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

APPELLATE DIVISION
CASE NO. 2023-31-AP

L.T. CASE No. Resolution No. PZAB-R-23-037 (City of Miami Planning and Zoning Appeals Board)

MIAMI-DADE COUNTY,

Petitioner,

v.

CITY OF MIAMI,
ANTHONY VINCIGUERRA,
and COURTNEY BERRIEN,

Respondents.
_____/

MIAMI-DADE COUNTY'S RESPONSE TO SECOND MOTION FOR REHEARING

For the second time, Respondents Anthony Vinciguerra and Courtney Berrien ("Individual Respondents") request rehearing in this matter, seeking yet another bite at the apple. Because they present largely the same arguments—all of which still lack merit—the Court should deny the second motion, just as it did the first.

While the Court issued a revised opinion after it denied Individual Respondents' first motion for rehearing, the revised opinion is substantively unchanged from the first and does not warrant further reconsideration. Indeed, the only material, substantive change appears in the concurring opinion, which added some discussion as to why, in the concurrence's view, the Court had denied Individual Respondents' first motion for rehearing.

Clearly, this sort of change does not warrant an additional motion for rehearing by Individual Respondents. Rule 9.330(b) expressly limits a party to a single rehearing motion with respect to a court's decision. Moreover, the Court's decisions cannot be viewed as an invitation for endless dialogue and re-argument by the parties. Indeed, "legal arguments . . . must be made between the parties ***before*** a judicial decision is rendered; not between one litigant and a tribunal which has already ruled." *Unifirst Corp. v. City of Jacksonville*, 42 So. 3d 247, 248 (Fla. 1st DCA 2009) (emphasis supplied). Because Individual Respondents' second rehearing motion violates this principle, the motion must be denied.

But this infirmity aside, their second motion—like their first—also amounts to an improper use of the rehearing procedure because it continues to largely rehash and repackage arguments that they previously made—arguments that the Court has repeatedly found unpersuasive. A motion for

rehearing "is not a vehicle through which 'an unhappy litigant or attorney [may] reargue the same points previously presented[.]" *McConnell v. Sanford Airport Auth.*, 200 So. 3d 83 (Fla. 5th DCA 2015). Nor is it a mechanism through which counsel may "request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay termination of litigation." *See State v. Green*, 105 So. 2d 817, 818-19 (Fla. 1st DCA 1958). Because Individual Respondents' second motion for rehearing runs afoul of these precepts, it must be denied.

Furthermore, even if their re-arguments were procedurally proper, Individual Respondents still would not be entitled to rehearing because their re-arguments all remain premised on misapprehensions of the record below or governing law. In this regard, rather than repeating its own arguments yet again here, the County directs the Court to the portion of the County's response to the first rehearing motion, wherein the County comprehensively addresses the flaws in Individual Respondents' assertions and arguments, particularly as to the record evidence concerning trees and certain exhibits included in the County's appendix. Doc. 32 at p. 5-10.

But, as was the case with its response to the first motion, here again the County must add a few additional words. Individual Respondents continue to harp on the issue of the non-existent lien, but as the County has

said many times over, unlike the City code now—which was amended ***AFTER*** the PZAB decided the County's application—the City code provision in effect at the time of the PZAB's decision did not make the existence of a lien a basis for denial of an application. Reply at 10-12. And because the existence or non-existence of a lien was not, at the time of the PZAB's decision, a legally permissible basis for denial of the County's application, any evidence bearing on such issue was legally irrelevant.

Equally unavailing is Individual Respondents' re-argument that a lien is "an ongoing city enforcement procedure" precluding approval of an application. Individual Respondents baldly state, without citation to any authority whatsoever, that "[i]t is clear that a lien is an ongoing city enforcement procedure, whether or not a violation is cured." Mot. at 6. But as both the City zoning administrator and City attorney explained to the PZAB, a lien is not an ongoing enforcement procedure; rather, a lien is what results afterwards. *See* App'x Ex. E at 1252-54, 1280-81, 1283. This testimony was unrebutted, and mere argument to the contrary by Individual Respondents' counsel is not evidence. *See Radosevich v. Bank of New York Mellon*, 245 So. 3d 877, 881 (Fla. 3d DCA 2018) ("Mere representations and argument of counsel do not constitute evidence."); *see also* App'x Ex. E at 1252 (City zoning administrator pointing out that Mr. Winker is not a code

compliance officer with requisite expertise). Moreover, the fifth page of Individual Respondents' own lien report stated in bold, capitalized lettering, "**NO OPEN VIOLATIONS FOUND.**"—a fact that completely belies Individual Respondents' argument. App'x Ex. E at 1400.

Finally, though now relegated to a footnote, Individual Respondents continue to argue about whether their counsel hid the fifth page of the lien report from the PZAB. *See* Mot. 4-5 n.2. Again, such argument does not warrant rehearing, as the Court's opinion did not address this issue at all. Rather it was mentioned only in a footnote to the concurring opinion. Nonetheless, Individual Respondents continue to misconstrue the record as to whether such evidence was omitted—although their version of what happened continues to evolve. Now they claim that "the fact that all 5 pages were in fact shown to the PZAB is confirmed by Board member Silva asking about the final page that had been previously shown." *Id.* at 4 n.2. But, once again, the transcript tells a different story: that page five was not shown ***until*** Board member Silva asked Individual Respondents' counsel about it:

> MR. GOLDBERG [City Zoning Administrator]: If we could see page 5, that would be wonderful. ***But we haven't been shown a complete document.***
>
> BOARD MEMBER SILVA: ***Do you have page 5, Mr. Winker?***
>
> MR. WINKER: ***No. I'll have to look at what I've got.***

> MR. GOLDBERG: I don't know how that happens. You print out a document. . . . [Y]ou get the whole thing. I think there is something that is not being shown here.
>
> * * *
>
> BOARD MEMBER SILVA: I think we saw something [on the screen] that said no open violation. I don't know if it was from the same document.
>
> MR. WINKER: Yeah, I don't know. Let me see what I got here. I'll open whatever window [on my computer] I have here.
>
> * * *
>
> MR. WINKER: ***Oh, here it is. So that's page 5.***
>
> MR. GOLDBERG: ***There we go. No open violations.***

Id. at 1285-87 (emphasis supplied). Again, the video of the hearing also makes plain that Individual Respondents' counsel did not display the fifth page on screen until Board member Silva asked him to do so.[1]

[1] The video recording may be viewed at Planning, Zoning and Appeals Board - Mar 15th, 2023 (granicus.com). At time-stamp 1:31:34-1:34:52, Individual Respondents' counsel first references the lien report and scrolls through only the first four pages of the document; at time-stamp 2:54:00-2:56:15, he states that he will show the PZAB the entire document, but then only shows pages one through four; and at time-stamp 3:21:10-3:22:24, he is ultimately questioned about the missing page and asked to show it. As is evident from the video, counsel embedded the first four pages of the lien report into his 15-page presentation that he displayed on screen to the PZAB. Indeed, at time-stamp 1:34:26-1:34:58, counsel shows on screen a page of his argument outline, followed by four pages of the lien report (without the fifth page), followed immediately by another page of his argument outline.

Conclusion

In sum, for the reasons explained above, the Court should deny Individual Respondents' second motion for rehearing.

Dated: May 3, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by electronic mail on May 3, 2024, upon the counsel listed below:

s/ James Edwin Kirtley, Jr.
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