CITY OF MARCO ISLAND, FLORIDA
CITY COUNCIL

In re: 986 Sundrop LLC Boat Dock Extension Application	)	Reference No. BD-21-000177

MCBRIDE APELLEES' MOTION *IN LIMINE*

Gary and Lorraine McBride, through undersigned counsel, move to exclude (1) the "expert" testimony of Mr. Robert Mulhere, (2) any legal conclusions other experts plan to espouse, and (3) an unauthenticated hearsay exhibit. The McBrides are mindful that this is a quasi-judicial proceeding rather than a judicial proceeding, but nonetheless are of the opinion that these three categories of proposed "evidence" are so far outside the realm of what a court would admit that it would be an abuse of quasi-judicial discretion for the Council to consider such "evidence" here. Thus, pursuant to Marco Island Quasi-Judicial Proceedings Rule § 3(d)(2), the McBrides move to exclude such "evidence."

I. Relevant Background

On November 19, 2021, Petitioner 986 Sundrop LLC ("Petitioner") submitted that it intended to call Mr. Robert Mulhere to present legal conclusions where he purports to apply the Boat Docking Facilities Code to the facts as he understands them, that it intended to call Mr. Timothy Hall to present a legal argument relating to the meaning of "channel," and that it intended to present various exhibits hand-crafted for it by Turrell Hall & Associates. *See* Petitioner Notice of Intent to Call Witnesses and Submission of Exhibits (dated November 19, 2021).

II. Legal Standard

Courts have explained that quasi-judicial decision-makers are only allowed to consider "competent substantial evidence." *Haines City Community Development v. Heggs,* 658 So.2d 523 (Fla. 1995) (discussing the standard for review of quasi-judicial orders of local agencies and boards: "administrative findings and judgment [must be] supported by competent substantial evidence.").

The Florida Supreme Court in *De Groot v. Sheffield*, 95 So.2d 912 (Fla. 1957) elaborated on what is meant by this standard:

> Substantial evidence has been described as such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred. We have stated it to be such relevant evidence as a reasonable mind would accept as adequate to support a conclusion. In employing the adjective 'competent' to modify the word 'substantial,' we are aware of the familiar rule that in administrative proceedings the formalities in the introduction of testimony common to the courts of justice are not strictly employed. We are of the view, however, that the evidence relied upon [to] sustain the ultimate finding should be sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.

Marco Island recognizes the same rule, albeit in variant wording. Marco Island Quasi-Judicial Proceedings Rule § 3(d)(2) explains that:

> All evidence relied upon by reasonably prudent persons in the conduct of their business shall be admissible, whether or not such evidence would be admissible in a court of law. However, immaterial or unduly repetitious evidence shall be excluded.

The City Council's hearsay rule is as follows:

> Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient by itself to support a finding.
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> Marco Island Quasi-Judicial Proceedings Rule § 3(d)(3).

III. Argument

A quasi-judicial hearing is one meant to have more flexible rules of admissibility. However, the Florida Supreme Court recognizes that this does not mean a quasi-judicial body has unlimited discretion in its consideration of evidence. The Council may only consider competent substantial evidence that is material to the petition.

A. Mr. Robert Mulhere is not able to give competent substantial evidence

Marco Island is under the jurisdiction of the Second District Court of Appeal.[1] The Second District Court of Appeal has clearly held: "Expert testimony is not admissible concerning a question of law. Statutory construction is a legal determination to be made by the trial judge, with the assistance of counsels' legal arguments, not by way of 'expert opinion.'" *Lee County v. Barnett Banks, Inc.*, 711 So.2d 34 (Fla. 2d DCA 1997). In this jurisdiction, "expert" legal opinion is out of the question. Experts may not testify as to legal issues. *See In re Estate of Williams*, 771 So. 2d 7, 8 (Fla. 2d DCA 2000) ("[O]pinion testimony as to the legal interpretation of Florida law is not a proper subject of expert testimony"); *Hann v. Balogh,* 920 So.2d 1250, 1251 (Fla. 2d DCA 2006) (same).

Despite this, Petitioner wants the City Council to hear "expert" testimony from Mr. Robert Mulhere on his interpretations of the Code and Comprehensive Plan, how they fit together, and whether the facts meet the requisite legal standards. *See* Petitioner Ex. 3 (Report, Analysis and Expert Opinion of Robert Mulhere). This is impermissible. The Second District Court of Appeal has not departed from the common law understanding that expert legal testimony is forbidden. If

[1] The McBrides note that there appears to be some conflict between Florida's District Court of Appeals regarding whether it is proper to permit expert legal testimony and in what circumstances, but we are bound to follow the law in the jurisdiction in which Marco Island sits, which is the Second District Court of Appeal. *See* § 35.03, Florida Statutes.

the Council heard from Mr. Mulhere as to his legal analysis, the Council would not be hearing evidence. Legal conclusions and advice on legal application of the issues are not evidence, which must be based on facts. *See De Groot*, 95 So.2d at 916 ("Substantial evidence has been described as such evidence as will establish a substantial *basis of fact* from which the fact at issue can be reasonably inferred.") (emphasis added); *Estate of Murray v. Delta Health Grp. Inc.,* 30 So.3d 576, 578 (Fla. 2d DCA 2010) ("An expert should not be permitted to testify regarding a legal conclusion that the jury should be free to reach independently *from the facts* presented to it.") (emphasis added).

Mr. Mulhere does not plan to provide facts. Instead, he plans to apply the Code for the Council. *See* Ex. 3 at 15-18. In large part, his "expert analysis" follows closely along the lines of the legal contentions in Petitioner's appeal. His report offers "conclusions" and "professional opinions," literally going through each Code factor and purportedly giving a "professional opinion" applying the facts as he understands them to the law. In the Second District, this is flatly out of the question. *See Estate of Murray,* 30 So.3d at 578 ("An expert … is not permitted to render an opinion that applies a legal standard to a set of facts.").

The Petitioner plans to usurp the role of the City Attorney to have one of its own "experts" tell the City Council how to rule. Mr. Mulhere's generalized opposition reads much like a legal brief. The City Council hired Mr. Alan L. Gabriel, Esq., a respectable and well-known land-use attorney, not Robert Mulhere, an unlicensed consultant, to provide it legal advice.

If the McBrides knew that there was going to be a battle of experts on legal implications and application of the Boat Docking Facilities Code, they surely would have retained multiple attorneys as expert witnesses. The McBrides justifiably relied on governing law in this jurisdiction that the parties' lawyers would present their interpretations of law with the Council deciding the

proper legal principles and applying them based on advice of independent counsel. Petitioner's "expert" plans to disrupt that settled assumption.

Because Mr. Mulhere does not intend to give factual evidence that is both substantial and competent, his immaterial opinion testimony must be excluded under Rule 3(d)(2).[2]

B. All "expert" testimony regarding legal analysis must be excluded

Testimony relating to legal advice by any of Petitioner's experts on the way the City Council should interpret and apply its own Code should be excluded.

For example, Petitioner asserts in his Supplemental Memorandum that Mr. Timothy Hall intends to give an "expert" opinion that when the City Council adopted its Code and used the word "channel," it really meant "navigable channel." *See* Petitioner Ex. 4 at 3. It would be improper for the Council to consider Mr. Hall's "expert" opinion as to the meaning of channel because expert testimony is improper "to determine the meaning of terms in a legislative enactment." *Lindsay v. Allstate Ins. Co.,* 561 So.2d 427, 428 (Fla. 3rd DCA 1990). The Second District Court of Appeal cautioned in *Crown Custom Homes, Inc. v. Sabatino*: "regardless of the expertise of the witness, generally, and his familiarity with legal concepts relating to his specific field of expertise, it is not the function of the expert witness to draw legal conclusions." 18 So.3d 738, 741 (Fla. 2d DCA 2009).

The McBrides ask for a simple and basic ruling: no expert may give testimony to the Council that advises it on legal interpretation, meaning, or application of the Code.

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[2] With regards to Mr. Mulhere, he cannot present competent substantial evidence for yet another reason. He is not a lawyer. *See* Petitioner Ex. 2 (Cover Letter of Robert Mulhere). Despite this, Petitioner seeks to use him to explain the law and apply the law to the facts. However, neither a reasonably prudent quasi-judicial body nor person would rely on a non-lawyer to give it legal advice. Thus, even if legal advice was proper, this particular witness would not be permissible.

C. Exhibit 13 is an unauthenticated hearsay exhibit which must be excluded

Petitioner's Exhibit 13 (Channel Exhibit) is a made-up exhibit which purports to look like an official government document outlining the channel "as defined by Collier County." As seen in the index table on the exhibit, it was created on November 16, 2021 specifically for the "Curtis" project by consultants at Turrell, Hall and Associates, Inc.

Unlike the other exhibits which the McBrides disagree with and will dispute at the hearing, Exhibit 13 could lead a reasonable person to assume that Collier County defines the channel as what is shaded on the aerial map. Exhibit 13 might be a different representation of Exhibit 12's map of manatee protection zones, but this is conjecture. Petitioner ostensibly plans to introduce Exhibit 13 for the truth of the matter, but must not be permitted to do so in its current form because no source indicates Collier County defines the channel as the limited shaded portion in the Exhibit.

IV. Conclusion

The McBrides look forward to the hearing as the proper application of the law to the facts will inevitably lead to the Council affirming the Board, but the mere circumstance that Petitioner has bad facts should not justify a departure from considering only competent substantial evidence. Thus, for the foregoing reasons, the McBrides timely move under Marco Island Quasi-Judicial Proceedings Rule § 3(d)(2) for the exclusion of the categories of evidence outlined above. *See* Marco Island Quasi-Judicial Proceedings Rule § 3(d)(6) ("Any questions as to the propriety and admissibility of evidence shall be presented to the City Attorney's office in a timely fashion").

Date: November 22, 2021

Respectfully submitted,

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