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George L. Christenson
Clerk of Circuit Court
2020CV007031

STATE OF WISCONSIN

CIRCUIT COURT

MILWAUKEE COUNTY

FRANKLIN COMMUNITY ADVOCATES, INC.,
WOODLAKE VILLAGE HOMEOWNERS ASSOCIATION
CHAD and KARYN ZOLECKI, JEFF and DANIELLE KENNEY,
RYAN and RACHEL RINGWELSKI,
STEVE VALLEE and COLLEEN DOMASK
NICK POPLAR, TOM and ALICE BENNING
MIKE and JOANNE ZOLECKI, DEAN REIN
ERIC and MICHELLE BALCEROWSKI
MELINDA HAMDAN

Case No. 20-CV-7031

Honorable Hannah Dugan

Plaintiffs,

v.

CITY OF FRANKLIN,

Defendant,

And

STRAUSS BRANDS, LLC,

Intervening Defendant.

**BRIEF REGARDING THE CITY OF FRANKLIN'S
MOTION TO CORRECT THE RECORD**

In response to the City and its counsel's Motion to Correct the record and accompanying Affidavit, *Doc Nos. 193, 194*, Plaintiffs provide the following response and request for relief:

FCA agrees that the record should be corrected. However, the City and its litigation counsel did not act appropriately in this matter and FCA has incurred costs and spent time arising from the City's misrepresentation in its filings.

This matter arose at the hearing on November 16, 2021. As the Court knows, the Court addressed the overall disposition of the case as part of its rulings that day and remanded the entire case for new hearings. During the November 16th hearing, after the Court announced its Order, counsel for the City responded and inquired of the Court whether the Order was only a

narrow one related to the two items the Court had added to the record. The effect of this question was to try to narrow the nature of the new hearings upon remand. The Court was quite direct in correcting him. The transcript of that exchange is as follows:

THE COURT: I've had enough things, I'm telling you this is being remanded because there's enough question that had been raised about whether or not there was a minimal due process with enough notice and enough opportunity to be included in this claim, including those included in the body.

MR. BITAR: And so the remand would give proper notice on the police report and the study?

THE COURT: No. Entire thing. The decision, remanding, supplement the record to satisfy that those four elements have been met, which incorporates necessarily in due process and fair playing on the standards met.

See Doc No. 183, November 16, 2021 Transcript at p. 26.¹

Soon after the hearing undersigned submitted a proposed order memorializing the Court's order. That was submitted on November 20, 2021. FCA's proposed order called for a remand for a new de novo hearing in compliance with the Court's actual Order. *See Doc No.*

Counsel for the City then submitted its own alternative proposed order. However, the City's proposed order inaccurately sought to have the Court's order be limited to addressing only the two added items on remand. *See Doc. No. 169.* The City included a letter with its alternative proposed order which stated in part as follows:

" ... , the City of Franklin's Proposed Order better reflects the Court's order because the Court remanded the matter to the Common Council for the limited purpose of completing the record with the two above-referenced documents

¹ It is noted that in their Affidavit, Counsel for the City included a lengthy excerpt of the Court's ruling but failed to include this key exchange, which shows counsel for the Village raising the issue of a limited remand and being told by the Court of his mistake.

See Doc. No. 170 at p. 1.

The City's assertions in its explanatory letter were directly contrary to the clear statements of the Court at the November 16, 2021 hearing, held only 8 days before Counsel for the City's inaccurate letter to the Court on November 24, 2021.

The Court having both parties' proposed orders on file rendered and entered its remand Order on November 24, 2021. That Order called for a new *de novo* hearing and made clear that it was based on the entire record of the proceedings and provide in part as follows:

The Court considered *all pleadings and papers on file herein*, the arguments by the parties, and *the record of proceedings for all motions and hearings*. ... This matter is *remanded to the City of Franklin Common Council* with instructions to allow for a *new, public hearing, ...*

See Doc No. 174 at reasoning and at ¶ 1.

Based on the above, the City and its counsel were fully aware and should have well understood as of November 30, 2021 that its view of the Court's November 16th Order – that it was limited to only the two items – was completely incorrect. However, even after multiple record documents explaining the true content of the Court's Order the City persisted in repeating the inaccurate assertions that the Court's remand Order was limited to only the two added record items.

On December 7, 2021 in the City's motion for reconsideration the City asserted that:

When the court orally ruled from the bench that a remand was necessary, something neither party asked for, the instructions were to have the Council consider and hold a public meeting relating to those two documents, and to return to the court with a full record that included those documents (as well as the agenda, minutes and transcript reflecting said review). The City's proposed order, (Dkt. # 169), faithfully incorporated those instructions, and the Plaintiffs did not object to the same, albeit submitting a much more streamlined proposal days earlier.

See Doc. No. 177 at p. 9-10.

This was the City again misrepresenting the Court's November 16th Order. Undersigned strongly objected to this misrepresentation of the Court's Order in Plaintiffs' response brief, explaining that:

The City misstates that Court's Remand Order, which was based on the briefs and the record filed regarding the merits of the issues presented. **Not** as the City misrepresents, an order related to the Motion to Complete the record. This was explicitly stated by the Court on the record

.....

..The City's arguments otherwise are directly contrary to the Court's ruling and to Counsel for the City's own specific questions to the Court at the November 16th hearing.

See Doc. No. 185, FCA Brief opposing reconsideration at p. 2-3.

Then, at the January 11, 2021 hearing on the case counsel for the City persisted again in trying to claim that the hearing on remand would be limited and that was what the Court had ordered. The Court advised Counsel that was not true and that the City's previous filings were thus inaccurate and improper. The Court ordered the City and its counsel to file an affidavit and motion to correct the record. That was done but no hearing was obtained for quite some time.

In the interim, and apparently based on inaccurate advice yet again, the Mayor of the City issued public media statements also reflecting an intent to limit the remand hearings. *See Doc. No. 199.* The continuing confusion caused by the City and its counsel's actions raised genuine concern that the Court's Order was not going to be carried out. Undersigned raised the issue in Plaintiffs' expedited motion seeking clarification. *See Doc. No. 193.* That motion was addressed by the Court at a hearing on February 15, 2022.

While the Court did not grant the motion, it did clarify again that the remand hearings were to be new hearings. The Court expressed concern during the February 15th hearing regarding the City's focus on the "prior administrative record" and reminded the City in strong

terms that the remand hearings were not a “do-over” but new *de novo* hearings on the Special Permit Application.

The Court also inquired whether the applicant, Strauss Brand, would be appearing at the upcoming February 17th Plan Commission hearing. While the transcript is still being prepared, undersigned recalls Counsel for the City stated that they would be. However, as it turned out, the applicant *did not appear* and instead sent a letter to the City Staff *withdrawing its request for the Special Use Permit*. A copy of that letter is filed herewith as Exhibit S.

More unusual and disconcerting, the City Plan Commission went forward with the public hearing on the SUP request despite it having been withdrawn and no Strauss representative appearing. This was over the objection of undersigned and Plaintiffs and turned the February 17th hearing and the subsequent March 1st hearing into an exercise of absurdity and frustration causing even more conflict between the citizens and City officials.

Undersigned will be filing a further motion seeking immediate summary judgment against the City voiding the SUP that the City attempted to approve at the February 17th and March 1st hearings. Given the failure of the applicant to appear at either the February 17, 2022 Plan Commission hearing or the March 1st Common Council meeting the matter was moot and the City’s unusual actions to persist to review and approve the Special Use Permit *in the absence of an applicant* was improper.

With respect to the City’s misrepresentations regarding the content of the Court’s order, those statements, which the Court noted were not true, displayed a clear lack of candor with the Court. And as noted by the Court were not in compliance with SCR 20:3.3

Plaintiff spent substantial time in its briefing addressing the City’s errors. Further time was spent in trying to rectify the matter with Plaintiffs’ supporters after the Mayor misstated the

nature of the Court's order in the media. That included the need to file a motion with the Court to seek confirmation that the remand hearings would proceed as directed and ordered by the Court.

Plaintiff requests that based on the above and pursuant to the Court's inherent power and its statutory authority under Wis. Stats. §802.10 to govern its proceedings, the Court allow the record to be corrected but also impose an appropriate sanction against the City commensurate with the significant material misrepresentations made by the City and its counsel on multiple occasions.

Dated this 9th day of March, 2022

Electronically Signed by Joseph R. Cincotta
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