Filing # 193810242 E-Filed 03/12/2024 10:44:26 AM

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 MOTION FOR REHEARING

The Motion for Rehearing ("Motion") filed by Respondents Anthony Vinciguerra and Courtney Berrien ("Individual Respondents") should be denied.

Despite the Court's clear opinion and the limited circumstances in which rehearing is appropriate under Rule 9.330, Individual Respondents seek rehearing without even mentioning the applicable legal standard or a single case showing they meet that standard here.

Contrary to the rule and governing case law, their Motion largely rehashes and repackages arguments that they previously made—arguments that the Court already found unpersuasive. In this regard, Individual Respondents' Motion does nothing more than tell the Court that they believe the decision is wrong, which is an improper use of the rehearing procedure. Finally, even if their arguments were procedurally proper, Individual Respondents would still not be entitled to rehearing because their arguments are all premised on misapprehensions of the record below or governing law.

Accordingly, for these reasons, rehearing is unwarranted and the Motion should be denied.

I. Legal Standard

"Because it is the 'exception to the norm,' a motion for rehearing filed under Florida Rule of Appellate Procedure 9.330 'should be done under very limited circumstances.'" *Dabbs v. State*, 230 So. 3d 475, 476 (Fla. 4th DCA 2017). Indeed, on its face, Rule 9.330(a) expressly limits the permissible scope of rehearing motions: "[a] motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its decision, and shall not present issues not previously raised in the proceeding." The reason for this

narrow legal standard is clear: "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). Thus, a motion for rehearing must be "strictly limited to calling an appellate court's attention—without argument—to something the appellate court has overlooked or misapprehended." *Cleveland v. State*, 887 So. 2d 362, 364 (Fla. 5th DCA 2004). "It 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).

II. Argument

A. Individual Respondents' Motion is Improper

Individual Respondents' Motion is procedurally improper because it reargues points previously raised. Specifically, Individual Respondents seek rehearing of the Court's determination that the record contains no substantial competent evidence supporting the PZAB's decision, arguing that "[e]ntered into evidence was a Lien Report produced by the City of Miami which showed that there was an existing lien on the property." Mot. at 3. But this is the same argument that Individual Respondents presented in their response to the County's petition—an argument that the Court

rightly rejected. *See* Individual Respondents' Resp. at 22. Similarly, Individual Respondents also repeat in their Motion the rejected arguments from their response to the petition that no tree survey was in the record and that the County included in its appendix certain exhibits not in the record below. *Compare* Mot. at 10-14 *with* Individual Respondents' Resp. at 17-20, 28. Finally, Individual Respondents strangely reargue the County failed to preserve its contention that the Acting Chair of the PZAB should have recused due to bias—an argument that the Court did not even address in the main opinion.[1] Mot. at 14-15.

[1] Individual Respondents contend that "[t[he opinion appears to indicate that the Court based its decision on the County being denied due process in part on its conclusions regarding [the Acting Chair's] involvement despite the County waiving any objection." Mot. at 15. But the Acting Chair's bias was addressed only in the concurring opinion, which actually agreed with Individual Respondents that the issue was not preserved for appellate review. However, even if an objection to the Acting Chair's participation was not made, his participation in the hearing below amounted to fundamental error. *See Alamo Rent–A–Car v. Phillips*, 613 So.2d 56 (Fla. 1st DCA 1992) (finding fundamental error, even in the absence of an objection, where judge made comments reflecting a bias against one of the parties in violation of the party's due process right to a fair hearing); *Meilleur v. HSBC Bank USA, N.A.*, 194 So. 3d 512, 513 (Fla. 4th DCA 2016) ("A trial judge who assumes the role of a litigant commits a fundamental error, which may be raised for the first time on appeal."). Thus, this issue ***should*** have been addressed in the Court's main opinion and the Court ***should*** have found that the Acting Chair's participation violated due process. Accordingly, if anything, the Court should revise its opinion to say that the Acting Chair's bias is yet another reason the PZAB's decision must be quashed.

Clearly, this effort to simply repress various positions previously and unsuccessfully argued is a wholly improper basis for rehearing. As the First District cogently stated long ago in denying such a motion:

> Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs . . . and necessarily considered by the court, or to 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.

State v. Green, 105 So. 2d 817, 818-19 (Fla. 1st DCA 1958); *see also Lawyers Title Ins. Corp. v. Reitzes*, 631 So. 2d 1100, 1100 (Fla. 4th DCA 1993) ("The motion does what Rule 9.330(a) proscribes; it re-argues the merits of the case."). Accordingly, the Motion should be denied.

B. Individual Respondents' Motion is Wrong on the Merits

As to the arguments noted above that Individual Respondents repeat or paraphrase from their response to the petition, the County—rather than piling on its own reargument—simply directs the Court to the portions of its petition and reply brief that address and refute Individual Respondents' arguments. *See, e.g.*, Reply at 8-9 (tree survey in the record); 10-12 (lien report not evidence that supports PZAB's decision); 16-17 (County exhibits properly included in the appendix).

As to the lien report, however, a few additional words are merited here, because Individual Respondents' Motion misleadingly cherry-picks a single sentence from a footnote to the Court's opinion in an effort to show that the Court improperly reweighed the evidence. Mot. at 3-4 (quoting in part footnote 2 to the Court's opinion, which stated "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 argument is mistaken because it overlooks the Court's entirely correct conclusion that liens—among other matters considered by the PZAB—had no bearing on the County's waiver application at all. Op. at 4-5. As the County explained in its reply to the petition, 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.[2] *See* 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

[2] In their response to the petition, Individual Respondents cited the amended code provision and argued that it prohibited the City from granting an approval where the property is subject to an outstanding lien, even though the amended provision was not in effect at the time of the PZAB's decision. *See* Individual Respondents' Resp. at 21-22.

denial of the County's application, any evidence bearing on such issue was legally irrelevant.[3]

Equally unavailing is Individual Respondents' argument that a lien is "an ongoing city enforcement procedure" precluding approval of an application. Mot. at 7-8. 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 by Individual Respondents' counsel on this point 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

[3] Individual Respondents' citation to Board Member Mann's testimony does not change this fact and, moreover, statements by individual board members are not evidence. *See Metro. Dade Cnty. v. Blumenthal*, 675 So. 2d 598, 604 (Fla. 3d DCA 1995), *on reh'g en banc* (Feb. 21, 1996). Furthermore, Individual Respondents' reliance on this statement is misleading, because Board Member Man made the statement ***BEFORE*** the point in the hearing when the City Attorney consulted the public records, *see* App'x Ex. G at 1393-1395, and noted that the lien had been released. *Compare* App'x Ex. E at 1304 (Board Member Man stating, "But the lien is still sitting there") *with id.* at 1305-06 (Assistant City Attorney reviewing the County Clerk website and stating "the lien was released in 2014" and "the system shows there is no lien and there's zero amount due"). And, by the way, it was Individual Respondents' counsel who invited City staff to look up the lien ticket number and confirm whether it was still in existence, *see id.* at 1288 (MR. WINKER: "Can they just look it up? I mean, I got the ticket violation. Can they just look it up now?"), which resulted in an answer at odds with his argument. Under such circumstances, Individual Respondents should not now be heard to complain.

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 the 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.

Lastly, Individual Respondents spend several pages arguing about whether their counsel hid evidence from the PZAB regarding the fifth page of the lien report. *See* Mot. 5-10. But 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.

Moreover, Individual Respondents misconstrue the record as to whether such evidence was omitted. They selectively quote a portion of the hearing transcript wherein their counsel, referring to the lien report, states to the PZAB, "I want to show you the entire document" and "I'm going to show you each page." Mot. at 6 (quoting App'x Ex. E at 1258-59). But, despite his introductory statement and promise, Individual Respondents' counsel did not in fact show the dispositive fifth page at that point in the hearing. Indeed, a review of the portions of the transcript immediately following their counsel's statements make plain that he showed the PZAB

only the first four pages, not the fifth. App'x Ex. E at 1259-61 (counsel references only pages one, two, three, and four of the lien report before ending his initial presentation). It was only later in the hearing, after a PZAB member inquired about the missing page, that Individual Respondents' counsel finally displayed the fifth page containing the bold, capitalized words, "**NO OPEN VIOLATIONS.**" This is evident from the text of the hearing transcript:

> 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). In addition to the transcript, the video of the hearing makes plain that Individual Respondents' counsel did not display the fifth page on screen until asked to do so.[4]

Yet, despite the clear record evidence, Individual Respondents somehow argue that "[t]he 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**," citing to the PZAB member who requested the fifth page be shown. Mot. at 7 (emphasis original). But that's not what happened; nowhere prior to that point in the hearing did Individual Respondents' counsel actually display the fifth page, and he does not cite to any portion of the transcript showing that he did. Thus, this argument is mistaken and should be rejected.

---

[4] 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.

III. Conclusion

Individual Respondents' Motion should be denied as the paradigmatic improper rehearing motion that reargues points but fails to identify anything the Court actually misapprehended. It should also be denied on the merits, for the reasons noted above.

Dated: March 12, 2024

Respectfully submitted,

GERALDINE BONZON-KEENAN
Miami-Dade County Attorney
Stephen P. Clark Center
111 NW 1st Street, Suite 2810
Miami, Florida 33128

By: s/ James Edwin Kirtley, Jr.
James Edwin Kirtley, Jr.
Assistant County Attorney
Florida Bar Number: 30433
Dennis A. Kerbel
Assistant County Attorney
Florida Bar Number: 610429

Counsel for Miami-Dade County

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on March 12, 2024 via e-mail generated by the Florida Courts E-Filing Portal.

s/ James Edwin Kirtley, Jr.
Assistant County Attorney