IN THE CIRCUIT COURT OF THE COUNTY OF ST. LOUIS
STATE OF MISSOURI

FILED
AUG 1 5 2016
Joan M. Gilmer
Circuit Clerk,
St. Louis County

WESTMINSTER CHRISTIAN ACADEMY d/b/a WESTMINSTER CHRISTIAN ACADEMY, a non-profit corporation	)	
Relator/Plaintiff,	)	Cause No: 15SL-CC03523
vs.	)	Division 18
CITY OF TOWN AND COUNTRY,	)	
Respondent/Defendant.	)	

ORDER AND JUDGMENT

Now before the court is Relator/Plaintiff/Appellant Westminster Christian Academy's ("Westminster") Appeal for Judicial Review of the Denial of Bill No. 15-47 (An Ordinance Approving a Conditional Use and Authorizing a Conditional Use Permit for Outdoor Athletic Facility Lighting and a Permanent Public Address System for Westminster Christian Academy at 800 Maryville Centre Drive). This court affirms the Town and Country Board of Aldermen's ("Board") decision to deny Westminster's conditional use permit ("CUP") request.

BACKGROUND

On October 13, 2008, the Board passed Ordinance Nos. 3370 and 3369, which were both signed by the Mayor on October 18, 2008. Ordinance No. 3370 provided approval for Westminster's preliminary site development plan for a campus located at 800 Maryville Center Drive, 13600 South Forty Drive and 679 Woods Mill Road in the city of Town and Country. This site is approximately 66.8 acres. Ordinance No. 3370 explicitly noted that approval of the plan "exlcud[ed] entirely any stadium lighting," and that "[t]here shall be no

public address system, concerts or bands in the stadium except as permitted by a Conditional Use Permit." Ordinance No. 3369 rezoned the site from Suburban Estate (SE) and Estate (E) Zoning Districts to the Major Educational Campus (MEC) Zoning District.

On August 23, 2010, the Board passed Ordinance No. 3528, which approved an amended final development plan and authorized the plan's certification; the Mayor signed the ordinance on August 24, 2010. In addition to noting that previous conditions remained in effect, the ordinance plainly stated, "All fields and tennis courts remain unlighted . . . ."

Westminster admitted that stadium lighting was contemplated in the original site development plan and indicated that it withdrew stadium lighting from its initial request "[a]fter receiving initial neighborhood questions/concerns about lighting, and taking in to account the financial challenges of completing the development . . . to avoid potential delays . . . and to allow additional time for Westminster to improve the case and consensus for stadium lighting support." Westminster maintains that it did not indicate that it would refrain from pursuing stadium lights in the future. Westminster installed empty conduit under the field and access panels for future light poles during the initial site development work as a cost-saving measure in anticipation of pursuing field lights again in the future.

On April 8, 2015, Westminster hosted a meeting "to present information regarding plans for Westminster's Athletic Program Upgrade Project." The meeting invitees included: Arlington Oaks and Old Woods Mill Manor subdivision residents; Delmar Gardens West; and the CenturyLink, Kellwood, and J.W. Terrill office buildings.

On May 5, 2015, Westminster submitted a CUP application to the Board; Westminster revised this application on July 24, 2015. The CUP request sought field lighting and a permanent public address system ("PA") for Westminster's football stadium. Westminster petitioned for

permission to use lighting for twenty-five (25) nights per calendar year solely to support school-related programs including: athletic games and practices, school assemblies, and recreational events and activities. The application specifically stated that the lights would not be used: past the end of the league-sponsored football season (typically mid-November); during the months of December, January, and February; for any events which would involve light or PA usage after 10 p.m. (unless the lights and PA were necessary to conclude a game that had been affected by an official weather delay); for any non-school related and sanctioned events; or for outdoor concert or any other events, unless previously approved by the city.

On May 20, 2015, the Planning and Zoning Commission of the City of Town and Country ("P & Z Commission") held a meeting at which it considered requests for approval of both Westminster's Amended Final Site Development Plan and Westminster's CUP request for outdoor athletic facility lighting and a permanent PA system. In addition to the lights and PA system, the amended site development plan included construction of a tennis pavilion and a flag pole. The P & Z Commission members unanimously voted to consider the proposed amendment "significant" (requiring a public hearing).

The City Planner, Melanie Rippetoe, entered exhibits into the record, including the Development Office's file. The Development Office's file included a staff report titled "Agenda Item 4, Planning and Zoning Commission, May 20, 2015." This report recommended that the amendment be found "significant." The report noted that, although the amendment "[was] consistent in purpose and content with the proposal as it was last advertised for public hearing, the fixed lights were withdrawn from the plan prior to approval" and that the Amended Final Site Development plan conformed to City Zoning Regulations. The file also included a list of conditions relating to the proposed improvements. The P & Z Commission then held a public

hearing. The hearing included a description of the project, testimony regarding the reasons for the project, and testimony from light and acoustic consultants regarding the project's projected impacts. Twenty-three people made statements during the public comments portion of the hearing.

The P & Z Commission unanimously voted to recommend approval of the Amended Final Site Development Plan for the tennis pavilion and flag pole only, with conditions. The P & Z Commission then unanimously voted to recommend denial of the CUP with conditions 1-10 as set forth in the staff report.

The Board addressed Westminster's Amended Final Site Development Plan and CUP request at its August 10, 2015 meeting. Both proponents and opponents of the CUP attended the meeting and presented evidence.

Town and Country's Zoning Regulations regarding standards for conditional use read: "[t]he Board of Aldermen *shall not approve* any conditional use permit application, or any amendment to an existing conditional use permit, which they determine will: 1. Substantially increase traffic hazards or congestion; 2. Substantially increase fire, health or any other public safety hazards; 3. Adversely affect the visual coherence, predominant usage, or development character of adjacent neighborhoods; 4. Adversely affect the general welfare of the community; 5. Overtax public utilities, service or other municipal facilities; 6. Be developed and operated in a manner that is physically and/or visually incompatible with the permitted uses in the surrounding areas; 7. Substantially increase storm water drainage on other lots; *or* 8. Create a nuisance." (Section 405.190, City Zoning Code) (emphasis added). The disjunctive quality of the ordinance is noteworthy. Under the ordinance, if the Board finds even one of the negative effects would be triggered by a requested use, the Board has to deny the CUP request. The ordinance also requires

that "[a]ll conditional uses, if granted, shall observe and be subject to all other regulations and restrictions otherwise applicable to permitted uses in the district within which the proposed use is to be located, unless more stringent requirements are imposed in connection with a condition imposed as part of the granting of the conditional use." Therefore, to meet City Zoning Code requirements a requested CUP must not trigger any of the eight negative effects of section 404.190(A) and must meet the zoning district's existing code requirements (or more stringent requirements). Meeting standard zoning requirements is not enough to grant a CUP.

The Board determined that granting Westminster's CUP application would result in four of the negative effects: "adversely affect the visual coherence, predominant usage or development character of adjacent neighborhoods" (Effect 3); "adversely affect the general welfare of the community" (Effect 4); "be developed and operated in a manner that is physically and/or visually incompatible with the permitted uses in the surrounding areas" (Effect 6); and "create a nuisance" (Effect 8). As a result, the Board denied Westminster's request for a CUP. This appeal followed.

APPLICABLE LAW

A legislative body of a city acts administratively in granting conditional use permits. *Williams v. City of Kirkwood*, 537 S.W.2d 571, 574 (Mo. App. 1976). "[Conditional use permits] allow[ ] a land use authorized by a local legislative body and deemed conducive to the general welfare of the community, but which may be incompatible with the basic uses in the particular location in relation to surrounding properties unless certain conditions are met." *Gray v. White*, 26 S.W.3d 806, 817 (Mo. App. E.D., 1999).

A city's denial of a CUP is subject to judicial review by a trial court to determine "whether the agency action is unconstitutional; is in excess of the agency's statutory

authority or jurisdiction; is unsupported by competent and substantial evidence on the whole record; is unauthorized by law; is made upon unlawful procedure or without a fair trial; is arbitrary, capricious, or unreasonable; or involves an abuse of discretion" based on the record created before the administrative body. *450 N. Lindbergh Legal Fund, LLC v. City of Creve Coeur, Missouri*, 477 S.W.3d 49, 53 (Mo. App. E.D., 2015). This Court cannot substitute its judgment for that of the administrative tribunal. *State ex rel. Karsch v. Camden County*, 302 S.W.3d 754, 756 (Mo. App. S.D., 2010).

The record as a whole must contain sufficient competent and substantial evidence to support the decision. *Albanna v. State Bd. of Registration for Healing Arts*, 293 S.W.3d 423, 428 (Mo., 2009). "Substantial evidence denotes competent evidence that, if believed, would have a probative force upon the issues. Competent evidence is defined by Missouri courts as relevant and admissible evidence that can establish the fact at issue." *City of Kansas City v. New York-Kansas Bldg. Associates, L.P.*, 96 S.W.3d 846, 861 (Mo. App. W.D., 2002) (internal citations omitted). The evidence is no longer reviewed in the light most favorable to the agency's decision. *Albanna*, 293 S.W.3d at 428.

"[The competent and substantial evidence] standard would not be met in the rare case when the [agency's decision] is *contrary to* the overwhelming weight of the evidence." *Id.* (emphasis added). "If the evidence before an administrative body would warrant either of two opposed findings the reviewing court is bound by the administrative determination and it is irrelevant that there is supportive evidence for the contrary finding." *Davco Food Inc. v. City of Bridgeton*, 725 S.W.2d 32, 34 (Mo. App. E.D., 1986).

Even though the evidence is not viewed in the light most favorable to the agency's decision, the agency is still "the sole judge of witness credibility and the weight and value to give

to the evidence." *Lindenwood Care Corp. v. Missouri Department of Social Services*, 466 S.W.3d 707, 713 (MO. App. W.D., 2015) (quoting *Faenger v. Bach*, 442 S.W.3d 180, 189 (Mo.App. W.D., 2014). As the *Chaminade* court noted, "[z]oning often involves questions of sensitivities and perceptions which are appropriate for political rather than judicial resolution." *Chaminade College Preparatory, Inc. v. City of Creve Coeur*, 956 S.W.2d 440, 442 (Mo. App. E.D., 1997).

DECISION

Appellant, Westminster, has requested that this court enter an Order and Judgment that the City's decision is not supported by competent and substantial evidence in the record and is illegal and discriminatory, treating similarly situated applicants differently. For the following reasons, this court denies Appellant's request and affirms the Board's decision to deny Westminster's CUP request.

Westminster and the City presented the Board with extensive evidence at the public hearing. Westminster hired experts, who explained the project's details and predicted its impacts. The experts provided evidence in the form of measurements, maps, and highly technical testimony. They concluded that the project would, at the very least, meet code requirements and that it would not negatively impact property values.

Each of the neighboring subdivisions, Old Woods Mill Manor and Arlington Oaks, had residents speak against the project. Several residents expressed dissatisfaction with the current noise levels during Saturday games but said that they tolerated the noise because they knew it would end in the evening and because they wanted to be good neighbors. Some neighbors also noted that Westminster was predicting higher turnouts at Friday night games and that, while the PA system would have a control stop feature, no such feature could be installed on crowd noise.

Rob Obert, a resident of Arlington Oaks who trained in otolaryngology at Washington University, explained that "sound affects the human organism in a much different way than sound affects a decibel meter." He explained that some noise, like the noise from the nearby highway, is "tonal noise." This noise does not vary much in pitch or frequency, so human brains can habituate the noise. He stated that spoken language over a PA is different and cannot be habituated in the same way.

Additionally, the neighbors testified as to the quality and character of their neighborhood, which they repeatedly described as tranquil. Rodney Rowe, who lives in Old Woods Mill Manor subdivision, noted that the neighborhood does not have streetlights or sidewalks. Light pollution was a frequent concern. Several neighbors expressed displeasure with the aesthetic impact 80-foot poles (mounting large light fixtures) would have even when the lights were not in use.

A few neighbors also expressed concerns related to bringing large crowds, of mostly teenagers, into the vicinity at night. These concerns focused on post-game activities and celebrations. Neighbors were concerned about safety and also worried about additional noise.

Each subdivision presented a petition against the lighting and sound project. Old Woods Mill Manor's petition had signatures representing 45 of the 53 homes in the neighborhood, and Arlington Oak's petition had signatures representing 29 of 30 homeowners.

Westminster has dismissed this testimony as "some neighbor opposition" and declared that it is speculative, irrelevant, and not competent and substantial evidence. Westminster, however, "does not cite this Court to case law and this Court has been unable to find case law which says that an administrative body must accept and defer to expert testimony over that presented by lay witnesses." *State ex rel. Karsch*, 302 S.W.3d at 762. Additionally, Westminster's declared purpose for requesting this CUP was to create a Friday night football

community event at the school. Neighbor concerns regarding the impacts such an event would have are far from irrelevant, especially considering the nature of the eight enumerated negative effects that trigger a CUP request denial.

Neighbor testimony has been recognized as competent and substantial evidence in Missouri. *See Windy Point Partners, L.L.C. v. Boone County ex rel. Boone County Com'n*, 100 S.W.3d 821, 825 (Mo. App. W.D., 2003). In *Windy Point Partners, L.L.C*, the Planning and Zoning Commission held a public hearing which, in relevant part, addressed a CUP request related to a mobile home park. *Id.* at 823. The CUP's proponent presented a traffic study and appraisal studies to support its request. *Id.* Seventeen "area residents" spoke against the project. *Id.* Some of those residents' comments related to concerns regarding real estate values and traffic problems. *Id.* Notably, two of the residents raised concerns about the current traffic conditions and their beliefs that the project would worsen the situation. *Id.* at 825. The Court of Appeals noted that "the combined testimony of the neighbors constituted competent and substantial evidence that the flow of traffic would be hindered if the conditional use permit was granted." *Id.*

This testimony is similar to that made by Town and Country residents regarding the Saturday football game noise and their concerns about having higher attendance and more noise on Friday nights. Like in *Windy Point Partners*, the Board chose to weigh the testifying neighbors' opinions, concerns, and assertions heavily in choosing to deny the CUP application. This court cannot re-weigh the evidence or independently evaluate witness credibility. *Lindenwood Care Corp.*, 466 S.W.3d at 713 (quoting *Faenger*, 442 S.W.3d at 189).

The Board's decision is not "contrary to the overwhelming weight of the evidence." *Albanna*, 293 S.W.3d at 423. The Record contains sufficient competent and substantial evidence

to support the Board's conclusion that granting Westminster a CUP for field lighting and a permanent PA system would "adversely affect the visual coherence, predominant usage or development character of adjacent neighborhoods;" "adversely affect the general welfare of the community;" "[cause development and operation] in a manner that is physically and/or visually incompatible with the permitted uses in the surrounding areas;" and "create a nuisance."

Further, the Board's discretionary option to impose conditions on the CUP was not triggered because the Board determined that the proposed project implicated four of the negative effects listed in Section 405.190. Therefore, the Board did not have to consider imposing conditions.

Westminster has also asserted that the CUP request denial was discriminatory because the Board previously granted Principia and Christian Brothers College High School ("CBC") conditional use permits. It is true that cities are "not free to pick and choose between similarly situated applicants . . . ." *Ford Leasing Development Co. v. City of Ellisville*, 718 S.W.2d 228, 233 (Mo. App. E.D. 1986). It is not clear, though, that the applicants are "similarly situated" in this case.

In *Ford Leasing Development Co.*, Ford Leasing Development Company ("Ford") applied for a CUP to allow construction of an additional dealership to sell and service new and used Lincoln-Mercury automobiles. *Id.* at 229. Frank Bommarito Oldsmobile ("Bommarito") also applied for a CUP to develop a sales and service building. *Id.* Notably, Ford submitted its CUP application before Bommartio, and the relevant properties were directly across the street from each other. *Id.* Bommarito's CUP request was granted, and Ford's was denied. *Id.* Additionally, Bud Anderson Ford Company had previously been granted a CUP for an AMC Jeep Dealership on the same land that Ford's CUP application related to. *Id.* The City

distinguished Ford's CUP application and Bommarito's CUP application because Bommarito's application involved only the expansion of an existing agency, whereas Ford's involved the creation of a new agency. *Id.* at 233. The court did not find, "any evidence in the record to support a distinction between the two applicants *under the tests provided in the Ordinance*." *Id.* (emphasis added).

In the present case, the properties are not across the street from each other as they were in *Ford Leasing Development*. *Id.* at 229. At the Board's public hearing, Westminster's attorney said, "In this case, this site is unique, like all cites. CBC was unique. Principia was unique."

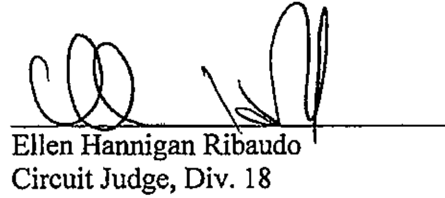
In addition to the site differences, the CUP details also distinguish the cases. While it is true that CBC's CUP allows light use 28 nights a year, the CBC CUP includes a provision that "[s]tadium light fixtures shall be on retractable poles which shall be retracted to no more than twelve feet in height when not in use." Principia's CUP does not limit the number of nights a year that lights can be used, but it does contain provisions that "[n]o such lighting structure shall exceed 50 feet in height at any point around the field," and that "[a] public address system shall not be permanently installed at the subject field and should same be so installed the applicant will return to seek approval of the City for such a system." The site differences and unique CUP requirements could definitely impact the analysis regarding whether the negative effects are triggered; the three CUPs can be distinguished under the ordinance's test. Therefore, the Board did not discriminate against Westminster in denying the school's CUP request.

CONCLUSION

Wherefore, for the above stated reasons, the Court hereby denies Westminster's request that this Court enter an Order and Judgment that the City's decision is not supported by

competent and substantial evidence in the record and is illegal and discriminatory, treating similarly situated applicants differently. The Board's decision is hereby affirmed.

SO ORDERED this 15 **day of** Aug**, 2016.**



Ellen Hannigan Ribaudo
Circuit Judge, Div. 18