IN THE SUPREME COURT OF THE STATE OF MISSOURI

CITY OF CREVE COEUR, MISSOURI,	)	
Appellant,	)	Case No. SC99619
v.	)	
BG OLIVE & GRAESER LLC, et al.,	)	
Respondents.	)	

RESPONDENTS' MOTION FOR REHEARING

The Court's opinion of December 20, 2022 effectively holds that the City has eliminated the right of any citizen to obtain meaningful judicial review of an administrative decision pursuant to § 536.150, RSMo (2016) by unilaterally reserving "full authority" to reject a permit in its ordinances. The City's reservation of "full authority" undermines the promise of judicial review contained earlier in the same ordinance. Further, it vitiates the requirements of § 536.150 and necessarily rejects the reasoning in *Furlong Companies, Inc. v. City of Kansas City*, 189 S.W.3d 157, 167 (Mo. banc 2006) and *City of Valley Park v. Armstrong*, 273 S.W.3d 504, 508 (Mo. banc 2009), which expressly require the Circuit Court to exercise such a review.

Here, the Circuit Court found the salient facts and expressly determined that the city's decision was "unlawful, unreasonable, arbitrary, capricious, and constituted an abuse of discretion." (D6, p. 7). This is the precise standard required by § 536.150, as well as *Furlong* and its progeny. By relying on the "full authority" retained by the City in

its ordinance to reverse this determination, the opinion has rendered the City's own enumerated criteria for issuance of a conditional use permit virtually meaningless. Even when all the criteria are satisfied (as was found by the circuit court and the city's own corporate representative), the city council rejected the permit. Now that action, whether based on whim, caprice or unstated substance – is an exercise of unreviewable full authority.

Perhaps this is what the Court intended, but the upshot is that municipalities across the state may adopt this language[1] and reject any permit for any reason without fear of ever being subjected to judicial review. Respectfully, Respondents suggest that this could not have been the Court's intent at the time of opinion.

Additionally, the argument that the City retained "full authority" to reject a permit under Code Section 405.1070(A)(2) – or the language the Court specifically relied on from that provision – was never raised before the trial court, was never raised in the court of appeals, and was never raised by the city in this Court. While the City made various other arguments regarding discretionary language before this Court, the specific language of Section 405.1070(A)(2) was never mentioned in any briefing prior to the issuance of the opinion.

It is also worth noting that the language omitted in the Court's recitation of the ordinance does *not* actually reserve for the City such broad, unfettered discretion to reject

[1] This further effectively overrules *450 N. Lindbergh Legal Fund, LLC v. City of Creve Coeur, Missouri*, 477 S.W.3d 49, 54 (Mo. App. 2015), which held Creve Coeur "***shall approve*** a conditional use only if it finds that the proposed use will meet enumerated criteria…." (Emphasis added).

a permit. Section 405.1070(A)(2) provides that "the City reserves full authority to deny any request for a conditional use," but only limited conditions, to wit: "***upon a finding*** that the permitted conditional use will or has become unsuitable and incompatible in its location ***as a result of any nuisance or activity generated by the use***." Section 405.1070(A)(2) (emphasis added). The latter part of the provision was not mentioned in the opinion, is a critical limitation on the City's authority under its own ordinance, and no finding of nuisance, incompatibility or unsuitability has ever been made in this case.

In short, the direct reversal of the Circuit Court's judgment suggests that the evidence presented at trial as irrelevant so long as "full authority" is reserved by the City, thereby eliminating any judicial review. This issue, and other material issues raised in the appeal, appear to have been overlooked by the Court in its opinion. Respondents therefore respectfully request that the Court utilize its authority pursuant to Rule 84.17 to order a rehearing so that the issues may be addressed.

I. Respondents' Right to Due Process

In *Furlong*, the Court determined that when reviewing non-contested administrative proceedings, "the circuit court does not review the administrative record, but hears evidence, determines facts, and adjudges the validity of the agency decision." 189 S.W.3d at 165. In this case, the Circuit Court carefully followed this Court's guidance in *Furlong* by hearing evidence, finding facts, and expressly determining an abuse of discretion existed. The process outlined in *Furlong* ensures § 536.150 is applied in a way that affords citizens, who may have wrongly been denied a permit, due process. As this Court unanimously held:

> 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***.

189 S.W.3d at 167 (emphasis added). The City has admitted this was a non-contested case in which adequate procedural formality and protection was not provided at the city council level. (Tr. 25). Pursuant to *Furlong* and the fundamental right to due process, Respondents must therefore have the opportunity to have a court "present evidence" and have a court "determine the controversy." *Id.* Complete deference to a city council decision due to reservation of "full authority" to reject a permit in an ordinance is inherently violative of this principle.

The due process implications of the City's position have been central to this case, but appear to have been overlooked in the Court's opinion. Rehearing is therefore proper.

II. Respondents' Right to Equal Protection of the Law

Respondents have raised 14th Amendment equal protection issues concerning the city council's decision since the very outset of this lawsuit (D2, ¶ 42). Specifically, Respondents raised in their Petition that, "in light of the City's prior approval of Mobil on the Run's CUP application, the City's denial of QuikTrip's CUP Application constitutes the discriminatory application of land use restrictions among similarly situated landowners in violation of 14th Amendment of the United States." *Id*. At trial, evidence

was elicited to support this. (Exhibit 44, pp. 28-29). The same argument was then raised on appeal.

Accordingly, this constitutional issue has been properly preserved and raised before the Court, but was nonetheless not addressed in this Court's opinion and appears to have been deemed moot due to the city's reservation of discretion in the ordinance. Affording such gravity to a city's own reservation of "full authority" to reject a permit – without regard to the specific approval criteria otherwise enumerated in its ordinance – allows the city to arbitrarily pick and choose who is issued a permit. It could choose to deny a permit based on an applicant's race, gender, or simply because someone on the city council has personal differences with the applicant. The former situations would be unconstitutional under any circumstances, and the latter is unconstitutional if the city is treating similarly situated landowners differently. *City of Sugar Creek v. Reese*, 969 S.W.2d 888, 893-94 (Mo. App. 1998) (The "Equal Protection clause prohibits the discriminatory application of land use restrictions among similarly situated landowners.").

Regardless, broad discretionary language in an ordinance simply cannot overcome a violation of equal protection of the law. There does not appear to be any basis to prevent a municipality from applying the same rationale to the issuance of other types of permits, such as marriage licenses and occupancy permits. Respondents have properly raised the equal protection issue at every instance in this case. The Court has not addressed this issue in its opinion, and a determination on the issue in Respondents' favor would be dispositive. Rehearing is therefore proper.

III. There Has Been No Requisite Finding to Invoke Discretion Under the Ordinance

In determining that the City reserved "full authority" to reject a conditional use permit, the Court cited to the portion of Section 405.1070 that reads as follows: "the City *reserves full authority* to deny any request for a conditional use[.]" Opinion, p. 6 (citing Section 405.1070(A)(2)) (emphasis in opinion). But the full language of the provision provides:

> [T]he City reserves full authority to deny any request for a conditional use, to impose conditions on the use or to revoke approval at any time, ***upon a finding*** that the permitted conditional use will or has become unsuitable and incompatible in its location ***as a result of any nuisance or activity generated by the use***."

(Emphasis added). Thus, the City only chose to retain "full authority" to reject a permit upon a ***finding*** that the use is unsuitable "as a result of any nuisance or activity generated by the use." *Id*. No such finding was ever made in this case, nor has it ever been suggested by the City that the proposed use meets the elements of a nuisance. Accordingly, the operative provision is not applicable to this particular case and rehearing is proper.

IV. No Evidence Supporting the City's Position

From an immediate practical standpoint, the opinion leaves developers and property owners across the state with an acute uncertainty as to how their land can be used, in that a city council appears to now be able to reject a proposal that satisfies the city's own approval criteria and has been approved by city staff – as was the case here. Specifically, the record in this case contains the remarkable circumstance that the city's

own corporate representative admitted at trial that the permit should have been issued. (Tr. 239-240; Tr. 244; Exhibit 44, p. 36). There was simply no evidence presented before the city council or at trial from which the application could have been lawfully rejected.

Indeed, in its discussion regarding the specific evidence presented at trial, the opinion provides as follows:

> In this case, the circuit court properly heard evidence in the trial *de novo*. Some of this evidence included facts, which it determined would meet section 405.1070(E)'s factors supporting issuing the CUP. ***The circuit court also heard evidence there was opposition to the CUP from the City's residents***. The circuit court found that, because there was evidence presented supporting a finding each of section 405.1070(E)'s six factors were met, the City's refusal to issue the CUP was unlawful, unreasonable, arbitrary, capricious, and constituted an abuse of discretion.

Opinion, p. 6-7 (emphasis added). The mention of opposition from residents is the only discussion in the opinion of the case the City presented at trial. Rightly so, as the existence of resident opposition was the crux of the City's basis for rejecting the application. But resident opposition is entirely irrelevant to the six standards outlined in the applicable ordinance, *see* Section 405.1070(E), and the City did not present any evidence relating to the factors that could support its denial of the CUP. The Court nonetheless reversed the circuit court's decision, rather than remanding, despite the lack of any evidence that could lawfully support the City's decision. Rehearing is therefore proper.

CONCLUSION

For the reasons set forth above, Respondents respectfully request that the Motion for Rehearing be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this 4th day of January, 2023, a true and accurate copy of the foregoing was via the Court's electronic filing system upon all counsel of record.

By: *Gerard T. Carmody*