

# Discretion is the better part of ... your CUP ordinance

BG Olive & Graeser LLC v. City of Creve Coeur, 658 SW3d 44 (Mo banc  
2021) aka Creve Coeur QT decision

July 2023



Carl J. Lumley

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## Key Holding

Mo Supreme Court reversed without remand, holding that in judicial review of noncontested case pursuant to 536.150 RSMo, **“the circuit court should have reviewed the City’s determination based on the evidence rather than making its own independent decision regarding issuance of the CUP.”**



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## No Surprise?

Should not be a surprising result, given that the statute says:

“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.**”

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### And Yet ...

While prior court opinions recited the statutory text, the resulting decisions often seemed contradictory

Plaintiffs argued City had no discretion because there was evidence which would support issuance of the CUP

And trial court proceeded to make its own decision as if it were the city council, and mandated issuance of CUP

And Court of Appeals affirmed

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### Background – the application

Proposal to replace an aging strip center with a large, modern 24-hour Quik Trip – 16-pump gas station, convenience store, with fast- food restaurant offerings



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### Background – City process

- Thorough staff review – dozens of plan modifications, 20 conditions of approval accepted by applicant, resulting in **staff recommendation of approval**
- Three PZ meetings/public hearing – hours of public comment
- Two council meetings/readings – lots more public comment
- Largely remote proceedings due to COVID
- PZ majority recommended denial (one dissent)
- Council motion to approve the CUP ordinance failed **unanimously**

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## Background – the trial

First in-courtroom trial for judge after return from COVID

### Plaintiff witnesses/evidence

- Property owner – well regarded, good corporate citizen
- Quik Trip rep – did not downplay QT business model
- Zoning expert – hired by cities frequently (and currently by Creve Coeur)
- Traffic engineer – hired by Creve Coeur often
- Appraiser – thorough work, no opposing opinion available

### City witnesses/evidence

- City Dept Head who had recommended approval, but at trial explained City comprehensive plan, how it was developed, and how decision was up to City Council under the ordinance, not him (plaintiff put plan and ordinances into evidence)
- Most active Resident
- Exhibits - traffic detail showing impact on the neighborhood, council & PZ minutes

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## Background – City Comp Plan

“The Vision for East Olive is to create a **walkable corridor** of destination retail boutiques, **neighborhood service businesses**, small-scale restaurants, attached townhomes, and low-density multi-family homes and single family homes. Development of the East Olive corridor should encourage pedestrian access from adjacent neighborhoods and prioritize walkability between neighboring lots while accommodating car access and easy parking.”

Developed by extensive process, with high citizen engagement and involvement (and recorded with County)



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## Background – the Ordinance

- “The City Council may authorize by ordinance, under prescribed conditions, the construction or undertaking of any conditional use that is expressly permitted as a conditional use in a particular zoning district; **however, the City reserves full authority to deny any request for a conditional use ...**”
- The City Council shall not approve a conditional use unless it finds that the application and evidence presented clearly indicate that the proposed conditional use:
- will meet six criterion, including “the applicable provisions of the City’s Comprehensive Plan”

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## Just for fun, more challenging facts

Two service stations nearby, both there for decades (however at a busier intersection)

One of them recently completely redone and upgraded with City approval – flashy new Mobil on the Run with large car wash



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## Takeaway No. 1

- If you don't have a current (recorded) comp plan, you have a problem
- But it is hard to impress on judges the significance of the plan when you do have one (nonetheless, don't give up)



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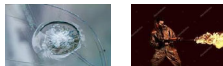
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## Takeaway No. Two

- It is better to draft a "bulletproof" proposed judgment than a totally one-sided "scorched earth" version



- Would have been more difficult appeal if the judgment did not clearly indicate trial court was remaking the decision rather than reviewing it

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### Takeaway No. C

- Very important to expressly retain full Council/Board discretion in your CUP ordinance in the noncontested context
- Some city attorneys prefer the contested case approach at the local level, but consider the burden of a full trial on your elected officials (and the prospect of cross-examination of residents)

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### Takeaway Fourth



- While the Supreme Court referred to evidence of resident opposition, it ultimately spoke of the council discretion regarding issuance of the CUP
- IMHO, the case does not stand for proposition that bare resident opposition is sufficient basis for denial
- But your residents will likely assert otherwise (be prepared)

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### Takeaway Number 5

- Consider enacting a “record of decision” process to apply when the vote on a CUP ordinance fails
- At trial, used detailed council and PZ minutes as evidence decision was not arbitrary
- But would have been helpful to have a clear written rationale approved by council majority rather than just the negative vote on the ordinance and individual comments in the minutes

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## Takeaway Last But Not Least

- Doesn't hurt to retain former Missouri solicitor general Jim Layton to argue the case in Supreme Court



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## Thank you

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