful, unreasonable, arbitrary, capricious, or the product of an abuse of discretion rests on substantial evidence and correctly declares and applies the law.'" *Ard v. Shannon County Commission*, 424 S.W.3d 468, 473 (Mo. App. S.D. 2014), quoting *Wondel v. Camden Cnty. Comm'n*, 618 S.W.3d 682 (Mo. App. 2021).

The question posed in Point I – the proper standard for review in the circuit court under § 536.150.1, RSMo. – is a question of the proper interpretation of that statute. "The interpretation of statutory language is a question of law, and our review of it is de novo." *Maxwell v. Daviess Cnty.*, 190 S.W.3d 606, 610 (Mo. App. W.D. 2006), quoted with approval, *State ex rel. Dalton v. Mo. Comm'n on Human Rights*, 618 S.W.3d 640, 646-47 (Mo. App. W.D. 2020). The same is true of Point II, which addresses the interacting interpretation of § 536.150.1, RSMo. with § 405.1070 of the Ordinances of the City of Creve Coeur.

Point III points out that in one dispositive respect, the circuit court's decision is against the weight of the evidence.

> "'[W]eight of the evidence' denotes an appellate test of how much persuasive value evidence has, not just whether sufficient evidence exists that tends to prove a necessary fact." *Ivie [v. Smith]*, 439 S.W.3d [189,] 206 [(Mo. 2014)]. This Court exercises great caution in setting aside a judgment on the grounds it is against the weight of the evidence and "will reverse only in rare cases, when it has a firm belief that the decree or judgment is wrong." *Id*. Under this test, "[t]his Court defers to the trial court's assessment of the evidence if any facts relevant to an issue are contested." *Arbors at Sugar Creek Homeowners Ass'n. v. Jefferson Bank & Trust Co*., 464 S.W.3d 177, 187 (Mo. banc 2015) (internal quotation omitted). The Court's "role is not to reevaluate testimony through its own perspective." *Pearson v. Koster*, 367 S.W.3d 36, 44 (Mo. banc 2012).

Macke v. Patton, 591 S.W.3d 865, 871-872 (Mo. 2019).

As to preservation, "in cases tried without a jury or with an advisory jury, neither a motion for a new trial nor a motion to amend the judgment or opinion is necessary to preserve any matter for appellate review if the matter was previously presented to the trial court." Rule 78.07(b). *See also State Farm Mutual Automobile Ins. Co. v. Esswein*, 43 S.W.3d 833, 840 (Mo. App. E.D. 2000) ("Furthermore, no motion for new trial is necessary to preserve an issue in a judge tried case.").

ARGUMENT

Introduction

As to judicial review, the Missouri Administrative Procedures Act ("MAPA," Chapter 536, RSMo.) makes various distinctions. One is between a contested and a noncontested case, that is, between cases where the formal record is created at an administrative hearing (a "contested case" reviewed per § 536.140) and reviewed by the circuit court based on that record, and cases (a "noncontested case" reviewed per § 536.150.1) where the formal record is created in the circuit court itself.

As to that distinction, this is a noncontested case. No formal hearing was conducted or required to be conducted by the City Council. No formal record was created before the Council made its "decision which is not subject to administrative review, determining the legal rights, duties or privileges of any person." *Id*. In fact, the Court of Appeals had previously held that § 536.150.1, noncontested case review, applies to decisions as to conditional use permits made under the City's ordinance. *450 N. Lindbergh Legal Fund LLC v. City of Creve Coeur, Missouri*, 477 S.W.3d 49 (Mo. App. E.D. 2015).

But among noncontested cases there are also important distinctions. One of those, the one we address here, is based on the criteria to be used by the administrative or legislative decision maker in "determining legal rights, duties or privileges." Sometimes the criteria the decision maker is required to use are objective, creating a single possible "right" or "wrong" answer to a question posed based on a particular set of facts. But other times there are multiple possible "right" answers, depending on the subjective nature of the criteria used by the decision maker.

The distinction between these two types of decisions and the resulting judicial review is compelled by two aspects of § 536.150.1.

The first, addressed in Point I below, is the "review" concept: the declaration that § 536.150.1 provides for review of the challenged decision, not for a judge to make the decision as if she were the decision maker in the first instance. Thus § 536.150.1 provides for a decision to "be reviewed." It then authorizes relief where, "in view of the facts as they appear to the court," the decision "is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion." It does not authorize the court to find facts and then simply make its own decision, as if it were the decision maker. Nor does it require the decision maker to detail the bases for the decision, not to prove that the decision was constitutional, lawful, reasonable, neither arbitrary nor capricious, and within its discretion.

The second, addressed in Point II below, addressed discretion, *i.e.*, the manner in which applicable criteria permit a range of possible results based on a single set of facts. The language of § 536.150.1 is explicit in that regard: "the court shall not substitute its discretion for discretion legally vested in such administrative officer or body." Discretion may be vested in the decision maker in a number of ways, including (and perhaps most often) by using subjective criteria.

Regardless of which type of decision is being challenged, the circuit court at the end of its work has the same task: not to determine what the "right" answer to the question when subjective criteria are applied to the facts as found by the judge, but instead to determine whether the answer actually given – the decision on review – was within the range of permissible answers when the subjective criteria are applied to those facts.

Here, the conditional use permit ordinance of the City of Creve Coeur presumptively denies all applications for conditional use permits. It then

permits (not compels) the City Council to allow certain uses through such a permit. And it defines those permissible uses by using a mix of objective criteria (not at issue below nor here) and subjective criteria (at issue here). The use of subjective criteria preserves the ability of the City Council to act within a permissible, discretionary range, rather than dictating a specific result.

In Point III, we turn to a one of the subjective criteria in the City's ordinance: the requirement that the proposed conditional use meet the applicable provisions of the City's Comprehensive Plan.[3] As to that criterion, the weight of the evidence clearly establishes that the proposed gas station/convenience store combination is not a use envisioned by the Comprehensive Plan. The only place it might fit would be the category of a "neighborhood service business." But the record shows that serving the neighborhood was never the goal of this project – unless "neighborhood," an undefined, subjective term, is read so broadly as to become meaningless.

[3] A comprehensive plan adopted under Chapter 89 is the foundation for all zoning decisions. *See, e.g.*, § 89.040 RSMo.; *McCarty v. City of Kansas City*, 671 S.W.2d 790, 794 (Mo.App. W.D. 1984).

Point I: The circuit court erred in entering an Order in Mandamus requiring the City Council of the City of Creve Coeur to enact an ordinance granting a conditional use permit as set forth in Bill #5831 because in doing so the circuit court exceeded its authority under § 536.150.1 in that rather than reviewing the decision of the City Council of the City of Creve Coeur or finding any error in that decision, the circuit court made its own, independent decision with regard to whether the conditional use permit application should be granted.

I. Rather than review the decision of the City Council, as § 536.150.1 provides, the circuit court improperly replaced that decision with its own.

This case was brought to the circuit court pursuant to the judicial review provision of the Missouri Administrative Procedures Act that applies to "noncontested cases," *i.e.*, to the review of administrative decisions that are not made on a formal record, after a formal hearing. The first question here is whether that provision, § 536.150.1, RSMo., provides for judicial *review* of the decision of the City Council of the City of Creve Coeur, or instead provides for a circuit court to make the decision itself – from scratch, as if it, rather than the City Council, were the decisionmaker.

The circuit court took the second choice – as Respondents have consistently urged, most recently in a motion to this Court, before substitute briefs and argument, to retransfer this appeal to the Court of Appeals. We know that for two reasons. First, the record that the circuit court created included information that was not presented to the City during the administrative proceedings (such as the testimony of Mr. Brancaglione). And second, having made findings of fact, the circuit court leapt to a decision

without even paying lip service to the concept of looking at the City Council's decision to ascertain whether it was a permissible one, given the facts that the court found.

A. Section § 536.150.1.

Section 536.150.1, RSMo., provides:

> When any administrative officer or body existing under the constitution or by statute or by municipal charter or ordinance shall have rendered a decision which is not subject to administrative review, determining the legal rights, duties or privileges of any person, including the denial or revocation of a license, and there is no other provision for judicial inquiry into or review of such decision, such decision may be reviewed by suit for injunction, certiorari, mandamus, prohibition or other appropriate action, and in any such review proceeding the court may determine the facts relevant to the question whether such person at the time of such decision was subject to such legal duty, or had such right, or was entitled to such privilege, and may hear such evidence on such question as may be properly adduced, and the court may determine whether such decision, in view of the facts as they appear to the court, is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion; and the court shall render judgment accordingly, and may order the administrative officer or body to take such further action as it may be proper to require; but the court shall not substitute its discretion for discretion legally vested in such administrative officer or body, and in cases where the granting or withholding of a privilege is committed by law to the sole discretion of such administrative officer or body, such discretion lawfully exercised shall not be disturbed.

That section provides for a "review proceeding," *i.e.*, a proceeding in which the administrative body's decision "may be reviewed." The "review proceeding" is

brought as a "suit for injunction, certiorari, mandamus, prohibition or other appropriate action."

Regardless of which form of action a plaintiff chooses,[4] the question before the circuit court is whether the decision made by the administrative body "is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion." In that respect, review of a noncontested case largely parallels that of a contested case, where the court is also inquiring whether the decision at issue:

> (1) Is in *violation of constitutional provisions*; …
> (4) Is, for any other reason, *unauthorized by law*;
> (5) Is made upon unlawful procedure or without a fair trial;
> (6) Is *arbitrary, capricious or unreasonable*;
> (7) *Involves an abuse of discretion*.

§ 536.140.2 (emphasis added).

As further discussed in I(B), the difference between contested and noncontested cases goes to the record on which the review is done. For a contested case, the record is fixed by the agency, so one inquiry performed by the circuit court is whether the decision was "unsupported by competent and substantial evidence upon the whole record." *Id.* For a noncontested case, the factual record is created by the circuit court. But as discussed in I(C), the next step, the review step, is the same for both contested and noncontested cases. And that step is *not* to re-make the challenged decision.

[4] Respondent filed a Petition for Judicial Review (D.2) that was not in the form of a "suit for injunction, certiorari, mandamus, [nor] prohibition" – the types of actions authorized by § 536.150. Nor did the petition name any other form of action. The circuit court nonetheless issued an order in mandamus (D.7) – though the court did not address or apply any test for mandamus relief, citing instead just § 536.150.1.

B. The record to be created.

The circuit court noted the contested/noncontested case distinction when it set out its approach, citing precedent:

> 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 involved an abuse of discretion." [*450 N. Lindbergh Legal Fund, LLC v. City of Creve Coeur, Missouri*, 377 S.W.3d 49, 53 (Mo. App. E.D. 2015)]' *Phipps v. Sch. Dist. of Kansas City*, 645 S.W.2d 91, 95 (Mo. App. [W.D.] 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.").

D.6 p.3.

As to the factual record, that explanation begs this question: When the circuit court creates a record under § 536.150.1, it is a record of what? Here and elsewhere circuit courts have concluded that their responsibility is not to create a record of what was before the decisionmaker, *i.e.*, the functional equivalent of a contested case record. In their view, what was before the decision maker when it made the decision under review is entirely irrelevant. Missouri circuit and appellate courts have apparently concluded that so long as the applicant fulfills the procedural requirements in a city ordinance, the applicant can make its case not to the city council or other decision maker, but to the circuit court – legally authorized "sandbagging."

That approach cannot be reconciled with the concept, declared repeatedly in § 536.150.1, that what the circuit court must do is review the decision. Relief is available only when the decision maker acted erroneously.

Nothing in that section provides for the circuit court to conclude, as the circuit court implicitly did here, that if an applicant can persuade the court, using whatever evidence the applicant might introduce to the court, that it should receive a particular benefit that it sought from a city council, then the court not only may but must indict the city council with error and order it to grant that benefit.

The mischief permitted by divorcing the circuit court record from what was actually before the decision maker permits is shown by this hypothetical, based on *Klugler v. City of Maryland Heights*, 817 SW3d 931 (Mo. App. E.D. 1991). That appeal involved an occupancy permit, not a conditional use permit. The question was an objective one: did the housing unit have the requisite number of off-street parking spaces. The "re-make" version of § 536.150.1 would allow this scenario:

- The applicant submits confusing or vague parking information to a city, and the city denies on that basis.
- The applicant seeks judicial review in the circuit court.
- The applicant submits better, clearer information to the circuit court.
- The circuit court finds that the city decision was "unconstitutional, unlawful, unreasonable, arbitrary, capricious," *even though it was none of those* – or that it "involved an abuse of discretion" *even though it did not* – and orders the city to act contrary to the City's original decision.

That means that a person who wants a particular result from an administrative officer or body, especially one who is at odds with that officer or body, only has to complete the minimum procedural steps, and can sandbag the officer or body by withholding evidence until arriving in a potentially more friendly judicial forum. There is no way, with that reading of

§ 536.150.1, to avoid giving every disappointed applicant an entirely new bite at the factual part of the apple.

Read as a whole, the Missouri Administrative Procedures Act contemplates a record, on judicial review, of the basis for the challenged decision. This Court should eliminate the confusion created by past precedents and clarify that although the record in a noncontested case is created *de novo* – *i.e.*, it is not imported from the decision maker, and is created using procedural formalities – the content of the record must be the basis for the decision being attacked. In this regard, the City's evidence included the minutes of proceedings before the Planning and Zoning Commission and the City Council, which reflect a through and careful analysis over multiple meetings.

C. The decision to be made.

Whether the record is imported from the agency (as in a contested case) or created in the circuit court, and whether in a noncontested case the record consists of what was presented to the decision maker instead of what might (or might not) have been presented there, the next step is the same in both contested and noncontested cases: to determine, based on the facts found, whether, when the decision maker made its decision, its action (to use the noncontested case version from § 536.150.1, but again, the differences are minimal) was "unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion." Whether proceeding under § 516.140 or under § 516.150, at that point the circuit court does not step into the shoes of the decision maker.[5]

[5] Contrast the circuit court with the Administrative Hearing Commission (AHC), which by statute in some instances becomes, in essence, the agency

Under § 516.150, there were two questions before the court below:

1. Was the decision of the City Council of the City of Creve Coeur to reject adopt a bill authorizing a conditional use permit for QuikTrip
   - unconstitutional,
   - unlawful,
   - unreasonable,
   - arbitrary, or
   - capricious?

And if not,

2. Did that decision involve an abuse of discretion?

Nowhere in the circuit court's decision did it pose or answer either of those questions. Rather, it leapt directly to the conclusion that because the "six standards" were "satisfied," in the court's independent view based on that after-the-fact record (a finding that usurped the City Council's discretion, as discussed in Point II), the City Council's prior decision was "*therefore* unreasonable, arbitrary, capricious, and constitutes an abuse of discretion." D.6 p.7 (emphasis added). The italicized word is the entirely of the circuit court's review analysis. That leap bypassed any consideration of the City Council's possible interpretation of its ordinance.

Instead of answering either of the questions posed by § 536.150.1, then, the circuit court answered a different one – a variation on the question that had been before the City Council:

3. Is the applicant (QuikTrip) entitled to a conditional use permit under the ordinances of the City of Creve Coeur?

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decision maker. *See Custom Hardware Engineering & Consulting, Inc. v. Director of Revenue*, 358 S.W.3d 54, 58 (Mo. 2012).

In doing so, the circuit court did not *review* the City Council's decision. Instead, it *replaced* that decision with its own. The court *re-made* the Council's decision.

What should this Court say, then, that § 536.150.1 actually means by instructing the circuit court to "adduce" facts, and then to "determine whether such decision, in view of th[os]e facts as they appear to the court, is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion"? That it means:

> *First*, create a factual record of the basis for the challenged decision of the "administrative officer or body" – the equivalent of the record on which "contested case" review is done pursuant to § 536.140, a record based on sworn testimony and authenticated documents.
>
> *Second*, determine whether the challenged decision was permissible, given those facts.

That was the approach recently affirmed and approved in *Sanders v. City of Columbia*, 602 S.W.3d 288 (Mo.App. W.D. 2020). The Court of Appeals described those steps, which had been properly used by the Circuit Court for Boone County:

> Here, the trial court made de novo findings about Sanders's conduct, and made de novo findings that the conduct found by the trial court was the conduct relied on by the City Manager to determine that Sanders violated City policy and ordinances addressing the use of unreasonable force and the abusive or improper treatment of a prisoner. All that remained was a strictly legal question about whether these facts could, as a matter of law, have been relied on by the City Manager to make the discretionary determination that Sanders violated City policy and ordinances and should be terminated as a result.

Id. at 300.

Here, upon reaching the second step, instead of deciding whether the City Council did something wrong – something "unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion," terms that courts associate with review – the circuit court felt empowered, improperly if perhaps understandably, to itself replace the City Council. That is not what § 536.150.1 instructs or authorizes the circuit court to do.

Point II: The circuit court erred in entering an Order in Mandamus requiring the City Council of the City of Creve Coeur to enact an ordinance granting a conditional use permit as set forth in Bill #5831 because in doing so the circuit court exercised discretion contrary to its authority under § 536.150.1 and went beyond the scope of permissible mandamus relief in that Section 405.1070(A) and (E) of the ordinances of the City of Creve Coeur create and preserve to the City Council discretionary authority.

II. The circuit court did what § 536.150.1 expressly prohibits: it exercised the discretion left to the City Council.

As discussed in Point I, the review concept inherent in § 536.150.1 protects the authority of the "administrative officer or body" by instructing the court to review, not re-make, the decision. And it allows the circuit court to provide relief upon review, in the form of mandamus (used here) or other means. But in addition to defining the circuit court's role as review, § 536.150.1 expressly restricts the scope of the court's authority when the court encounters the use of "discretion," *i.e.*, where the "administrative officer or body" applies a subjective, rather than objective, test, choosing among acceptable decisions. Where both the facts and the law permit a choice to be made, the court cannot itself make that choice *i.e.*, it cannot exercise

discretion retained by, or disturb a discretionary decision made by, the administrative officer or agency – regardless of the strength of the case made to it:

> … but the court *shall no*t substitute its discretion for discretion legally vested in such administrative officer or body, and in cases where the granting or withholding of a privilege is committed by law to the sole discretion of such administrative officer or body, such discretion lawfully exercised *shall not* be disturbed.

§ 536.150.1 (emphasis added). In other words, even if the circuit court is authorized by § 536.150.1 to create a record entirely divorced from the administrative proceedings and to re-make rather than review the official's or agency's decision, that authorization ends at the point (or at each point if the analysis involves more than one) where the analysis moves from ministerial[6] to discretionary. At that point, the court must turn the matter back to the official or agency to make the final decision, though based on the court-found facts.

The Court of Appeals, Western District, recently recognized that line and affirmed a circuit court decision that applied it. As noted above, in *Sanders v. City of Columbia* that court recognized the two analytical steps in § 536.150.1 review, and held that the *de novo* concept that the Respondents urged and the circuit court apparently adopted here does not apply at the second step where there is any element of discretion involved. 602 S.W.3d at

[6] This Court elaborated upon ministerial acts in *State ex rel. Helms v. Rathert*, 624 S.W.3d 159, 163 (Mo. 2021): "A ministerial duty 'is one in which a certain act is to be performed upon a given state of facts in a prescribed manner in obedience to the mandate of legal authority, and without regard to [the public official's] judgment or opinion concerning the propriety or impropriety of the act to be performed.'" (Quoting *State ex rel. Alsup v. Kanatzar*, 588 S.W.3d 187, 190 (Mo. 2019).

300-301. The Court of Appeals recognized that the question for the circuit court was whether the facts as found by the court "*could*, as a matter of law, have been relied on" by the city. *Id.*(emphasis added). If not, then the court could grant relief.

> But, if the facts as determined by the trial court could, as a matter of law, have supported the City manager's finding…, then the trial court had no authority to substitute its discretion on the subject of whether Sanders violated City policy or ordinances, or on the subject of whether Sanders should have been terminated as a result. Sanders's insistence that the trial court was obligated to exercise its discretion, de novo, to determine whether Sanders violated City policy or ordinances is at odds with the plain language of section 536.150.1.

Id.

Here, the circuit court simply did not tackle the question of whether there were discretionary elements in the decision it took over from the City Council. Instead, it adopted wholesale a conclusion urged upon it by QuikTrip: that the scheme in the conditional use permit ordinance does not include any discretion, *i.e.*, that the ordinance establishes a set of objective criteria, and if those criteria are met, the City Council's decision is "ministerial."

The circuit court cited two cases to justify its conclusion that there was no discretion, both pressed below by Respondents. But in neither was the question of the presence of discretion even asked, much less answered.

The first was *Klugler v. City of Maryland Heights*. There the Court did say, broadly, that 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." 817 S.W.3d at 933. The facts before the

court did not, of course, justify a statement about any and all permits. Or, for that matter, a much narrower one, restricted to land use permits.

Klugler involved an occupancy permit, not a conditional use permit. But dispositive here, the question posed to the circuit court there and addressed on appeal was an objective one: Did the housing unit have the requisite number of off-street parking spaces? In other words, the question in *Klugler* was similar to one that might arise with regard to "Standard 1" in Creve Coeur, which asks whether the proposal complies with the City's requirements for "yard and setback, parking and loading areas, screening and buffering, storage and service areas and signs." *See* App. p.A20. At trial here, the City agreed that QuikTrip's application met that and other objective standards.

In *Klugler*, there was no subjective question, no room for analysis – and the court did not address (nor need to address) whether there was discretion as to any other requirement for the occupancy permit. As to the only question at issue, the City of Maryland Heights (or on review, the court) was to count the number of spaces, compare the total to the standard, and abide by the outcome – a truly ministerial function.

The second case cited by the circuit court was *450 N. Lindbergh Legal Fund v. City of Creve Coeur*, 477 S.W.3d 49 (Mo. App. E.D. 2015). That appeal involved the same conditional use permit ordinance that is at issue here. There, the Court of Appeals explained,

> The "purpose of conditional-use permits is to provide the City with a procedure for determining the appropriateness of a proposed use that is not authorized as a matter of right by the regulations of the district in which the proposed use will be located, Creve Coeur City Code section 405.1010(a)(2).

Id. at 54. The court went on to say that after review by the Planning and Zoning Commission "the City Council shall consider the application." *Id*. The court then said that the Council "shall approve a conditional use only if it finds that the proposed use will meet enumerated criteria," citing § 405.1070(E). *Id*. The court did not say that the City Council was required to approve any such application. It just said, as the ordinance says, that the City Council "shall" do so "only" if the criteria are met.

And what the Court of Appeals said in *450 N. Lindbergh* about the City Council's authority (or, in Respondents' view, obligation) was entirely dicta. Why? Because the *only* question that the court actually decided was whether judicial review of a grant of a conditional use permit was a contested or a noncontested case, under the Missouri Administrative Procedures Act:

> The plaintiffs sought judicial review under sections 536.100 to 536.140 RSMo. (2000 & Supp.2013), which govern review of contested cases. Because the case does not qualify as a contested case, however, the trial court had no statutory authority under sections 536.100 to 536.140 to review the decision of the City as such. Therefore, we reverse the judgment, and remand the case to the trial court with directions for the trial court to dismiss the petition for review for failure to state a claim upon which relief can be granted.

477 S.W.3d at 51.

Here, we know that this is a noncontested case. And that § 536.150.1 expressly prohibits the circuit court from usurping the City Council's discretion, and requires the circuit court to determine whether (as a matter of law, and thus subject to review here *de novo*). So the question is whether that ordinance includes elements of discretion. If it does, then to the extent the circuit court's decision invaded that discretion, that decision must be

reversed. The City Council must be allowed to exercise its discretion, albeit now based on the circuit court's findings.

The Creve Coeur ordinance includes discretion in three respects that we discuss below: (A) by creating a presumption that such uses will be denied, then saying the City Council "may" make an exception; (B) by including subjective, value-laden, and comparative language in the standards to be considered in deciding whether to grant an exception; and (C) by incorporating from other sources standards that including subjective, value-laden, or comparative language. We then turn to a fourth question, neither posed in the circuit court nor stated by the circuit court as a basis for its decision, but deemed significant, if not dispositive, by the Court of Appeals: whether § 536.150.1 imposes on decision makers an obligation to set out the bases for the decision when it is made, to prove that basis in the circuit court, or both.

A. By presuming denial and making the exception permissive, the ordinance expressly retains discretion in the City Council.

The ordinance begins with a prelude – which the circuit court omitted entirely from its quotation of the ordinance (D.6, pp.3-4; App. pp.A-4-A-5). The prelude opens with this subsection (A):

> The purpose of conditional use permits is to provide the City with a procedure for determining the appropriateness of a proposed use not authorized as a matter of right by the regulations of the district in which the use is proposed to be located. The appropriateness of the use shall be determined in consideration of surrounding uses, activities and conditions of the site and of surrounding areas. Based upon this determination, the City may decide

> to permit, reject or permit conditionally the use for which the conditional use permit is sought.

§ 405.1070(A)(1). That subsection declares, unequivocally, that the City's decision to grant a permit is discretionary, *i.e.*, that the City "may," not shall or must, issue a conditional use permit. Under § 536.150.1, the circuit court cannot itself exercise that discretion.

The circuit court began its discussion of the ordinance not with (A), but with subsection 405.01070(E), where the ordinance sets out "standards" to be used in considering whether to make an exception and allow a conditional use. App. A3. But that subsection, too, begins with an opening – an introduction or overlay that the circuit court again omitted: "The City Council shall not approve a conditional use unless it finds that the application and evidence presented clearly indicate that the proposed conditional use…." App. A20. That opening defines the scope and manner of application of the "standards" that follow, *i.e.*, of the only portion of the ordinance that the circuit court actually recognized and addressed.

Consistent with the prelude, subsection (A) of the ordinance, the opening of subsection (E) states the rule not as mandate, but as a prohibition with a limited, discretionary exception. It never says, as the circuit court did, that the City "must approve a CUP application if it finds that the proposed use" meets the "standards." D.6 p.3; App. A-4. It never says that the City "shall" grant a conditional use permit, as the Court of Appeals rephrased it in *450 N. Lindbergh*. 477 S.W.3d at 54. Instead, the opening of subsection (E) again presumes rejection, then permits (not requires) approval in certain circumstances. Nothing in subsection (E) purports to eliminate all discretion, as the circuit court supposed.

Together, those portions of the ordinance – the prelude and the opening to (E) – retain discretion in the City Council. The circuit court did not recognize that discretion. Rather than stop when it reached subjective questions, it usurped the City Council's authority and answered them itself.

B. The standards in the ordinance where the issues were contested in the circuit court preserve discretion by including discretionary elements.

After the statements that expressly retain discretion, the ordinance turns (App. A3) to the part of the ordinance that the circuit court actually addressed: a list of "standards" to be used in exercising that discretion. Some of those standards are objective. But others include elements that are inherently *subjective*, not objective. They use value-laden, comparative, or other terms or concepts that permit various acceptable answers, based on the same facts. Those subjective, discretionary considerations are quite unlike the parking space number at issue in *Klugler*, which could be resolved objectively and thus lent itself to the "ministerial" label. Independent of the prelude and opening, they preserve discretion for the City.

Various court decisions have recognized that some words are inherently subjective. Among them:

- "[T]he word 'valuation' seems to connote intrinsic value—an inherently subjective determination involving judgment and discretion." *Pettis Cty. R-XII Sch. Dist. v. Kahrs*, 258 S.W.3d 85, 89 (Mo. App. W.D. 2008), quoted with approval, *Summit Natural Gas of Mo., Inc. v. Morgan Cnty. Comm'n*, 536 S.W.3d 729, 734 (Mo. App. S.D. 2017);

- "The 'best interest' determination, which is reviewed for an abuse of discretion, is a subjective assessment based on the totality of the circumstances." *In re Interest of A.C.G.*, 499 S.W.3d 340, 344 (Mo. App. W.D. 2016).

Indeed, courts have recognized that value-laden terms are inherently subjective. *E.g.*, *City of Independence v. Richards*, 666 S.W.2d 1, 8 (Mo. App. W.D. 1983) (re "unsightly"). Similarly, courts have equated the amorphous concept of "convenience" with "discretion":

- "The doctrine of law of the case, however, is not absolute. Rather, the doctrine is a rule of policy and *convenience*; a concept that involves *discretion*." *Walton v. City of Berkeley*, 223 S.W.3d 126, 128–29 (Mo. 2007) (emphasis added), quoted with approval, *Schnurbusch v. W. Plains Reg'l Animal Shelter*, 571 S.W.3d 191, 198 n.4 (Mo. App. S.D. 2019);
- "The improvement of streets, drainage, sewers, &c., are in almost every instance mere matters of public *convenience* which the city authorities in their *discretion* are allowed by law to make." *Thurston v. City of St. Joseph*, 51 Mo. 510, 514 (Mo. 1873) (emphasis added).

All of that makes logical sense. There is no objective test for whether something is "valuable," "convenient," "best," or "unsightly." In each instance, there is a range of possibilities. And where there is a range of acceptable possibilities, someone has the discretion to choose among them. Section 536.150.1 is written to ensure that the courts do not exercise that discretion: Those choices are statutorily reserved to the "administrative officer or body."

We turn, then, to the sole part of the Creve Coeur ordinance (App. p. A20-A21) that the circuit court recognized: the "standards" that the City

Council must determine are "clearly" met by the proposed conditional use before the Council can grant a conditional use permit.

Four of the six "standards" were contested below. We address Standard 4 – the most amorphous and thus discretionary – in (C). But each of the other three standards at issue contains one or more subjective terms, italicized here:

- Standard 2: "Will contribute to and promote the *community welfare and convenience* at the specific location."
- Standard 3: ""Will not cause *substantial* injury to the value of neighboring property."
- Standard 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."

There is no objective test for "welfare," "convenience," "substantial," "compatible," or "excessive." There are particular sets of facts where to grant or deny an application would be an abuse of discretion. But between those points lies a range of choices that are within the decision maker's discretion. The circuit court cannot exercise that discretion. And here the circuit court did not define the scope of permissible decisions, nor specifically find that the City Council decision was beyond the permissible scope. Instead, again, it incorrectly assumed that the Court of Appeals had already held that all permitting standards, or at least those in the City's conditional use permit ordinance, are bright lines that can lead, on a particular set of facts, to just one possible decision.

C. Standard 4 incorporates discretionary elements from the City's comprehensive plan and neighborhood "vision."

The fourth standard at issue may not on its face appear to contain subjective elements, but it may leave the most discretion. That standard says:

> 4. Meets the applicable provisions of the City's comprehensive Plan and any applicable neighborhood or sector plans ….[7]

App. A20. Standard 4 thus incorporates the City's foundational planning documents.[8] Those documents, in turn, contain discretionary elements.

The City's Comprehensive Plan and the applicable neighborhood plan for the East Olive Corridor do not draw bright lines, like the number of parking places or distance of setbacks. Rather, they set broadly worded objectives. See Exhibit 19 at p. 88; App. p.A32. They are subjective, thus leaving room for the exercise of discretion – discretion that the circuit court is statutorily barred from exercising.

Rather than specific rules, those documents include a "vision" for the area that includes Respondents' proposed development. That area, labelled the East Olive Corridor, consists of a short portion of Olive Boulevard that includes the QuikTrip site. The Comprehensive Plan specifically defines an objective for the East Olive Area that, under the ordinance, Respondents' project must meet for the City Council to have authority to permit it:

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[7] Ironically, as discussed in Point III, the respondents argued for, and the circuit court and court of appeals adopted, an even less definite, and thus more discretionary, replacement for the actual language of that standard. They would replace "meets" with "is generally consistent with." *See* pp. ___-___, *infra*.

[8] *See* note 3, *supra*.

> Create a walkable corridor of destination retail boutiques, neighborhood service businesses, small-scale restaurants, attached townhomes, and low-density multi-family home and single-family homes. Development of the East Olive Corridor should encourage pedestrian access from adjacent neighborhoods and prioritize walkability between neighboring lots while accommodating car access and easy parking.

Exhibit 19 p. 88; App. p.A-32.

Again, that language does not consist of bright lines. Rather, it looks at whether the project for which the conditional use permit is proposed will:

1. Help create a "walkable corridor";
2. Lead toward a neighborhood (those few blocks) that will, ultimately, consist of a mix "destination retail boutiques, neighborhood service businesses, small-scale restaurants, attached townhomes, and low-density multi-family home and single-family homes."
3. "[E]ncourage pedestrian access from adjacent neighborhoods"; and
4. "[P]rioritize walkability between neighboring lots while accommodating car access and easy parking."

Each element contains requires subjective, and thus discretionary, analysis.

We first address the three elements that relate to pedestrians, then turn to the one seeking to implement a vision of the mix of uses.

As to pedestrian-focused element (1), "walkable" and "walkable corridor" are undefined. They do not set a standard that a court can apply in any purely objective way. And what, with regard to (1) does, QuikTrip propose? It adds nothing to the sidewalk along Olive Boulevard. On its site, QuikTrip merely replaces an existing building to which one can walk now, then adds a bit of sidewalk around the corner, on the west side of Graeser Road.

The circuit court seems to have concluded that the bit of new street-side sidewalk, plus a short sidewalk proposed to connect the Olive Boulevard sidewalk to the to-be-renovated shopping strip to the West of the QuikTrip, would help make a "walkable corridor." But under what standard is that enough to make a City Council conclusion otherwise an "abuse of discretion"? Or arbitrary or capricious? The circuit court suggests none.

As to (3), the circuit court seems to have found the short stretch of sidewalk along the west side of Graeser Road to be the key. But that court does not address these facts:

- The QuikTrip sidewalk would
    - Abruptly end at the QuikTrip project line; it would not be connected to any sidewalk or crosswalk that would give safe or attractive access to the QuikTrip site from any adjacent neighborhood; and
    - Not be connected to any crosswalk across Olive Boulevard.
- There is already a sidewalk on the East side of Graeser Road that
    - Extends well south of Olive Boulevard, and
    - Is connected to a crosswalk on Olive Boulevard leading to Walgreens – and, within two blocks of existing sidewalk, to two existing convenience stores.

The City Council could conclude that the minimal change proposed by QuikTrip would not materially contribute to encouraging access from adjacent neighborhoods.

What it means to "prioritize walkability" in (4) may be the most discretionary of the three pedestrian-related points. Under that point, a proposal to construct a gas station/convenience store combination, designed

and intended specifically to capture business from *vehicles* as they travel East on Olive (see Point III *infra*) should bear a high burden to show that the project actually *prioritizes* walkability. Were QuikTrip's small pedestrian-friendly features enough to *permit* the City Council to say that the project "prioritizes walkability" (and they are not), they would not be enough to *compel* the City Council to reach that conclusion – and thus not enough to show that the Council acted unconstitutionally, unlawfully, unreasonably, arbitrarily, or capriciously, or abused its discretion in concluding otherwise.

Which leads us to the heart of the "vision," the aspiration in (3) to have a stretch of Olive Boulevard that consists of "destination retail boutiques, neighborhood service businesses, small-scale restaurants, attached townhomes, and low-density multi-family home and single-family homes." It seems obvious that the "vision" is to have a mix of those uses. But what QuikTrip argued, and what the circuit court accepted, was a very different reading of that description. The way that QuikTrip and the circuit court read that section, the City Council cannot refuse conditional use permit applications for gas station/convenience store combinations, one after another, until the entire stretch consists of such businesses – because (according to QuikTrip, anyway) each of them would be a "neighborhood service business,"[9] and the City Council lacks discretion to regulate the area to ensure a mix of uses. That reading of the "vision" for the East Olive Corridor is entirely irrational. The only fair reading is that the City wants – and through its discretion may promote and permit – a mix of uses.

That reading is especially compelling when considered alongside the three pedestrian points. Think of the East Olive Corridor now: It already has

[9] As discussed in Point III, under the only permissible reading of the East Olive Corridor "vision," QuikTrip is not a "neighborhood service business."

two gas stations with convenience stores,[10] plus a Walgreens, in the short 2-3 block stretch that would include QuikTrip. Any pedestrian who is looking for the services that a QuikTrip would provide has easy access to them already. Adding QuikTrip adds nothing notable to the mix. The City Council could reasonably conclude that if the East Olive Corridor is to ever achieve what the "vision" sets out, the Council had to reject the QuikTrip application.

* * *

In sum, assuming that § 536.150.1 empowers the circuit court to make its own record independent of what was presented to the "administrative officer or body" whose decision was under review (see Point IA) and then re-make city council's decision (IB), the court could still grant relief only to the extent its decisions did not stray into questions where the "administrative officer or body" had discretion. Sure, the circuit court could decide that to reach some specific answer was an abuse of discretion. But here the circuit court made no abuse of discretion finding. Instead, it relied on the erroneous premise that appellate courts had already held that there was no discretion involved. Because the ordinance does preserve and include discretion for the City Council, the circuit court's decision must be reversed. Within the range that the subjective terms of the ordinance allow, it is up to the City Council, not the court, to evaluate and decide whether the QuikTrip proposal, even if

[10] Repeatedly through its presentation at trial, QuikTrip compared its proposal to the improvement of the nearby, long standing Mobil on the Run station, for which the City Council previously approved permits. The circuit court made no findings as to the Mobil station, nor as to any comparison. That may be because the Mobil project was notably different – most prominently because: it was the replacement of an existing gas station, with a small convenience store and car wash. *i.e.*, the project did not change the mix of offerings in the East Olive Corridor; and, the project was on the edge of the City, between Olive Boulevard and the City limit, not adjacent to, and thus little potential impact on, any City neighborhood.

based on the circuit court's record and findings, meets the requirements of the ordinance.

D. Section 536.150.1 imposes the entire burden on the person challenging the decision; it does not impose a burden on the decision maker to state the basis for the decision nor to present evidence to defend it.

But again, neither the circuit court nor the court of appeals tackled the question of discretion. Neither explained how under § 536.150.1 the subjective aspects of the City's ordinance could be construed by the circuit court independent of the scope they are given by the City Council. Having been alerted to that omission on appeal by the City, the Court of Appeals deemed it unnecessary. Why? Because, according to the Court of Appeals, the City bore, but did not fulfill, a burden: to set out the bases for the decision when it is made, to prove that basis in the circuit court, or both. See Slip op. p.7-10. But there is no such burden under § 536.150.1.

Imposing such a burden at trial would be, of course, an exception to the general rule:

> As a general rule, plaintiff has the burden of proof and a verdict for defendant need not be supported by any evidence. Generally, the party not having the burden of proof on an issue need not offer any evidence concerning it.

Haffey v. Generac Portable Products, L.L.C., 171 S.W.3d 805, 809 (Mo. 2005) (quotation marks and internal citations omitted). And § 536.150.1 contains no express exception to that general rule.

Under the statute, the burden was always on Respondents to demonstrate that the City's decision was "unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion." The City bore no corresponding obligation to prove that the City Council's

decision was constitutional, lawful, and reasonable, not arbitrary nor capricious, and within its discretion.

In justifying imposing a burden on the City, the Court of Appeals turned not to § 536.150.1, but to a 27-year-old Court of Appeals, Western District, decision, *Barry Service Agency Co. v. Manning*, 891 S.W.2d 882 (Mo.App. W.D. 1995). In *Barry*, the court recognized that the critical term, "appropriate," "comprehend[ed] some measure of judgment or discretion" (*id*.at 888) (which, of course, under § 536.150.1 the circuit court could not usurp). The defendant Director chose to testify at trial and stated "the two factors he considers in determining if a proposed rate is 'appropriate.'" *Id* at 892. The court in *Barry* observed that "there [was] absolutely no evidence in the record from which the trial court could find that the Director made his decision on the basis of anything other than surmise, guesswork, or a 'gut feeling.'" *Id*. Here, the Court of Appeals quoted that statement. Slip op. p.8. But the court in *Barry* did not provide any rationale or authority for the proposition that the Director had any obligation to do so, nor did the Court of Appeals here.

Moreover, rather than relying on that absence of evidence from the Director as a basis for its decision, the court in *Barry* imposed the burden on the challenger and found that the challenger prevailed based in its evidence own, not because of some failure by the Director, at trial or before. The court in *Barry* thus found that those challenging the decision "did indeed meet their burden to show that the Director acted arbitrarily, capriciously and unreasonably in determining that their rates were 'inappropriate.'" *Id.* In *Barry* the Court of Appeals reversed the circuit court not because the Director had failed to meet some burden, but because, the court concluded, the

Director's decision "was not based on substantial evidence and because he completely failed to consider" a key issue. *Id.*

Here, neither the circuit court nor the Court of Appeals suggested that the City Council lacked "substantial evidence" to support its decision, nor that there was some key issue that the City Council "failed to consider."

Moving past the trial to a broader proposition – the need for a decision maker to state the bases for a decision – the Court of Appeals here would impose not just an evidentiary burden, but an obligation to "explain." Thus the Court of Appeals describes *Barry* as having held that the Director's finding was "arbitrary and capricious *because* the official did not adequately explain the criteria he used to make the decision." Slip op. p.9 (emphasis added). The Court of Appeals cited 891 S.W.2d at 893-894. Slip op. p.9. But the *Barry* decision does not, in the cited pages, impose such a requirement. And more important, neither does § 536.150.1.

The City bore no obligation under its ordinance or § 536.150.1 to state on the record (either in its own proceedings or in the circuit court) the bases for its decision. To require such statements under § 536.150.1 would be deeply problematic. It would impose on every Missouri government decision maker an obligation to detail, presumably in writing, the bases for and criteria used in making each decision "determining the legal rights, duties or privileges of any person" – decisions that are made thousands of times every day. It would be a particular problem for bodies that act collectively, such as a city council, where the different members may have different reasons for their votes. Fortunately, it is not required by § 536.150.1.

Again, the burden throughout a noncontested case rests on the challenger. Admittedly, to prove that there was no reasonable basis for the action complained of may be difficult when the decision maker does not, by

stating the bases for the decision, defining the areas that the challenger must address. But making that case is the statutory obligation imposed on challengers, such as Respondents, by § 536.150.1. Had the City neither presented evidence nor argued its case (and it did both), that would not give Respondents their victory.

Point III: The circuit court erred in entering an Order in Mandamus requiring the City Council of the City of Creve Coeur to enact an ordinance granting a conditional use permit as set forth in Bill #5831 because that decision was against the weight of the evidence in that the evidence showed that QuikTrip's business was not a "neighborhood service business," i.e., it was a business designed and intended not to serve the neighborhood, but to attract and serve passing highway traffic and thus did not meet the applicable provisions of the City's Comprehensive Plan.

III. The weight of the evidence shows that the QuikTrip proposed for Olive and Graeser is not a "neighborhood service business," and thus fails to meet Standard 4 regarding the City's Comprehensive Plan.

The circuit court's finding that the QuikTrip proposal meets Standard 4 should have included a foundational finding that the QuikTrip station is one of the things envisioned for the East Olive Corridor, *i.e.*, a "destination retail boutique, neighborhood service business, small-scale restaurant, attached townhome, low-density multi-family home, or single-family home." Exhibit 19 at 88; App. p.A-32. But the circuit court made no such finding. Nor could it. The QuikTrip is not any of those.

Were the QuikTrip to qualify, it could only be as a "neighborhood service business." There are two ways to look at that term. A "neighborhood service business" may be:

1. A service business that happens to be in the neighborhood; or
2. A business designed and intended to provide service to those in the neighborhood.

Option (1) would make the adjectival "neighborhood" meaningless. Option (2) is the choice that fits the vision in the Comprehensive Plan. Option (2) is consistent with the others on the list – and contrasts with the different visions for adjacent sections of Olive Boulevard.

To the west is Creve Coeur's Downtown or Central Business District – an area of intense commercial development. Exhibit 19, pp. 55, 72-81. On the east is a Mixed-Use Innovation Campus District. *Id.* at 55. The East Olive Corridor is a Neighborhood Commercial District (*id.* at 55), intended to provide "a transition between more intense commercial districts to the east and west"—a district that is "ideal for specialty retail and service businesses" (*id.* at 58). Definition (1) would blur, or even erase those lines.

And assuming that the neighborhood vision in the comprehensive plan was intended to retain the character of the area, only option (2) fits the mix of businesses in place when the plan was adopted. One of QuikTrip's witnesses pointed out that until the building on the QuikTrip site was vacated, its occupants included "Krummenachers Pharmacy, which had been there since the [in]ception of the shopping center almost 60 years ago," and "Sam's Shoe Repair, who had been a tenant for almost 35 years." Tr. pp.39-40. These were businesses that served the neighborhood, ones that fit the "neighborhood service business" label.

The weight of the evidence – if not all the evidence – in the trial record shows that despite claiming the "neighborhood service business" label for purposes of meeting Standard 4, that is not what QuikTrip intends, proposes, or plans.

QuikTrip's employee witness, Gwen Keen, explained that the site was chosen not because a gas station/convenience store combination located there

would service the neighborhood, but because it could capture traffic passing from elsewhere. She described the Olive/Graeser intersection as "a great location" because it is on a "state highway [that] carries over 36,000 cars on average a day." Keen Depo. p.12. QuikTrip picks such locations, she testified, "because we draw off of that traffic. It's kind of a misconception that we bring traffic to us. It's – it's really more that we draw off of what is already there." *Id.* She explained that it was important to QuikTrip that the site was on the south side of Olive Boulevard – not because there were neighbors there who would use QuikTrip, but because there were already two convenience stores very nearby on the north side, including "Mobil On the Run, who is our competitor." *Id*. p.12-13. QuikTrip's object was to "pull off of more people making those right turns in," *i.e.*, those already traveling on the south side of the road. *Id*. p.13. Keen said nothing at all about the residents of the neighborhood, nor about those who may work nearby.

QuikTrip's traffic analyst confirmed that QuikTrip's plan and intent was to draw business from cars traveling Eastbound on Olive. Tr. p.134. In fact, he confirmed that according to QuikTrip's data, its customers are "over 80 percent pass-by," *i.e.*, those who stop in en route somewhere else. *Id*. He did not suggest that the remaining 20 percent were from the neighborhood, just that they would come to the QuikTrip station without already being on a route along Olive Boulevard.

None of QuikTrip's exhibits or witnesses said anything about having considered the number of residents, employers, or employees in the neighborhood. None addressed the local market for gas and convenience store items (perhaps because it is already well served). None addressed the movement of vehicles or pedestrians within the residential area adjacent to the proposed QuikTrip site. None of the witnesses expressed any interest in

the neighbors at all – except to describe neighborhood opposition (Keen Depo. pp.18-19) and to assert that the additional of a required, short, dead-end sidewalk along the west side of Graeser would "give the ability for folks to walk to this location from the adjacent neighborhood" (Tr. 120).

To find that Standard 4 was met because the QuikTrip is a "neighborhood service business," then, the circuit court would have to do one of two things:

First, the circuit court could have chosen reading (1), defining the requirement to cover any service business in the neighborhood. But again, such a reading must be wrong. It would open the door to, well, any service business at all.

Second, the circuit court could have inferred (or relied on some witness who inferred) from something in the nature of the QuikTrip business, design, or site plan that serving the neighborhood was the QuikTrip goal. But an inference that QuikTrip had any real interest in serving its neighbors would be tenuous, at best – particularly when the record shows that many of the pedestrian-friendly aspects of the site plan were not originally proposed by QuikTrip in an effort to serve the neighborhood but were pushed on QuikTrip by City staff. (*See* Exhibits 6-9, 11-13; Tr. 49, 163, 255; Keen Depo. pp.29-30, 40.) Such a weak inference cannot stand against the explicit evidence from QuikTrip's officer and its own hired and designated consultants that the purpose of the project is to serve those passing through the neighborhood, rather than those living and working in it.

Actually, though, the circuit court did not choose either option (1) or option (2). Instead of tackling the "neighborhood service business" problem, the circuit court (and the Court of Appeals) accepted Respondents' argument

that Standard 4 is essentially meaningless, *i.e.*, that a proposed project need not actually be a "destination retail boutique, neighborhood service business, small-scale restaurant, attached townhome, low-density multi-family home, or single-family home" (Exhibit 19 at 88; App. p.A-32). Instead, according to the circuit court, pretty much anything is allowed so long as it can be described as "generally consistent" with the Comprehensive Plan. That approach presents three insurmountable problems.

First, the argument is necessarily based on the premise that "generally consistent" is the right standard. But that standard does not appear in the ordinance. Rather, the ordinance allows the City Council to approve a conditional use only if it actually "*meet[s]* the applicable provisions of the City's Comprehensive Plan and any applicable neighborhood or sector plans." App. p.A-20 (emphasis added). The circuit court made no effort to explain how a project that falls outside the list of acceptable uses for the East Olive Corridor can "meet" the provisions of the Comprehensive Plan and vision that set out that list.

As support for concluding that "generally consistent" was the right test, the court of appeals cited the testimony of the testimony of a City employee, Mr. Jason Jaggi. Mr. Jaggi did say that "the relevant question is whether the proposed use is generally consistent with the Comprehensive Plan." Slip Op. p.13. But the identification of the "relevant question" posed by the City's ordinance is a question of law. Mr. Jaggi may have his view, but it was not binding on the City Council, nor on the circuit court.

Second, neither of the courts below, nor the testimony they cited, explains what "general consistent" means. Were "generally consistent" a test that could be shoved into the language and structure of the ordinance, it

would still have to mean something. And so far, no one – not a witness, not Respondents, not the circuit court, not the Court of Appeals – has given it any substance.

And third, the QuikTrip proposal does not pass any reasonable reading of a "generally consistent" test. In arguing below that it did, respondents did not provide a fact-based explanation, but instead just pointed to the testimony of Mr. Jaggi, cited above. Respondents also pointed out that in response to a leading question, he said that he "tended to agree" with respondents' counsel's theory that "[t]here can never be complete compliance with a comprehensive plan. Tr. 240-241. But what does that even mean?

Perhaps it means that the East Olive Corridor can never achieve what the Comprehensive Plan contemplates. That could be true. After all, the Corridor contains existing, pre-Plan uses and the City cannot force land use change, unilaterally depriving existing uses of their grandfathered rights. So, unless "destination retail boutiques, neighborhood service businesses, small-scale restaurants, attached townhomes, low-density multi-family homes, or single-family homes" replace the grandfathered uses, there will never be "complete compliance." But what relevance does that have to the authority of the City Council to reject *new* nonconforming uses, such as the QuikTrip station? To the extent it relies on Mr. Jaggi's response to the leading question about the Comprehensive Plan, Respondents' theory must be that the City Council can be compelled to permit new uses that fall outside those identified in the Comprehensive Plan because ultimately the Plan may not be achievable. Such a theory has no support in any precedent cited by Respondents at any point in this case. Nor have Respondents nor any lower court explained the logic behind such a rule, which would largely gut the statutorily required foundation to zoning, the Comprehensive Plan.

Perhaps Mr. Jaggi's statement is a reference to specific projects, *i.e.* that he "tends to agree" that some, many, or perhaps all of projects that he expects to be proposed for the East Olive Corridor will not fit the vision for that space. But that still would not support the circuit court's conclusion. Suppose that there are and will be no projects in the East Olive Corridor that require conditional use permits that actually meet the requirements of the Comprehensive Plan. The ordinance as written leads, then to just one possible conclusion: applications for conditional use permits must be denied, and the area will be redeveloped within the confines of the permitted zoning uses. The concept that instead applications like QuikTrip's must be granted if they are in some undefined, general sense compatible with, though failing to qualify under, the Plan is anathema to both the Plan and the language of the ordinance.

The weight of the evidence thus shows that QuikTrip did not propose a "neighborhood service business," and the circuit court erroneously found that QuikTrip proposal meets Standard 4.

CONCLUSION

For the reasons stated above, the decision of the circuit court should be reversed.

Respectfully submitted,

TUETH KEENEY COOPER
MOHAN & JACKSTADT, P.C.

/s/ James R. Layton
James R. Layton, MoBar 45631
34 North Meramec, Suite 600
St. Louis, MO 63105
Telephone: 314-880-3600
Facsimile: 314-880-3601
jlayton@tuethkeeney.com

ATTORNEY FOR APPELLANT

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the foregoing Brief complies with the limitations contained in Rule 84.06(b) in that excluding the cover, certificates of service and compliance, tables of contents and authorities, and signature blocks, the Brief contains 12,373 words.

/s/ James R. Layton