

IN THE SUPREME COURT OF MISSOURI

No. SC99619

CITY OF CREVE COEUR, MISSOURI

Appellant

v.

BG OLIVE & GRAESER LLC and
FORSYTH INVESTMENTS LLC,

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

BRIEF OF *AMICUS CURIAE*
THE MISSOURI MUNICIPAL LEAGUE

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Statutes

§536.1509,11,13

§536.150.19,11,12

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CONSENT OF PARTIES

Pursuant to Rule 84.05 the Missouri Municipal League hereby notifies this Court that it has not obtained the consent of all parties to file this brief. Appellant granted consent but Respondents did not consent to the filing of this brief.

JURISDICTIONAL STATEMENT

Amicus Curiae, the Missouri Municipal League, adopts and incorporates the Statement of Jurisdiction contained in the Appellant's Brief.

INTEREST OF AMICUS CURIAE MISSOURI MUNICIPAL LEAGUE

The Missouri Municipal League (“MML”) is an independent not for profit association of over six hundred (600) municipalities in the State of Missouri. MML members are political subdivisions. The MML provides for cooperation in formulating and promoting municipal policy and administration of local government at all levels to enhance the welfare and common interests of its members and their citizens. The MML advocates on behalf of its members in favor of the proper exercise of governmental authority, against the inappropriate or unlawful usurpation of local authority, and in defense of attacks on local governmental action.

Like the City of Creve Coeur in this case, many MML members have adopted ordinances that establish zoning standards, requirements, and procedures within the members' respective jurisdictions. Those ordinances provide for the holding of public hearings to be conducted by numerous volunteer citizens and elected officials. These procedures and the resultant decisions often fall within the purview of the Missouri Administrative Procedures Act (“MAPA” or “Act”). In addition to land use procedures, the processes and decision making of municipalities in other areas falling under the MAPA include personnel decisions, permit issuances, code enforcement, and licensing. By design many of these areas of municipal activities involve the application of discretion. The decision of the Circuit Court as upheld by the Court of Appeals would substitute the judgment of

a single member of the judiciary for the judgment of the elected members of the legislative body charged with responsibility under the constitution, statutes, and ordinances. A holding permitting the substitution of a single member of the judiciary to exercise discretionary judgments contrary to the decision of local officials tasked with the primary duty in the area of responsibility will have immediate impact on how decisions and processes are set up. To avoid similar exposure to the imposition of a subjective decision by a member of the judiciary municipalities would be faced with the prospect of altering their procedure to make all critical cases contested cases. This prospect would create delays, increase the costs, and make hearings more formal and confrontational when the purpose of the hearing is to provide a forum for the members of the public to address their local officials holding the hearing.

STATEMENT OF FACTS

Amicus Curiae adopts Appellant City of Creve Coeur's Statement of Facts.

POINTS RELIED ON

- I. Review of noncontested cases is governed by §536.150 RSMo which empowers and limits the court.

§536.150 RSMo

- II. The limitation in §536.150.1 on the court controls remedies available to the court.

§536.150.1

State Tax Commission of Missouri v. Administrative Hearing

Commission, et al., 641 S.W.2d 69 (Mo. banc 1982)

- III. Discretionary calls remain the purview of the involved entity.

§536.150.1

Phipps v. Sch. Dist. Of Kansas City, 645 S.W. 2d 91 (Mo. App. W.D. 1982)

STANDARD OF REVIEW

Amicus Curiae adopts the standard of review as set out in Appellant's brief.

SUGGESTIONS BY AMICUS CURIAE

The MML supports the reversal of the judgment of the circuit court and the return of the case for compliance with §536.150 RSMo. The MML writes separately to address a major issue of separation of powers implicated by the arguments of the Respondents and raised by the erroneous opinion issued by the Circuit Court and upheld by the Court of Appeals. This Court should reject the concept of judicially exercised discretion in lieu of the exercise of the discretion by the administrative and legislative bodies in whom the discretion is vested.

The settled law is that the courts' relationship to legislative bodies is one of deference, not one of prescription or usurpation. The Court should not venture into second guessing discretionary decisions of elected officials or setting rules, directly or indirectly, for governmental entities in their conduct and management of legislative and administrative processes which could lead to a noncontested case.

Review of Noncontested Cases is Governed by §536.150 RSMo which Empowers and Limits the Court.

The host of decisions which lead to a noncontested case are reviewed under §536.150 RSMo. That statute provides guidance on the review when it states in §536.150.1:

... 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;

Note the court is empowered as set out in this excerpt to determine the facts and entertain such evidence as parties may produce and to examine the judgment in light of the facts determined by the court. The standard then to be applied to the facts as determined is whether the decision falls within one or more categories of “unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion” as specified. In the instant case the circuit court does not appear to have found any unconstitutional or unlawful act, matters clearly within the purview of the court’s review correction. When the court then proceeds to reverse the judgment of the legislative body it necessarily enters into a finding of unreasonable, arbitrary, capricious, or reflecting an abuse of discretion. This finding requires resort to a second section of §536.150.1 which places limits on the court. The final lines of §536.150.1 read: “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.”

The Limitation in §536.150 on the Court Controls Remedies

The limitation of the statute, §356.150 RSMo restrain the circuit court from an act which will "substitute its discretion for discretion legally vested in such administrative officer or body". This does not constrain the role of the court as a finder of fact but does limit any judgment or remedy to exclusively legal considerations. The methodology in the statute acknowledges that often a governmental agency or body exercises comingled powers, judicial and legislative or executive *State ex rel. Chicago, Rock Island & Pacific Railroad Company v. Public Service Commission*, 312 S.W.2d 791, 796 (Mo. banc 1958); *State ex rel. Hotel Continental v. Burton*, 334 S.W.2d 75, 85 (Mo. 1960). A court should strive to avoid infringing on the proper exercise of legislative or executive authority and therefore not create an issue with the constitutional separation of powers. *State Tax Commission of Missouri v. Administrative Hearing Commission, et al.*, 641 S.W.2d 69 (Mo. banc 1982)

Discretionary Calls Remain the Purview of the Involved Agency

Despite the comprehensive zoning enabling provisions of Chapter 89 (cities, towns and villages), the Missouri legislature has not directed local elected officials to conduct hearings any particular way.

By exclusion, however, and certainly because of the constitutional requirement of separation of powers, neither the legislature nor the courts of Missouri have seen fit to do what Respondents advocate—that is, substitute the discretionary opinion of a judge for that of the body responsible for the decision and its impact.

Circuit courts are empowered to conduct the hearing in noncontested cases as the court sees fit and they are and should be given leeway to make determinations of facts and weigh the credibility without reference to what may have occurred during the process prior to the filing of a suit. The one and only significant limitation placed on judges conducting a noncontested review proceeding is that they cannot substitute their discretion for the discretion legally vested in the agency. *Phipps v. Sch. Dist. of Kansas City*, 645 S.W.2d 91, 96 (Mo. App. W.D. 1982).

The Respondents' arguments in this appeal ignore the nature of the decision that they seek to uphold. Zoning and land use decisions are inherently legislative acts. *JGJ Properties, LLC v. City of Ellisville*, 303 S.W.3d 642, 647-648 (Mo. App. E.D. 2010). Any uncertainty about the reasonableness of a zoning action must be resolved in the government's favor. *Id.* If the issue is at least fairly debatable, the reviewing court may not substitute its opinion for that of the zoning authority that acted. *Id.* The evidence, even in a noncontested case, should be viewed in the light most favorable to the legislative body's decision. *Id.* This should apply even if the evidence is that taken at the trial in the circuit court. The challenged act in the instant case is denial of a conditional use permit by the legislative body exercising its discretion. This concept of deference is rooted in the doctrine of separation of powers, a constitutional doctrine, which may not be overturned by the judiciary (or by statute of the legislature). Mo. Const. Art. II. For the same reasons

supporting judicial deference to substantive decisions of legislative bodies, this Court should defer to procedural decisions.

In these circumstances, the discretionary decisions of the legislative bodies are and should remain a matter on which the Court defers to the legislative body. The members of the MML, in exercising their legislative functions, have discretion that they must continue to be able to exercise in the proceeding that they regularly conduct. To hold otherwise would be inefficient and inject the Court into matters that are not committed to the Court's discretion. The number of instances in which the circumstances would give rise to noncontested cases are varied and numerous. They occur at all levels of government and throughout the state.

1. CONCLUSION

The trial court improperly substituted its judgment for that of the City of Creve Coeur as to the granting of a conditional use permit. The Missouri Municipal League respectfully submits that this Court should reverse the decision and direct the Circuit Court to uphold the decision of the City to deny the conditional use permit. The judgment of the trial court should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of this brief was served via the court’s electronic filing system on all parties of record on August 1, 2022.

/s/ B. Allen Garner

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief includes the information required by Rule 55.03 and complies with the requirements contained in Rule 84.06. Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in this brief is 1933 excluding the cover, certificate of service, certificate required by Rule 84.06(c), signature block, and appendix.

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