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IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

CASE NO. ________________________

CIRCUIT COURT APPELLATE
DIVISION CASE NO. 2019-167-AP-01

MIAMI-DADE COUNTY,

Petitioner,

v.

CITY OF MIAMI,

Respondent.

______________________________/

MIAMI-DADE COUNTY'S
PETITION FOR WRIT OF CERTIORARI

Miami-Dade County, Florida (the "County") seeks second-tier certiorari review of the Circuit Court Appellate Division's July 22, 2020 decision[1] finding that it lacked jurisdiction to review the County's first-tier petition for writ of certiorari.

I. Introduction

In one fell swoop, the Circuit Court Appellate Division (the "Circuit Court") eviscerated decades of law regarding the due process protections attendant to quasi-judicial proceedings. It did so by focusing exclusively on the provisions of a

[1] The Circuit Court's opinion is Exhibit A to the *Appendix to Petition for Writ of Certiorari*, filed concurrently with this petition. It is cited as "Op. at __." The remainder of the documents in the Appendix are cited as "Pet. App. Ex. __ at MDC____." Except where the opinion is cited, page references correspond to the bates-stamped numbers at the bottom right of each page in the Appendix.

municipal charter and code of ordinances—and ignoring the constitutional due process requirements that the Florida Supreme Court, this Court, and other district courts have said are required in such proceedings—to determine that a city mayor's veto authority over quasi-judicial decisions somehow rests outside the quasi-judicial process and is thus not subject to its strictures. In essence, the Circuit Court created a mayoral loophole through which dissatisfied parties in a quasi-judicial proceeding can lobby a mayor to veto a decision they do not like and through which the mayor can act for any reason whatsoever—untethered from the hearing record—while the board whose decision is being vetoed was subject to due process constraints.

The particular quasi-judicial proceeding at issue here concerns a historic preservation permit, but the ramifications of the Circuit Court's decision redound to all quasi-judicial proceedings. In *Board of County Commissioners of Brevard County v. Snyder*, 627 So. 2d 469, 472–73 (Fla. 1993), the Florida Supreme Court took steps to rein in the world of "The Zoning Game," in which "the loose judicial scrutiny [of zoning decisions] afforded by the fairly debatable rule," rather than the standards applicable to quasi-judicial proceedings, led to "'neighborhoodism' and rank political influence [having a significant effect] on the local decision-making process" and to "ad hoc, sloppy and self-serving decisions" that should instead have been made in accordance with defined standards based on evidence. With its bizarre decision, the Circuit Court has now returned us to that world, but with a twist: it has

vested all of the malign authority in a single official, making a city mayor with veto authority the Emperor of All Quasi-Judicial Proceedings.

The particular decision at issue here is the latest act in a long and complicated saga, marked with dramatic twists and turns that are perhaps appropriate to a case involving a theater. Part one of this saga began in 2017, when the County first applied to alter and rehabilitate the Coconut Grove Playhouse (the "Playhouse"). Because the Playhouse is a locally-designated historic site in the City of Miami (the "City"), the project required regulatory approval—in the form of a certificate of appropriateness—from the City's Historic and Environmental Preservation Board (the "HEPB"). Throughout this process, the County has appeared before the City not as a sovereign or other governmental entity, but as any other applicant subject to regulatory review.

In April 2017, the HEPB granted the County a certificate of appropriateness for a conceptual master plan for the project—a preliminary step undertaken at the suggestion of the City's historic preservation staff to provide a macro view of the project before developing and seeking approval of final plans. Two constituents appealed that decision to the City Commission, which granted their appeal in part. The County sought certiorari review to challenge the City Commission's quasi-judicial decision, and a different Circuit Court panel granted the County's petition, thereby reinstating the HEPB's 2017 approval. *See Miami-Dade Cnty. v. City of*

Miami, 26 Fla. L. Weekly Supp. 800b (Fla. 11th Cir. Ct. App. Div. Dec. 3, 2018) ("*Playhouse I*"). There ended part one.

Part two—this proceeding—concerns the County's final plans for the Playhouse, which it designed in reliance on, and in conformance with, the 2017 approval. As required by that approval, the County returned to the HEPB for another quasi-judicial hearing. But this time, the HEPB disregarded all the competent evidence in the record and its prior approval, and denied the application. Pursuant to the City's process, the County appealed to the City Commission, which conducted a de novo, quasi-judicial public hearing and, this time, approved the application.

Part two should have ended there, but it didn't. The City Mayor vetoed the City Commission's approval, purporting to reinstate the HEPB's denial, and the City Commission failed to override the veto. The City deems the mayoral veto, un-overridden, to be the City's final decision on the application.

The County again timely sought certiorari review, challenging the City's final decision on its quasi-judicial application—i.e., the un-overridden mayoral veto. But rather than review for compliance with due process, the essential requirements of the law, and substantial competent evidence, the Circuit Court panel instead determined that the veto existed outside the quasi-judicial process and that the court therefore lacked jurisdiction pursuant to Florida Rule of Appellate Procedure 9.100.

Curiously, though, the Circuit Court also spent nearly two-thirds of its opinion recounting "facts" and making findings relevant to the underlying merits of the County's application—"facts" and findings that bore no relationship to the dispositive jurisdictional question, that presented selective and erroneous readings of the record below, and that conflicted with not only *Playhouse I,* but also the City's own interpretation of the underlying historic designation. Indeed, the Circuit Court's purported factual findings are so unnecessary to the ultimate disposition that it appears the court may have been trying to have it both ways, by signaling a particular policy preference on the Playhouse project while also avoiding an actual decision on the merits. But, of course, that is not the province of a court, jurisdiction or not.

As further explained herein, the Circuit Court's decision violates the essential requirements of the law and results in a miscarriage of justice. Indeed, in severing the City Mayor's veto from the unquestionably quasi-judicial process from which it emanated and of which it is an integral part, the Circuit Court's decision shields the City's final decision from the meaningful review that would apply had that decision been rendered by the City Commission rather than the City Mayor—an outcome that affects the very structure of all future quasi-judicial proceedings in the City and extends the miscarriage of justice well beyond this case. That absurd and outrageous result cannot be countenanced on second-tier review. This Court must therefore exercise its authority to quash the decision, remand, and instruct the lower court to

consider the merits of the City's decision, based on the actual facts in the record, under the three-pronged standard for first-tier review of quasi-judicial decisions.

II. Jurisdiction

The Circuit Court's determination that it lacked jurisdiction is a final order of a circuit court acting in its review capacity. Thus, this Court has jurisdiction pursuant to Florida Rules of Appellate Procedure 9.030(b)(2)(B) and 9.100(c)(1) and may review the lower court's decision on second-tier certiorari.[2]

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[2] When a lower court dismisses a petition seeking first-tier certiorari review, that decision may be challenged on second-tier certiorari. *Bush v. City of Mexico Beach*, 71 So. 3d 147 (Fla. 1st DCA 2011); *see also Terry v. Bd. of Trustees of City Pension Fund*, 854 So. 2d 273, 274 (Fla. 4th DCA 2003); *Fisher Island Holdings, LLC v. Miami-Dade Cnty. Comm'n on Ethics & Public Trust*, 748 So. 2d 381 (Fla. 3d DCA 2000); *Vazquez v. Housing Authority of City of Homestead*, 774 So. 2d 813 (Fla. 3d DCA 2000); *Payne v. Wille*, 657 So. 2d 964 (Fla. 4th DCA 1995).

Notwithstanding the above-cited authority, some cases in other contexts hold that dismissals should be challenged either by mandamus or direct appeal. *See, e.g.*, *Duarte v. RMC South Florida, Inc.*, 973 So. 2d 495, 498 (Fla. 3d DCA 2007); *Green v. Moore*, 777 So. 2d 425 (Fla. 1st DCA 2000). Accordingly, should this Court view certiorari as an inappropriate vehicle for review, the County respectfully asks that the Court treat this petition as though it requested the appropriate remedy. *See* Fla R. App. P. 9.040(b)(1) and (c); *Skinner v. Skinner*, 561 So. 2d 260 (Fla. 1990) ("[O]nce the district court's jurisdiction has been invoked, it cannot be divested of jurisdiction by a hindsight determination that the wrong remedy was sought by a notice or petition[.]"). The County has timely invoked this Court's jurisdiction, and because, as argued herein, the County is entitled to relief under the more exacting standard applicable on second-tier certiorari, it would also be entitled to relief under the less stringent standards governing mandamus and direct appeal proceedings.

III. Procedural Facts and Background

A. The County's 2017 application for a certificate of appropriateness to rehabilitate the Playhouse

Because the City designated the Playhouse as a historic site in 2005, the County required a certificate of appropriateness from the City to make alterations to, and rehabilitate, the site. Pet. App. Ex. B; Ex. C. A certificate of appropriateness is a permit that must be obtained before undertaking "any new construction, alteration, relocation, or demolition within a designated historic site[.]" *Id.* Ex. C. at MDC0062. This project requires a special certificate of appropriateness that the HEPB may only approve after a quasi-judicial public hearing. *Id*.

Notably, the City has agreed with the County that the 2005 designation did not expressly include preservation of the interior of the Playhouse structure. *Id.* Ex. D at MDC0120; Ex. E at MDC0476; Ex. F at MDC0638. The parties further agree that, under the City's own historic preservation code, the failure to expressly include interior features as part of the designation means that the interior is beyond the scope of regulation in certificate of appropriateness applications, such as the one at issue here. *Id.* Ex. D at MDC0120.

Rather than appearing before the HEPB for the first time with a final set of plans, the County applied for a certificate of appropriateness for a conceptual master plan early on in the design process, at the suggestion of City staff, to allow for more public input and transparency in a quasi-judicial setting before producing final

designs. *Id.* Ex. G. In April 2017, the HEPB conducted a public hearing and approved the County's application, with conditions. *Id*. Ex. H.

B. The appeal of the County's 2017 approval to the City Commission

Two City residents who disliked the County's plan and wished for preservation of the entire Playhouse interior appealed the HEPB's approval to the City Commission, in accordance with the City's historic preservation process. *Id.* Ex. I; Ex. D. The City Commission heard the appeal in December 2017 and granted it in part with conditions—conditions that ranged from being completely unrelated to historic preservation, such as requiring a greater number of theater seats based on the receipt of pledge money, to improperly attempting to regulate the non-designated interior, such as requiring preservation of the entire Playhouse structure, including the protection, restoration, and maintenance of specific interior features. *Id.* Ex. J.

C. The Circuit Court's decision in *Playhouse I*

The County timely petitioned for first-tier certiorari review of the City's decision. In December 2018, a different Circuit Court panel granted the petition. *Id.* Ex. K (*Playhouse I*). The court agreed with the County that: the two residents who had initiated the appeal to the City Commission lacked standing and, therefore, the City Commission ought not have heard their appeal; and that "the County was not afforded procedural due process" by the City Commission, because "[c]onsideration of preservation of the interior of the [Playhouse] was outside the purview of the

appeal and expanded the scope of the hearing without proper notice." *Id.* at MDC0670-71. Importantly, the court recognized what both parties had acknowledged: that "[t]he 2005 Designation Report did not include the interior of the building." *Id.* at MDC0671. Accordingly, the court reversed and remanded, quashing the City's decision. *Id.* at MDC0675.

D. <u>The HEPB's rejection of the County's final plans</u>

The Circuit Court's 2018 decision in effect reinstated the HEPB's 2017 approval. *Id.* Thus, all that remained was for the HEPB to consider and approve the County's final plans, which it prepared in reliance on, and in conformance with, the 2017 approval. *Id.* Ex. L. The HEPB conducted a quasi-judicial public hearing on the final plans in March 2019. *Id.* Ex. E. But unlike the prior hearing, this time the HEPB disregarded the only competent evidence in the record as well as its prior approval, and instead denied the County's application based on an incompetent and inapposite analysis produced by the state's historic preservation office. *Id.* at MDC0545-49; Ex. M. The HEPB's decision was further tainted by the participation of its biased vice-chair, who had been engaged in an *ex parte* campaign with objectors and the state historic preservation staff, in an apparent effort to find ways to defeat the County's project—including requesting from the state staff the very analysis that she would use at the hearing to justify the denial. *Id.* Ex. N at MDC0692-93.

Despite the denial, the HEPB expressly extended the validity of its 2017 approval to allow the County to return with a different proposal that the board might find more consistent with that prior approval. *Id.* Ex. E at MDC0546-47; Ex. M.

E. The County's 2019 appeal to the City Commission

The County timely appealed the HEPB denial to the City Commission, which held a de novo, quasi-judicial public hearing in May 2019. *Id.* Ex. O. This time, the City Commission approved the County's plans, subject to acceptable conditions. *Id.* at MDC1098-1103; Ex. P.

F. The City Mayor's veto of the City Commission's approval

On May 17, 2019, the City Mayor vetoed the City Commission's decision and issued a statement explaining the reasons for his veto. *Id.* Ex. Q. At the time, the City Mayor and his staff maintained that he was subject to, and had observed, the requirements for quasi-judicial proceedings, and his veto statement purported to be based on substantial competent evidence. *Id.* Ex. R at MDC1319 (City Mayor stating "I was persuaded by the competent substantial evidence in the record that the county's plan does not meet [the code-prescribed] standard"); *id.* at MDC1326 (City Mayor's staff stating that "it is crucial that this [veto] decision has to be guided by quasi-judicial factors"); Ex. Q at MDC1187. The veto statement further expressed that the City Mayor sought to reinstate the HEPB's decision, which, as explained, had denied the County's application while leaving in place the 2017 master plan

approval. *Id.* The City Commission failed to override the mayoral veto by a single vote. *Id.* Ex. R at MDC1337. The City has regarded the un-overridden veto as the final decision on the County's application, and has never argued that the veto was anything other than a final decision.[3] *Id.* Ex. S.

G. The County's second certiorari petition and the Circuit Court's dismissal for lack of jurisdiction

On June 17, 2019, the County timely sought first-tier certiorari review in the Circuit Court, challenging the City's final decision—i.e., the City Mayor's un-

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[3] While arguing that the Circuit Court lacked jurisdiction, the City never contended that the mayoral veto was anything other than a final, reviewable decision on the County's application. Rather, the City's argument has been that the veto was an executive act that may only be reviewed by action for declaratory or injunctive relief. *See id.* Ex. S at MDC1425 n.4 (stating that "[a]lthough this Court does not have jurisdiction to review the County's petition for writ of certiorari, ***the mayoral veto is not insulated from challenge***") (emphasis supplied). The City has thus forfeited any argument that would now attempt to recharacterize the veto as something other than a final decision. *See, e.g.*, *W.T. v. Dep't of Children & Families*, 846 So. 2d 1278, 1282 (Fla. 5th DCA 2003) ("We do not address this argument because it was not raised below").

But even if the mayoral veto were viewed as a non-final act that merely triggers a supermajority vote requirement on the override to sustain the approval, *see* City Charter § 4(g)(5) (providing that "city commission may, . . . after the veto occurs, override that veto by a four-fifths vote"), the veto of a quasi-judicial decision would, for the reasons explained *infra*, still be part and parcel of a quasi-judicial proceeding. It thus would still have to apply the right law, observe due process, and be based upon record evidence. And the City Commission's decision on the override would have to follow the same standards. But whether the veto is characterized as a final decision (as the City has maintained) or as a mere undoing that triggered a supermajority vote requirement by the City Commission (as the Circuit Court decision insinuates, but does not hold), the result is the same: by whichever final decision-maker, ***the City*** denied the County's quasi-judicial application in violation of the first-tier certiorari standards, and that denial must be quashed.

overridden veto. *Id.* Ex. T. As the County argued below, the City Mayor's veto of the quasi-judicial approval was unsupported by competent substantial evidence, failed to apply the right law, and violated due process. *Id.* The City argued that the court lacked jurisdiction because, in its view, the veto of a quasi-judicial decision was not itself part of the quasi-judicial proceeding, notwithstanding the City Mayor's own contention that he had acted in accordance with the requirements for quasi-judicial proceedings. *Id.* Ex. S; Ex. U.

The Circuit Court received briefing on this jurisdictional issue and the merits of the appeal, and held oral argument. On July 22, 2020, the court issued its decision, agreeing with the City that the mayoral veto was not quasi-judicial and, thus, finding that it lacked jurisdiction over the County's challenge. Op. at 13-15.

In reaching this conclusion, the court relied primarily on the City's code and charter. As to the former, the court found that the HEPB and City Commission proceedings were quasi-judicial because the code required "notice, the opportunity to be heard, a public hearing, and the right to appeal." *Id.* at 11. But the court viewed the City Mayor's veto as something separate and apart from the proceedings to which it related, noting that the City charter provides him with "veto authority over any legislative, quasi-judicial, zoning, master plan or land use decision of the city commission," but that it is silent as to how that veto authority must be exercised. *Id.* at 13 (emphasis omitted).

Although the City Mayor had vetoed a quasi-judicial approval that the County obtained through a public hearing process, the court reasoned that "[u]nlike the HEPB decision and the City Commission appeal, a mayoral veto contains no hallmarks of a quasi-judicial act" because the City code and charter do not require notice, an opportunity to be heard at a public meeting, or a means to appeal the veto. *Id.* at 13-14. Noting that the veto "***negates*** the power of the Commission," the court declined to classify it as executive or quasi-legislative, but found that "no matter how veto power is described, it is not quasi-judicial and therefore, not properly reviewable by certiorari." *Id.* at 14 n.7 (emphasis original).

While the court found that it lacked jurisdiction, it nevertheless included in its opinion unsupported factual findings and conclusions relating solely to the merits of the County's appeal and not to the jurisdictional question it was deciding. *Id.* at 2-9. Some of those findings are furthermore belied by the record below and counter to the law of the case established in *Playhouse I*. *See infra*, Part V.C.

IV. Legal Standard

Parties may twice seek judicial review of a local government's quasi-judicial decision. "First, a party may seek certiorari review at the circuit court level," and second, "[t]he parties may then seek 'second-tier' certiorari review of the circuit court decision by petitioning for review in the district court." *Miami-Dade Cty. v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 199 (Fla. 2003). "The scope of the district

court's review on second-tier certiorari is limited to whether the circuit court (1) afforded procedural due process, and (2) applied the correct law," as "[t]he district court may not review the record to determine whether the underlying agency decision is supported by competent, substantial evidence." *Id.*

On second-tier review, the due process inquiry concerns the circuit court's actions, rather than the underlying actions of the local government. *Seminole Entm't, Inc. v. City of Casselberry, Fla.*, 813 So. 2d 186, 188 (Fla. 5th DCA 2002). As to the essential requirements of the law, the challenging party must show not only that the lower court applied the incorrect law, but that the error "amounts to 'a violation of a clearly established principle of law resulting in a miscarriage of justice.'" *Omnipoint*, 863 So. 2d at 199 (citation omitted). "The writ functions as a safety net and gives the upper court the prerogative to reach down and halt a miscarriage of justice where no other remedy exists." *Dougherty ex rel. Eisenberg v. City of Miami*, 89 So. 3d 963, 966 (Fla. 3d DCA 2012). As such, the court's "role requires 'assessment of the gravity of the error and the adequacy of other relief.'" *Id.* (citations omitted). "[T]he function of this great writ of review" is to serve as "a 'backstop' to correct grievous errors that, for a variety of reasons, are not otherwise effectively subject to review." *United Auto. Ins. Co. v. Palm Chiropractic Ctr., Inc.*, 51 So. 3d 506, 508 (Fla. 4th DCA 2010) (citation omitted).

Where a circuit court erroneously dismisses a first-tier certiorari petition for lack of jurisdiction, the district courts have held that such an error "constitute[s] 'a violation of a clearly established principle of law resulting in a miscarriage of justice' and, therefore, a departure from the essential requirements of law" warranting second-tier certiorari relief. *Bush*, 71 So. 3d at 147; *Terry*, 854 So. 2d at 274.

V. Argument

A. The Circuit Court departed from the essential requirements of the law in holding that the City Mayor's veto of a quasi-judicial decision was not itself quasi-judicial and thus not subject to first-tier certiorari review

In dismissing the petition for lack of jurisdiction, the lower court violated the essential requirements of the law by allowing the City Mayor to make a final decision in an acknowledged quasi-judicial proceeding without himself adhering to the fundamental due process protections that are required to make such a proceeding fair. The Circuit Court itself acknowledged that the HEPB and City Commission proceedings "are undoubtedly quasi-judicial acts," but erroneously, and based on inapposite law, reasoned that the "nature of a mayoral veto is quite different." Op. at 10. According to the court, "a mayoral veto contains no hallmarks of a quasi-judicial act" and is a "discretionary exercise of power to prohibit a ***legislative*** act," and therefore cannot itself be a quasi-judicial act. *Id.* at 13-14 (emphasis supplied).

Because the court fundamentally misunderstood the nature of the action it was charged with reviewing, its decision must be quashed.

First, the Circuit Court's decision fails to properly assess the character of the proceeding as a whole. The court's explanation of the effect of a mayoral veto to prohibit a ***legislative*** act is true as a general statement, but beside the point here. The City Mayor did not veto a legislative act, he vetoed a ***quasi-judicial*** one, and the lower court did not even attempt to explain how its analysis in any way applies to the veto of a quasi-judicial act. When a mayoral veto is used to overturn a quasi-judicial decision, it is not prohibiting a legislative policy from moving forward. It is fundamentally changing the governing body's decision on the application—here, from a "yes" to a "no." Unlike with a legislative act, the veto's effect on a quasi-judicial act is adjudicative rather than preventative—particularly where, as here, the local government views the un-overridden veto as the final decision on the application.

In addition, while notice and opportunity to be heard are hallmarks of a quasi-judicial act, neither their presence nor absence at any specific point in the proceedings alone determines whether the nature of the action is quasi-judicial. Instead, what controls the distinction between quasi-judicial and other actions is the nature of the proceeding as a whole—particularly, whether the proceeding concerns

an adjudication or the application of an existing policy or law to a particular request in a regulatory context, as compared with the creation of a general policy.

Moreover, a local government cannot control the nature of an act simply by providing, or not, particular hearing procedures. To hold otherwise would allow the local government to wholesale deprive participants of their due process rights, and then say that those rights never existed because the local government did not provide the means to protect them. But that is precisely the effect of the Circuit Court's decision here. Its reasoning—that the failure to provide a hearing at the time of the veto severs the veto from the rest of the quasi-judicial hearing process, even though the veto occurred after quasi-judicial hearings had already been held—is both the ultimate expression of form over substance and completely circular.

Second, the court relies entirely on inapposite authority describing the effect of a veto on a legislative act and, more precisely, on the relationship between the State Governor and the State Legislature. That authority is utterly beside the point here. Article III, section 3 of the Florida Constitution establishes the traditional separation of powers between the executive and legislative branches of state government. But that separation of powers does not apply at the local level. Rather, municipal governing bodies can and do exercise a combination of legislative, quasi-judicial, and executive powers. Such local powers include engaging in proprietary acts regarding contracts that at the state level are addressed by the executive branch,

and making quasi-judicial decisions that at the state level are similarly handled by executive agencies.

There is simply no analogy to draw between the Governor's veto power at the state level—where the separation between executive and legislative powers is constitutionally pronounced, quasi-judicial decisions are clearly made on the executive side of that line, and a gubernatorial veto of a legislature's action is clearly part of the legislative process—and what the City Mayor did here—where the governing body exercises both legislative and quasi-judicial powers, and the role of the mayoral veto thus depends on the action being considered. In drawing such an inapposite analogy anyway, and allowing its view of the mayoral veto to be informed by the state level veto power, the Circuit Court committed a fundamental legal error amounting to a miscarriage of justice that has ramifications far beyond this case.

1. The Circuit Court applied the wrong law in considering the veto in isolation and ignoring the character of the entire proceeding

Local government decisions generally fall into one of three categories: quasi-judicial, executive, or legislative. Correctly characterizing a local government proceeding is critical to determining what judicial review, if any, is available.

Simply put, a proceeding is quasi-judicial if it "results in the ***application*** of a general rule of policy," *see Snyder*, 627 So. 2d at 474 (emphasis original), and "has an impact on a limited number of persons or property owners and on identifiable

parties and interests,"[4] *see D.R. Horton, Inc.–Jacksonville v. Peyton*, 959 So. 2d 390, 398-99 (Fla. 1st DCA 2007); *see also Jennings v. Dade Cnty.*, 589 So. 2d 1337, 1343 (Fla. 3d DCA 1991) (Ferguson, J., concurring) ("A judicial inquiry investigates, declares and enforces liabilities as they stand on present facts and under laws supposed already to exist. That is its purpose and end.").

Such decisions are also typically contingent upon a showing made at a regulatory hearing where the rights of an individual applicant or respondent are adjudicated. *See De Groot v. Sheffield*, 95 So. 2d 912, 915 (Fla. 1957); *Fla. Motor Lines*, 129 So. at 882 ("It is the essential nature of the official act that determines whether it is quasi judicial. If the action is taken on prescribed adversary hearing and involves the exercise of independent judgment in determining controversies that directly affect adversary legal rights or privileges claimed by individuals, it is at least quasi judicial.").

[4] By contrast, "legislative action results in the ***formulation*** of a general rule of policy," *see Snyder*, 627 So. 2d at 474 (emphasis original), and generally "is open-ended and affects a broad class of individuals or situations," *see D.R. Horton, Inc.*, 959 So. 2d at 398-99. Here, the dispute concerns not the formulation of a general rule of policy affecting a broad class, but a hearing board's application of existing policy to an applicant's request for permission to alter a particular historic property. In no way can such action be characterized as legislative. *See Snyder*, 627 So. 2d at 474; *D.R. Horton*, 959 So. 2d at 398-99.

Below, the Circuit Court correctly recognized that notice, a hearing, and presentation of adversary evidence are the "hallmarks" of a quasi-judicial decision.[5]

[5] But, as the Circuit Court's decision here illustrates, too much emphasis on whether the "hallmarks" are present at any given stage of the decision-making process can lead to the wrong conclusion about the nature of the proceeding itself. Instead, a more careful, holistic assessment of the character of the entire proceeding is required, as sometimes an executive proceeding may bear indicia of a quasi-judicial one, and vice-versa. For example, a local government's decision to enter into a contract following a competitive bidding process is generally considered an executive function, and is not made something different simply because the competitive bidding process also includes a hearing for an unsuccessful bidder to challenge the executive's recommendation. *See MRO Software, Inc. v. Miami-Dade Cnty.*, 895 So. 2d 1086, 1086 (Fla. 3d DCA 2004). In such contexts, the hearing—indeed, the character of the proceeding itself—is not adjudicatory in nature but rather serves a purpose other than facilitating a judicial determination:

> The hearing provides a forum for the orderly presentation and reception of evidence and argument for and against the positions of the opposing parties, and other purposes, not the least of which would be to secure a favorable recommendation from the hearing examiner, and even to allow the protesting bidder an opportunity to convince the county manager to change his recommendation.

Miami-Dade Cnty. v. Church & Tower, Inc, 715 So. 2d 1084, 1088 (Fla. 3d DCA 1998). Similarly, "[i]f an act is in essence legislative in character, the fact of a notice and a hearing does not transform it into a judicial act. If it would be a legislative act without notice and a hearing, it is still a legislative act with notice and a hearing." *Jennings*, 589 So. 2d at 1343 (Ferguson, J., concurring).

Relatedly, a decision may be executive and not quasi-judicial even though made by a government board rather than a lone official. Typically, executive decisions are made by a single official without a hearing having ever been held at any point. *See Fla. Motor Lines v. R.R. Comm'rs*, 129 So. 876, 882-83 (Fla. 1930); *City of St. Pete Beach v. Sowa*, 4 So. 3d 1245, 1246 (Fla. 2d DCA 2009) (single city official's decision granting building permit was executive and, thus, not subject to certiorari review). But that is not always the case. For example, commercial leasing of government property is an executive act, even though the decision is made by a local government board and not an official. *See MRO Software*, 895 So. 2d at 1086;

See, e.g., *Teston v. City of Tampa*, 143 So. 2d 473, 476 (Fla. 1962). But the court fundamentally erred in atomizing what was otherwise a single continuum of proceedings—from initial hearing to appellate hearing to veto of appellate hearing decision—into discrete components, plucking out a single portion from the continuum, and labeling that isolated piece differently from the rest.

The Circuit Court applied a simplistic syllogism: because the City Mayor himself could not hold a hearing, his role in the quasi-judicial process continuum could not itself be quasi-judicial. The Circuit Court should have applied a different syllogism instead—one that focused not on the City Mayor's veto in isolation, but on the nature of the proceeding as a whole. *See Fla. Motor Lines*, 129 So. at 882 ("The essential nature and effect of the governmental function to be performed, rather than the name given to the function or to the officer who performs it, should be considered in determining . . . whether [the action] is legislative, executive, or judicial in its nature."). Had it done so, the court would have realized that it does have jurisdiction here.

The decision into which the City Mayor inserted himself unquestionably entailed the application of law to a specific property (i.e., the application of the City code requirements to the County's request for a certificate of appropriateness to alter

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Charles M. Schayer & Co. v. Bd. of County Comm'rs of Dade Cnty., 188 So. 2d 871, 871 (Fla. 3d DCA 1966).

a single parcel of historically-protected property), unquestionably impacted only "a limited number of persons or property owners" (i.e., the County and Florida International University, as co-tenants, seeking to rehabilitate the Playhouse), *D.R. Horton*, 959 So. 2d at 398-99, and unquestionably involved an application that could only be decided after notice and hearing and where the judgment of the board was contingent on the showing made at the hearing, *see De Groot*, 95 So. 2d at 915. The Circuit Court itself recognized as much. Op. at 11 ("The HEPB decision at issue here . . . was made subject to required notice, the opportunity to be heard, a public hearing, and the right to appeal. This decision . . . was therefore quasi-judicial in nature. The City Commission's decision . . . was similarly quasi-judicial in nature.").

Thus, the nature of the City's historic preservation process was unquestionably quasi-judicial. *See De Groot*, 95 So. 2d at 915; *Bloomfield v. Mayo*, 119 So. 2d 417, 421 (Fla. 1st DCA 1960) ("[T]he test of a quasi-judicial function turns on whether or not the statutory tribunal had exercised a statutory power given it to make a decision having a judicial character or attribute, and consequent upon some notice or hearing to be had before it as a condition for the rendition of the particular decision made.").

The nature of that process did not magically change when the City Commission's approval landed on the City Mayor's desk. So when the City Mayor

decided to insert himself into an unquestionably quasi-judicial process, he was obligated to confine his review to the record adduced during the prior hearings, and to apply the same law that the boards were charged with applying. The fundamental character of the proceeding does not change merely because the City charter and code did not require the City Mayor to personally hold a hearing himself. Not every stage of a proceeding must involve a hearing for the proceeding to be quasi-judicial and thus subject to certiorari review: a decision that is "purely administrative or quasi-legislative or quasi-executive in character and quality" may nevertheless be "reached or affected by the writ of certiorari" if "as an incident to the arriving at or making of such order by the promulgating authority, a notice and hearing, judicial in nature, is required by law to be observed as a condition precedent" to the decision. *Bloomfield*, 119 So. 2d at 421. But the Circuit Court failed to examine the character of the overall proceeding and instead focused myopically on whether the last stage of the continuum entailed an additional public hearing. The Circuit Court simply decided that because the City code and charter did not require the City Mayor to hold a duly noticed public hearing, his veto of a quasi-judicial decision could not itself be labelled quasi-judicial. Op. at 13-14.

By embracing this simplistic logic, ignoring the overall character of the proceedings, and instead classifying each component in isolation from the other, the Circuit Court capitulated to the City's *post hoc* attempt to relabel the proceeding

rather than respond to the merits of the County's challenge, *see 75 Acres, LLC v. Miami-Dade Cnty., Fla.*, 338 F.3d 1288, 1296 (11th Cir. 2003), and thereby wrongly embraced the "tyranny of labels," *see Snyder v. Com. of Mass.*, 291 U.S. 97, 114 (1934) (Cardozo, J.) (deriding "the tyranny of labels" as "[a] fertile source of perversion" in which "another situation is placed under the rule because it is fitted to the words, though related faintly, if at all, to the reasons that brought the rule into existence"); *City of Cumming v. Flowers*, 797 S.E.2d 846, 851 (Ga. 2017) ("[S]ubstance matters far more than form, and the courts need not 'capitulate to the label that a government body places on its action.").

But the court should have realized that, because a decision on the historic preservation application at issue here required at least notice and a hearing and would be contingent on the showing made at the hearing, any decision on that application was quasi-judicial in nature, and the City Mayor's participation did not suddenly transform the proceeding into something unreviewable on certiorari. *See Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship*, 619 So. 2d 996, 1001 (Fla. 2d DCA 1993) ("[I]t is the character of the administrative hearing leading to the action of the administrative body that determines the label to be attached to the action," and "[a]ny meaningful decision as to the proper scope of judicial review of a zoning decision must start with a characterization of the nature of that decision") (citations omitted); *Fla. Motor Lines*, 129 So. at 882.

Moreover, there is nothing inherent in the veto power that prevents it from being exercised in a manner that comports with the constitutional due process protections attendant to quasi-judicial decisions. In fact, the City Mayor maintained that he was subject to, and had observed, quasi-judicial requirements, and his veto statement purported to be based on substantial competent evidence. Pet. App. Ex. R at MDC1319 (City Mayor stating, "I was persuaded by the competent substantial evidence in the record that the county's plan does not meet [the code-prescribed] standard"); *id.* at MDC1326 (City Mayor's staff stating, "it is crucial that this [veto] decision has to be guided by quasi-judicial factors"); Ex. Q at MDC1187.

While the City Mayor ultimately failed on this front, he at least purported to recognize the applicable standard at the time. The Circuit Court's error was more fundamental: it refused to hold the City Mayor—as the final decision-maker in this quasi-judicial proceeding—to the standard that he himself thought applied and that would have applied had the City Commission's decision been the final one. In making one and only one portion of an otherwise unquestionably quasi-judicial proceeding unreviewable on certiorari, the lower court departed from the essential requirements of the law.

2. *The Circuit Court's reliance on the Governor's veto power was wholly misplaced, because the cited cases concern the veto of legislative, not quasi-judicial, actions*

The Circuit Court analogizes the City Mayor's veto power here to the Governor's veto power over actions of the Florida Legislature. Op. at 14-15, 15 n.10. But that analogy is wholly misplaced and constitutes fundamental legal error. To begin with, the separation of powers that distinguishes the executive from the legislature at the state level does not apply at the local government level, where the local governing body can exercise multiple powers. *See Locke v. Hawkes*, 595 So. 2d 32, 36 (Fla. 1992) (recognizing that local governing bodies do not have a strict separation of powers between legislative and executive functions). By contrast, the State Legislature does not take quasi-judicial actions such as the one at issue here.

And even if the Legislature did take quasi-judicial actions, none of the cases the Circuit Court relies upon concern a procedure or decision remotely similar to the adjudicatory proceeding at issue in this case. Instead, the cited cases concern the purest of policy-setting decisions: making and modifying fiscal appropriations. *See Brown v. Firestone*, 382 So. 2d 654, 664 (Fla. 1980) (addressing gubernatorial veto of legislative appropriations); *Chiles v. Children A, B, C, D, E, & F*, 589 So. 2d 260, 265 (Fla. 1991) (recognizing that the "executive branch does not have the power to use the veto to restructure an appropriation" when considering whether broad

statutory delegation to executive branch to reapportion state budget violated separation of powers between legislature and executive).

To be clear, the Circuit Court cites no authority supporting its attempt to equate a mayor's veto of a municipal board's quasi-judicial decision with the Governor's veto of the Legislature's legislative decisions. In fact, those actions are of vastly different characters, and the judicial review and constitutional protections attendant to each character of decision are likewise vastly different. *See infra* Part V.B. Accordingly, the Circuit Court applied the wrong law in resting its decision about mayoral veto power on an inapposite analogy to the Governor's veto power.

B. The Circuit Court's finding that the City Mayor's veto was not quasi-judicial and, thus, not subject to certiorari review results in a miscarriage of justice warranting relief here

The Circuit Court's holding exempts the City Mayor from the strictures otherwise applicable to the quasi-judicial proceedings he is vetoing. This decision subverts not only the entire purpose of the historic preservation process at issue—which requires a decision based on the application of code-prescribed standards to evidence in a public hearing record—but also all other quasi-judicial proceedings that the City Mayor has the authority to veto. Unless remedied, the Circuit Court's holding would create a glaring loophole in any quasi-judicial review conducted by the local government, invite in at the eleventh hour of the local decision-making process the type of "rank political influence" derided by the *Snyder* court, sanction

the *ex parte* communications that this Court called "anathema to quasi-judicial proceedings" in *Jennings*, and result in the systematic denial of due process to all parties at the local level. *See Dougherty*, 89 So. 3d at 966 (second-tier certiorari "functions as a safety net and gives the upper court the prerogative to reach down and halt a miscarriage of justice").

Obtaining second-tier certiorari relief requires a showing that the lower court's decision transcends mere legal error and results in a miscarriage of justice. As one district court judge recently explained in colloquial terms:

> [W]hen called upon by a petitioner to decide whether the umpire made the correct call, our inquiry is not whether the pitch was a ball or strike; instead, we adjudge only whether the umpire's call was itself such a wild pitch that it departed from fundamental legal norms, depriving the losing party of due process and resulting in a miscarriage of justice. Stated another way, we cannot correct "mistake-errors," which are the province of the circuit court, but ***we can correct "blunder-errors," ones so egregious that a failure of justice would otherwise result***.

Evans Rowing Club, LLC v. City of Jacksonville, 45 Fla. L. Weekly D1467, 2020 WL 3286285, at *7 (Fla. 1st DCA June 18, 2020) (Makar, J., concurring) (emphasis supplied). This case presents just such a "blunder-error."

To begin, Florida courts have found that the improper dismissal (rather than denial) of a petition warrants second-tier certiorari relief and, thus, the Circuit Court's error here necessarily meets the miscarriage of justice standard. *See, e.g.*, *Bush*, 71 So. 3d at 147; *Terry*, 854 So. 2d at 274. The Circuit Court's decision here is even more egregious, though, because it results in a miscarriage of justice not just

for the County in this case, but for all future quasi-judicial applicants in the City. As explained above, the Circuit Court erroneously atomized what was otherwise a single proceeding into discrete segments, divorced them from one another, and found that the veto of a quasi-judicial decision was not itself quasi-judicial. But the court did not cite any authority permitting a quasi-judicial proceeding to be severed in that way, and to have its very character converted into a purely executive decision that is no longer subject to certiorari review even after hearings have been held. In reaching that conclusion based on nothing more than its overly narrow reading of the City charter and code and an inapposite analogy to a gubernatorial veto, the lower court's violation of the essential requirements of the law eviscerated all the due process protections that Florida courts have long held to be required for quasi-judicial proceedings. That evisceration is a miscarriage of justice.

When a municipality's governing body considers a quasi-judicial application, it is obligated to observe certain basic components of due process. *Jennings*, 589 So. 2d at 1340 ("certain standards of basic fairness must be adhered to in order to afford due process" in quasi-judicial proceedings); *see also Snyder*, 627 So. 2d at 474; *Cherry Comm'n, Inc. v. Deason*, 652 So. 2d 803, 804 (Fla. 1995) (an "impartial decision-maker is a basic constituent of minimum due process" in quasi-judicial proceedings); *Thorn v. Fla. Real Estate Comm'n*, 146 So. 2d 907, 910 (Fla. 2d DCA 1962) (quasi-judicial decision must be based solely on public hearing record).

Neither the City nor the Circuit Court has explained how an applicant's right to constitutional due process—particularly the right to an impartial decision-maker who renders a decision based solely on the record evidence—evaporates merely because the City charter imbues its Mayor with veto authority over a decision that was otherwise subject to those due process requirements. The Circuit Court did not even address this issue, which the County raised below, and so far as the County is aware, no authority in any jurisdiction supports such an outcome.

In fact, another Circuit Court panel had previously found to the contrary, holding that the City Mayor's veto authority in a quasi-judicial proceeding ***was*** subject to the same essential due process requirements that applied to the City Commission decision under review. Pet. App. Ex. V (*The Vizcayans v. City of Miami*, 15 Fla. L. Weekly Supp. 657a (Fla. 11th Cir. Ct. App. Div. May 7, 2008)). In that case, the panel found that the then-City Mayor's *ex parte* communications regarding a quasi-judicial land use matter, which took place during the veto period after the City Commission's public hearing, violated due process:

> [T]he Mayor engaged in *ex parte* communications with Respondent during the ten day veto period following the Commission's adoption of the Orders. . . . We find that the Mayor's communications all took place after the hearings had concluded, away from public earshot, and therefore violated Petitioner's due process rights under the *Jennings* criteria.

Id. at MDC 1581. This finding necessarily rests on the view that the veto of a quasi-judicial decision is itself quasi-judicial, because the prohibition on *ex parte*

communications is a due process protection particular to quasi-judicial proceedings. *See Jennings*, 589 So. 2d at 1340.[6] The Circuit Court did not so much as acknowledge this prior decision, much less grapple with the implications of its decision here on the due process rights of quasi-judicial parties.

By interpreting the mayoral veto as existing apart from the proceeding it purported to alter, the Circuit Court hastily stripped away all of the procedural protections to which the County was entitled as a quasi-judicial applicant seeking a historic preservation permit from the City. Indeed, the Circuit Court's decision effectively denied the County—and future, similarly-situated quasi-judicial applicants—all meaningful review, thereby resulting in a miscarriage of justice. *See, e.g.*, *Kahana v. City of Tampa*, 683 So. 2d 618, 619 (Fla. 2d DCA 1996) (circuit court's dismissal of petition on the mistaken view that the challenged action was quasi-legislative deprived petitioner of "any meaningful judicial review" and, thus, "resulted in a miscarriage of justice"); *Jennings*, 589 So. 2d at 1340 (lower court's decision "constitutes a departure from the essential requirements of law" warranting second-tier certiorari because it "requires him to litigate a putative claim in a

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[6] Although *Vizcayans* is not binding precedent, the City did not appeal it to this Court, and therefore the result was at least binding on the City. Moreover, the decision properly heeds this Court's longstanding precedents governing quasi-judicial proceedings, such as *Jennings*, and correctly rests on the understanding that it is possible to harmonize the veto power with quasi-judicial process requirements.

proceeding that cannot afford him the relief requested and for that reason does not afford him an adequate remedy").

A simple hypothetical illustrates the point. Suppose that an application is denied by the City Commission (as occurred in *Playhouse I*) instead of the City Mayor. In that instance, the applicant would be entitled to first-tier certiorari review, meaning that the local government's decision would be sustained only if it applied the right law, afforded due process, and was supported by competent substantial evidence. But where, as here, the application is denied by virtue of the City Mayor's veto, the Circuit Court insulates that decision from first-tier certiorari review and only allows it to be challenged in an action for declaratory relief on the grounds that the denial was arbitrary or capricious. *See Sowa*, 4 So. 3d at 1247 ("When an administrative official or agency acts in an executive or legislative capacity, the proper method of attack on the official's or agency's action 'is a suit in circuit court for declaratory or injunctive relief on grounds that the action taken is arbitrary, capricious, confiscatory, or violative of constitutional guarantees.'").

The arbitrary and capricious standard is a much less stringent basis of review, as it does not require the decision to be constrained to the record evidence adduced at a duly-noticed hearing. It would be a miscarriage of justice to find that if a quasi-judicial application is decided by one decision-maker (i.e., the City Commission), the decision is subject to certiorari review, while if the same application is decided

by another decision-maker (i.e., the City Mayor), it is subject to a much less stringent review in an entirely different type of judicial proceeding. *Cf. Tampa-Hillsborough County Expressway Auth. v. K.E. Morris Alignment Serv., Inc.*, 444 So. 2d 926, 929 (Fla. 1983) (rejecting lower court's interpretation because "there could be absurd and unfair results in hypothetical situations that readily come to mind"); *Wollard v. Lloyd's & Companies of Lloyd's*, 439 So. 2d 217, 218 (Fla. 1983) (quashing decision that "exalts form over substance" and creates "a result [that] is clearly absurd").

Not only does such a result have no basis in logic, it also cannot be squared with due process. As noted above, Florida courts have long held that parties to a quasi-judicial proceeding are entitled to certain due process protections. In *Jennings*, for example, this Court explained "certain standards of basic fairness must be adhered to in order to afford due process" in a quasi-judicial proceeding, including, importantly, the right to a decision based upon evidence in the record and nothing else. *Jennings*, 589 So. 2d at 1340. But, under the Circuit Court's decision, that due process right is thrown by the wayside and will apply only to parties who receive a quasi-judicial decision from a local government board, not to those whose decision comes from a mayoral veto. This inexplicable inequity occasioned by the court's decision is plainly a miscarriage of justice because it means that the constitutionally-required due process protections for quasi-judicial proceedings will only apply sometimes, depending capriciously on the mere identity of the decision-maker.

Finally, a miscarriage of justice results because the negative consequences of the lower court's decision do not stop with just this case, but rather reach far and wide and threaten the integrity of all quasi-judicial proceedings in the City and beyond. *Cf. Yankey v. Dep't of Highway Safety & Motor Vehicles*, 6 So. 3d 633, 636 (Fla. 2d DCA 2009) (finding that lower court's "error result[ed] in a miscarriage of justice because it establishes a rule of general application in [certain administrative proceedings] within the circuit that may deprive [individuals] of appropriate process in [such] administrative hearings").

In *Jennings*, this Court held that "[e]x parte communications are inherently improper and are anathema to quasi-judicial proceedings." *Jennings*, 589 So. 2d at 1340. But if left to stand, the lower court's decision will effectively gut that precedent because it will mean that parties to quasi-judicial proceedings are protected from the corrupting influences of *ex parte* communications only during proceedings before local government boards, at least within the City. Once a board renders its decision, attempts to influence the mayor's veto with *ex parte* communications will be fair game, because if the mayor exercises the veto, that decision will not be subject to, or reviewed for compliance with, the same protections attendant to quasi-judicial board decisions.

Unfortunately, this parade of horribles is no mere hypothetical. The record below reflects that the City Mayor here in fact received *ex parte* communications

after the City Commission approved the County's application and before he issued his veto. Pet. App. Ex. W. And, at least one of those communications came from a principal objector to the County's plan, Richard Heisenbottle, who went so far as to email the City Mayor, stating: "As the deadline [to veto] is fast approaching, I took the liberty of drafting the attached Veto Message and suggested Compromise[.]" *Id.* at MDC1589. No concept of due process would countenance an objector communicating privately with a decision-maker to encourage rejection of an absent party's application, much less an objector privately ghostwriting a proposed basis for rejection without the applicant having notice and an opportunity to respond. But that is exactly what happened here.

Thus, in attaching the label "not quasi-judicial" to the City Mayor's veto, the lower court has, with one stroke of its pen, upset an entire body of caselaw and invited what this Court has called "anathema" to due process into proceedings that are otherwise required to be insulated from the pernicious influences of lobbying. "The Zoning Game" that *Snyder* found so troubling may once again be played. And if that is not the essence of a miscarriage of justice, one wonders what is.

C. The Circuit Court departed from the essential requirements of the law when it included in its opinion factual findings on the merits, unrelated to the issue of jurisdiction, and inconsistent with the record and the law of the case

On first-tier certiorari, the circuit court's role is limited to reviewing the record and making a decision in accordance with that record. The court is not at liberty to make its own factual findings:

> A circuit court's certiorari review of an administrative decision is essentially an appellate proceeding and should be limited to the administrative record and those items attached to the petition. Seated in its appellate capacity, the circuit court has no jurisdiction, in certiorari, to make factual findings or to enter a judgment on the merits of the underlying controversy.

Evergreen Tree Treasurers of Charlotte County, Inc. v. Charlotte County Bd. of County Comm'rs, 810 So. 2d 526, 530 (Fla. 2d DCA 2002).

In the instant case, while the Circuit Court found that it lacked jurisdiction to hear the County's challenge because, in its view, the City Mayor's veto was not quasi-judicial, the court nonetheless laid out a rather extensive statement of "facts" that were unrelated to the jurisdictional question, beyond the scope of the court's review, and inconsistent with the record and the law of the case.

First, the opinion finds that, since *Playhouse I* was issued, "the 2017 certificate of appropriateness has expired." Op. at 7. But not only is that finding irrelevant to the court's jurisdiction, it is also belied by the record. When the HEPB denied the County's application in 2019, it expressly authorized the 2017 approval to remain in place, *see* Pet. App. Ex. E at MDC0546-47; Ex. M at MDC0688, and

when the City Mayor issued his veto, he expressly purported to reinstate the HEPB's decision, *see id.* Ex. Q at MDC1187. Contrary to the Circuit Court's finding, then, the record shows that the HEPB's prior approval had not expired. In fact, neither party has ever argued otherwise in this proceeding and, in any event, the continued validity of that approval bears no relation to whether the lower court has jurisdiction over this matter.[7]

Second, the Circuit Court inexplicably reached into the record to attempt to address another issue that was equally unrelated to jurisdiction and, moreover, that the parties did not raise: whether the 2005 designation included preservation of the Playhouse's interior. The City and the County have agreed throughout these proceedings that the 2005 designation did not include the interior. As an assistant city attorney advised the HEPB when it considered the County's final plans in 2019: "I'm only going to speak about things which [sic] I think there is unequivocal certainty. The interior is not designated." *Id.* Ex. E at MDC0476. The prior panel also recognized this fact in *Playhouse I*, holding that "[t]he 2005 Designation Report did not include the interior of the building" and thus it was "not within the purview of the Historical Board." *Id.* Ex. K at MDC0670-71.

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[7] In addition, the court's finding reflects a fundamental misunderstanding of the nature of the 2017 approval. As the record reflects, the 2017 application clearly stated that it was a masterplan concept. *Id.* Ex. G. And, the HEPB's approval included conditions ***requiring*** the project to come back for final approval. *Id.* Ex. H at MDC0656. That is why the County sought the final approval at issue here.

But ignoring the parties' own stipulations and the law of the case, the Circuit Court found that the interior ***is*** subject to regulation:

> The 2017 staff's conclusion that the interior of the theater was not designated as historic credited only one sentence of the following paragraph contained in the 2005 historical designation report:
>
> > Contributing structures within the site include the Coconut Grove Playhouse itself. ***Only the south and east facades possess architectural significance.*** There are no contributing landscape features.
>
> In so doing, the staff disregarded the 2005 report's description of the Parker Browning [sic] renovation of the interior of the theater and the ***historical significance*** of the entire theater and its builders.

Op. at 6 (emphasis original).

This finding violates the essential requirements of the law. As the City code provides, a historic designation does not include interior areas, unless the designation report expressly provides otherwise. Pet. App. Ex. C at MDC051 ("The designation report shall describe precisely those features subject to review and shall set forth standards and guidelines for such regulations. Interior spaces not so described shall not be subject to review under this chapter."). While the 2005 designation of the Playhouse clearly did not include any express interior designation, the court latched onto the designation report's descriptive narrative of the Playhouse's history, which included a historical recounting of the mid-century interior renovations performed by Alfred Browning Parker, *id.* Ex. B at MDC0035-

36, and then used that narrative to improperly conclude that the interior may be regulated, Op. at 6.

In the first instance, because the Circuit Court found that it lacked jurisdiction, this issue was not before it and should not have been addressed in an opinion that otherwise did not reach the merits. *See Evergreen Tree Treasurers*, 810 So. 2d at 532 n.6 ("rather than reaching the merits of the petition, the circuit court should have dismissed [the petition] for lack of jurisdiction").

The court also exceeded the scope of its review in reaching an issue not contested by the parties. In *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 200-01 (Fla. 2003), the Florida Supreme Court held that the district court "exceeded the proper scope of second-tier certiorari review when it, sua sponte," decided "an issue neither party raised in any phase of the proceedings." Below, neither party argued that the Playhouse interior had been designated; in fact, the City has repeatedly acknowledged that the 2005 designation report does not encompass the interior. *See* Pet. App. Ex. D at MDC0120; Ex. E at MDC0476; Ex. F at MDC0638-39.

Those threshold issues aside, the Circuit Court also erred in its review of the record. Simply put, it should not have cherry-picked statements from the record to supplant its judgment for that of the City as to the proper scope of a City designation report. Certainly, the court has no particular expertise in historic preservation and in

how designations of interior features must be described to comply with the City code. And the court appears to have confused the narrative history of what happened to the Playhouse, inside and out, with the City code requirement that particular interior features to be preserved must be expressly called out as subject to regulation—a requirement that the City attorney's office and City historic preservation staff recognized was not met here. *See id.* Ex. E at MDC0476; Ex. F at MDC0638-39. On this point, which the parties have not contested, the court should have deferred to the City's technical expertise in interpreting its own code requirements. *Cf. Metro. Dade County v. P.J. Birds, Inc.*, 654 So. 2d 170, 175 (Fla. 3d DCA 1995) (local government's interpretation of its own regulation is entitled to deference, so long as it is reasonable and consistent with legislative intent).

In doing otherwise, the court did just what the Florida Supreme Court has said it may not do: it "embarked on an independent review of the [designation report] and made its own factual finding based on the cold record." *Broward Cnty. v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 844 (Fla. 2001). In *G.B.V.*, the circuit court denied a petition for certiorari upon finding that an applicant was estopped from challenging the county's partial denial of a plat application because it had made misrepresentations before the county commission. On second-tier review, the district court considered the underlying merits of the plat application, granted the petition, and remanded the case for entry of an order approving the application. Accepting

review and quashing the decision below, the Florida Supreme Court held that both courts had, in different ways, exceeded the scope of their review:

> The circuit court denied [the plat applicant's] petition for certiorari, ruling that the [county's] decision was legislative in nature and that [the applicant] was estopped from raising its claim because [it] had misrepresented its position on [an issue] in its application[.] ***This ruling was improper.*** First, the [county's] decision was a quasi-judicial, not legislative, function and was reviewable via certiorari. Second, rather than limiting its review of the [county's] decision to the three "first-tier" factors [for certiorari review], ***the court embarked on an independent review of the plat application and made its own factual finding based on the cold record*** (i.e., the court determined that [the applicant] had misrepresented its position on [an issue]). In other words, ***instead of simply reviewing the record to determine inter alia whether the [county's] decision was supported by competent substantial evidence, the court combed the record and extracted its own factual finding. The court thus exceeded the scope of its authority***[.]
>
> At the district court level, the court granted certiorari and quashed the circuit court decision, concluding that the decision "was a departure from the essential requirements of law." ***This ruling was proper.*** As explained above, according to the plain language of its order, ***the circuit court made its own factual finding based on the cold record. The circuit court thus applied the wrong law ([by] appl[ying] an independent standard of review), and this is tantamount to departing from the essential requirements of law (as the district court ruled)***.
>
> The district court proceeded to evaluate the merits of the [county's] decision and remanded for entry of an order directing the [county] to approve the plat at ten units per acre. This was improper.

Id. at 844-45 (emphasis supplied).

Like the circuit court in *G.B.V.*, the lower court here exceeded the scope of its review and applied the wrong law when it made its own factual finding related to

the scope of the 2005 designation, contrary to the record. *See also Evergreen Tree Treasurers*, 810 So. 2d at 530 ("Seated in its appellate capacity, the circuit court has no jurisdiction, in certiorari, to make factual findings or to enter a judgment on the merits of the underlying controversy.").

As noted above, the panel in *Playhouse I* also recognized, and expressly held, that the 2005 designation did not encompass the interior. Pet. App. Ex. K at MDC0670-71. While circuit court panel decisions are typically not binding on future circuit court panels, the rule is different when a later panel hears a subsequent appeal in the same matter involving the same parties. In that instance, as this Court has held, the prior decision becomes the law of the case, the later panel is bound by the former's decision, and if the later panel deviates from it, second-tier certiorari relief is warranted.

"The lower court's failure to follow the law of the case warrants certiorari because such failure exceeds the court's role in the appellate process." *Dougherty*, 89 So. 3d at 966; *see also United Auto. Ins. Co. v. Comprehensive Health Ctr.*, 173 So. 3d 1061, 1068 (Fla. 3d DCA 2015) (granting second-tier certiorari and quashing lower court's decision because it violated law of the case doctrine by disregarding earlier panel's decision; finding it "irrelevant—despite the suggestion of the appellate division panel in [the second appeal]—that different appellate division panels of the circuit court heard and ruled on [the two appeals]"); *Dougherty ex rel.*

Eisenberg v. City of Miami, 23 So. 3d 156, 158 (Fla. 3d DCA 2009) ("the 2008 appellate decision failed to apply the correct law when it failed to enforce its prior decision"). The parties have regarded *Playhouse I* as law of the case in the proceedings before the City below. *See* Pet. App. Ex. E at MDC0476 (assistant city attorney advising the HEPB, "I do agree with the county that it's the law of the case because there was a finding made in the decision; it has not been appealed").

In sum, because its ultimate decision did not reach the merits, the Circuit Court should not have included any factual findings relating to the merits at all, much less wrong ones. [8] Rather, the court should have faithfully recited only the procedural

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[8] Unfortunately, the Circuit Court's factual errors are not limited to those described above. For example, the court states:

- the City owns the Playhouse, but the record reflects that the state owns it and that the County is a lessee, Pet. App. Ex. D at MDC0092-93;
- the County plan only proposes to retain the Playhouse's historic façade, but the record reflects that the County plan contemplates rehabilitation of the entire front building and proposes to restore its original characteristics, architectural style, and the original uses, *id.* Ex. F at MDC0641-46;
- the architect responsible for the mid-century interior renovations was "Robert Browning Parker" and, elsewhere in the opinion, "Parker Browning," but his name was "Alfred Browning Parker," one of Florida's most renowned mid-century architects, *id.* Ex. B at MDC0035;
- the first certiorari proceeding was initiated by "city residents," but actually it was the County that sought certiorari review after the City Commission improperly granted the residents' appeal, *id.* Ex. K;
- the HEPB chair engaged in *ex parte* communications, but it was actually the HEPB vice-chair, *id.* Ex. N at MDC0692-93.

While not determinative of the legal issues in this appeal, these misstatements suggest that the court failed to carefully consider the record—an essential

facts necessary to its jurisdictional determination and nothing more, for when "a court is without jurisdiction, it has no power to adjudicate or determine any issue or cause submitted to it." *Capricorn Marble Co. v. George Hyman Const. Co.*, 462 So. 2d 1208, 1208 (Fla. 4th DCA 1985).

But, even if the lower court had (we think rightly) concluded it had jurisdiction and proceeded to the merits, the findings in the opinion would still be problematic because, on first-tier review, the circuit court must conduct its three-pronged review only in reference to the facts in the record below. It is simply not permitted to go on its own fact-finding frolic and craft an alternate version of events that enjoys no support in the record and that the parties did not even press. *See G.B.V.*, 787 So. 2d at 844; *Omnipoint*, 863 So. 2d at 200-01.

Accordingly, in reaching beyond the issue of jurisdiction and making erroneous findings on the merits, the lower court exceeded its role in the appellate process and, thus, departed from the essential requirements of the law.

VI. Conclusion

For each of the reasons above, this Court should issue a writ of certiorari, quash the Circuit Court's decision below, and remand with instructions that the County's petition be decided on the merits in accordance with the facts in the record.

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component of its charge on first-tier certiorari. *See, e.g.*, *Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs*, 794 So. 2d 1270, 1274 (Fla. 2001).

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Respectfully Submitted,

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Certificate of Service

I HEREBY CERTIFY that this ***Appendix to Petition for Writ of Certiorari*** is being served on August 21, 2020, via e-mail generated by the Florida Courts E-Filing Portal to: John A. Greco, Esq., Deputy City Attorney, City of Miami jagreco@miamigov.com, kjones@miamigov.com; and Kerri L. McNulty, Esq., Senior Appellate Counsel, City of Miami, klmcnulty@miamigov.com, csantos@miamigov.com, MRedruello@miamigov.com.

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I certify this brief complies with Florida Rule of Appellate Procedure 9.100(l) regarding computer-generated briefs. It is double-spaced, in Times New Roman 14-point font, and has 1-inch margins.

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