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 April 12, 2024 [DE 36],[1] and state:

[1] The Court's original Opinion dated February 9, 2024 [DE 28 and DE 29] was withdrawn after Petitioners filed their Motion for Rehearing [DE 31] and replaced with the Opinion dated April 12, 2024 [DE 36].

SUMMARY

The Court's opinion should be quashed because 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 (and other statements by the Court in the Opinion) shows that this is simply not true. The Record demonstrates that the Board found that there was a question as to whether a lien existed on the property… because a Lien Report produced by the City of Miami 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 about "overwhelming evidence") by the Court demonstrates that the Court is doing exactly what it cannot do- weighing the evidence.

As outlined above, courts reviewing municipal action are admonished:

> 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).

It is indisputable that the Lien Report generated by the City is substantial competent evidence that there is a lien.[2]

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[2] Undersigned counsel hereby preserves the issue regarding the allegation that the Board was not shown all 5 pages of the City of Miami Lien Search because 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:

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

But the Court's statement that the evidence is "overwhelming" that there is no lien is the epitome 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

There is no evidence on the Record explaining how an erroneous lien report was generated by the City, just the City denying there was any lien despite its own lien report.

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.

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." It is clear that a lien is an ongoing city enforcement procedure, whether or not a violation is cured.

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. It is undisputed that PZAB members did not have the tree survey available to them at the hearing. Not only was the tree survey not available to PZAB members, it was also unavailable to Petitioners.

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.

The Court's argument that during the hearing the City acknowledged receipt of a tree survey as part of the application does not make the tree survey part of the record because it was not available to the PZAB members.

Finally, the Court's argument that the lack of a tree survey was waived because it was not raised at the hearing by Petitioners is without merit, because the issue is whether there is substantial competent evidence to support the PZAB's decision. There was no tree survey available to the PZAB members (as pointed out by board member Mann), so there was no record evidence to support PZAB denying the Petitioner's appeal.

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 1986 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 29th day of April, 2024.

Respectfully submitted,

s/davidwinker/
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