IN THE SUPREME COURT OF MISSOURI

NO. SC99619

BG OLIVE & GRAESER, LLC, et al.,

***Plaintiffs/Respondents*,**

v.

CITY OF CREVE COEUR, MISSOURI,

Defendant/Appellant.

Appeal from the Circuit Court of St. Louis County, Missouri
The Honorable Nancy Watkins McLaughlin, Division 21
Cause No. 20SL-CC04674

RESPONDENTS' SUBSTITUTE BRIEF

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INTRODUCTION

In August 2020, the City of Creve Coeur wrongfully refused to issue a Conditional Use Permit ("CUP") to QuikTrip Corporation to redevelop two outdated and largely vacant properties located on a heavily commercialized portion of Olive Boulevard. This is an appeal from a trial *de novo* in which the sole issue before the Circuit Court was whether that proposed development satisfied the six standards for issuing a CUP in the City's zoning ordinances. The Circuit Court unequivocally answered this question in the affirmative, and consequently held that the City's refusal to issue a permit was unlawful, unreasonable, arbitrary, capricious, and an abuse of discretion.

At trial, the City's own corporate representative – who also happened to be the City's only designated expert – admitted that the proposed use satisfies each of the City's six standards. That corporate representative also admitted that ***the CUP should have been issued*** and that there was no basis for the City to treat this proposal differently than a nearby Mobil on the Run proposal that had recently been approved. Despite this, the City has chosen to ignore its own ordinances (and the recommendations of its own staff) by continuing to challenge the development in this appeal – all to appease a vocal minority of individuals opposed to the project.

The evidence presented at trial overwhelmingly and unequivocally established that QuikTrip is entitled to a CUP.[1] Accordingly, the City chose to advance a new theory on appeal, challenging the application of the *de novo* standard of review by suggesting that

[1] Indeed, the property owners presented unrebutted evidence from four experts and one fact witness and conclusively established that each of the six standards had been satisfied.

the Circuit Court should have limited its review to the record before the city council. But this is simply not the law with respect to non-contested cases. Nor is it the position the City took at trial, where it admitted in its answer that *de novo* review was proper and then expressly told the Court:

> ***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. 25 (emphasis added). The City's brief did not advise this Court of these critical admissions. Rather, it retained new counsel and ignored this admission so that it could change its position on appeal.

Nonetheless, the applicability of the *de novo* standard to this case is not controversial. To the contrary, when considering judicial review of non-contested cases, this Court has already held in *Furlong Companies, Inc. v. City of Kansas City*, 189 S.W.3d 157 (Mo. banc 2006), that "review de novo [i]s the proper procedure," *id.* at 173, and that in such cases "the circuit court conducts [its] hearing as an original action," *id. at 166*. The City's brief fails to mention *Furlong* in any capacity, let alone acknowledge that it cannot prevail on its core argument unless this Court overrules the 2006 case in its entirety.[2]

[2] The City eventually conceded to the Court of Appeals that its argument could not prevail unless this Court abandoned decades of "erroneous" precedent, ostensibly referring to *Furlong* and its progeny. *See* Appellant's Brief, Cause No. 109879, p. 26 ([I]f the appeal turns on this Point I, the existence of misleading or erroneous precedent may require … [transfer] to the Supreme Court of Missouri 'for the purpose of reexamining existing law.'"). The fact that the City chose not to even mention *Furlong* now that it is finally before this Court – or even frame its case as a reexamination of existing law – is telling.

In addition to its challenge to the application of the standard of review, the City also argues that a Circuit Court could never be permitted to reverse the City Council's determination regarding the issuance of a CUP because some of the standards outlined in the applicable ordinance contain "subjective" components that require deference to the City's prior findings. Such reasoning fails to appreciate that a CUP application is not a rezoning effort, but a request for the issuance of a ***permit*** that would allow the applicant to utilize their property for a use that is already authorized by the zoning code subject to certain specifically enumerated conditions. The issuance of a CUP – or any permit for that matter – has always been considered a ministerial act. The City therefore has no discretion to refuse to issue a CUP so long as a proposal satisfies the standards outlined in its ordinance.[3] Whether or not those standards contain "subjective" components is entirely irrelevant. *See Furlong*, 189 S.W.3d at 163 (determining that a plat approval is a ministerial act despite the fact that the factors enumerated in the appliable ordinance contained similarly subjective components). If the City wants stricter standards, it can amend its ordinances accordingly. What it cannot do is pick and choose those to whom its current standards apply.

This is not, as the City suggests, a situation in which a court has unilaterally usurped the authority of an elected body against its will. Rather, the Circuit Court, in conducting a *de novo* review of the city council's decision, has simply followed the very procedures

[3] If the City were permitted to unilaterally reject an application that satisfied all of the enumerated standards, then there is nothing preventing the City from applying its ordinances in a discriminatory manner. The City's position on appeal would permit it to deny a permit for a number of unlawful reasons, such as the applicant's race or gender.

mandated by the City's own ordinances. Indeed, since the Court of Appeals' decision in *450 N. Lindbergh Legal Fund, LLC v. City of Creve Coeur, Missouri*, the City has known that its CUP application process lacks the requisite procedural protections for a contested case and that its decisions are therefore going to be subjected to *de novo* review. 477 S.W.3d 49 (Mo. App. 2015). If the City did not want its CUP decisions to be reviewed in this way, it could have amended its ordinances at any time to implement the necessary procedural protections for such deference to be proper. Instead, it advocated for the *de novo* standard – both in *450 N. Lindbergh* and in this case – until it received an unfavorable result. The City chose not to amend its ordinances in the aftermath of *450 N. Lindbergh* and it cannot now feign surprise that the outcome of its procedurally scarce proceeding was afforded no deference on review.

The trial court properly heard evidence and concluded that the City's refusal to issue a permit to QuikTrip was unlawful, unreasonable, arbitrary, capricious, and an abuse of discretion. To rule in the City's favor, this Court would need to ignore the weight of the evidence establishing that the CUP should have been granted, as well as the impracticable (and discriminatory) consequences of its position. It would also need to overrule decades of controlling precedent conclusively refuting the City's legal arguments. There is simply no evidence – or any basis – to disrupt the Circuit Court's determinations in this case. The judgment should be affirmed.

STATEMENT OF FACTS[4]

I. The Properties

Plaintiffs BG Olive & Graeser, LLC and Forsyth Investments, LLC (collectively, the "Property Owners") are the owners of adjacent properties situated in Creve Coeur, Missouri, commonly known as 11004, 11026, 11032, and 11056 Olive Boulevard and 825-827 Graeser Road (collectively, the "Properties"). (Trial Transcript ("Tr.") 33-34). The Properties are located on a signalized intersection of Olive Boulevard – a state highway that carries approximately 36,000 cars per day. (Trial Exhibit ("Exhibit") 44, p. 12). Each of the Properties is located within Creve Coeur's East Olive Corridor and has been zoned for commercial use for decades. (Tr. 44). That zoning allows for a multitude of uses – including, *inter alia*, liquor stores, tobacco stores, medical marijuana facilities, and supermarkets – that would not require a CUP or any other city council approval. (Tr. 46-47). There are two buildings currently located on the site in question, both of which were developed in the 1960s and are now mostly vacant. (Tr. 34).

Recognizing the need for improving the site, the Property Owners entered into an agreement to sell the Properties to QuikTrip. (Tr. 48). The sale was contingent on QuikTrip obtaining a CUP from the City to develop a new convenience store and service station on a portion of the Properties.[5] (Tr. 41-42). In early 2020, with Plaintiffs' support, QuikTrip

[4] The Statement of Facts in the City's Appellant's Brief is inaccurate and incomplete. Therefore, the Property Owners present this Statement of Facts pursuant to Mo. R. Civ. P. ("Rule") 84.04(f).

[5] Although the site was zoned commercial, a CUP was required for the specific use proposed for the development. (Exhibit Tr. 44-45).

applied for a CUP, site development plan, and boundary adjustment, seeking permission from the City to (1) build a new convenience store and service station on the eastern portion of the Properties and (2) redevelop and renovate the 53-year-old shopping center currently located on the western portion of the Properties. (Exhibit 6).[6]

II. The CUP Application Process

Section 405.1070(E) of the Creve Coeur Zoning Code enumerates six standards that the city council must evaluate in determining whether to approve a CUP application. (Exhibit A; *see also* Exhibit 1). The ordinance provides that a proposed use is satisfactory if it:

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

2. Will contribute to and promote the community welfare and convenience at the specific location;

3. Will not cause substantial injury to the value of neighboring property;

4. Meets the applicable provisions of the City's Comprehensive Plan and any applicable neighborhood or sector plans and complies with other applicable zoning district regulations and provisions of this Chapter, unless good cause exists for deviation there from;

5. Will provide, if applicable, erosion control and on-site stormwater detention in accordance with the standards contained in this Chapter; and

[6] Depictions of the site as it currently exists (Exhibits 2-4), as well as renderings of the proposed development (Exhibit 5), are attached in the accompanying appendix. (App, p. A3-A8).

6. Will be compatible with the surrounding area and thus will not impose an excessive burden or have a substantial negative impact on surrounding or adjacent users or on community facilities or services.

See id.

After the filing of QuikTrip's CUP application, members of the City staff – led by Director of Community Development Jason Jaggi – spent hundreds of hours reviewing the proposal, meeting with QuikTrip representatives, and preparing reports for the council members to review. (Tr. 242; *see also* Exhibits 11-13). QuikTrip worked closely with the City's staff during this process to fine-tune a proposal that not only met the City's official criteria for approval, but also any additional aesthetic preferences that the City may have had for the site. (Exhibit 43, pp. 29; 32; 39; Exhibit 44, pp. 160-161).

Over the course of the review process, the City staff requested and reviewed dozens of modifications to the proposed plan – more concessions than have been requested of any other QuikTrip development in the St. Louis area. (Exhibit 43, p. 29; Exhibit 15, pp. 9-12). The staff requested, among other things, that QuikTrip use custom Sonoma stone in its design, remove its signature red signage, and pay to reconfigure the adjacent intersection. (Exhibit 43, pp. 29-40).[7] QuikTrip also agreed to resurface the entire parking lot, pay for an extension of the right turn lane on Graeser Road, and maintain a minimum of two employees always on duty. (Exhibit 16, pp. 2-5). QuikTrip agreed to every one of the City's

[7] Many of the modifications were requested by City staff and agreed to by QuikTrip even before the city council ever held a hearing on the proposal. (Exhibit 43, p. 17; Tr. 211-212). In addition to the numerous changes requested by the staff, the city council imposed over 28 additional conditions to the proposed plan, all of which were incorporated into the final draft of the proposed ordinance. (Exhibit 16).

requests – regardless of whether the conditions had anything to do with the six standards – and agreed to a design that it had never used before.[8] (Exhibit 43, p. 29; 42).

After the review process, the City staff ultimately concluded that Standards 1, 4, and 5 had been satisfied. (Exhibit 11, p. 12). City's staff thus specifically concluded that the proposed use complied with the City's Comprehensive Plan. It did not make a recommendation – and, in fact, never makes an express recommendation – regarding Standards 2, 3, and 6. (*Id.*; *see also* Tr. 227-28; 239-40). Nonetheless, after months of evaluating QuikTrip's proposal, Jaggi concluded that the six standards had been satisfied and that the City should issue a CUP to QuikTrip. (Exhibit 44, p. 36; *see also* Tr. 239-40; Tr. 244). Not one City staff member ever suggested to Jaggi that the CUP should be rejected. (Exhibit 44, pp. 36-37).

The Creve Coeur city council then held a series of hearings concerning the QuikTrip proposal. (Tr. 213). The hearings were not conducted on the record, witnesses were not sworn, formally examined, or cross-examined, and rules of evidence were not followed – all of which would be required for the case to be considered "contested" under Missouri law. (Exhibits A, D). On August 10, 2020, the city council voted unanimously to deny QuikTrip's CUP application. (Exhibit D, p. 6). The city council did not conduct a specific

[8] All told, the proposed ordinance contains 28 conditions as part of the CUP approval. The agreed-upon design included a 91-foot landscape buffer between the back of the store and the nearest residential property – nearly three times more than the buffer required by the zoning code and three times more than the buffer behind the recently approved Mobil on the Run. (Exhibit 43, pp. 25; 28; 45; *see also* Exhibit 5). The agreed-upon design also included multiple rows of evergreen trees to screen any residential property's view of the site. (Exhibit 43, p. 25).

standard-by-standard vote. (Tr. 251-52). Instead, each councilmember made general comments at the hearing about the proposal – many of which were unrelated to the standards outlined in the ordinance – and then simply voted no on the proposal as a whole. (*Id*.) Pursuant to the ordinance, there are no written findings from the city council's decision. (Exhibit A). Likewise, there is no evidentiary record from the proceeding. (*Id*.)

After the City's rejection of QuikTrip's application, the Property Owners filed a Petition in the St. Louis County Circuit Court seeking *de novo* judicial review of the city council's determination pursuant to § 536.150. (D2).

III. The Trial

Prior to trial, the parties filed a joint stipulation in which they agreed that the QuikTrip proposal satisfied Standard 1 and Standard 5 of the zoning code. (D5). Accordingly, only Standards 2, 3, 4, and 6 were at issue before the Circuit Court. (*Id*.) The City did not request findings of fact and conclusions of law pursuant to Rule 73.01. (*See generally*, Tr. 1-313).

At trial, the Property Owners presented testimony from (1) Tom Stern, a commercial real estate expert and the owner of the properties at issue, (2) Gwen Keen, the project manager for QuikTrip who oversaw this development project and dealt frequently with the City regarding it, (3) John Brancaglione, a city planning expert with over 50 years of development experience, (4) Linda Atkinson, a certified appraiser, real estate consultant, and valuation expert with over 36 years of experience, and (5) Lee Cannon, a traffic engineer who has been engaged by the City in the past for guidance in traffic matters. (Tr. 30; 59; 98; 137). These witnesses unequivocally testified that each of the CUP

standards at issue had been satisfied and gave factual evidence about why. (*See, e.g.*, Tr. 51-57; 65; 97; 109; 124-26; Exhibits 21-24).

Conversely, the only expert designated by the City was Jaggi, ***who admitted that he believes that QuikTrip's CUP should have been issued***. (Tr. 239-240; Tr. 244; Exhibit 44, p. 36). Jaggi also testified that he and other City staff members, who spent hundreds of hours reviewing the QuikTrip application, determined that the development satisfied the Comprehensive Plan. (Tr. 242-44; 250; Exhibit 44, p. 25).

The only other witness called by the City was Brett Berger – the leader of a small faction of residents who formed a vocal group specifically for the purpose of defeating the QuikTrip project. (Tr. 297). Berger's testimony generally ignored the six standards and did not address the unrebutted evidence presented by the Property Owners. (Tr. 271-311).

IV. The City Issued A CUP To Mobil on the Run For A Substantially Similar Use

The evidence at trial also established that, shortly before QuikTrip's application process began, the City approved a CUP and rezoning for a 24-hour Mobil on the Run convenience store, service station, and car wash. (Exhibit 34). The Mobil on the Run development is located approximately 300 yards away from the proposed QuikTrip site. (Tr. 56). Both sites are on Olive Boulevard within the same East Olive Corridor sector. (Tr. 118-119). The two proposals were so similar that, at the outset of the application process, City staff directed QuikTrip to use Mobil on the Run's application as a guide to follow for receiving City approval. (Ex. 43, pp. 16; 51-52). Based on the City staff's direction, QuikTrip relied on Mobil on the Run application as a model for its own proposal. (Ex. 43, p. 16).

At trial, 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 Run proposal. (Tr. 252). Nonetheless, the City approved Mobil on the Run's application and denied QuikTrip's. (Exhibit 44, p. 28).

V. The Trial Court Enters Judgment in the Property Owners' Favor

After two days of trial, the Circuit Court entered an Order and Judgment finding that "each of the standards appearing in Section 405.1070(E) has been satisfied." (D6) The court further ordered the City to grant QuikTrip its CUP and issued an order in mandamus concerning the same. (D7). The City subsequently appealed. (D8).

STANDARD OF REVIEW

A judgment rendered "in a noncontested case under § 536.150 is essentially the same as other judgments declared in court-tried cases" and is subject to the same standard of review on appeal. *Citizens for Safe Waste Mgmt. v. St. Louis Cty.*, 810 S.W.2d 635, 641 (Mo. App. 1991). Consequently, an appellate court should sustain 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." *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976).

In applying this standard, the appellate court "give[s] the prevailing party the benefit of all favorable evidence and reasonable inferences to be drawn therefrom, disregarding all evidence to the contrary." *Weaks v. Rupp*, 966 S.W.2d 387, 392 (Mo. App. 1998). An appellate court should also "defer to the trial court's credibility determinations because it was in a better position to judge the credibility of witnesses." *Murphy v. Middleton*, 256 S.W.3d 159, 164 (Mo. App. 2008). A party's ability to challenge the weight of the evidence on appeal is exceedingly limited, and "an appellate court will reverse only in rare cases, when it has a firm belief that the decree or judgment is wrong." *Ivie v. Smith*, 439 S.W.3d 189, 206 (Mo. banc 2014).

ARGUMENT

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 and, consequently, whether the city council's refusal to issue the permit was unconstitutional, unlawful, unreasonable, arbitrary, capricious, or constituted an abuse of discretion. *See* § 536.150, RSMo (2016). In answering these questions, the Circuit Court unambiguously found in favor of the Property Owners and against the City. (D6, p. 7). All evidence must be viewed in a light most favorable to its determination. *Weaks*, 966 S.W.2d at 392.

The City has asserted three points relied on in its appeal, claiming the Circuit Court: (1) incorrectly applied the *de novo* standard of review, (2) failed to acknowledge the City's purportedly "discretionary" authority to refuse to issue a permit, and (3) ultimately ruled against the weight of the evidence. As a threshold matter, the City's arguments were not preserved at trial and should be disregarded for purposes of this appeal. Nonetheless, each point raised by the City is meritless for a multitude of reasons and the Circuit Court's judgment should be affirmed.

I. THE CITY FAILED TO PRESERVE ITS ARGUMENTS FOR APPEAL

As is discussed in full in the Property Owners' Motion for Retransfer currently pending before this Court,[9] the City failed to raise with the trial court the arguments it now makes on appeal. It therefore failed to preserve its arguments for review by this Court.

[9] The Motion for Retransfer is hereby incorporated by reference.

Indeed, at trial, counsel for the City repeatedly argued – consistent with binding Missouri precedent – that the Circuit Court was to apply a *de novo* standard of review without any deference to the city council's findings. The City expressly stated in its Answer to the Petition: "City admits that ***the Court is authorized to conduct a de novo review*** of the City Council's decision to deny the CUP application in accordance with Section 536.150 RSMo." *See* D4, p. 3 (emphasis added). Likewise, the City reaffirmed its position when it expressly told the Court in its opening statement:

> ***"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."

See Tr. p. 25 (emphasis added). Nor did the City file an after-trial motion suggesting that the trial court did not apply the appropriate standard of review. The City never advanced the arguments it makes to this Court regarding the propriety of the trial court's review.

Despite these concessions, the City's first Point Relied On argues – for the first time on appeal – that the Circuit Court erred by hearing its own evidence and making its own independent judgment as to the satisfaction of the CUP standards instead of reviewing the record before the city council for reversible error. Likewise, in its second Point Relied On, this City alleges that there is a "presumption" in the ordinance that CUP's will be denied due to the City's supposed retention of discretion. This argument was not made at trial. Finally, the City's third Point Relied On makes various arguments as to why QuikTrip is not a "neighborhood service business" – arguments that were never made at trial and are unsupported by the evidence proffered there.

The failure to preserve arguments is more than a harmless procedural technicality. It is dispositive. Indeed, it is "well recognized that a party should not be entitled on appeal to claim error on the part of the trial court when the party did not call attention to the error at trial and did not give the court the opportunity to rule on the question." *Brown v. Brown*, 423 S.W.3d 784, 787-88 (Mo. banc 2014). Issues that are not preserved simply "***cannot be reviewed in this Court***." *Barkley v. McKeever Enterprises, Inc.*, 456 S.W.3d 829, 841 (Mo. banc 2015) (emphasis added). This has been established, not only through holdings from this Court, but also by statute. *See* § 512.160, RSMo (2016) ("[N]o allegations of error shall be considered in any civil appeal except such as have been presented to or expressly decided by the trial court.").

The City's briefing does not and cannot advise "where in the record the trial court's purported legal error[s] w[ere] presented to the trial court, as required by Rule 84.04(e)." *Sanders v. City of Columbia*, 602 S.W.3d 288, 297 (Mo. App. 2020). The Court need look no further in affirming the judgment.

II. THE CIRCUIT COURT CORRECTLY APPLIED THE *DE NOVO* STANDARD OF REVIEW (RESPONSE TO THE CITY'S FIRST POINT RELIED ON)

The City's primary argument on appeal is that the circuit court erred by creating its own record and making its own determination as to whether the six CUP standards had been satisfied. *See, e.g.*, Appellant's Brief, p. 19 (claiming the Circuit Court erred by "find[ing] facts and … mak[ing] its own decision, as if it were the decision maker"). In essence, the City is claiming that the Circuit Court erred by incorrectly applying a *de novo* standard of review to the city council's non-contested CUP proceeding. The City's

argument is directly contrary to Missouri law and to what it admitted at the commencement of the trial.

A. Precedent From this Court Required the Circuit Court to Conduct a Trial *De Novo*

The City does not dispute that its CUP application process is a "non-contested" case governed by § 536.150. This Court has expressly held that when reviewing a non-contested case under § 536.150, a "***review de novo*** [i]s the proper procedure" for the circuit court. *Furlong*, 189 S.W.3d at 173 (emphasis added). This means that "the circuit court ***does not review the administrative record***, but hears evidence, ***determines facts***, and adjudges the validity of the agency decision." *Id. at* 165 (emphasis added). It short, it conducts the matter "as an original action," *id.*, and "exercises a ***parity of function with the administrative tribunal*** in a contested case…." *Phipps v. Sch. Dist. of Kansas City*, 645 S.W.2d 91, 95 (Mo. App. 1982) (emphasis added). Nowhere in the City's brief does it mention that the adoption of its position would require this Court to overrule *Furlong*, as well as several dozen other appellate decisions spanning decades. This is nonetheless the case.[10]

Indeed, the City now suggests that the circuit court should have limited its review of this non-contested proceeding to the "record" made before the city council – a record

[10] *See, e.g.*, *Furlong*, 189 S.W.3d at 173; *City of Valley Park v. Armstrong*, 273 S.W.3d 504, 508 (Mo. banc 2009); *State ex rel. Leggett v. Jensen*, 318 S.W.2d 353, 358 (Mo. banc 1958); *THF Chesterfield North Dev. v. City of Chesterfield*, 106 S.W.3d 13, 18 (Mo. App. 2003); *Cade v. State*, 990 S.W.2d 32, 37 (Mo. App. 1999); *Ard v. Shannon Cty. Comm'n*, 424 S.W.3d 468, 473 (Mo. App. 2014); *Phipps*, 645 S.W.2d at 95; *Mosley v. Members of Civ. Serv. Bd. for City of Berkeley*, 23 S.W.3d 855, 858 (Mo. App. 2000); *St. Louis Cty. v. State*, 525 S.W.3d 141, 147 (Mo. App. 2017); *State ex rel. Nance v. Bd. of Trustees for Firefighters' Ret. Sys. of Kansas City, Mo.*, 961 S.W.2d 90, 93 (Mo. App. 1998).

that, by its own admission – does not even exist. *See* Appellant's Brief, p. 18 ("No formal record was created…."). This novel interpretation of § 536.150 is not based on any applicable legal authority of any kind.[11] Instead, it is wholly dependent on the City's irrationally narrow construction of the word "review" as it appears in the statute. While § 536.150 authorizes courts to "review" city council decisions, the City fails to acknowledge that a *de novo* review is still a "review." In fact, it is the only kind of review possible in a non-contested proceeding where there is no underlying city council record. This is why Missouri law unequivocally requires a Circuit Court to do the opposite of what the City now suggests by hearing evidence and making its own record. *See, e.g., Furlong*. 189 S.W.3d at 167 ("Although Furlong was required to prove that it presented the city with sufficient evidence to show that it met the requirements for preliminary plat approval, ***it had the right, before the circuit court, to adduce any evidence relevant to proving such facts***.") (emphasis added).

[11] The City's reliance on *Sanders v. City of Columbia*, 602 S.W.3d 288, 295 (Mo. App. 2020), is misguided. In *Sanders*, the Court was tasked with determining whether a city manager lawfully exercised his discretion to terminate [the Appellant police officer]…" after he violated the City's "use of force" policy. *Id*. at 298. Unlike the issuance of a CUP, the decision to retain or terminate an employee in response to this violation was not a ministerial act. Rather, if it was determined that the employee violated the policy, the city manager still had the discretion to take one of various responsive actions – including to "suspend or terminate the services" of the employee. *Id*. at 299. Accordingly, the Court properly held a *de novo* review, heard evidence, and made its own determination of the salient facts. *Id*. at 299-300. Finding that the Appellant had violated the policy, the Court determined that the city manager's decision to terminate ***was*** within the range of legally viable actions that could be taken. Unlike the City's unlawful decision in the present case to deny a CUP to an applicant that had satisfied the standards, the decision made by the city manager in *Sanders* was lawful. *Sanders* does not support the City's arguments.

Additionally, the City alleges that the Circuit Court failed to follow § 536.150 because it made its own decision rather than deciding whether the city council's decision, "in view of the facts as they appear[ed] to the court, [wa]s unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion." *See* § 536.150. This is simply not true. The Circuit Court – after hearing evidence and making ***its own judicial determinations*** as to the salient facts in this case – expressly found that, in its own view of the facts, the city council's ministerial decision to deny the CUP was "unlawful, unreasonable, arbitrary, capricious, and constitute[d] an abuse of discretion." (D6, p. 7). This is exactly what it was required to do pursuant to § 536.150. *Furlong*, 189 S.W.3d at 164-65.

Rather than directly addressing any of the dozens of dispositive cases conclusively negating its position, the City (and the amicus party) attempt to frame the interpretation of § 536.150 as a novel issue that would drastically alter the rights of municipalities across the state. This is not the case. The City's erroneous interpretation of the statute should be rejected.[12]

B. There Is No Suitable City Council Record for the Circuit Court to Review

Notwithstanding the City's prior admission that *de novo* review was proper, and even ignoring the dozens of dispositive cases refuting the City's new position, the City's

[12] To the extent the City claims to fear the possibility of "sandbagging" or "forum shopping," this Court has already dispelled the concern, noting that "[d]epending upon the circumstances, this difference [in forum] may result in procedural advantages or disadvantages to the parties, but in either situation, the litigant is ***entitled*** to develop an evidentiary record in one forum or another." *Furlong*, 189 S.W.3d at 165 (emphasis added).

argument also fails because it would be impossible for the Circuit Court to ever conduct anything but a *de novo* review of the city council's decision in this case. Indeed, there is no official transcript of the city council hearing. Nor did the City request one. There is no evidentiary record of what was presented to the council. Nor did the City request or prepare one. There was not even a cohesive vote by the council as to each of the six factors or any collective explanation of the decision of the council members. The City's own corporate representative in this case has admitted that, in defending this lawsuit, the City was left to speculate as to which of the factors the city council actually voted for and which it voted against. (Tr. 251-252).

Notwithstanding the above, because of the lack of procedural guidelines codified in the Creve Coeur Zoning Code, there could never be a sufficient record of one of its CUP decisions for a Circuit Court to review. This precise issue was addressed in *450 N. Lindbergh*, 477 S.W.3d at 54 – a case involving the exact same CUP ordinance central to this appeal.

In *450 N. Lindbergh*, a group of Creve Coeur residents challenged the City's decision to grant a CUP for a proposed assisted-living center by filing a petition for judicial review pursuant to § 536.140 – the statute governing contested cases. 477 S.W.3d at 52. Acknowledging the critical differences in the way contested and non-contested cases are reviewed, the Court set out to determine which category the City's CUP proceeding fell under. Noting that the relevant inquiry is whether the City's applicable CUP ordinance required the city council to conduct a hearing with sufficient procedural protections to afford applicants due process, the Court "determine[d] that the present case d[id] not

qualify as a contested case" and that the parties therefore lacked authority to proceed under § 536.140. *Id.* at 55. The Court then remanded the matter to the Circuit Court for dismissal. *Id*.

450 N. Lindbergh simply followed the basic principles of administrative law in this state. As this Court previously acknowledged:

> The driving idea behind administrative law in Missouri is that the citizen is entitled to a fair opportunity to present the facts of his or her case. If this occurs in the context of the procedural formality and protection of a "contested case" before the administrative agency, the review in the courts can be limited to the record. ***If the citizen is denied this opportunity before the agency, then he or she is entitled to present such evidence as is necessary before the courts to determine the controversy***.

Furlong, 189 S.W.3d at 167 (emphasis added). The seven-year-old *450 N. Lindbergh* case put the City on express notice that its CUP ordinance generated non-contested proceedings with decisions that would be subject to a judge's "*de novo* review." 477 S.W.3d at 53.[13] In light of the holding, if it wished to prevent a judge from conducting a *de novo* review, the City could have simply amended its ordinances to include additional procedural protections. It chose not to do so. Its apparent shock on appeal that a Court would be able to review its decision without deference to its determination of the facts is disingenuous at best.

In sum, the trial court made the necessary findings under § 536.150 and cases like *Furlong* by hearing evidence and determining the city council's ministerial decision to

[13] As applied to the present case, *450 N. Lindbergh* leaves no question that the Property Owners were denied the requisite procedural safeguards before the city council and that any ostensible "record" made at that time – *i.e.*, the City's unsworn, paraphrased meeting "minutes" – is insufficient for judicial review.

deny the CUP was "unlawful, unreasonable, arbitrary, capricious, and constitute[d] an abuse of discretion." (D6, p. 7). Nonetheless, the City's first point relied on should be denied because: (1) the City itself conceded at trial that the *de novo* review was proper, (2) there exists decades of binding precedent holding that the form of *de novo* review applied in this case is proper, and (3) the City has drafted its ordinances in a way that leaves no adequate record for a Circuit Court to review under any circumstances.[14] This newly manufactured argument regarding the standard of review is baseless and wrong.

III. IF AN APPLICANT HAS SATISFIED EACH OF THE SIX STANDARDS OUTLINED IN THE CITY'S ORDINANCE, THEN THE CITY LACKS THE DISCRETION TO DENY THE PERMIT (RESPONSE TO THE CITY'S SECOND POINT RELIED ON)

The City's second point relied on claims that the Circuit Court is never permitted to reverse the city council's determination regarding a CUP application because – regardless of whether or not the six standards have been satisfied – the City retains the ultimate discretion to accept or reject any CUP application because its ordinance contains "subjective" components. The City attempts to justify this inexplicable position in several ways. Each argument again must fail for a multitude of reasons.

[14] Moreover, notwithstanding the clear applicability of the *de novo* standard of review, the City would not have prevailed under even the most deferential standards. Indeed, as is discussed in more depth below, the City's own corporate representative testified that he believed each of the six standards outlined in the Creve Coeur Zoning Code had been satisfied and that a CUP should have been issued to QuikTrip. (Tr. 239-240; Tr. 244; Exhibit 44, p. 36). Notwithstanding the arguments made in this appeal, the City cannot overcome the weight of the evidence provided by its own witness.

A. The Creve Coeur Zoning Code Does Not and Cannot Expressly Afford the City Council Unfettered Discretion to Accept or Deny a Conditional Use Permit

First, without any language in the ordinance to justify it, the City asserts that the plain language of the Creve Coeur Zoning Code creates a "presumption" that CUP permits will be denied, and therefore expressly reserves to the City the discretion to refuse or deny any permit without regard to the six factors enumerated in its ordinances. (Appellant's Brief, p. 34). In essence, the City alleges that the language of its ordinance provides the city council with an unfettered right to reject a CUP application for any reason.

The City's new argument is contrary to controlling precedent and would also permit unconstitutional application of its ordinances.

i. Binding Missouri Precedent Makes Clear That Conditional Use Permits Are Not Discretionary

As established in Section II above, the Creve Coeur CUP application process is a non-contested proceeding in which the Circuit Court must hear evidence, make ***judicial*** determinations as to the salient facts, and then decide whether – in its own view of the facts – the agency's ultimate ***ministerial*** action was proper. *Phipps*, 645 S.W.2d at 100. In this case, the ultimate ministerial action at issue is the denial of QuikTrip's CUP application.

In examining this exact ordinance, the Court of Appeals acknowledged that the ordinance at issue here is not discretionary, and that the City "***shall approve*** a conditional use only if it finds that the proposed use will meet enumerated criteria … [appearing in] Creve Coeur City Code section 405.1070(E)." *450 N. Lindbergh*, 477 S.W.3d at 54 (emphasis added). This determination is consistent with decades of Missouri case law

holding that cities lack the discretion to deny the issuance of a CUP if the conditions enumerated in their own ordinance have been met. *State ex rel. Presbyterian Church v. City of Washington*, 911 S.W.2d 697, 701 (Mo. App. 1995) ("[I]f the proposed use meets the standards prescribed by the local ordinance, the [city council] ***is bound to issue the [conditional] use permit*** subject to reasonable conditions which it might impose to mitigate any harmful effects that might otherwise result.") (citations and quotations omitted) (emphasis added); *see also Martin Marietta Materials, Inc. v. Bd. of Zoning Adjustment*, 246 S.W.3d 9, 19 (Mo. App. 2007) ("[I]f [a] proposed use satisfies the ordinance standards, the zoning agency is required to issue the [conditional] use permit.").

Accordingly, if the enumerated criteria in the ordinance are satisfied, the City lacks the discretion to reject the proposed conditional use and ***must*** issue the permit. A rejection of a CUP that meets the standards outlined in the ordinance is therefore necessarily "unlawful, unreasonable, arbitrary or capricious [and] involves an abuse of discretion." *See* § 536.150. This is the unequivocal law and the City's attempt to claim unfettered discretion to reject a CUP should be denied.[15]

[15] Contrary to the City's assertion, the language appearing in the ***prelude*** to Section 405.1070 of the Creve Coeur Zoning Code does not "unequivocally" impart the City with unfettered discretion to reject a conditional use permit for any reason. Instead, it simply explains that some uses are not authorized "as a matter of right" in the zoning code and that these "conditional uses" require city council approval. It then explains that, by way of a conditional use permit, the city council will, based on the circumstances, either permit or reject the use. To say that this introductory sentence "presumes rejection" of a CUP in a way that grants the City unlimited discretion is simply a misstatement of the law.

ii. Allowing The City To Exercise Discretion To Reject A Permit That Meets Its Own Standards Would Be Illogical and Unconstitutional

The City's assertion that it has the authority to reject a CUP application even if the application satisfies the six standards outlined in Section 405.1070(E) is not only unsupported by law, but would render the six standards entirely meaningless. It would render every CUP decision ever issued by the City categorically unappealable. It would also render Creve Coeur's Zoning Code decidedly unconstitutional.[16]

Indeed, under the City's proposed interpretation of its ordinance, the council could reject a conditional use permit for any reason whatsoever – regardless of whether or not it has anything to do with the enumerated standards. Such an interpretation would permit discriminatory enforcement of the zoning code based on considerations such as race, gender, and wealth. The possibility of discriminatory enforcement is precisely the reason why the issuance of permits must be ministerial and not discretionary. *State ex rel. Kugler v. City of Maryland Heights*, 817 S.W.2d 931, 933 (Mo. App. 1991) ("***The issuing of a permit is a ministerial act, not a discretionary act, which may not be refused if the requirements of the applicable ordinance have been met***.") (emphasis added); *see also Presbyterian Church*, 911 S.W.2d at 701. If the applicant satisfies the City's requirements for issuing the permit, the City ***must*** issue the permit. If the applicant does not satisfy the requirements, the City must not issue the permit.

[16] It is worth noting that the Property Owners have challenged the constitutionality of the City's discriminatory application of the zoning code from the outset of this case. (D2, p. 2). Nonetheless, the Court need not address the constitutionality of the city council's actions to affirm the Circuit Court's decision.

Contrary to the City's apparent position on appeal, it is "not free to pick and choose between similarly situated applicants of whom they will or will not require strict compliance with the ordinance." *Wolfner v. Bd. of Adjustment of City of Frontenac*, 672 S.W.2d 147, 151 (Mo. App. 1984); *see also Ford Leasing Dev. Co. v. City of Ellisville*, 718 S.W.2d 228, 233 (Mo. App. 1986). The "Equal Protection clause prohibits the discriminatory application of land use restrictions among similarly situated landowners." *City of Sugar Creek v. Reese*, 969 S.W.2d 888, 893-94 (Mo. App. 1998).

The risk of "discriminatory application of land use restrictions among similarly situated landowners," *id*., is not simply a hypothetical concern. It is exactly what the City did in this case. Indeed, the year before QuikTrip's application process began, Mobil on the Run received City approval for a 24-hour convenience store, service station, and car wash on a site located 300 yards from the proposed QuikTrip site at issue in this case. (Exhibit 34). This area was subject to the same portion of the Comprehensive Plan as is the site at issue here. At trial, the City's corporate representative conceded that there is no justifiable basis for the City to treat the Mobil on the Run use differently than the QuikTrip use. (Tr. 252).[17] Nonetheless, the City approved Mobil on the Run's application and denied QuikTrip's application. (Tr. 163). This concession alone renders the City's decision to deny QuikTrip's CUP unlawful.

[17] Tr. 252 ("Q. And so when we talk about, let's say, compliance with the comprehensive plan, ***in fact, in compliance with all of the factors***, that was all the same for this CUP, Mobil On the Run, as it would be for this, correct? A. …***I would agree with that***….") (emphasis added).

B. The Issuance of a Permit Is a Ministerial Act Regardless of Whether Any of the Six Standards Include Subjective Elements

The City's second basis for claiming unfettered discretion to reject a Conditional Use Permit is that one or more of the six standards contain "discretionary elements,"[18] which the City claims insulate the council's decision from review. The City therefore claims the Circuit Court erred by not deferring to the city council's determination as to each individual standard that contained such "discretionary" components. Again, this argument has already been rejected by Missouri courts. It is also impracticable and would result in unlawful procedures that allow the City to apply its ordinances in a discriminatory manner.

i. Missouri Courts Have Already Rejected The City's Argument

As a threshold matter, the City's assertion that a court must defer to its decision on the "subjective" elements of the six CUP standards is again refuted by this Court's decision in *Furlong*.

Like the CUP ordinance at issue in this case, the "replatting" ordinance at issue in *Furlong* required the City Council to determine whether various factors had been satisfied, including but not limited to whether the proposed replatting would (i) provide for "the general welfare of the city," (ii) "guide the future growth and development of the city in accordance with the official Master Plan," and (iii) "protect the character and the social and economic stability of all parts of the city, and to encourage the orderly and beneficial

[18] For example, Standard No. 2 requires the Court to determine whether the proposed use will "contribute to and promote the community welfare and convenience…."

development of all parts of the city." *See* A9-23.[19] These standards are uncannily similar to those that the Circuit Court was tasked with addressing in this case. *See id*. Despite the inclusion of such "subjective" elements, this Court nonetheless maintained that "[i]f the plat complies, then ***it is the ministerial duty*** of the commission and the council to approve it, and ***they have no discretion to deny it***." *Furlong*, 189 S.W.3d at 164-65. The City's suggestion that issuance of a CUP is not a ministerial act because some of the factors in its ordinance contain "subjective" components is therefore conclusively refuted by *Furlong*.

Also instructive in refuting this point is the holding in *Phipps v. School District of Kansas City*, 645 S.W.2d 91, 99 (Mo. App. 1982), in which a school employee sought judicial review of a school board decision to terminate his employment, which was ultimately determined to be a non-contested matter governed by § 536.150. The factual background of the case is somewhat nuanced, but the ultimate holding directly negates the argument presently made by the City in this case.

In *Phipps*, the plaintiff – a custodian-fireman – was one of many employees terminated for absence from work during a teacher strike. *Id.* at 93. The strike began on March 20, 1977. *Id*. The school board voted to terminate the striking employees on April 25, 1977. *Id*. On May 6, 1977, a circuit judge ordered the school district to permit all terminated employees to return to work. *Id*. Upon plaintiff's return, the school district informed him that an evaluation of his performance "prompted demotion from custodian-

[19] These are the applicable city ordinances in *Furlong* and were taken directly from the legal file in that case. The Court may take judicial notice of the legal file in its prior proceeding.

fireman to custodian I, a lesser classification with lesser pay." *Id*. On July 8, 1977, the school board again voted to terminate the employment of all the employees previously on strike. *Id*. Thereafter, the teachers and school district ultimately entered into an agreement in which all terminated employees would be permitted to apply for reappointment to a position with the same salary as the position from which they were terminated. *Id*. The plaintiff applied for reappointment pursuant to the agreement but was only offered the job of custodian I – not the custodian-fireman position that he held prior to the strike. *Id.* at 93-94. He then filed a grievance with the school district. *Id*. at 94.

Plaintiff's position before the agency was that the school district's offer to appoint him as custodian I violated the provision of the agreement requiring reappointment of an applicant "to a position with the same salary as that position held with the District on the date of termination." *Id*. This argument, in turn, rests on the rationale that the plaintiff was only terminated once – in April 1977 – "and that since on that date he was a fireman-custodian, the contract contemplated reappointment to that position and salary." *Id*. Conversely, the school district argued that the plaintiff was terminated twice and is only entitled to the benefits of a custodian I. *Id*.

The agency found in favor of the school district. *Id*. On judicial review, the circuit court held that "doubt was to be resolved in favor of the [school district]" because it "could ***reasonably*** have found under the terms of the parties' [agreement] that the correct termination date upon which to base its reappointment … was July 8, 1977…." *Id.* at 99 (emphasis added). On appeal, the Court expressly held that the circuit court's "conclusion ***misconceived the circuit court judicial function in the review of a noncontested case***

under § 536.150 … [because] [t]hat procedure requires the circuit court to ***find the facts***." *Id.* (emphasis added). Stated another way, the Court of Appeals determined that the circuit court did not follow the statute because it "heard evidence, as the statute and rule contemplate, and found subsidiary facts, ***but not the salient fact*** of the termination date intended by the [a]greement…." *Id.* (emphasis added). The circuit court's failure to make its own determination as to the ***salient facts*** was deemed to be error.[20]

Here, the salient facts are whether each of the six standards has been met. As held in *Phipps*, the role of a circuit court is not to merely find cursory facts and, from those facts, determine whether the city council's decision was reasonable. Instead, its role is to hear evidence and make its ***own determination*** as to the dispositive, salient facts.

This holding is fully supported by the language of the statute. *See* § 536.150 (providing that the circuit court must conduct a judicial review of non-contested cases by "hear[ing] … evidence" and deciding whether the city council's 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"). The Circuit Court found that the facts established that conclusion. The City provides no authority for the alternative interpretation of the statute it asserts on appeal. It should be conclusively rejected.

[20] While *Phipps* is instructive, the principles it relies on have been repeated in dozens of Missouri cases addressing the Circuit Court's role in reviewing a non-contested decision. *See, e.g.*, n. 13, *supra*.

ii. The City's Argument Would Permit Every City To Circumvent Judicial Review Without Adequate Procedural Safeguards

If this Court were to accept the City's argument that a court must defer to any finding that includes a discretionary component, then every city in Missouri could systematically prevent judicial review of its entire CUP application process by simply including one subjective element. Such a situation would be patently unlawful. As this Court has made clear, a CUP applicant is "entitled to a fair opportunity to present the facts of his or her case." *Furlong*, 189 S.W.3d at 167. If a city's ordinances do not provide the procedural safeguards necessary to constitute a contested case, then "the citizen is denied this opportunity before the agency, [and] he or she is entitled to present such evidence as is necessary before the courts to determine the controversy." *Id*.

The City cannot circumvent an applicant's right to a fair process by simply including a subjective component in its CUP standards. In fact, nearly every standard that can be included in such a review process is subjective. If the standards were not subjective, a city council would never need to hold a hearing or exercise its own review process to begin with.

iii. There Are No Standard-by-Standard Findings to Defer To

Finally, notwithstanding the controlling precedent and practical concerns, the City's argument still fails because the city council never conducted a standard-by-standard vote to determine exactly which of the six standards it ***collectively*** believed were unsatisfied.

Indeed, there is no collective city council determination as to ***any*** of the six factors. Instead, each council member made offhand comments at the hearing about the proposal – many of which had nothing whatsoever to do with the standards – and then, without

expressing any real justification, simply voted yes or no on the proposal as a whole. There is no way to discern exactly which (or how many) of the six standards actually had the requisite number of council members in opposition. Accordingly, the City's own corporate representative admitted that, in formulating the City's position for this lawsuit, the City was left to speculate – based only on the comments and questions raised during the discussion – as to which of the factors the city council specifically felt was satisfied and which was not. (Tr. 251-252).

The sheer extent of the speculation is evidenced by the City's initial representation at the outset of this case that Standard 4 had been satisfied and would not be an issue at trial. (Tr. 243-44). The City then changed its position during the course of this case after it retroactively determined that the city council did not, in fact, find that Standard 4 was satisfied.[21]

The City is now claiming that the Circuit Court should have deferred to the city council's determination as to the standards that it deems to be "discretionary." But the City does not even know for certain what the council's determinations were for any given standard. In reality, the City is not really asking this Court to defer to the city council's determinations. Instead, it is asking the Court to defer to the findings that its attorneys

[21] Interestingly enough, Standard 4 is the only standard that the City specifically continues to challenge on this appeal. Tellingly, it was also one of the standards the City's staff concluded in its report was satisfied.

manufactured for this appeal. Even ignoring the binding precedent and unlawful interpretation of the ordinances described above, the City's position cannot prevail.[22]

IV. THE COURT'S DETERMINATION THAT STANDARD 4 HAD BEEN SATISFIED WAS NOT AGAINST THE WEIGHT OF THE EVIDENCE (RESPONSE TO THE CITY'S THIRD POINT RELIED ON)

In its final point relied on, the City asserts that the Circuit Court's decision should be reversed because it erroneously found, contrary to the weight of the evidence at trial, that QuikTrip was a "neighborhood service business." But as a threshold matter, whether or not QuikTrip is a "neighborhood service business" is not remotely dispositive of any issue in this case. The finding is entirely inconsequential to the court's ultimate determination. Furthermore, the City had just found that the substantially similar Mobil on the Run was a "neighborhood service business" when it approved that CUP application. Finally, even if it were a material issue, there exists substantial evidence to support the Circuit Court's finding. The City's argument is again entirely meritless.

A. Whether or Not QuikTrip Is a Neighborhood Service Business Is Not Dispositive Because the City Conceded That Full Compliance With the Comprehensive Plan Is Never Required or Even Possible

There are only six standards that must be satisfied prior to the issuance of a Conditional Use Permit – none of which expressly stipulate that the proposed use must constitute a "neighborhood service business." If the City wanted this to be a requirement for issuing a CUP, it could have amended its ordinances accordingly. Furthermore, it could

[22] The City's argument further hinges on language in § 536.150 providing that the "court shall not substitute its discretion for discretion legally vested in such administrative officer or body…." (Appellant's Brief, p. 19). But because the issuance of a permit is a ministerial act, there is no discretion legally vested in the city council. *Martin Marietta Materials*, 246 S.W.3d at 19. The language is entirely inapplicable to the present situation.

have asked for a specific finding of fact on that issue. The only reason the "neighborhood service business" language is even remotely relevant to this proceeding is because (i) Standard No. 4 requires that that the proposed use be consistent with "the applicable provisions of the City's Comprehensive Plan" and (ii) the Comprehensive Plan recommends that the City promote the development of, among other things, "neighborhood service businesses." (Exhibit 19, p. 90).

A Comprehensive Plan "is a guide to development" published by the City – a list of general land use recommendations that are not mandatory or compulsory in any capacity. *State ex rel. Schaefer v. Cleveland*, 847 S.W.2d 867, 871 (Mo. App. 1992); *see also* Tr. 249-250. Indeed, the City itself testified that it is not necessary for a proposed use to satisfy every single component of the Comprehensive Plan for a conditional use permit to be approved. (*See* Exhibit 44, p. 24) ("Q. And is it your sense as the City of Creve Coeur that every single component of a comprehensive plan must be satisfied in order to approve a conditional use permit? A. No. My position would be that, in general, does it comply -- is it consistent with the comprehensive plan or is it inconsistent?").[23]

Instead, to evaluate compliance with the plan, the Court must simply look to whether a proposed use is generally consistent or generally inconsistent. *Id.*; *see also* Tr. 249-50. It

[23] In fact, the City's corporate representative conceded that a proposed use can ***never*** be completely compliant with the Comprehensive Plan. Tr. 240-41 (emphasis added). ("Q. All right. ***There can never be complete compliance with a comprehensive plan, can there?*** Because a comprehensive plan like that may call for ten-story office buildings and other things. So you can't comply with every component of a comprehensive plan, correct? A. ***I would tend to agree with that, and it's a guide, and it's a general guide for development***. So there are strengths and weaknesses through most applications.").

is without question that a proposed use can be "generally consistent" with the plan even if it is not a "neighborhood service business."

B. The City's Own Corporate Representative and "Comprehensive Plan Expert" Testified That the Proposed Use Comports With the Comprehensive Plan.

In its Order and Judgment, the Circuit Court found that the proposed development "[m]eets the applicable provisions of the City's Comprehensive Plan…" and "that Standard 4 has been satisfied." As discussed above, the Circuit Court's judgment must be sustained unless it is not supported by substantial evidence or against the weight of the evidence, *Murphy*, 536 S.W.2d at 32, and on such a standard "an appellate court will reverse only in rare cases, when it has a firm belief that the decree or judgment is wrong." *Ivie*, 439 S.W.3d at 206. The Property Owners, as the prevailing parties, are afforded "the benefit of all favorable evidence and reasonable inferences to be drawn therefrom, disregarding all evidence to the contrary." *Weaks*, 966 S.W.2d at 392. Based on the evidence adduced at trial, it is without question that the proposed use is consistent with the Comprehensive Plan and that Standard 4 has been satisfied.

In affirming the decision, the Court need look no further than the testimony of Jason Jaggi – the City's corporate representative and designated expert on the Comprehensive Plan. Contrary to the inexplicable position the City has taken with respect to Standard 4 on appeal, Jaggi testified that QuikTrip's proposed use ***is generally consistent*** with the Comprehensive Plan. Exhibit 44, p. 25 ("Q … And you personally felt that it was generally consistent; but the city, you're saying, in this litigation is suggesting or taking the position that it was not generally consistent? A. Yes."). Jaggi further testified that, as far as the City

staff was concerned, compliance with the Comprehensive Plan was not a concern with this development. (Tr. 250). Jaggi and other city staff members spent hundreds of hours working on and evaluating the QuikTrip CUP application. (Tr. 242). The culmination of those hours was a report that concluded, among other things, that the proposed use complied with the Comprehensive Plan. (*See* Exhibits 11-13).

The proposed use is so clearly consistent with the Comprehensive Plan that, according to Jaggi, the City originally contemplated at the outset of this litigation that it would ***stipulate*** that Standard 4 had been satisfied. (Tr. 243-244). It is still unclear why the City's position concerning the satisfaction of Standard 4 changed during the course of this lawsuit – to the point that they continue to challenge the issue in this appeal.

Additionally, the Property Owners' own expert, John Brancaglione, testified as to the proposed use's conformance with the Comprehensive Plan. (Tr. 98). Brancaglione, who has drafted numerous comprehensive plans for municipalities over his five decades of city planning experience, testified that he believes the proposed QuikTrip development is consistent with the Comprehensive Plan because it: (1) achieves the plan's goal of redeveloping older, underutilized properties (Tr. 120-121), (2) promotes the plan's vision for the East Olive Corridor of developing medium to low density commercial, retail, and neighborhood service businesses (Tr. 122), (3) promotes the plan's goal of encouraging pedestrian access and walkability while accommodating car access (Tr. 122-23), (4) meets or exceeds the zoning requirements and development factors for the corridor (Tr. 123), and (5) is supported by current retail development trends (*Id.*) (*See also* Exhibit 23). The City made no effort to rebut this testimony.

Despite the unrebutted testimony of the Property Owners' expert, and despite the fact that the City's own corporate representative and Comprehensive Plan expert continues to maintain that the proposal satisfied the Comprehensive Plan, *see also* Tr. 240, the City incomprehensibly continues to challenge the sufficiency of the evidence with respect to Standard 4. This Court should again reject the City's argument and affirm the judgment.

Notwithstanding the above, the evidence adduced at trial does establish that QuikTrip is a "neighborhood service business." Indeed, the "neighborhood" in question is a heavily commercialized, signalized corner of Olive Boulevard. (Tr. 63). One of the Property Owners' experts testified that "[a] QuikTrip often, in fact, caters to nearby residential neighborhoods and particularly people who are, for example, coming home and … calls and says, 'Bring milk or juice or a six-pack or whatever…'" (Tr. 122-123). The expert unequivocally testified that "these are neighborhood service businesses associated with this development." (Tr. 122). This evidence must be construed in the Property Owners' favor and contrary evidence disregarded. *Weaks*, 966 S.W.2d at 392.

There was also evidence that the renovated strip center included in the application would be tailored to neighborhood service businesses, including businesses already in the center. (Tr. 122-123).

The fact that the City only takes issue with this one discrete and inconsequential finding regarding the categorization as a "neighborhood service businesses" is telling. The Property Owners presented testimony from four different experts and one fact witness to support their case. Other than Jaggi – who admitted the City should have issued the CUP – the only witness the City called was Brett Berger, the leader of a vocal, "volatile"

minority of residents who have relentlessly pressured the City to prevent QuikTrip from developing the property. (Exhibit 43, pp. 18-19; Tr. 270; 297-98).

At trial, Berger testified that he formed an opposition group to stop the QuikTrip development, and that if his group does not like any subsequent proposals for the space then they will fight those developments too. (Tr. 297-98). He testified that the QuikTrip proposal should be treated differently than the Mobil on the Run because he lives in a "luxury home," as opposed to those who live in the more modest homes behind the Mobil on the Run site. (Tr. 301). Berger's testimony had little to do with the six factors at issue in the case. Rather than call its own experts to refute the four experts called by the Property Owners, the City chose to present to the Court Berger's outlandish, unsubstantiated ruminations.

C. The City Determined Mobil on the Run Was Consistent With the Comprehensive Plan.

As discussed above, the City issued a CUP for a substantially similar Mobil on the Run use within the same East Olive Corridor shortly before QuikTrip filed its CUP application. The issuance of the CUP necessarily meant that the city council believed the Mobil on the Run use satisfied each of the six standards outlined in the zoning – including the requisite compliance with the Comprehensive Plan. (Exhibit 44, pp. 27-29). The City has admitted that there was no basis to treat the QuikTrip use any differently than the Mobil on the Run use under the Comprehensive Plan. (Exhibit 44, pp. 28-29). Thus, it is unclear how the City could now try and justify its rejection of QuikTrip's CUP application by claiming it is not a "neighborhood service business."

Whether or not the use at issue in this case constitutes a neighborhood service business is irrelevant. Moreover, there is sufficient evidence in the record to support a finding that the proposed use constitutes a neighborhood service business. But notwithstanding these arguments, the approval of the Mobil on the Run use, combined with the City's admissions regarding the similarity of the two uses, necessarily renders the denial of QuikTrip's CUP application irrational, unreasonable, arbitrary, capricious, and an abuse of discretion.

V. THE TRIAL COURT'S DECISION DOES NOT ALTER THE STANDARDS TO WHICH MUNICIPALITIES HAVE ALWAYS BEEN HELD IN NONCONTESTED CASES (RESPONSE TO THE MISSOURI MUNICIPAL LEAGUE'S AMICUS BRIEF).

The amicus brief filed by the Missouri Municipal League suggests that any holding in the Property Owners' favor in this case would change Missouri administrative law in a way that would require municipalities across the state to have to "alter their procedure to make all critical cases contested cases." Amicus Brief, p. 7. In doing so, the Missouri Municipal League is either unaware of the dozens of prior decisions already mandating application of the *de novo* review standard for non-contested cases over the last 40 years or has chosen to ignore these cases. To make matters worse, the brief proposes that municipalities should have the ability to withhold necessary constitutional safeguards from citizens in "critical" cases at the city council level while simultaneously preventing those citizens from obtaining any meaningful opportunity for judicial review thereafter. This is precisely the situation that due process aims to prevent.

The amicus brief highlights the importance of one's right to pursue a *de novo* review before the Circuit Court in a non-contested case. Without this right, municipalities such as

those represented by the Missouri Municipal League will endeavor to prevent their citizens from ever having a "a fair opportunity to present the facts of his or her case," as is required by law. *Furlong*, 189 S.W.3d at 167. To the extent the municipalities represented by the Missouri Municipal League fear this case will permit a single judge to overrule their non-contested decisions, this is already the case. If any municipality truly fears such an outcome, the good news is that it can simply amend its ordinances – unilaterally – to provide minimal necessary procedural safeguards at their city council hearings. The Missouri Municipal League's assertion that the prospect of "delays" and excessive "formality" should take precedence over constitutional rights should be disregarded.[24]

CONCLUSION

The City presented no testimony to rebut the plethora of evidence presented by the Property Owners with respect to each of the six standards. The City's own corporate representative admitted that the CUP should have been issued. The Circuit Court properly found on the evidence before it that each of the six standards had been satisfied and that the CUP must be issued. The City has set forth no justifiable basis to challenge that decision on this appeal.

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[24] The amicus brief also fails to appreciate the distinction between rezoning, which is a legislative function, and the issuance of a permit, which is a ministerial function. As stated above, a CUP application seeks permission to use property for a purpose that has ***already*** been approved by the zoning code, albeit if specific enumerated conditions are satisfied. There was no rezoning whatsoever in this case. There are no legislative functions at issue in this case. *Phipps*, which the amicus brief itself relies on, clearly acknowledges that "[i]n a noncontested case, the circuit court and not the administrator adjudicates the evidence, and the facts found are product of a ***judicial function only*** without mix of legislative or other governmental considerations – an exercise interdicted to a court." 645 S.W.2d at 100 (emphasis added).

For the foregoing reasons, the Property Owners respectfully request that the Court reject the City's arguments and affirm the Circuit Court's Judgment.

Respectfully submitted,

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By: /s/ *Gerard T. Carmody*

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 25, 2022, the foregoing was filed with the Clerk of the Court electronically, to be served by operation of the Court's electronic filing system upon all parties of record.

/s/ *Gerard T. Carmody*

CERTIFICATE OF COMPLIANCE WITH RULE 84.06

The undersigned certifies that the foregoing Respondents' Substitute Brief includes the information required by 55.03 and complies with the requirements contained in Rule 84.06(b). Relying on the word count of the Microsoft Word program, the undersigned certifies that the total number of words contained in the Respondents' Substitute Brief is 12,134 exclusive of the cover, signature block and certificates of service and compliance.

/s/ *Gerard T. Carmody*