IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

APPELLATE DIVISION

CASE NO.: 23-31 AP 01

MIAMI-DADE COUNTY,
Petitioner,

vs.

CITY OF MIAMI,
ANTHONY VINCIGUERRA, and
COURTNEY BERRIEN,
Respondents.
_____/

MOTION FOR REHEARING

Respondents, ANTHONY VINCIGUERA and COURTNEY BERRIEN, by and through undersigned counsel and pursuant to Fla. R. App. Proc. 9.330, file this MOTION FOR REHEARING of the Court's Opinion dated February 9, 2024 [DE 28],[1] and state:

[1] There are two identical opinions filed on the docket as DE 28 and DE 29.

SUMMARY

The City of Miami Planning, Zoning & Appeals Board ("PZAB") applied the correct law, rendered its decision based upon the competent substantial evidence before it, and afforded the County due process.

STANDARD FOR REVIEW

This Court is required to apply an exacting—and constrained— review standard to the evidence presented:

> [T]he "competent substantial evidence" standard cannot be used by a reviewing court as a mechanism for exerting covert control over the policy determinations and factual findings of the local agency. Rather, this standard requires the reviewing court to defer to the agency's superior technical expertise and special vantage point in such matters. The issue before the court is not whether the agency's decision is the "best" decision or the "right" decision or even a "wise" decision, for these are technical and policy-based determinations properly within the purview of the agency. The circuit court has no training or experience—and is inherently unsuited—to sit as a roving "super agency" with plenary oversight in such matters. *Dusseau*, 794 So. 2d at 1275-76; accord *Miami-Dade County v. Torbert,* 69 So. 3d 970, 974 (Fla. 3d DCA 2011).

"As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful," and the Court's "job is ended." *Dusseau*, 794 So. 2d at 1276.

SUBSTANTIAL COMPETENT EVIDENCE SUPPORTS PZAB DECISION

The PZAB resolution provides that "*based on the testimony and evidence presented, . . . there is substantial evidence in the record to grant the appeal and deny the County's application for the waiver*." App. 1407.

Despite this statement by the PZAB after an almost 4-hour hearing, this Court concluded that:

There is no *competing* evidence to reweigh.

The Record shows that this is simply not true.

Entered into evidence was a Lien Report produced by the City of Miami which showed that there was an existing lien on the property.

The Court states in the Opinion at page 4:

> *For example, the Individual Respondents inexplicably maintain that the property has an open lien despite overwhelming evidence that there is not, in fact, an open lien.*

This statement by the Court demonstrates that the Court is doing exactly what it cannot do- weighing the evidence.

The City's own Lien Report is substantial competent evidence that there is a lien.

But the Court's statement that the evidence is "overwhelming" that there is no lien is the definition of weighing the evidence.

And it is important to point out that the Board was skeptical of the City's testimony that there was no lien despite the City's own Lien Report:

> *BOARD MEMBER MANN:*
>
> *I think that if we assume that City did not know that there was $4,500 owed, and besides the fact that the County maybe can never be forced to pay it, there's got to be some way for that lien to disappear, to be closed. And maybe possibly the violation that produced it was satisfied.* ***But the lien is still sitting there****. So I could vote to approve the denial of the waiver just based on that technicality that we need to clean that up.*

App. 1304

At the time of the hearing, Miami 21, Section 7.1.3.7 prohibited the City from issuing any waiver approval if the property for which the approval is granted is subject to an "ongoing city enforcement procedure."

In a special concurring opinion, Judge Trawick writes in footnote 5 that undersigned counsel played “fast and loose” with the evidence:

> *[5] While the Court chose not to address alleged ethical lapses of counsel for the Individual Respondents, they are also a cause for concern. One glaring example is counsel's presentation of a City code enforcement report to the PZAB in support of his argument that there were ongoing enforcement proceedings against the subject property. In presenting that report, counsel omitted the fifth and final page of the document which directly refuted counsel's argument. That page was not presented by counsel until a board member asked him about the missing page. Playing "fast and loose" with evidence in this manner is a violation of counsel's duty of candor toward a tribunal pursuant to Rule 4-3.3 of the Florida Bar's Rules of Professional Conduct.*

Undersigned counsel respectfully suggests that the Record shows that there was (i) no omission of any evidence by undersigned counsel, and (ii) the evidence referenced does not refute counsel’s argument in any way.

NO OMISSION OF EVIDENCE

Undersigned counsel provided in advance of the hearing the results of a Lien/ Violation Search ordered through the City of Miami website at: https://www.miamigov.com/Permits-Construction/Property-Information/Run-a-Lien-or-Violation-Search. See Exhibit D of County’s Appendix

The City's lien report showed that the property was in fact subject to ongoing code enforcement action in the form of unpaid liens owed to the City of Miami for unpaid code violations.

And the allegation made by the County that the Board was not shown all pages of the report is belied by the Record. Early in the presentation, undersigned counsel stated:

> *There is no gotcha here, guys. I will show now -- and I provided it to the clerk prior to the meeting --* ***I want to show you the entire document*** *so you can see there's no funny business here about what's going on. A simple request was made. It's the only way that I know how to find out if there's a lien, to be honest with you, is you send in your $100 or whatever it is, and you get the following letter. And I'm going to go through it.*
>
> *Again, this is what I received via email: Welcome to the City of Miami. This package is intended to provide you with all open code enforcement violations and liens as of the current date and time. That's underlined. As of the current date and time.*
>
> *It goes on to helpfully explain how does a violation become a lien. It becomes a lien when the property owner does not timely remedy the violation. There is an ongoing violation.*
>
> *You go to the next page. It's one of five.* ***I'm going to show you each page.***

App. 1258

The fact that all 5 pages were in fact shown to the PZAB is confirmed later in the hearing when a Board member asked about the final page **that had been previously shown**:

BOARD MEMBER SILVA: I think we saw something that said no open violation. App. 1286

Whereupon, undersigned counsel brought up page 5 again on the screen for the Board to review.

As a result, the County's argument that undersigned counsel didn't show the entire Lien Report to the PZAB until asked by a Board member is refuted by the Record.

PAGE 5 DOES NO REFUTE COUNSEL'S ARGUMENT

And it is important to note that the Court's allegation that "*the fifth and final page of the document which directly refuted counsel's argument*" is incorrect.

The statement on the final page of "no open permit violations" does not refute Respondents' argument that there was an outstanding lien

and that outstanding lien constituted an ongoing city enforcement procedure.

As stated on the record,

> *This is a perfect example. http://7.l.3.7 says - it doesn't say anything about open code violations. What it says is, shall not be issued if the property is the subject of an ongoing City enforcement procedure. There is no argument, a lien is a very ongoing City enforcement procedure.*

App. 1279

Board members rightfully expressed skepticism of the City's efforts to distance themselves from their own Lien Report:

> *BOARD MEMBER SILVA: So, question, I understand the part about the non-collectability of liens. If the City missed whatever this lien was, right, because you guys did your own search and somehow it didn't come up, but then he requested it from someone and he got something that whenever you guys did your search was completely missed. Is it possible if that's researched that, in fact, there is some kind of perhaps ongoing code enforcement action that was also missed by your code enforcement system in the same way that your lien search was deficient?*
>
> *MR. GOLDBERG: I don't think our lien search was deficient. And I can't prove the absence of something. So the fact that there's no code case listed on that lien search doesn't mean there's a code case and we missed it. The simplest explanation that there's no code case.*

To the extent there's a lien and it was asserted in the appeal letter, it would have been nice for that to have been backup so that could have been reviewed.

That said, doing our search, asking the appropriate department, we were told there was no lien.

To the extent there is a lien, it doesn't matter. Because http://7.1.3.7--

BOARD MEMBER SILVA: It doesn't matter so long as your search for open code enforcement violations is also just as correct as your -

MR. GOLDBERG: Well, we can't have it both ways. That can't be a correct lien search with a correct lien, but it happened to miss the code case. It's the same system. So it can't be both. It can't be right for one purpose and wrong for another.

BOARD MEMBER SILVA: ***So how was the lien missed in your lien search?***

App. 1284

Undersigned counsel repeatedly made clear that the lien itself, not an open code violation, was the ongoing city enforcement action:

MR. WINKER: But, again, remember, that's not the standard. The standard is code enforcement activities.

MR. GOLDBERG: And if there's no open violations, there's no code enforcement activity.

BOARD MEMBER SILVA: Is there a written clear legal definition within our code of what an open code enforcement activity is, that defines the beginning and end of such activity?

MR. GOLDBERG: It's not defined. It just goes to common sense, which is that there's no code case. No code compliance officer citing, no Board action, the department not looking at it, not actively prosecuting it. It's not an open violation.

BOARD MEMBER SILVA: The only thing I would say is that I would feel better if we actually understood what this particular lien that was mysteriously missing was actually imposed for. And if that specific code violation, if there's an affidavit of compliance on file for that.

MR. WINKER: Can they just look it up? I mean, I got the ticket violation. Can they just look it up now?

BOARD MEMBER SILVA: Well, that was my question before. Do any of you-

App. 1287

NO TREE SURVEY IN RECORD

A writ of certiorari appeal to this appellate court is a closed, record-based proceeding.

In its Response, Respondents pointed out that the County included materials in its Appendix that are not part of the Record on Appeal by including the following:

Exhibit C
Exhibit F

Exhibit G
Exhibit H

The proscription against submitting to the appellate court documents that were never presented to, or considered by, the lower tribunal is a fundamental canon of appellate procedural law:

> Appellate review is limited to the record as made before the trial court at the time of the entry of a final judgment or the orders complained of. It is entirely inappropriate and subjects the movant to possible sanctions to inject matters in the appellate proceedings which were not before the trial court.

Rosenberg v. Rosenberg, 511 So. 2d 593, 595, n.3 (Fla. 3d DCA 1987); *Rampart Life Assocs., Inc. v. Turkish*, 730 So. 2d 384 (Fla. 4th DCA 1999); *Keller Indus., Inc. v. Yoder*, 625 So. 2d 82, n.1 (Fla. 3d DCA 1993); A*rnowitz v. Equitable Life Assur. Soc'y of U.S*., 539 So. 2d 605, 606 (Fla. 3d DCA 1989); *Thornber v. City of Fort Walton Beach*, 534 So. 2d 754, 755 (Fla. 1st DCA 1988); *Hayes v. State*, 488 So. 2d 77, 81 n.3 (Fla. 2d DCA 1986); *Altchiler v. State, Dept. of Prof'l Regulation, Div. of Professions, Bd. of Dentistry*, 442 So. 2d 349, 350 (Fla. 1st DCA 1983).

In *Thornber*, the First District commented, the violation of this proscription "is so elemental there is no excuse for an attorney to attempt to bring such matters before the court." 534 So. 2d at 755

Courts routinely strike such extra-record submissions. See *Finchum v. Vogel*, 194 So. 2d 49, 51 (Fla. 4th DCA 1966) (striking document from appendix because document was "not shown to have been offered, received or in any way made a part of the trial record"); *Agency for Health Care Admin. v. Orlando Reg'l Healthcare Sys., Inc.*, 617 So. 2d 385, 389 (Fla. 1st DCA 1993); *Arnowitz*, 539 So. 2d at 606; *Thornber*, 534 So. 2d at 755; *Rosenberg*, 511 So. 2d at 595 n.3; *Altchiler*, 442 So. 2d at 350–51; *Mann v. State Rd. Dept.*, 223 So. 2d 383, 385 (Fla. 1st DCA 1969). And see, *Hutchins v. Hutchins*, 501 So. 2d 722 (Fla. 5th DCA 1987) (striking portions of brief containing factual misrepresentations, and imposing sanctions, with the observation that briefs submitted to an appellate court must be "truthful and fair in all respects").

The County has included Exhibits C, F, G and H in its Appendix although they were not part of the Record below. The materials that were available to the PZAB are listed and available on the City's Website at http://miamifl.iqm2.com/Citizens/Detail_Meeting.aspx?ID=3391 include:

> 6. PZAB-R-23-037 : A RESOLUTION OF THE MIAMI PLANNING, ZONING AND APPEALS BOARD ("PZAB") GRANTING THE APPEAL OF AND THEREBY REVERSING WAIVER NO. PZ-22-15336 ISSUED BY THE OFFICE OF

ZONING PURSUANT TO ARTICLE 7, SECTION 7.1.2.5(D) OF ORDINANCE NO. 13114, AS AMENDED, THE ZONING ORDINANCE OF THE CITY OF MIAMI, FLORIDA ("MIAMI 21"), FOR THE PROPERTY LOCATED AT APPROXIMATELY 3500 MAIN HIGHWAY, MIAMI, FLORIDA; MAKING FINDINGS AND PROVIDING FOR AN EFFECTIVE DATE.

a. 13513 - Final Decision Waiver -Exhibit A
b. 13513 - Appeal Submission Request
c. 13513 - Appeal Letter
d. 13513 - Proof of Payment
e. 13513 - Meeting Submittal Document Mr. Winker Presentation
f. 13513 - Online Public Comment

The only additional items entered into the record at the PZAB hearing were the City's PowerPoint (Exhibit J) and the County's letter in reply to the appeal (Exhibit K).

The fact that these materials were not before the PZAB is illustrated in the record, as PZAB members indicated that they had not even been provided a tree survey:

> BOARD MEMBER MANN: **I mean, I heard nothing about trees to even make a decision about. I mean, I don't know whether you're in compliance or not. No one has talked about trees.**

App. 1305

The issue of what constitutes record evidence in this matter is simple- what was available to PZAB members as they made their decision. Exhibits C, F, G and H of the County's Appendix were not available to PZAB members as they made their decision.

As a result, the decision of the Board to deny the appeal is supported by the Record before the PZAB, which did not include a tree survey.

CONFLICT OF INTEREST

Although the County failed to raise any concerns about PZAB member Andy Parrish's participation in the PZAB's decision-making process at the hearing, and despite the fact that the result would have been the same if his vote is disqualified, the concurring opinion states:

> *However, the conflict and bias, or at the very least the appearance of a conflict and bias, raised in the record below is so startlingly apparent that it cannot be ignored.*

But, of course, it must be ignored because it was waived by the County.

The Opinion appears to indicate that the Court based its decision on the County being denied due process in part on its conclusions regarding Mr. Parrish's involvement despite the County waiving any objection.

CONCLUSION

WHEREFORE, RESPONDENTS, ANTHONY VINCIGUERRA and COURTNEY BERRIEN, respectfully request that this Court grant this motion for rehearing and dismiss the County's Petition.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Response was prepared in Arial 14-point and contains 2,831 words, in compliance with Rule 9.045 and Rule 9.100 of the Florida Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Florida Court's E-Filing Portal and that I have effectuated service on all attorneys registered to receive service on this case in compliance with Fla. R. Jud. Admin. 2.516 this 26th day of February, 2023.

Respectfully submitted,

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