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

RELIANCE BANK,	)	
	)	
Petitioner,	)	No. 15SL-CC01612
	)	
vs.	)	Division 12
	)	
CITY OF DES PERES, et al.,	)	
	)	
Respondents.	)	

RESPONDENTS' OBJECTIONS TO THE SPECIAL MASTER'S REPORT

This Court should not accept the Report of the Special Master because: 1) the Report erroneously omits substantial and competent evidence, much of it uncontested, that supports the discretionary decision of the Board of Aldermen of Des Peres to deny a conditional use permit ("CUP"); 2) the Report erroneously applies the wrong standard of review to an administrative decision of the Board of Aldermen, which is entitled to deference under the Missouri Administrative Procedure Act, and can only be set aside by clear and convincing evidence that the Board's **decision,** arrived at in the exercise of the Board's discretion, was unsupported by competent and substantial evidence upon the whole record; unauthorized by law; procedurally unlawful; arbitrary, capricious, or unreasonable; or involves an abuse of discretion; and 3) the Special Master substituted his discretion for that of the Board improperly analyzing the facts adduced at the evidentiary hearing in a manner that allowed the Master himself to decide whether or not to issue the CUP, rather than analyzing the evidence on the whole record to determine whether the evidence, even if subject to two opposite findings, could support the **decision** of the Board of Aldermen. *Prince v. County Commission of Franklin County*, 769 S.W.2d 833, 835 (Mo. App. E.D. 1989) ([n]othing short of clear and convincing evidence can

overcome the presumption of the validity afforded the administrative body's decision" and "If evidence permits two opposite findings, we should accept that of the administrative agency.").

The evidence in the case was primarily adduced through dueling traffic and sound experts[1]. From the battle of experts, substantial and competent evidence was adduced that could lead to two opposite conclusions regarding the traffic and sound impacts associated with the proposed CUP project – a Starbuck's drive-through facility associated with an existing bank use that generates little traffic or noise. Given the conflicting evidence on the issues, and clear uncontroverted evidence of increased traffic volumes and hazards during key hours of the day and of increased noise levels to be generated by Starbucks customers before 7 a.m. and as late as 11 p.m., the Board's decision should have been upheld.

This Court is not bound to accept the Special Master's report as written. Given the errors committed in the Report, Respondents urge the Court to examine the Record created at the hearing, and to issue its own findings of fact and conclusions of law that are consistent with the proper standard of review of an administrative zoning decision in a non-contested case context, keeping in mind that the discretion for such decisions has been delegated by the State Legislature not to the Special Master, but to the elected officials of the City of Des Peres. Section 536.150 RSMo ("**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**.")[2]

[1] The Special Master clearly acknowledged the expertise of the City's two experts and Petitioner's traffic engineer (Tr. at 675; 807)

[2] To allow the judiciary to exert zoning authority would violate Artice II, Section 7 of the Missouri Constitution that mandates a separation of powers.

For these reasons, Respondents file their objections to the Special Master's Report, and the Court should overrule the Report and correctly apply the evidence, which supports the decision of the Board of Aldermen.

ARGUMENT

I. The Special Master Omitted Relevant and Often Uncontested Evidence That Supports the Decision of the Board of Aldermen, Which Should Be Affirmed.

The Report omits material facts and uncontroverted facts that support the decision of the Board of Aldermen. Under the proper standard of review (as discussed in detail below in Section III), these facts must be reviewed through the prism of whether the decision is supported by the evidence. To do otherwise, simply allows the Special Master to substitute his decision for that of the Board of Aldermen, which Section 536.150 does not permit. The statute does not say the Court shall hold a trial *de novo* without reference to the ***decision*** of the administrative body. To the contrary, the statute requires that the decision be viewed in light of all the evidence adduced at the hearing, and in particular, the Court should review the decision with full knowledge of the facts related to traffic and noise impacts and how that testimony supports the Board's decision.

The Report omits material evidence, much of which is uncontested, that objectively supports the decision of the Des Peres Board of Aldermen, as the following summary amply illustrates:

Traffic impacts – Report at ¶33 and ¶34.

In the Report, the Special Master considered the traffic impacts resulting from the proposed use, and concluded that:

¶33 – The streets adjacent to the proposed use have sufficient capacity to service any increased traffic volume associated with the proposed use while maintaining adequate and reasonable levels of service for the community.

¶34 – The number of transit movements on abutting streets and on minor streets in the neighborhood to be generated by or associated with the proposed use will not cause significant increases in hourly or daily traffic levels.

In part, the Special Master relied upon the fact that no turning movement would see more than a single level drop in service levels (using an A to F scale) and that a single level drop from, for instance, a D to an E was not significant. The Special Master also concluded that because traffic backups created by the use would occur on the site, the adjacent streets would not be affected. In order to reach this conclusion, the Special Master overlooked important evidence, the majority of which is uncontroverted and to the contrary, including:

a) Mr. Shatto of the Lochmueller Group (a traffic engineer hired as an expert by the City) testified that Manchester Road is nearing its capacity for traffic on a daily basis, and has heavy bi-directional flows that make turning movements much more difficult on this five-lane major arterial roadway. [Tr. 693:22-24; 697:24-25; 698:1-4];

b) The corner radii of the driveway into the Property are extremely short, on the order of a five-foot radius [Tr. 702:18-25], which causes excessive deceleration of motorists turning into the driveway, or motorists on Manchester because of other motorists pulling out of the driveway because of the difficulty of turning into a very sharp turn [Tr. 703:5-20]. The sharp turn into the driveway is compounded

by its close location to Harwood Drive where another motorist might be trying to make a right turn out. [Tr. 704:3-10].

c) Mr. Shatto testified that, combined with the very heavy volumes of traffic going westbound on Manchester, the sudden deceleration expected is likely to increase rear-end collisions on Manchester. [Tr. 704:1-3].

d) The application could have contained a tapered turn into the Property, which would have lessened the safety hazard, but no such proposal was made to the Board of Aldermen or at trial. [Tr. 705, 706, 711].

e) The geometry of the hard right turn into the sight was not changed. [Tr. 712: 7-9].

f) Lee Canon with CBB Transportation Engineers and Planners ("CBB"), who served as a traffic expert for the Petitioner, did not do an analysis of the internal flow of traffic on the Property, the layout of which has secondary impacts on Manchester Road traffic that creates a significant safety concern for Mr. Shatto and his company. [Tr. 715-728:18].

g) Mr. Shatto testified that the safety concerns arise from the convergence of a series of facts related to the site layout: a high level of conflict of motorists crossing from several directions at the internal intersection at the end of the throat of the driveway; the location of bank and restaurant parking spots, including handicapped parking, for motorists driving north within the site; the location of the ATM and the inability of motorists to leave the ATM without making a three-point turn toward the west; motorists leaving the pick-up window and driving east toward the same intersection; the foregoing all create conditions that increase the

likelihood that someone driving into the site will be impeded and cause backing up onto Manchester Road. [Tr. 726-28].

h) These conditions give a motorist coming into the site a complex set of facts to mentally process in a short period of time, approximately two seconds, leading to a natural tendency to decelerate or stop. [Tr. 729-30].

i) There is insufficient flow or circulation within the site to allow the driveway off Manchester to flow freely, and the impedance likely to occur creates an operational concern on site, but also a safety concern for traffic on Manchester. [Tr. 730:16-22].

j) There would be a **significant increase in the morning hourly transit movements** into and out of the site from the proposed use, increasing the number from **5 to 200** in the morning hours as projected by CBB. [Tr. 695:23-24; 696:2-5].

k) Given the near capacity of Manchester Road to carry traffic and the significant increase in turning movements into and out of the Property, there is an increased likelihood of risk or safety hazards. [Tr. 698:3-14; 700:17-25].

l) Left turns out of the driveway of the Property onto Manchester Road degrade by two grade levels from a Level C condition to a Level E condition at peak hours during the day. [Tr. 731:6-9; 732:19-25; 733:1-6, 21-25; 734:8-13; Exhibit 6].

m) The Institute of Transportation Engineers establishes that 7.5 seconds is needed to make a safe left turn out of a site and accelerate to the flow of oncoming traffic. [Tr. 736:19-25].

n) CBB did not perform a gap analysis at the Property to determine whether there were sufficient gaps in traffic flows to allow opportunities during peak hours to make safe turns out of the site. **Mr. Cannon** presented a gap count, but admitted on cross-examination that it was flawed because he **counted only 4 second gaps**, which is the proper amount of time for a right turn, but he failed to account for left turns, which Cannon himself testified would take 8 seconds to complete safely into the center lane of the five lanes on Manchester Road. [Tr. 901:4-25; 902:1-18].

o) Mr. Shatto's company performed a gap analysis at the site immediately to the west and that analysis showed an estimated 27 concurrent gaps in the morning and 22 in the afternoon to complete left turns out of the site, using a proper 7.5 second time frame. [Tr. 737:1-6].

p) In the morning hours, there are 60 motorists who will want to make left turns out with only an estimated 27 concurrent gaps available for safe turns. [Tr. 738:22-24].

q) Therefore, motorists coming out of the site would either have to make a two-stage turn into the middle turn lane of the five lanes on Manchester (a maneuver not recommended by MoDOT) or make a quicker turn out than would be allowed by the expected time gaps available to make a safe turn. [Tr. 739:1-22].

r) The existence of the degradation in service levels from a C to an E or worse for left turns out of the Property supports the denial of the CUP by the Board of Aldermen in the opinion of Mr. Shatto. [Tr. 740:12-21; 741:5-10; 793:11-15; 794:1-7].

In sum, the decision to deny the CUP based upon traffic concerns was supported by the uncontradicted evidence adduced at trial, to wit: a) the operating conditions within the site; b) the degradation of conditions at the driveway; c) the site layout and flow of vehicles on the site and the effect on motorists entering the site; d) the parking layout; e) the placement of the ATM; f) potential stacking of cars onto Harwood; g) the precipitous increase in turning movements; h) the degradation of left turns from a Level C to a Level E condition, with a corresponding and significant decrease in the level of safety. [Tr. 795-820].

Accordingly, the City's decision to deny the CUP was not "unconstitutional, unlawful, unreasonable, arbitrary, capricious or involved an abuse of discretion."

(b) Sound Impacts - Report at ¶35.

In the Report, the Special Master considered noise impacts on the neighboring areas caused by the proposed use and concluded:

¶35 – The added noise levels generated by activities associated with the proposed use will not adversely impact the ambient noise level of the surrounding area and neighborhood.

In determining that the proposed used by the Petitioner would not adversely impact the neighboring area, the Special Master simply concluded that the sound generated by the Starbucks facility would be 54 to 58 decibels, which was the same as the ambient noise levels at the neighboring property. [Report at ¶35]. However, this finding overlooks significant uncontroverted testimony to the contrary, fails to account for the differences in existing ambient noise levels at different times of the day and ignores uncontested testimony that the Bank's noise expert did not take into account any noise that would be created by the customers of the Starbuck's facility, but only considered noise from the speaker at the order station. In addition, the Special Master omitted the following evidence, the majority of which was uncontested:

a) The location of the speaker to be used for ordering from the Starbucks restaurant was located at the back of the existing bank building on the north side of the Property about 65 feet from the nearest residence structure. [Tr. 564: 9-12; Tr. 636:3-22].

b) The proposed hours of the restaurant and drive-through were from **5:30 a.m. through 11 p.m. Sunday-Thursday and 5:30 a.m. to midnight Friday and Saturday.** [Reliance Exhibit 3, Page 4].

c) Placing the order station on the opposite side of the building would have been the best place to locate it because it would allow the bank building to serve as a shield from the noise of the order station and customer noise associated with it. [Tr. 565:22-25; 566: 8-22].

d) The City's ordinance requires consideration of "added noise levels generated by activities associated with the proposed use." [Reliance Exhibit 2, Page 3, ¶6f].

e) Added noise levels include all the noise of Starbucks plus all the noise that the customers make and their vehicles make. [Tr. 572: 12-19].

f) **Mr. Wentz did not make any actual measurements of any sounds by associated customer noise**. [Tr. 512:14-20; 495:21-25; 496:1-5].

g) Mr. Wentz did not even consider the City's ordinance, but only the St. Louis County noise ordinance. [Tr. 871:21-25; 872:1-20].

h) The Des Peres Code regarding CUPs does not include or incorporate by reference any part of the St. Louis County noise ordinance for purposes of granting or denying a CUP. [Exhibit 2; Tr. 664: 14-18].

i) Sound can only be "masked" if two sounds occur at the same time, at the same frequency and at the same amplitude (or one sound has greater amplitude than the other). [Tr. 576:8-25].

j) Sounds of the same frequency and amplitude virtually never occur at the same time. Tr. [577:1-6].

k) People notice intermittent sounds or changing sounds more than they notice constant sounds. [Tr. 580:23-25].

l) As a result of these acoustical principles regarding sound and noise, Mr. Schomer testified that the ambient noise levels measured by Mr. Wentz would not mask the sounds created by the Starbucks facility, which would produce much more noise than the ambient noise measured by Mr. Wentz. [Tr. 581-82; 583:3-5; 671:10-17; 672:1-14].

m) This is particularly true during the early morning and late night hours, when Wentz admits the ambient noise levels are much lower. Wentz presented a dirurnal cycle for the background or ambient noise showing the background to be 10 decibels quieter before 7 a.m., making the ambient noise levels at that hour to be between 44 and 48 decibels, which will not mask customer noise that will be between 54 and 56 decibels at that hour, and clearly not masked by ambient levels because those customer noises are significantly higher during those times before 7 a.m. [Tr. 603: 10-14; 609: 10-25; 667: 9-25; 668: 1; 673: 10-13; 674: 6-9; 676: 12-18; Exhibit E].

n) Mr. Wentz did not take any customer noise into account in his considerations. [Tr. 584:5-10].

o) Mr. Wentz's own graphics presented to the Board of Aldermen at the public hearing on March 9, 2015 showed an increase in ambient noise levels on neighboring properties. [Tr. 599-600; City Exhibit D].

p) Reliance proposed a sound barrier wall without absorptive materials that would be 40 feet long and 8 feet high at the northeast corner of the rear of the existing bank building. [Exhibit 3, Page 3].

q) The effectiveness of a sound barrier depends first on it being tall enough to break the line of sight between the source of noise and the receiver. [Tr. 586:18-20].

r) There is no evidence in the record to indicate that the sound barrier proposed would break the line of sight between the Starbucks ordering station and the second story window of the nearest neighboring house.

s) Sound also reflects off of hard walls, such as the brick walls of the existing bank building that would reflect in all directions, including to the second story of the nearest neighboring property. [Tr. 588, 590:12-23].

t) The barrier wall as proposed would not stop any sounds that are generated by customers or customer vehicles that occur past the point where the wall stops. [Tr. 591-92].

u) Mr. Schomer estimated that the decibel levels created by the Starbucks facility operation (which includes customer noise) would very conservatively be 54 to 58 decibels. [Tr. 610-10-25; 667:9-24];

v) He testified that car acceleration noises would be at the 50 decibel level, and before 7 a.m. that would be significantly higher than the ambient levels calculated by Mr. Wentz. [Exhibit E].

w) The most common decibel levels accepted nationally and internationally for residential land use is 55 decibels during the day and 45 decibels at night, as found in ANSI-S 12.9 and recommendations by the World Bank and the World Health Organization. [Tr. 676:14-21].

x) Even by Mr. Wentz's calculations, the proposed Starbuck's facility does not meet the commonly accepted decibel levels accepted nationally.

As such the decision of the City to deny the CUP based upon environmental noise impacts is supported by the evidence adduced at trial, to wit: (a) intermittent noise would not be masked by existing ambient noise levels, particularly during the early morning hours; (b) Petitioner failed to put any evidence on as to the noise that would be generated by customers or their vehicles; (c) Petitioner failed to adduce any evidence that would demonstrate that the proposed sound wall would screen vehicle noise as the vehicles travel down the Western edge of the Property, particularly in the early morning and late night hours; and (d) by his own admission, Mr. Wentz (Petitioner's sound expert) had presented information to the Board of Aldermen that demonstrated an increase to the ambient sound levels.

Again, the foregoing uncontested evidence should have been in the Report, and the Court should consider it in determining that the Board's exercise of discretion and its decision to deny the CUP should be affirmed because the decision was not unconstitutional, unlawful, unreasonable, arbitrary, capricious or an abuse of discretion.

II. The Special Master improperly substituted his discretion for that of the Des Peres Board of Aldermen.

Section 536.150.1 RSMo, sets forth the full standard of review pursuant to which this matter was tried:

> **When any administrative** officer or **body existing under the constitution or by statute** or by municipal charter or **ordinance shall have rendered a decision** which is not subject to administrative review, determining the legal rights, duties or privileges of any person, including the denial or revocation of a license, and there is no other provision for judicial inquiry into or review of such decision, **such decision may be reviewed by** suit for injunction, **certiorari**, mandamus, prohibition or other appropriate action, **and** in any such review proceeding the **court may determine the facts relevant** to the question **whether such** person **at the time of such decision** was subject to such legal duty, or had such right, or **was entitled to such privilege**, and may hear such evidence on such question as may be properly adduced, and the court may determine whether such decision, in view of the facts as they appear to the court, is unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion; and the court shall render judgment accordingly, and may order the administrative officer or body to take such further action as it may be proper to require; **but the court shall not substitute its discretion for discretion legally vested in such administrative officer or body**, **and** in cases **where** the granting or withholding of **a privilege is committed by law to the sole discretion of such administrative** officer or **body**, **such discretion lawfully exercised shall not be disturbed**.

(Emphasis added).

The clear and express language set forth in Section 536.150 RSMo, therefore, recognizes that a reviewing Court is not to substitute its discretion for that of the administrative body.

Chapter 536 deals with the review of administrative decisions by bodies with specialized knowledge and authority. Consequently, like all of Chapter 536, Section 536.150.1 RSMo clearly maintains deference to the City's exercise of administrative discretion interpreting and applying the criteria in the City's Ordinance.[3] The charge of this Court is to determine whether the zoning decision, made at the time that the Bank exercised its privilege of applying for a conditional use permit, is "unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion." In making such a decision, the Statute could not be more clear that "the court **shall not** substitute its discretion for discretion legally vested in such administrative officer or body . . . ." (Emphasis added). By a plain reading of the statute, even

[3] In the context of a Section 536.150 RSMo review there clearly is an important distinction between "findings" and the "decision" itself, which in this case was the denial of the CUP.

though the Special Master has now made an incomplete report of evidence to the Court, the Court must not: (1) substitute its discretion for that of the City's Board of Aldermen; or (2) disturb discretion lawfully exercised in cases where the granting or withholding of a privilege is committed by law to the sole discretion of such administrative body, by virtue of the exclusive vesting of the zoning power by the Legislature in municipalities (See Section 89.020 RSMo.). Thus, the burden of proof placed upon the Bank in this case is to show that the facts in the Record made by the Special Master clearly show that the Board's decision is not supported by competent and substantial evidence to the point where the Board's action was an abuse of discretion. That standard far exceeds a preponderance of evidence standard in an ordinary civil matter, and rightly so as the statute requires deference to the administrative body's exercise of discretion. The correct standard shows that in this case, a plethora of competent and substantial evidence before the Court supports the decision of the Board. The Court must, therefore, reject the Special Master's conclusions and re-examine the Record in the correct light as required by the governing statute.

While the Special Master may not agree with the Board of Aldermen's decision, as shown by Report, such a disagreement in and of itself is insufficient to warrant disturbing the **decision**. In fact, the Court of Appeals reaffirmed this established principle earlier this year in *St. Louis County, Missouri v. State of Missouri*, 482 S.W.3d 842 (Mo. App. W.D. 2016), wherein the Court stated that Section 536.150.1 "prohibits the court from substituting its discretion for discretion legally vested in such administrative office or body." *Id.* at p. 10 (internal quotations omitted). When the Court reviews the entire Record before it, the Court will plainly see that the omitted evidence is sufficient to affirm the Board's decision to deny the CUP, even though the

Special Master or the Court might have decided the case differently absent the existence of an administrative decision.

The majority opinion in *Long v. Bates County Memorial Hospital Board of Directors*, 667 S.W.2d 419, 421 (Mo. App. W.D. 1983), previously recognized this in stating that: "Appellants initially assert (and such assertion is correct) that the applicable standard of review . . . is whether the administrative body, with sole discretion to grant or withhold a privilege, in fact exercised its discretion lawfully." It would require an illogical reading of the statute to conclude that the Court (or the Special Master) may disregard the **decision** of the Board of Aldermen, when the entire point of review by the Court is to determine whether the decision was "unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion."

"Each word, clause, sentence, and section of a statute should be given meaning." *Hoffman v. Van Pak Corporation,* 16 S.W.3d 684, 689 (Mo. App. E.D. 2000). The interpretation advanced by the Special Master renders meaningless the statutory language contained in Section 536.150.1 RSMo which requires the Court to review the **decision** of the Board of Aldermen in this case.

Instead, the Special Master reviewed the evidence and determined that the Petitioner had satisfied the criteria for the issuance of a CUP. The Special Master concluded that the City's decision to deny the CUP was, therefore, "unlawful, unreasonable, arbitrary and capricious." To reach this conclusion the Special Master relied upon two cases. First, the Special Master cites to *Spurgeon v. Missouri Consol. Health Care Plan*, 481 S.W.3d 604 (Mo. App. W.D. 2016), wherein the Court of Appeals reversed the dismissal of a petition on a motion to dismiss. The standard used on such a motion, to determine whether a petitioner had stated a claim for review

under Section 536.150 by alleging that the agency acted unlawfully, does not inform the Court of the standard of review applicable after evidence has been adduced. *Spurgeon* is, therefore, inapplicable to this case.

Next the Special Master cites to *Curry Investment Co. v. Bd. Of Zoning Adjustment of Kansas City, Mo.*, 399 S.W.3d 106, 109-110 (Mo. App. W.D. 2013). In *Curry*, the Board of Zoning Adjustment (which was reviewing a SUP application), found that the petitioner had satisfied the requirements under the City's Code for a SUP to operate a pawnshop. The approval of the SUP, however, was conditioned upon the removal of two existing nonconforming signs. The trial Court concluded that there was an absence of any substantial and competent evidence that the requirement to remove the outdoor signs was related to the impact caused by the use of the property as a pawnshop. *Id.* at 108. In *Curry*, the requirement that the nonconforming signs be removed was in reality an exaction by the Kansas City, especially after the Board of Adjustment had expressly found the application satisfied the SUP criteria regardless of the sign.

Unlike *Curry*, the Des Peres Board of Aldermen neither found that the Des Peres CUP criteria had been met nor imposed any unrelated conditions to a CUP and, therefore, the decision before this Court was not, as in *Curry*, *de facto* an "arbitrary, capricious, unreasonable or unlawful" as the Special Master's Report suggests.

The issues of traffic and noise are, by their nature and the language of the Des Peres Zoning Code, both subjective and necessarily subject to interpretation by the Board of Aldermen in its informed exercise of discretion. Mr. Cannon, the Bank's traffic expert and in response to questioning from the Special Master, acknowledged the very subjective nature of what constitutes a "significant" decrease in traffic service levels:

> Q [Special Master]. Is there anything within the field of traffic engineering that defines what a significant increase is?

A [Mr. Cannon]. Not that I'm aware of, no, sir.

Q. Okay. So, this rests within the discretion of various traffic engineers; is that right?

A. Yes.

[Tr. 432 – 433].

Mr. Cannon himself recognized the discretionary nature of determining when a "significant" increase in traffic levels occurs. The uncontested evidence demonstrates that the daily and, in particular, certain hourly levels of traffic service will decrease; the only question before the Court is whether there was competent evidence adduced to support the determination that such decreases were "significant." In determining that the decrease was not significant, the Special Master did the very thing he is prohibited from doing under Section 536.150 RSMo, he substituted his discretion for that of the Des Peres Board of Aldermen, and ignored uncontested evidence that supported the Board's decision.

With respect to noise, Mr. Schomer testified that people are not noise meters. Instead, people respond to environmental noise based on their specific context. [Tr. 562: 16-22]. The evidence demonstrated that there would be negative impacts relative to noise experienced on the neighboring properties, particularly in the early morning hours and late night hours.

The Special Master overlooked this testimony and substituted his own discretion by summarily concluding that ambient noise levels would always mask new noise generated by the proposed new Starbucks' use. The Record does not support that conclusion for all hours of operations for the proposed CUP use. The Court should, therefore, review this evidence to determine whether the exercise of discretion by the Board of Aldermen as reflected in its decision was supported by the uncontested evidence that noise levels in the early morning hours and late at night would have a negative impact on the ambient levels of noise on neighboring

properties. As shown by the factual discussion in Section I of these Objections, a proper application of the evidence to the decision shows that the Board of Alderman was correct and its decision should be affirmed.

III. The Special Master did not apply the correct burden of proof in this case.

It is the law of this case that this matter has been tried as a non-contested case pursuant to Section 536.150 RSMo. [4] "In either a contested or a non-contested case, the private litigant is entitled to challenge the governmental agency's decision. The difference is simply that in a contested case the private litigant must try his or her case before the agency, and judicial review is on the record of that administrative trial, whereas in a non-contested case the private litigant tries his or her case to the court." *City of Valley Park v. Armstrong*, 273 S.W.3d 504, 506-507 (Mo. banc 2009). Under either a contested or non-contested case review, the reviewing Court is considering whether the decision is: (1) unconstitutional; (2) unlawful;[5] (3) unreasonable; (4) arbitrary; (5) capricious; or (6) involves an abuse of discretion.[6] *See* Sections 536.140 and 536.150 RSMo. This Court should never forget that this is the review of an administrative body vested with discretion to make the decision in the case, and that Missouri Courts defer to the discretion of those administrative bodies as required by the plain language of the statute:

> 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.

Section 536.150.

[4] The City maintains that this is not the correct standard of review of zoning matters, and does not waive such arguments for purposes of appeal. However, the City will not reargue those issues in these Objections.

[5] In lieu of simply stating "unlawful", Section 536.140 utilizes "in excess of statutory authority or jurisdiction of the agency" and "for any other reason unauthorized by law."

[6] There are additional grounds for reversal set forth Section 536.140 RSMo that are not pertinent to this case.

While the method of developing the factual record is different between contested case and non-contested case review, the standard of review of the decision is the same. The six factors for deciding whether an administrative decision is valid are the same in both contested case and non-contested case reviews. *See* Sections 536.140 and 536.150 RSMo. Accordingly, the Court is required, by long-established principles of statutory construction, to interpret the same words and phrases as having the same meanings. *See e.g. Cook v. Newman*, 142 S.W.3d 880, 891-892 (Mo. App. W.D. banc 2004) ("One rule of statutory construction is that the provisions of a statute are not read in isolation but construed together, and if reasonably possible, the provisions are harmonized with each other. . . Presumably, a word has the same meaning in every place used within a statute.").

Several cases have interpreted these words/phrases as they apply to the appellate review of a contested case. For example, in reviewing the issuance of a CUP under a contested review standard, the Court in *Prince v. County Commission of Franklin County*, *supra* at 835 (Mo. App. E.D. 1989) stated "[O]ur review of the administrative action encompasses whether it is unsupported by competent and substantial evidence upon the whole record; unauthorized by law; procedurally unlawful; arbitrary, capricious, or unreasonable; or involves an abuse of discretion." The emboldened language is equally applicable to non-contested case review. *See* Section 536.150 RSMo.

The *Prince* Court held that ***"[n]othing short of clear and convincing evidence can overcome the presumption of the validity afforded the administrative body's decision."*** *Id*. (emphasis added). The Court also held that, "If evidence permits two opposite findings, we should accept that of the administrative agency." *Id.*

As made clear by the plain language of Section 536.150, the City's decision is still entitled to the presumption of validity referenced in *Prince*. That presumption was ignored by the Special Master, and by doing so, he also ignored the last five lines of Section 536.150, which he is not entitled to do. The Court should correct this error by properly reviewing the evidence adduced at the hearing in the light required by Section 536.150 and controlling case law.

In *Longview of St. Joseph, Inc. v. City of St. Joseph*, 918 S.W.2d 364, 371 (Mo. App. W.D. 1996), in affirming a Trial Court's decision to uphold the denial of a Special Use Permit ("SUP"),[7] the Court held:

> Even if the circuit court disagreed with St. Joseph's interpretation of its ordinance, the court was obligated to give the city's interpretation much deference. "The interpretation placed upon a zoning ordinance by the body in charge of its enactment and application is entitled to great weight." *Taylor v. City of Pagedale*, 746 S.W.2d 576, 578 (Mo. App.1987). St. Joseph's interpretation was not so lacking of rationality as to render it arbitrary and capricious, especially given the city's search for assistance in the caselaw and considering the *Tohickon Valley Transfer* case before making its determination.

In *Hellmann v. Union School District*, 170 S.W.3d 52, 59 (Mo. App. E.D. 2005), the Court recognized in reviewing an administrative decision that "the presumption in favor of the Board's decision is strong and can only be overcome by clear and convincing evidence that the decision was arbitrary, capricious, unreasonable or an abuse of discretion."

In order to prevail, the Bank was required to establish by clear and convincing evidence that the City's decision to deny the CUP was "unconstitutional, unlawful, unreasonable, arbitrary, or capricious or involves an abuse of discretion." On the Record before this Court, that burden was not met. The substantial weight of the evidence clearly supported the decision of the Board of Aldermen, which was not unconstitutional, unlawful, unreasonable, arbitrary or capricious or an abuse of discretion.

[7] SUP and CUP are functional equivalents. *See e.g. State ex rel. Dotson v. County Commission of Clay County*, 941 S.W.2d 589, 592 (Mo. App. W.D. 1997).

Instead of applying the proper clear and convincing standard to the decision of the Board, however, the Special Master recommends only that the Petitioner establish that the CUP should have been granted based upon a preponderance of the evidence. [Report at ¶24 & ¶46]. In making this recommendation, the Special Master relied solely upon *dicta* from *State ex rel. Koster v. Morningland of the Ozarks, LLC*, 384 S.W.3d 346, 352 (Mo. App. S.D. 2012). In *Koster*, the State Milk Board had ordered the destruction of cheese produced by a manufacturer during a certain period of time due to the discovery of toxins including listeria. The manufacturer brought a review of the order under Section 536.150 RSMo.

In a discussion on a point of error unrelated to the Section 536.150 review, the appellant alleged that the trial Court had improperly reversed the burden of proof, requiring the manufacturer to prove that it had not illegally manufactured cheese under Section 196.545 RSMo. *Id.* at 352. In rejecting this argument, the Court noted that the trial Court set the burden of proof as being "a preponderance of the evidence that [the manufacturer's] cheese offended one or more of the proscriptions of Section 196.545,[8] and, to the extent applicable, that the cheese was 'offered, exposed for sale, or sold for human food purposes.'" *Id.* The Court held that the trial Court applied the correct burden upon the State requiring proof of Appellant's violation of the statute related to the unlawful sale of dairy products, not the standard of proof under Section 536.150.

Koster has no bearing on the proper review standard at issue in this case: whether the **decision** being reviewed was "arbitrary, capricious, unreasonable or an abuse of discretion." To hold otherwise would run contrary to the statutorily prescribed deference to the administrative body as required by the plain language of Section 536.150.

[8] Section 196.545 RSMo sets forth circumstances whereby the sale of dairy products can be deemed unlawful.

The Court should reject the Report of the Special Master and affirm the City's denial of the CUP in accordance with the substantial weight of the evidence.

Conclusion

For the reasons set forth herein, the City objects to the Special Master's Report, moves the Court to correct the findings and conclusions in light of the evidence and the correct standard of review, and asks that this Court set a hearing on the matter in accordance with Rule 68.01.

Respectfully submitted,

CURTIS, HEINZ, GARRETT & O'KEEFE, P.C.

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CERTIFICATE OF SERVICE

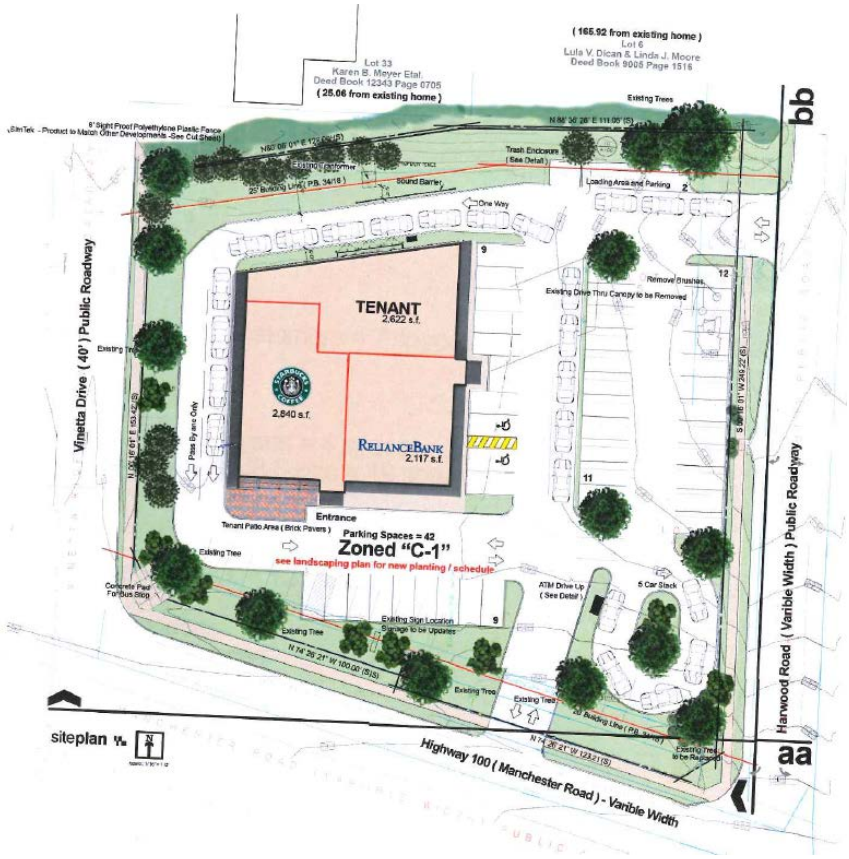
A copy of the foregoing was sent via the Court's electronic filing system this 20th day of May 2016, to all counsel of record.

/s/ Kevin M. O'Keefe

APPENDIX A

PROCEDURAL AND FACTUAL BACKGROUND

In December 2014, Reliance filed applications regarding the Property for: (a) site plan approval to remove existing bank drive-through facilities, re-route traffic patterns on the Property, install an exterior ATM device, install a drive-up food service window on the west side of the building and related order-taking device and drive-through lane on the north side of the building, and make changes to the existing structure, and (b) a CUP to allow a Starbuck's restaurant with drive-through service to be located on the Property.



Petitioner's Exhibit 3, Page 3.

The City's Municipal Code provides that no conditional use may be commenced or continued, and no construction or other permit applicable to a conditional use can be issued unless a CUP has been issued in accordance with Section 405.130 of the Code.

The law applicable to applications for a conditional use permit place the burden of proof of meeting each factor to be considered in granting or denying a CUP squarely on the shoulders of the applicant. *State ex rel. Cooper v. Cowan*, 307 S.W.2d 676, 680 (Mo. App. W.D. 1957); *see also, Lussow v. County Com'n of Franklin County*, 887 S.W.2d 815, 817 (Mo. App. E.D. 1994).

Code Section 405.130(B)(6) requires the Board of Aldermen to issue findings and conclusions related to a number of considerations, including:

> d. Whether streets adjacent to the proposed use have sufficient capacity to service any increased traffic volume associated with the proposed use while maintaining adequate and reasonable levels of service for the community;
> e. Whether the number of transit movements on abutting streets and on minor streets in the neighborhood to be generated by or associated with the proposed use will cause significant increases in hourly or daily traffic levels;
> f. Whether added noise levels generated by activities associated with the proposed use will adversely impact the ambient noise level of the surrounding area and neighborhood;

Petitioner's Exhibit 2.

Code Section 405.130(B)(7) also requires that the Board of Aldermen find that the public health, welfare and safety are adequately served and protected in view of the criteria set out above before it can grant a CUP application.

Based on the evidence presented at the March 9, 2015 public hearing and additional submissions by Petitioner during April 2015, the Board of Aldermen voted to deny the CUP and issued its Findings and Conclusions stating that the Petitioner had not met its burden to demonstrate that the additional noise and traffic to be generated by the proposed restaurant drive-through would not negatively impact the general character of the neighborhood, would

not have an adverse impact on the ambient noise levels of the surrounding area and neighborhood, or that the increased traffic levels associated with the proposed use would allow the existing streets to maintain adequate and reasonable levels of service for the community, and would not generate transit movements that would cause significant increases in hourly or daily traffic levels. The Board of Aldermen adopted its written Findings of Fact and Conclusions on April 29, 2015, and among those findings was an expression of concern over the safety of the new and added traffic movements Paragraph 36, Findings and Conclusions of the Board of Aldermen, R. at R-000642.

On May 11, 2015, Reliance Bank filed a "Verified Petition for Writ of Certiorari" pursuant to Section 89.110 RSMo. On May 20, 2015, Reliance Bank filed a motion for a change of judge that was granted on May 27, 2015. On May 29, 2015 the case was assigned to Division 12 of the St. Louis County Circuit Court.

On July 9, Reliance Bank moved for issuance of a Writ of Certiorari and scheduled that motion for July 20, 2015. On July 20, 2015, this Court granted the requested Writ of Certiorari and ordered the City to produce a record for review on or before August 14, 2015.

On August 12, 2015, the City filed its Answer and the Return to the Writ of Certiorari. On August 19, 2015, this Court granted Reliance's Motion for leave to file its First Amended Petition for Writ of Certiorari, which invoked Section 536.150 for the first time. On November 19, 2015, this Court found that review of the case should proceed under Section 536.150 RSMo and appointed Robert Blitz to serve as Special Master to hear evidence and decide facts to determine whether the City's decision was "unconstitutional, unlawful, unreasonable, arbitrary, capricious or involved an abuse of discretion." After an expedited discovery schedule, the case was set for trial on February 25, 2016 and was tried

on February 25, February 26, March 1 and March 2, and submitted for decision. At the hearing, the dispute between the parties centered on the CUP factors related to traffic and noise.

On April 20, 2016, the Special Master filed his Report.