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 REPLY BRIEF

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RESPONSE TO RESPONDENTS' STATEMENT OF FACTS

Though various statements made by Respondents about the record are misleading, two merit particular mention:

- Respondents assert that Jason Jaggi, the City's Director of Community development, "admitted that he believes that QuikTrip's CUP should have been issued." Respondent's Substitute Brief (Resp.Br.) pp.6,15.[1] But the testimony that Respondents cite does not say that. In fact, it emphasizes the "subjective"—that is, discretionary—standards in the ordinance, and circumscribes his and his staff's role to "provid[ing] information and analysis." Tr. 239-40. Further, the City presented evidence through Mr. Jaggi's testimony and by cross-examination of Respondents' witnesses that identified facts pertinent to that subjective analysis and supportive of the City Council's decision not to issue the conditional use permit – facts showing, for example:
    - the inconsistency of the proposal with the Comprehensive Plan goal of a pedestrian-friendly, small-scale business environment;
    - the impact of an additional and very intense vehicle-oriented business on the character of the area;
    - the impact of 24-hour operations, traffic, light, and noise; and
    - the impact on the character of Graeser Road.

  E.g., Tr. 136, 207, 283, 286; Exhibit B.

- Respondents assert that Mr. Jaggi, when deposed as the City's "corporate representative[,] conceded that there was no basis for the City to treat the QuikTrip proposal differently than the Mobil on the

[1] Respondents repeat this false assertion throughout their Substitute Brief.

Run proposal." Resp.Br. p.16.[2] But Mr. Jaggi's actual testimony on the page Respondents cite (Tr. 252) was just that "similarities exist." And they do – but so do obvious differences, such as

- the Mobil station replaced one that had been there for many years, and its upgrade did not change the mix of businesses in the East Olive Corridor (Tr. 26); and
- the Mobil station is at a much busier intersection (*e.g.*, Tr. 184, 232; Exhibit B).

[2] Respondents also reiterate this mischaracterization of Jaggi's testimony throughout their Substitute Brief.

ARGUMENT

A. By authorizing a *de novo* determination of facts, § 536.150 does not empower a circuit court to make its own decision rather than review the one before it.

Respondents confirm that the parties disagree as to what question a circuit court answers § 536.150 (noncontested case) review when they begin their argument by stating the issue before the circuit court this way: "The core issue in this case is whether, based on the Circuit Court's own *de novo* determination of the facts, the proposed QuikTrip development satisfied the six standards appearing in the City's zoning code…." (Resp.Sub.Br. p.18) But the question § 536.150 *actually* poses is instead whether, based on the Circuit Court's own de novo determination of the facts, the City Council could reasonably decide that the proposed QuikTrip development did not satisfy at least one of the six standards appearing in the City's zoning code. That question is consistent with what this Court said in *Furlong*: that the circuit court "hears evidence, determines facts, and adjudges the validity of the agency decision." *Furlong Co. v. City of Kansas City*, 189 S.W.3d 157,173 (Mo. 2006). In *Furlong* this Court did not say, as Respondents would have it, that the circuit court hears evidence, determines facts, and then makes its own decision.

To avoid the distinction between the two formulations of the question, Respondents claim that the City acceded to Respondents' version. To make that claim they rely here, as they did in their motion to retransfer, on this statement by the City's counsel at trial:

> We totally concur that it's a noncontested case. We totally concur it's a de novo review. We totally concur that

> the court is not to defer to any findings of fact, judgment of credibility and things like that.

Tr. p.25; *see* Resp.Sub.Br. p. 19. Contrary to Respondents' claim, the City's position on appeal is consistent with that statement. The circuit court was to make its own findings, based on the record before it. The circuit court alone would judge credibility. The circuit court alone would find facts. But nowhere in that statement did the City say that having found the facts, the circuit court was then to make its own decision based on those facts. The circuit court's task was to determine whether the City Council's decision could be supported by those facts – the question posed to the circuit court by § 536.150 and presented by the City in its pretrial briefing arguments regarding preserved Council discretion.

B. Not all permit decisions are ministerial.

Key to Respondents' arguments to this Court is the claim that *all* permit decisions are ministerial – *i.e.*, that whether to issue a permit never includes an element of discretion. Respondents are so determined to have this Court endorse that bright line rule that they repeat it five times. (Resp.Sub.Br. pp.8, 29, 31, 27n.22, 44n.24) And they are right in asserting that Missouri appellate courts have sometimes said, as dicta and without qualification, that permitting is ministerial. But neither in this case nor in any of the cases that Respondents cite is there any basis for such a blanket rule.

Sure, when the criteria for a permit are objective (as in most, perhaps all, of the precedents Respondents cite), whether to grant the permit is a ministerial task, based on the facts that are established. But criteria are not always objective. This case is an example: there are subjective elements to issuance of a conditional zoning permit in the City of Creve Coeur. Indeed,

the purpose of conditional use permits is a subjective evaluation of whether a proposed use, not permitted by right, should be allowed.

Under the logic inherent in the language and purpose of § 536.150, if there is a subjective element – an element as to which the ordinance does not draw a bright line – the decision cannot be entirely ministerial. And Respondents cite no court holding otherwise.

Certainly there is no such holding in either of the two cases to which they devote the most attention, this Court's decision in *Furlong* and the Court of Appeals decision in *Phipps v. School District of Kansas City*. 645 S.W.2d 91 (Mo. App. W.D. 1982).

In deciding *Furlong* this Court did not address the particular criteria in the ordinance at issue. The Court did not consider whether those criteria contained subjective elements. Nor did it decide whether the presence of subjective elements left discretion to the City of Kansas City. Respondents, though, infer such a holding. They base that inference on the claim that that the Kansas City ordinance applied in *Furlong* contained criteria that are "uncannily similar to those that the Circuit Court was tasked with addressing in this case." Resp.Sub.Br.p.32. In Respondents' view, the presence of those "similar" criteria means that this Court implicitly held concluded that even when there are subjective criteria there is no discretion.

To support that claimed implication, Respondents quote from and attach in their appendix a portion of the legal file in *Furlong*. Citing that source, Respondents claim that the Kansas City ordinance in excerpt contains "these standards," ones they say are "uncannily similar" to those at issue here. Resp.Sub.Br.pp.31-32. But what Respondents actually quote from the Kansas City ordinance are not standards at all. All three quotations come from the opening declaration of purpose, *i.e.*, they are among the "following

reasons" that the subdivision chapter of the Kansas City code "is adopted." Respondents Substitute Appendix p.A10. If there were subjective criteria in the Kansas City ordinance, they are not found in the *Furlong* legal file excerpts that Respondents submit.

Respondents thus provide no basis on which to conclude that in *Furlong* this Court implicitly decided that despite the presence of subjective elements, the application of a permitting ordinance, whether a subdivision ordinance as in *Furlong*, a conditional use ordinance as here, or some other permitting ordinance, is always ministerial.

Nor can that conclusion be derived from *Phipps v. School District of Kansas City*. 645 S.W.2d 91 (Mo. App. W.D. 1982). In *Phipps* the court did not address any form of property regulation – conditional use permit, zoning, or otherwise. That case arose from a dispute regarding reinstatement of an employee. The dispute was based on a clause in an agreement, not an ordinance. The clause agreed upon required reinstatement "to a position with the same salary as that position held with the District on the date of termination." *Id.* at 94. The parties disagreed as to how to determine "the date of termination," and the court of appeals held that the circuit court was required to find "the salient fact of the termination date intended by the agreement." *Id*. at 99.

Missing from the pertinent language of the agreement in *Phipps* was any subjective or otherwise discretionary term. The agreement referred to a specific date, and the circuit court was required to make a finding as to that singular date. That required interpretation of the agreement to determine what "date of termination" meant. But there could be only one such date. The agreement did not say, "near the date of termination," nor use other language admitting to a range of possibilities. If it had, the question before the circuit

court would have been whether the date chosen by the school district was outside the acceptable range. But as to the "termination date," the agreement at issue contained no subjective element, and preserved no discretion.

Leaving discretion as to what is the "termination date" when drafting the agreement would have been illogical. But retaining discretion as to conditional land uses, especially to implement the community's shared vision manifest in its comprehensive plan, makes eminent sense. The goal for the East Olive Corridor is a *mix* of *neighborhood* uses – residential and varied commercial – that contrast to the more intense commercial use east and west of the Corridor. If the Court were to affirm the legal rule urged by Respondents, to accomplish its goal for the Corridor the City would have to set out in advance a precise mix, such as allowing only two, rather than three or more, gas stations. But it is not appropriate or even realistic to expect that level of specificity. Obtaining the right mix is a dynamic situation, continually affected by myriad factors in the neighborhood, in nearby areas, and in the general economy – and by the precise nature of the proposed use and how it would fit into the then-current neighborhood mix. The City used subjective terms in its comprehensive plan and incorporated those terms into its conditional use permit ordinance to give the City the flexibility over time that the City requires to accomplish its goals for the Corridor – goals that were enacted after considerable public input to the Plan and its neighborhood components. The circuit court took away that flexibility, assuming all discretion for itself, rather than deciding whether the Council's decision was reasonable.

C. Respondents would eliminate much of the ordinance – or invalidate the entire ordinance.

In Appellant's Substitute Brief, the City points to portions of the ordinance that Respondents and the circuit court consistently ignored, *i.e.*, those that make conditional use permits permissive and that require as a prerequisite for any grant that the application before the City council not just meet but "clearly" meet all the standards. App.Sub.Br. pp. 34-35. quoting § 405.1070(A)(1). According to Respondents, the City thus claims "unfettered discretion to accept or deny a conditional use permit." Resp.Sub.Br.p.27. In Respondents' view, by citing that language the City is saying that the City can do whatever it wants. But that is not the City's position.

Respondents rely on their characterization of the City's position to implicitly ask the Court to simply ignore that prefatory language – that is, to say that the language has no meaning at all. That is what the circuit court did here, at least by omission. But this Court has rejected the concept of "giv[ing] no meaning to" an operative portion of a statute, *Wilson v. City of St. Louis*, 600 S.W.3d 763, 769 (Mo. 2020), and the same is true of an ordinance. Each part of a statute and ordinance must have some meaning. So here, what is the meaning of the prefatory section?

Respondents say that section cannot give the City "unfettered discretion" because, in their view, to do so would be illegal. And if the section were illegal, what would be the right result in this case? To hold that the ordinance is invalid. But of course, Respondents don't want that. Eliminating the conditional use permit ordinance would mean that the QuikTrip proposal

must be rejected because it would not otherwise be allowed under the zoning ordinance.[3]

What the City actually advocates is a third approach: to read the opening, prefatory portion of the ordinance as a declaration that the City preserves any discretion the rest of the ordinance can accommodate. The "may" language found in § 405.1070(A)(1) means that to the extent the ordinance is read by a court to compel (or prohibit) granting a permit, that reading must be narrow. Where there is room for interpretation of the language, the meaning must be decided by the City Council within the range of reasonable discretion. And here there is room for interpretation at the points where the ordinance and the documents it incorporates use subjective terms.

D. Respondents' reaction to Point III ignores the language and logical meaning of the City ordinance.

Respondents' reaction to Point III is problematic in various respects. We highlight four.

First, when Respondents quote Standard 4 on their p.38, they skip the most important part of the language. They quote "[m]eets the applicable provisions of the City's Comprehensive Plan," but then omit the continuation of the clause: "and any other applicable neighborhood or sector plans." A20. The limitation on the types of businesses to be allowed in the East Olive Corridor is found in that sector's plan and is expressly incorporated into Standard 4.

[3] Respondents do not request severance, and do not argue here, nor did they argue below, that the City would have enacted the ordinance without the prefatory section.

Second, Respondents continue their effort to essentially write out of the ordinance the requirement that to be approved a proposal must "clearly" and actually "meet" the Plan and neighborhood descriptions. Respondents would replace "meet" with an ephemeral "generally consistent with" standard. *E.g.*, Resp.Sub.Br.p.38 and n.23. Despite our invitation (App.Sub.Br. p.39n.7), Respondents make no attempt to explain what "generally consistent" means. Respondents cannot find substance for a "generally consistent" reading of "meets" in the ordinance itself. And of course neither "generally consistent" nor anything even roughly synonymous appears in the ordinance. So Respondents give it no substance at all. Indeed, they imply, and all but say, that anything and everything that can be done with a conditional use permit "meets" the Plan requirements. They would essentially read Standard 4 out of the ordinance, which the Court must not allow them to do.

Third, Respondents demonstrate by their own inconsistency that "neighborhood" as used in "neighborhood service business" does not have a single objective definition.

On page 41 they define "neighborhood" as a single commercial intersection. But that is self-defeating. After all, there is no evidence in the record to suggest that the QuikTrip is designed or intended to serve the credit union, coin dealer, and drugstore that occupy the other three corners. And to read "neighborhood" in the Comprehensive Plan and the East Olive sector plan to refer to a single intersection is nonsensical.

Thus elsewhere Respondents refer instead to "nearby residential neighborhoods" – as well as claiming that the neighborhood includes any person who happens to be passing the proposed QuikTrip when "coming home" (Resp.Sub.Br.p.41), a description that would include anyone living east

or west of the QuikTrip site, traveling along Olive Boulevard (Mo. highway 340).

The term "neighborhood" is certainly a subjective one, one as to which not just Respondents but also Mr. Jaggi and other City staff might have a different, yet still permissible, view than does the City Council. But the ordinance leaves the decision to the City Council, again within the range of reason.

Fourth, Respondents attempt to use the improvement of the existing building on the adjacent parcel (which does contain neighborhood service businesses) to redeem the fatal flaws of having a QuikTrip that is designed and intended to serve passers-by replace the corner center and its (now former) neighborhood service businesses. Resp.Sub.Br.p.41. But Respondents do not cite any authority for that proposition, nor explain any logic behind it. And nothing in the Comprehensive Plan or the ordinance suggests that so long as a proposed development includes "destination retail boutiques, neighborhood service businesses, small-scale restaurants, attached townhomes, and low-density multi-family homes and single family homes," it can disrupt the corridor by also including other kinds of development – here, a third gas station/convenience store (which is also a fast food enterprise) in a 300-yard (Resp.Sub.Br.p.15) stretch of Olive Boulevard.

CONCLUSION

For the reasons set out in Appellants' Substitute Brief and this Reply, the decision of the circuit court should be reversed.

Respectfully submitted,

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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 3,135 words.

/s/ James R. Layton