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IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

APPELLATE DIVISION
CASE NO. _____

L.T. CASE No. Resolution No. PZAB-R-23-037 (City of Miami Planning and Zoning Appeals Board)

MIAMI-DADE COUNTY,

Petitioner,

v.

CITY OF MIAMI,
ANTHONY VINCIGUERRA,
and COURTNEY BERRIEN,

Respondents.
_____/

MIAMI-DADE COUNTY'S
PETITION FOR WRIT OF CERTIORARI

Petitioner, Miami-Dade County (the "County"), seeks a writ of certiorari quashing Resolution No. PZAB-R-23-037, issued by the City of Miami Planning and Zoning Appeals Board (the "PZAB"). By that resolution, the PZAB granted an appeal of an administrative approval and denied the County's application requesting a demolition waiver for the Coconut Grove Playhouse. In doing so, the PZAB applied the incorrect law, made a decision

unsupported by substantial competent evidence, and violated due process. This Court has original jurisdiction pursuant to Florida Rules of Appellate Procedure 9.030(c)(2)-(3) and 9.100(c)(2).

I. Introduction

Dramatic theater rarely benefits from a sequel, much less two or three. Yet this case marks the third time that the County finds itself before a panel of this Court over its ongoing efforts to rehabilitate the historic Coconut Grove Playhouse (the "Playhouse"). In prior appeals, the County litigated its entitlement to a certificate of appropriateness—a historic preservation permit—to undertake certain improvements, alterations, and demolition in furtherance of the County's plan to return great theater to this site. After many years of litigation, the County was ultimately successful in each of those appeals. Now the County has returned, this time seeking certiorari relief from a PZAB decision denying the County's application for an administrative demolition waiver, even though the previously litigated certificates of appropriateness already authorized demolition on a portion of the site under the applicable historic preservation standards.

The reason for the most recent proceeding is that, separate and apart from the historic preservation approval, the City's Code requires an administratively-approved demolition waiver as a prerequisite to issuance of

a demolition permit for property located in the Coconut Grove Neighborhood Conservation District number 3 (NCD-3), a zoning overlay district where the Playhouse is located. Per the City Code—and as explained by a previous decision of this Court—the demolition waiver review process is strictly limited to compliance with the City's tree preservation requirements, to ensure that a proposed demolition will not negatively impact tree resources.

Below, the demolition waiver was administratively approved because the County's application met all applicable requirements. But two neighboring property owners appealed the administrative decision to the PZAB, asserting factually incorrect and legally irrelevant arguments. The PZAB improperly accepted those arguments and allowed the appellants to unearth and relitigate issues that had previously been resolved by the City's Historic and Environmental Preservation (HEP) Board, the City Commission, and this Court pursuant to the applicable historic preservation process—a process over which the PZAB has no jurisdiction or authority. Indeed, during the appeal hearing, the PZAB waded into a host of issues beyond the scope of the appeal, which was limited to compliance with tree preservation requirements, and denied the County's application using the wrong legal standard and without any record evidentiary support for such a denial.

In addition, the acting chairperson of the PZAB has been a vocal opponent of the County's plan to rehabilitate the Playhouse for years, even to the point of participating in fundraising efforts to derail it, yet he declined to recuse himself from considering the appeal below and the PZAB rejected a motion to force him to do so. Ultimately, this very biased chairperson supported a motion to deny the County's waiver application, in violation of the County's due process right to an impartial decision-maker.

Given these circumstances, this Court must issue a writ of certiorari and quash the PZAB's fatally flawed decision.

II. Factual and Procedural Background

The Third District Court of Appeal summarized much of the factual and procedural history leading up to this proceeding in *Miami-Dade County v. City of Miami*, 315 So. 3d 115 (Fla. 3d DCA 2020):

> In 2005, the Coconut Grove Playhouse was designated a historic site, as defined by City of Miami Code, section 23-2. [ ] Miami-Dade County and Florida International University (FIU) are co-tenants of the Playhouse property located at 3500 Main Highway in the City of Miami, Florida 33133. The County and FIU entered into a lease agreement with the State, the owner of the property, in October 2013.
>
> The County was developing a conceptual master plan to rehabilitate the Playhouse, and due to the Playhouse's historic site status, the County was required to apply for an historic preservation permit, known as a certificate of appropriateness, from the City's Historic and Environmental Preservation Board (HEPB). Section 23-6.2(a) of the City of Miami Code addresses

certificates of appropriateness for historic sites and when they are required. Section 23-6.2(b) addresses the procedures for issuing certificates of appropriateness. Specifically, section 23-6.2(b)(4) addresses "Special certificates of appropriateness" such as the one sought by the County in the underlying case, due to it involving "a major addition, alteration, relocation, or demolition." The process requires a public hearing, with notice to the applicant and to any other individual or organization requesting notice, before a decision of the HEPB is made. See City of Miami Code, § 23-6.2(b)(4)a.-b. The County's proposed plan included demolishing the theater, building various new elements, and building a completely new, smaller theater, while retaining the building's historic façade.

On April 4, 2017, the HEPB held a public hearing and conditionally approved the County's application for the certificate of appropriateness. As part of the master plan approval, the County was required to go back to the HEPB when the County had its plans completed to obtain the HEPB's final approval before the County could proceed with the rehabilitation of the Playhouse and before a demolition permit could be issued.

Thereafter, two City of Miami residents objected and appealed the HEPB's decision to the Miami City Commission. The City Commission heard the appeal on December 14, 2017, and after finding that the residents had standing to appeal, the City Commission reversed the HEPB's approval in part, affirmed it in part, and imposed some new conditions on the County's plan. The County filed a timely petition for writ of certiorari in the Eleventh Judicial Circuit's Appellate Division (the circuit court) in case number 18-000032-AP-01 contesting the City Commission's decision. On December 3, 2018, the circuit court granted the County's petition. See Miami-Dade Cty. v. City of Miami, 26 Fla. L. Weekly Supp. 800b (11th Jud. Cir. App. Div. Dec. 3, 2018) (the Playhouse I decision). The circuit court reversed and remanded the case with instructions that the City Commission's decision denying the certificate of appropriateness be quashed. Thus, the HEPB's approval of the County's application for the certificate of appropriateness was reinstated. No party appealed that decision.

> Afterwards, the County again submitted its application for a certificate of appropriateness, including an application for a demolition permit, for the final plans to rehabilitate the Playhouse, in order to conform with the HEPB's prior approval in April 2017. The HEPB heard the merits of the County's application at its March 5, 2019 meeting. At the end of the hearing, the HEPB denied the County's application. The County then timely appealed the HEPB's denial to the City Commission. After a public hearing was held on May 8, 2019, the City Commission granted the County's appeal and reversed the HEPB's decision to deny the County's application. The City Commission thus approved the County's final rehabilitation plans for the Playhouse.
>
> On May 17, 2019, the City of Miami Mayor vetoed the City Commission's approval, pursuant to the authority given to him by the City of Miami Charter and Code. The Mayor issued a "veto message" explaining his veto decision. The veto decision was placed on the agenda for the next City Commission meeting on May 23, 2019. . . . At the end of the hearing, the Commission voted, but the vote did not override the veto, thus leaving the Mayor's veto in place as the final decision on the County's application.

Id. at 117-18.

The County thereafter sought certiorari relief from the mayoral veto, which, after a series of appeals, was ultimately granted, with this Court quashing the veto and leaving in place the City Commission's approval of the final certificate of appropriateness. *See Miami-Dade Cnty. v. City of Miami*, 2021 WL 1308290, at *9 (Fla. Cir. Ct. App. Apr. 7, 2021), *reh'g denied*, 2019-167-AP-01, 2021 WL 3046218, at *1 (Fla. Cir. Ct. App. June 3,

2021) ("We grant the writ and quash the Mayor's veto."), *cert. denied*, 346 So. 3d 1210 (Fla. 3d DCA 2022).

In addition to the certificate of appropriateness, the County must also obtain various other administrative and board approvals to complete the project. Relevant here, the County is required to obtain an administrative demolition waiver to commence demolition within the NCD-3 district, where the Playhouse is located. *See* Pet. App. Ex. A at 011.[1] Under the Miami 21 Zoning Code (the "City Code"),[2] review of a demolition waiver application in the NCD-3 is limited to compliance with tree preservation requirements. *See id.* at 003 ("All demolition permits shall require a Waiver and be referred to the Planning Department for review under the Tree Preservation Ordinance. All submittals shall contain a tree survey by a certified arborist.").

A panel of this Court has previously opined on the exact same City of Miami demolition waiver process for property located in the exact same

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[1] Citations herein to the County's Appendix, filed concurrently with this Petition, are denoted as "Pet. App. Ex. __ at __."

[2] Specifically, the applicable provisions are found in Appendix A, section 3.3 and Article 7, section 7.1.2.5 of the City Code. Section 7.1.2.5 provides that various waivers "are described in the various articles of this Code, and are referenced here only for convenience," with the specific parameters of each waiver described in the articles in which each one appears in the City Code. Appendix A, section 3.3 supplies the parameters for the waiver at issue in this case. *See* Pet. App. Ex. A at 002-014.

zoning district. In *Cube 3585, LLC v. City of Miami*, Case No. 18-050 AP, at 6 (Fla. Cir. Ct. App. Jan. 31, 2019), this Court held that the purpose of the demolition waiver is to ensure protection of tree canopy. *See* Pet. App. Ex. B. at 060. In addition, and particularly relevant here, the Court further held that review of a waiver application is not an alternative means for historic preservation, which is governed exclusively by chapter 23 of City Code. *Id.* at 059-060. Because a separate process specifically addresses the matter, historic preservation issues may not be addressed or considered in a demolition waiver proceeding. *Id.*

In applying for the demolition waiver here, the County submitted all necessary documentation and application materials, including the required arborist report, which City staff reviewed in accordance with City Code requirements. Pet. App. Ex. C. Because the application met all requirements, the City zoning administrator approved the County's application. Pet App. Ex. L.

On February 10, 2023, neighboring property owners Anthony Vinciguerra and Courtney Berrien, represented by attorney David Winker, appealed the administrative approval to the PZAB. Pet. App. Ex. D at 238-41. As grounds for the appeal, they argued in a letter that: the project referenced in the demolition waiver application differed from the one the City

had approved in the prior proceedings (although it did not, and no competent substantial evidence supports appellants' allegation); the County's application was incomplete (although it was not, and no competent substantial competent evidence supports that allegation); and the application could not be approved because outstanding liens existed on the property (although there are no such liens, and again, no competent substantial evidence supported appellants' allegation). *Id.*

The appeal hearing took place on March 15, 2023. Pet. App. Ex. E at 1152. Presiding as acting chairperson of the PZAB was Anthony Parrish, who had publicly objected to the County's project on numerous prior occasions and engaged in outside activities to oppose the County's plan. In a lengthy disclosure at the outset of the PZAB meeting, Acting Chair Parrish admitted to his consistent and active opposition to the County's project, including his involvement with, and financial support of, objectors to the project:

> My involvement with the Coconut Grove Playhouse began when I was chair of the HEPB Board on October 5th, 2005, when the Board voted 8 to zero to designate the entire exterior of the Playhouse as historic.
>
> Since then, I have written letters to the editor of the Herald and many others, some of which have been published, recounting my memories of that HEPB Board meeting, for which I have the court reporter transcript showing conclusively that the

entire exterior of the Playhouse was designated and not just a so-called front building.

I got directly involved in [sic] again when I spoke to the Miami City Commission on May 8th, 2019, where I testified as to the HEPB Board vote designating the entire exterior of the Playhouse as historic.

I also attended the May 2019 mayor's veto rally at the Playhouse, where Mayor Suarez recounted his reasons for vetoing the City commission's vote to demolish most of the Playhouse except for the front facade.

In the fall of 2021, a half dozen Groveites, including me, who were in favor of preventing the demolition of all but the facade of the Playhouse raised $5,000 to pay for a billboard on U.S. 1 protesting the proposed demolition of most of the Playhouse.

My company, Wind & Rain Properties, offered to collect the $5,000 for the billboard because that company already had a bank account, was able to segregate and keep track of the monies collected. My contribution was $15, one – [sic] $15.

In August of 2022, I was one of 14 original plaintiffs in a lawsuit based upon a 2004 voter-approved bond issue to restore the Playhouse. This lawsuit was brought by the attorney here tonight, David Winker. My wife and I are social friends with Attorney Winker and his wife Christina, although we have not met with them at least for the last six months.

Then in September 2022, with the billboard collection mechanism as a precedent, I was requested by other Groveite citizens in favor of saving the Playhouse to again allow my company, Wind & Rain Properties, to collect GoFundMe donations in a segregated account. I agreed to that, but contributed no funding whatsoever myself. That segregated account no longer has any funds in it, having been dispersed to the citizen's group that started it.

> So as you can see, I've been involved in many and varying ways with preservation of the historic Playhouse since 2005. I have no private or personal interest in the Playhouse, other than what I have disclosed here. I, my wife, and my company have absolutely no financial interest in the Playhouse in any capacity.

Id. at 1153-57.

Confusing a financial conflict of interest with bias in a quasi-judicial proceeding, Acting Chair Parrish went on to opine that "civic activism" should not "automatically result in disqualification from participation on [the PZAB] or any other City Board," and "first amendment rights to express personal opinions are not relinquished just because we volunteer to serve on a civic Board like a planning and zoning appeals Board." *Id.* at 1156. He concluded that, notwithstanding his extensive activism, he could still be fair and would base his decision solely on the evidence and arguments presented. *Id.* at 1156-57. He therefore declined to recuse himself from the matter. *Id.* at 1158.

But some PZAB members expressed concern with Acting Chair Parrish's participation in reviewing the County's application, given his extensive involvement advocating against the County's plan for the Playhouse. *Id.* at 1158-63. For example, board member Gersten explained:

> I certainly wouldn't be able to do it. To say that I had invested money in a position against an applicant or an appellant, literally spent money. I mean, you just talked about putting up money against a particular point of view.

> So it's not to say that you're not capable of being fair and impartial. But you have actually spent money working against a particular point of view of an applicant or appellant. And so while you would not stand to benefit, in a sense you have invested in an outcome and you would benefit in a particular outcome; maybe not necessarily directly personally, but you've decided that it would benefit you. That's – that's on that side.
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> Then on the other side, in the quasi-judicial analysis, what is concerning is that there is no way that it cannot appear somewhat inappropriate. And I would not want to sit up here right now. I would feel uncomfortable. I would feel that our roles are further diminished, our abilities to deflect accusations that are, you know, thrown our way, whatever side we're on, but that somehow we're activists in one way or another. And [it] really presents, I think an ethical issue.

Id. at 1159-61; *see also id.* at 1162; 1165-66 (board member Silva stating that, based on Mr. Parrish's disclosure, "it's hard to argue that there isn't an appearance of a conflict"); *id* at 1170 (board member Porosoff stating that "I do believe he's got a conflict, but it doesn't matter. Let him vote."); *id.* at 1171 (board member Mercedes Rodriguez voting in favor of unsuccessful motion to require his recusal).

Notably, at no point in considering the bias and recusal issue did Acting Chair Parrish or any other PZAB member open the floor for public comment or even ask the County—as the party whose application was under consideration—for its position on recusal.

Ultimately, after Acting Chair Parrish left the room, a motion to require his recusal was made by a fellow PZAB member and seconded by another,

but a majority of board members did not vote in favor of requiring him to recuse. *Id.* at 1172. Thereafter, board member Gersten himself left the hearing, having said he felt uncomfortable participating in the proceeding because Mr. Parrish did not recuse. *Id.* at 1160-61. Acting Chair Parrish thereafter presided over the appeal of the County's application for demolition waiver. *Id.* at 1172.

Turning to the merits of the appeal, at the public hearing the City's zoning administrator, Daniel Goldberg, presented testimony and evidence demonstrating that the County satisfied the applicable requirements and was entitled to the waiver. *Id.* at 1176-84; *see also* Pet. App. Ex. J. First, Mr. Goldberg emphasized that, pursuant to this Court's *Cube 3585* decision, "[t]his waiver is not a review of the demolition itself. Reviews of demolitions are done through the building permit process by building [staff], and for historic structures by historic and environmental preservation staff. This is just a review of tree protection." Pet. App. Ex. E at 1177.

He explained that the County submitted a complete application, that City staff reviewed it for compliance with tree preservation standards, and that the application satisfied all applicable requirements. *Id.* at 1179-80. Mr. Goldberg also noted that the County did not have any open code violations on the property. *Id.* at 1180-82. Prior to the hearing, he conferred with the

code compliance department, which confirmed that no such open cases existed. *Id.*; *see also* Pet. App. Ex. F at 1384.

Thereafter, Appellants' counsel, David J. Winker, repeated and elaborated upon the inaccurate and irrelevant assertions first presented in the appeal letter, and added new—but no less inaccurate or irrelevant—ones. Pet. App. Ex. E at 1184-96.

Specifically, Mr. Winker represented to the PZAB that *Cube 3585* was inapposite to these facts, despite that the decision concerned the exact same waiver request in the exact same zoning district under the exact same code provision:

> [A]ll [a waiver application] needs is a tree review? Not true. Citing to the *Cube* case for that proposition, no bearing. That case was a very specific case about what was being appealed. It did not go into a what a waiver required. In that case it [sic] was arguing that they couldn't rely on a section about intent. That's what the case stands for.

Id. at 1189. Further, Mr. Winker argued that the PZAB could consider matters other than tree preservation in deciding whether to issue the waiver, even though *Cube 3585* said just the opposite. *Id.* at 1188-89.

Citing to the portion of section 7.1.2.5 that provides "[a]pprovals shall be granted when the application complies with all applicable regulations," Mr. Winker proceeded to argue, incorrectly, that the waiver could not be issued because, in 2019, the County's application for a certificate of

appropriateness did not request permission to demolish. *Id.* at 1194-95. Even though the reference in that provision to "all applicable regulations" clearly means all regulations applicable to the waiver decision, and not every unrelated regulation in the entire City Code, Mr. Winker nonetheless maintained that compliance with historic preservation requirements in chapter 23 was relevant to whether the waiver should issue. *Id.* at 1192-96. But even if such matters could be considered, the County's counsel explained to the PZAB that the County had expressly requested permission to demolish in its 2019 application, which was approved by the City Commission, and thus that issue had been addressed and resolved in the previous historic preservation hearings. *Id.* at 1244-45. Notably, appellants introduced no evidence into the record substantiating Mr. Winker's bald and incorrect assertion.

Mr. Winker also argued, incorrectly, that the waiver application could not be approved because the County's special certificate of appropriateness for the project had expired. *Id.* at 1194-95; 1262. Again, even assuming that such a matter could be properly considered here, the County's attorney later explained that this, too, was incorrect because, as both the County and City agree, the certificate of appropriateness did not take effect until June 2022, upon the conclusion of all the litigation relating to the certificate of

appropriateness. *Id.* at 1246-47; 1261-62. Indeed, the certificate could not have taken effect any sooner, because the City had appealed the County's win before this Court to the Third District Court of Appeal and the County cross-appealed on other grounds. *Id.* at 1299. Consistent with these facts, Assistant City Attorney George Wysong thus advised the PZAB that, legally, "the certificate of appropriateness has not expired due to the tolling of the underlying appellate process." *Id.* at 1261-62.

In the end, Mr. Winker proffered no evidence, much less competent substantial evidence, that the County's certificate of appropriateness approval failed to include permission to demolish or that the certificate had expired.

Lastly, Mr. Winker argued that the waiver could not be issued because, under section 7.1.3.7 of the City Code, there is a $4,500 lien on the property, citing to a code enforcement estoppel report he obtained from the City. *Id.* at 1189-91. But as Mr. Goldberg explained, "[section] 7.1.3.7 mentions nothing about liens or money owed. It's only about ongoing procedures. And there's no dispute [that] there's no ongoing procedure." *Id.* at 1283; *see also* § 7.1.3.7 of the City Code (application may not be approved if the property "is the subject of an ***ongoing city enforcement procedure***, or is the subject of a notice of violation of a state law or county ordinance," unless approval of

the application would cure the violation) (emphasis supplied)). The City's attorney also confirmed that a lien is not an "ongoing city enforcement procedure," as that term is used in section 7.1.3.7. *Id.* at 1280-82.

Mr. Winker presented no evidence of any "ongoing city enforcement procedure[s]" against the property, and in fact the final page of his own evidence—the code enforcement report he obtained from the City—indicated in prominent lettering that the property had "no open violations." Pet. App. Ex. E at 1285-87; Pet. App. Ex. G at 1400. Tellingly, when he advanced his argument that open code violations precluded issuance of the demolition waiver, Mr. Winker initially presented to the PZAB all the pages of the City report ***except*** that final page. And even after a PZAB member noted that Mr. Winker had only shown the first four pages of the report and specifically requested that he also present the fifth page, Mr. Winker fumbled with his computer before finally and reluctantly presenting it. Pet. App. Ex. E at 1285-87 (Board member Silva: "Do you have page 5, Mr. Winker?" Mr. Winker: No. I'll have to look at what I've got. . . . Oh, here it is. So that's page 5." Mr. Goldberg: "There we go. No open violations.").[3]

[3] The City did not include the fifth page of the estoppel report in the publicly-available hearing record below and, as of the filing of this Petition, has not yet furnished it to the County, even though the document is a public record both because it was presumptively generated by the City in the first

The Assistant City Attorney later explained to the PZAB that, even as to the irrelevant $4,500 lien, Mr. Winker's report was wrong:

> Hearing board staff searched that lien number, and . . . it shows that the lien was released in 2014 and it shows a zero balance. . . . And it's inexplicable why a report that showed up in February of this year reflects a lien, but the system shows there is no lien and there's zero amount due.

Id. at 1305-06; Pet. App. Ex. G. Thus, the hearing record conclusively demonstrates that—even if it were relevant to the applicable code section, which it is not—the purportedly open lien had been satisfied, and no ongoing enforcement procedures existed. *Id.*

As noted above, Mr. Goldberg, the zoning administrator, testified that under the City Code, this waiver was limited solely to a review of tree protection under the City's tree preservation ordinance. *Id.* at 1177. The *Cube 3585* decision, which is binding on the City, requires that same conclusion. Yet in neither the public comment portion of the hearing nor the

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instance and Mr. Winker later used his computer to present it electronically to the PZAB during a public meeting. *See, e.g., Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201, 1207 (Fla. 1st DCA 2009) ("The term 'received' in section 119.011(12) refers not only to a situation in which a public agent takes physical delivery of a document, but also to one in which a public agent examines a document residing on a remote computer."). The County will supplement its Appendix with this document, *see* Pet. App. Ex. G at 1400, if and when the City provides it in response to the County's public records request.

appellants' presentation did a single person address tree preservation. Instead, the bulk of the public comment focused on historic preservation and perceived deficiencies in the County's business and architectural plan for rehabilitating the Playhouse. *Id.* at 1196-1241.

During the board discussion portion of the hearing, a number of board members also waded into matters irrelevant to the standards governing the demolition waiver and indeed made it clear that they were considering everything but tree preservation.

Board member Silva asked questions relating to whether the certificate of appropriateness had expired, a matter that is outside the limited standards the PZAB was charged with applying to this application. *Id.* at 1262-88.

Board member Domingues spoke about a wide range of irrelevant issues, including historic preservation, which is not within the PZAB's purview. *Id.* at 1288-93. He concluded:

> So I give a rats ass about the trees right now that we're arguing about. If that's why we're here, all right, I will vote, yeah, let's stop the demolition. . . . But knocking down 80 percent of something, you might as well knock the whole damn thing down. You know, that to me isn't historic preservation. That's bullshit. So that's what I have to say.

Id. at 1292-93.

Board member Mann stated that "we're in a tough spot here because now we'd like to – I get the sense that we'd like to rule for the community.

And I'm looking, and I think some of the other Board members here are looking for a way to be able to do that." *Id.* at 1303. While recognizing that the waiver is confined to tree preservation matters, he professed that he'd "heard nothing about trees to even make a decision," even though Mr. Goldberg had offered unrebutted testimony that the application complied with the tree preservation requirements. *Id.* at 1305.

Acting Chair Parrish commenced an extended discursion expressing his disagreement with the *Cube 3585* decision and expounding on his view that tree preservation is not the sole focus of the demolition waiver appeal to the PZAB. *Id.* at 1310-15. He contended that waivers were issued only for "minor deviations" from the City Code, and that the County's plan to demolition 80 percent of the Playhouse was not minor, even though the City Code does not define what is "minor" and does not provide that a waiver may be denied based on whether it is perceived to be "minor." *Id.* at 1315. He further contended that the County was using the waiver process "to avoid going back before the Historic and Environmental Preservation Board," even though the waiver is a separate process from historic preservation, there was no evidence in the record that the County had failed to comply with any historic preservation requirements, and the extensive litigation over the

County's efforts to satisfy historic preservation requirements reflects anything but a desire to usurp that process. *Id.*

At the conclusion of the board's discussion, the PZAB voted six-to-three to grant the appeal and deny the County's application, even though the record contained no competent substantial evidence supporting the conclusion that the County had failed to satisfy the only applicable standards. *Id.* at 1328. The PZAB's resolution was rendered on April 10, 2023. Pet. App. Ex. I at 1407-09. The County thereafter timely commenced this certiorari proceeding.

II. Legal Standard

In a challenge to a quasi-judicial decision, this court conducts a "first-tier review" and considers: (1) whether the decision-maker observed the essential requirements of the law; (2) whether the decision is supported by competent substantial evidence; and (3) whether the parties were accorded procedural due process. *See, e.g.*, *Miami-Dade Cnty. v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 198-99 (Fla. 2003).

A. Essential Requirements of the Law Standard

Observing the essential requirements of law means applying the correct law. *See Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995). "The lower court's application of the wrong standard of review can be

corrected through certiorari." *Dougherty ex rel. Eisenberg v. City of Miami*, 89 So. 3d 963, 966 (Fla. 3d DCA 2012). Relief is also warranted where the lower tribunal fails to consider or apply the essential provisions of the applicable law. *See Alvey v. City of N. Miami Beach*, 206 So. 3d 67, 74 (Fla. 3d DCA 2016). In addition, "the 'failure to apply a controlling legal decision is a classic departure from the essential requirements of the law,'" as is the "failure to apply the unambiguous language of a statute." *See Dep't of Highway Safety & Motor Vehicles v. Chakrin*, 304 So. 3d 822, 826 (Fla. 2d DCA 2020).

B. Competent Substantial Evidence Standard

Competent substantial evidence has been defined as such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Smith v. Dep't of Health & Rehab. Servs.*, 555 So. 2d 1254, 1255 (Fla. 3d DCA 1989) (citation omitted). Although a local government's quasi-judicial decision must generally be upheld if any substantial competent evidence supports it, the court is required to examine whether such evidence in fact exists and must quash the decision where "the record is devoid of substantial competent evidence to support the [ ] decision." *City of W. Palm Beach Zoning Bd. of Appeals v. Educ. Dev. Ctr.*, 504 So. 2d 1385, 1386 (Fla. 4th DCA 1987); *see*

also Jesus Fellowship, Inc. v. Miami-Dade County, 752 So. 2d 708, 711 (Fla. 3d DCA 2000).

C. Procedural Due Process Standard

In a quasi-judicial proceeding, "certain standards of basic fairness must be adhered to in order to afford due process." *See Jennings v. Dade Cty.*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). First, due process requires that the parties are provided notice of the relevant hearing and that the hearing is confined in scope to the matters noticed. *Sem. Entm't. v. City of Casselberry*, 811 So. 2d 693, 696 (Fla. 5th DCA 2001). "The granting of relief, which is not sought by the notice of hearing or which expands the scope of a hearing and decides matters not noticed for hearing, violates due process." *Connell v. Capital City Partners, LLC*, 932 So. 2d 442, 444 (Fla. 3d DCA 2006).

Second, the parties must be given an opportunity to be heard and "be informed of all the facts upon which the [quasi-judicial decision-maker] acts." *Jennings*, 589 So. 2d at 1340. Essential to this component of due process is that the quasi-judicial decision is based solely on the record presented at the public hearing. *See, e.g.*, *Thorn v. Fla. Real Estate Comm'n*, 146 So. 2d 907, 910 (Fla. 2d DCA 1962).

An "impartial decision-maker is a basic constituent of minimum due process" in quasi-judicial proceedings. *Cherry Comm'n, Inc. v. Deason*, 652 So. 2d 803, 804 (Fla. 1995) (citation omitted). A decision-maker who cannot be fair and impartial may not participate in the proceeding. *Ridgewood Properties, Inc. v. Dep't of Cmty. Affairs*, 562 So. 2d 322, 324 (Fla. 1990); *Verizon Bus. Network Servs., Inc. ex rel. MCI Commc'ns, Inc. v. Dep't of Corr.*, 988 So. 2d 1148, 1151 (Fla. 1st DCA 2008). In such matters, "the appearance of neutrality can be as important as neutrality itself because of the former's impact upon confidence in the proceedings." *Int'l Ins. Co. v. Schrager*, 593 So. 2d 1196, 1197 (Fla. 4th DCA 1992).

III. Argument

In disregarding the actual code requirements for the waiver at issue, ignoring the only evidence in the record relative to those requirements, and allowing its deliberations to be led by a biased decision-maker, the PZAB departed from the essential requirements of the law, rendered a decision unsupported by competent substantial evidence, and violated due process. Each argument is addressed below.

A. The PZAB Violated the Essential Requirements of the Law

In granting the appeal and denying the County's request for the demolition waiver, the PZAB applied the wrong law. Under the City Code,

review of a demolition waiver application in the NCD-3 zoning district is limited to compliance with tree preservation requirements. *See* Appendix A, section 3.3 of the City Code ("All demolition permits shall require a Waiver and be referred to the Planning Department ***for review under the Tree Preservation Ordinance***. All submittals shall contain a tree survey by a certified arborist.") (emphasis supplied).

The City's zoning administrator, Mr. Goldberg, emphasized this point in his testimony before the PZAB and explained the difference between a waiver and demolition permit:

> This is not a demolition permit. That phrase is commonly understood to mean a building permit issued by the building official for demolition. This is an administrative permit that is needed in this case for that [process of obtaining a permit] to go forward. And again, this administrative permit is governed just by the tree protection provision, that's it.

Pet. App. Ex. E. at 1255.

In *Cube 3585*, a panel of this Court rejected the argument that the PZAB could consider matters other than tree preservation and confirmed that, under the City Code, the sole purpose of the demolition waiver is "to make certain that the tree canopy is not being affected and is protected" within the NCD-3 zoning district:

> The City and [the objecting neighbor] argued that the plain word "and" in section 3.3. Appendix A of the Zoning Code means the requirement that a Waiver is needed for a demolition permit is

> separate from and in addition to the review under the Tree Preservation Ordinance. We disagree.

See Pet. App. Ex. B. at 060.

Particularly relevant here, *Cube 3585* held that review of a waiver application is not an alternative means for regulating historic preservation, which is governed exclusively by chapter 23 of City Code. *Id.* at 059-060. In reviewing an application for a waiver, City staff considers whether the property requires compliance with historic preservation regulations, but if it does, there is a wholly separate process for that set forth in chapter 23 of the City Code. *Id.* at 060; Pet. App. Ex. E at 1255. Thus, historic preservation issues may not be addressed or considered in this proceeding, which is about something else entirely: tree preservation. Pet. App. Ex. B at 060.

Mr. Goldberg further explained to the PZAB that *Cube 3585* was controlling on this application:

> The *Cube 3585* case is directly on point. I may be butchering the phrase that the courts have used, but it's what's known I believe as a red cow case. It's not just the same animal, it's the same color animal. In that case, you had a demolition waiver in NCD-3; in this case, you have a demolition waiver in NCD-3. It's the exact same analysis. . . . And the court held that aside from intent not being a criteria, it held that the purpose of the waiver is for tree protection.

Pet. App. Ex. E at 1251. Accordingly, while *Cube 3585* may not be precedential in the traditional sense, the decision was at a minimum binding

on the City and the PZAB below when addressing a request for the exact same waiver in the exact same zoning district. *Id.* at 1183-84. And because it was binding on them, the PZAB was required to follow the decision in considering future applications seeking the same thing, such as the County's application here. To reach any other conclusion would demean this Court's authority and leave the PZAB free to ignore or flout a prior decision of this Court with impunity—which is exactly what the PZAB tried to do here. And, in flouting *Cube 3585* below and inserting into this proceeding historic preservation issues that are governed by a wholly separate, code-prescribed process, the PZAB necessarily failed to apply the right law. *See Chakrin*, 304 So. 3d at 826 ("'failure to apply a controlling legal decision is a classic departure from the essential requirements of the law'"); *Cf. United Auto. Ins. Co. v. Comprehensive Health Ctr.*, 173 So. 3d 1061, 1065 (Fla. 3d DCA 2015) ("when a lower court fails to follow the law of the case, certiorari is warranted").

With the applicable standard in mind, the County submitted all necessary documentation and application materials, including the required arborist report, which City staff reviewed for compliance with tree preservation standards. Pet. App. Ex. C. The City's zoning administrator offered unrebutted testimony that the County's application satisfied all

applicable requirements under the tree preservation ordinance. Pet. App. Ex. E at 1176-84. He further testified that the County's application was complete. *Id.*

Mr. Winker made no argument, and appellants presented no evidence, that the County's application failed to satisfy the City's tree preservation standards. Instead, Mr. Winker argued that the application should be denied pursuant to section 7.1.3.7 of the City Code. But, as the record clearly reflects, the property was not subject to any "ongoing code enforcement procedure[s]," nor were there any outstanding liens. *See supra* at 17-18. During the hearing, City staff dispositively showed that the lien Mr. Winker pointed to had in fact been fully satisfied. *See id.* In any event, as Mr. Goldberg explained, "[section] 7.1.3.7 mentions nothing about liens or money owed. It's only about ongoing procedures. And there's no dispute [that] there's no ongoing procedure." *Id.* at 17. Thus, section 7.1.3.7 provided no basis on which to deny the waiver at issue.

All other arguments raised by Mr. Winker related to historic preservation matters outside the PZAB's purview and jurisdiction. According to Mr. Winker, such arguments could be considered because a portion of section 7.1.2.5 provides that waiver "[a]pprovals shall be granted when the application complies with all applicable regulations," and, according to him,

historic preservation requirements are part of the "applicable regulations" here. The problem with this argument is that it both reads that portion of section 7.1.2.5 out of context and ignores the provisions of the City Code that exclusively vest the HEP Board, not the PZAB, with jurisdiction and authority over historic preservation matters.

To begin, the word "applicable" in the cited portion of section 7.1.2.5 clearly refers to requirements governing the particular waiver in question, not to every unrelated City Code requirement that an applicant may have to satisfy to effectuate a project its entirety. To read it appellants' way would import into the waiver review innumerable City Code standards that have nothing to do with the purposes of the waiver and over which the PZAB has no jurisdiction or expertise. Indeed, appellants' reading is absurd, and "[i]t is elementary that a statute should be read to avoid absurd results." *Wagner v. Orange Cnty.*, 960 So. 2d 785, 790 (Fla. 5th DCA 2007).

Significantly, too, in another part of article 7, the City has used different language when compliance with standards outside of Miami 21, such as chapter 23 of the City Code, is required as a prerequisite. For example, in section 7.1.2.1 pertaining to building permits, the City Code provides that such a permit shall issue for a use that "meets all of the applicable standards of the Miami 21 Code, ***and the other specific requirements that may be***

enumerated elsewhere in the City Code." (emphasis supplied). But the operative code provisions here contain no similar incorporation of standards outside of those enumerated in Appendix A, section 3.3 of the City Code. "It is a familiar interpretive principle that when a legislature uses particular language in one section of a statute and omits it from another section, courts must presume the omission was intentional." *Subirats v. Fid. Nat. Prop.*, 106 So. 3d 997, 1000 (Fla. 3d DCA 2013); *see also City of Miami v. Valdez*, 847 So. 2d 1005, 1008 (Fla. 3d DCA 2003) ("when a law expressly describes a particular situation where something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded."). So, had the City intended to require compliance with other regulations outside of those for waivers set forth in Appendix A, section 3.3, it could have said so, but didn't. And because it didn't, the PZAB was not free to require such compliance in its review of the waiver.

Moreover, appellants' reading is directly contrary to *Cube 3585*, which rejected a variation on the exact same argument—namely, that provisions elsewhere in the City Code could be imported into the analysis and used to deny a demolition waiver request in the NCD-3 zoning district. Again, as the Court there held, the focus of such a waiver is solely on tree preservation,

not historic preservation or other unrelated matters. Pet. App. Ex. B. at 059-060

Chapter 23 of the City Code exclusively vests the HEP Board with the jurisdiction and authority to hear and decide historical preservation matters, and it provides no role for the PZAB in such matters. Pet. App. Ex. A at 015-053. And not only does it provide no role for the PZAB, it also doesn't let the PZAB consider whether a party has independently satisfied those other requirements in deciding whether to issue a waiver. *Id.*

Nonetheless, in arguing the opposite below, Mr. Winker contended—without introduction of any supporting evidence—that the County's waiver application should be denied because the certificate of appropriateness did not include permission to demolish and, further, that the certificate had expired. He also claimed, incorrectly and without evidentiary support, that the plans submitted for the waiver differed from the plans approved for the certificate of appropriateness. Appellants' unsupported arguments are both irrelevant and false.[4]

[4] While irrelevant to this proceeding, the County's plans have not changed, and Mr. Winker proffered no evidence that they had. Nor has the County's certificate of appropriateness expired. On May 19, 2019, the City Mayor vetoed the City Commission's approval of the certificate of appropriateness, and the City Commission failed to override the veto. The County then sought first-tier certiorari relief from this Court. On April 7, 2021,

In any event, the City Code does not make a certificate of appropriateness a prerequisite to issuance of a demolition waiver. Rather, as already explained, they are separate processes. Pet. App. Ex. E at 1255. While compliance with each may be needed for the County to ultimately obtain a demolition ***permit***, the demolition ***waiver*** process is distinct from both the process to obtain a building permit for demolition and the process to obtain a historic preservation certificate of appropriateness, as the zoning administrator made clear in his testimony.[5] *Id.* ("This [waiver] is not a demolition permit. . . . [T]his administrative permit is governed just by the tree protection provision, that's it.").

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a panel of this Court quashed the mayoral veto. Thereafter, the City petitioned the Third District for second-tier certiorari relief, and the County filed a cross-petition. On May 5, 2022, the Third District issued an order denying the City's request for relief. That order became final on June 6, 2022, after the City's time to file post-decision motions expired. As both the City and County agree, the certificate of appropriateness thus did not take effect until June 7, 2022. Pet. App. Ex. H at 1402. Pursuant to section 23-6.2(g) of the City Code, certificates of appropriateness "expire 12 months from the date of issuance, unless the authorized work is commenced within this time period, or a building permit has been obtained," and "[t]he preservation officer may grant an extension of time not to exceed 12 months upon written request by the applicant[.]" And because the County's certificate did not take effect until the conclusion of the litigation in June 7, 2022, it has not yet expired.

[5] This is also plain from the face of the waiver initially approved by the zoning administrator, which made "[f]ull compliance with all other aspects of the Code" a condition of—not a prerequisite to—such approval. Pet. App. Ex. L at 1443.

Certificates of appropriateness and waivers have separate requirements, are governed by separate standards, and are under the jurisdiction of separate boards and separate City departments. As Mr. Goldberg explained to the PZAB:

> [W]e've heard a lot about the certificate of appropriateness. Respectfully, this Board does very important work, but that is the purview of the HEP Board. Both Boards do important work, but never the two shall meet. You have your respective roles. And the role of this Board isn't to second guess the HEP Board to the extent you don't like the [certificate of appropriateness] that was issued or think it was imprudent. That is their purview. And it's been litigated. It's gone to the [City] Commission and it's been litigated.

Id. Thus, clearly, the appeal of an administratively issued waiver under section 7.1.2.5 of the City Code is not the forum to relitigate issues related to a certificate of appropriateness, which is governed by a wholly separate Code chapter and board. But by mixing the two separate proceedings and inviting the PZAB to act as a "super" preservation board to halt the County's project, Mr. Winker lured the board into applying the wrong law.

And apply the wrong law it did. This is apparent from the fact that the PZAB denied the waiver despite the hearing record containing absolutely no evidence that the County's application failed to satisfy the applicable tree preservation standards. And it is further apparent from the board's discussion prior to the vote denying the County's application, which makes

plain that board members who voted to grant the appeal were focused on wholly irrelevant matters and felt unrestrained by the Court's decision in *Cube 3585* or the actual City Code text they were charged with applying.

For example, while recognizing that the waiver is confined to tree preservation matters, board member Mann ignored the only evidence in the record on that issue and remarked that "we'd like to rule for the community," and that he and "some of the other Board members here are looking for a way to be able to do that." Pet. App. Ex. E at 1303.

Board member Domingues commented on a wide array of topics irrelevant to the waiver, including historic preservation, and concluded that the County's application should be denied because "knocking down 80 percent of something, you might as well knock the whole damn thing down. You know, that to me isn't historic preservation. That's bullshit." *Id.* at 1293.

And Acting Chair Parrish commented that, notwithstanding the *Cube 3585* decision, he did not agree that tree preservation should be the sole focus of this demolition waiver. *Id.* at 1314-15 (stating that "this waiver application is not about the tree preservation ordinance or requiring a tree survey"); 1318 (stating that "going into the weeds, into the details of Miami 21 . . . shows that this is not – it cannot be about just a tree ordinance"). He confessed that he "spent a lot of time" before the meeting "dusting off [his]

35-year-old legal degree and [his] credentials as a citizen to look at the code and see what it says." *Id.* at 1312. He contended that, under section 7.1.2.5, waivers are to be issued only for "minor deviations" from the City Code and that, in his view "as a native English speaker," the County's plan to demolition 80 percent of the Playhouse was not minor. *Id.* at 1315.

But contrary to Acting Chair Parrish's results-oriented interpretation of the applicable regulations, the City Code does not define what is "minor" and does not provide that a waiver may be denied based on whether it is perceived to be "minor." Moreover, the term "minor deviation" appears in section 7.1.2.5, which is the very intent provision that *Cube 3585* held does not supply the "standard or criteria for a Waiver." Pet. App. Ex. B at 058. Rather, the applicable standard is set forth in Appendix A, section 3.3 of the City Code. Thus, in looking to section 7.1.2.5, Acting Chair Parrish relied on a provision that *Cube 3585* expressly said could not be considered. He also opined that the County was using the waiver process "to avoid going back before the Historic and Environmental Preservation Board," even though the waiver is a separate process from historic preservation and the record contained no evidence that the County had failed to comply with any historic preservation requirements. Pet. App. Ex. E at 1315. Simply put, appellants sought in this improper forum an improper redo of the City's prior historic

preservation decisions, and Acting Chair Parrish—who opposed the County's project with his time and money, *see infra* at 40-47—was willing to oblige.

In summary, the applicable standard for this waiver asks only whether the County's plan complies with the City's tree preservation requirements. The unrebutted record evidence demonstrates that it does. The record is also clear that the County has no liens or ongoing enforcement proceedings on the property, so section 7.1.3.7 of the City Code did not supply a basis for denial. The only other bases for denial urged by appellants and members of the public related to historic preservation matters, which, as explained above, are not within the PZAB's jurisdiction and bear no relation to the waiver at issue. Comments by individual board members, while not evidence, also make plain that several of them—enough to make a difference in the outcome—based their votes on extraneous matters and considered the wrong legal standard, especially given the lack of any valid basis in the record to deny the application under the actual standards.

Accordingly, in rendering the decision below, the PZAB departed from the essential requirements of the law.

B. No Competent Substantial Evidence Supports the PZAB's Decision

The PZAB resolution provides that "based on the testimony and evidence presented, . . . there is substantial evidence in the record" to grant the appeal and deny the County's application for the waiver. Pet. App. Ex. I at 1407. In fact, no such evidence exists.

As to tree preservation—which, again, is the sole standard governing issuance of the waiver—Mr. Goldberg unequivocally testified that the County's application satisfied all requirements. Pet. App. Ex. E at 1182-84 (testifying that the application had been reviewed and approved by the environmental resources department for tree protection and by himself to ensure the application included an arborist report, which it did). Neither Mr. Winker nor any member of the public provided any testimony or evidence to the contrary. Thus, the record includes no evidence—much less competent substantial evidence—that the County's application failed to satisfy the applicable tree preservation standards.

The record is also clear that the property was not subject to any "ongoing code enforcement procedure[s]" and—although irrelevant to the applicable code enforcement requirements here—no outstanding liens applied to the property either. *See supra* at 16-18. Thus, the record includes

no evidence—much less competent substantial evidence—to support denying the application under section 7.1.3.7 of the City Code.

As noted above, the only other testimony and arguments in the record relate to historic preservation and other extraneous matters that have no bearing on whether an administrative demolition waiver should issue. To be clear, none of the commentary from members of the public offered even a scintilla of competent substantial evidence that the County's application failed to satisfy the Code-prescribed criteria for a demolition waiver. *See Metro. Dade Cnty. v. Blumenthal*, 675 So. 2d 598, 607 (Fla. 3d DCA 1995), *on reh'g* (Feb. 21, 1996) ("Mere generalized statements of opposition are to be disregarded."); *City of Apopka v. Orange Cty.*, 299 So. 2d 657, 659 (Fla. 4th DCA 1974) (denial may not be based solely on "objections of a large number of residents") (citation omitted).

Nor did Mr. Winker's arguments on behalf of the appellants. Aside from being irrelevant to the governing standard, his presentation was mere pontification unsupported by actual evidence. And "[a]rgument of counsel does not constitute competent substantial evidence." *Skinner v. State*, 31 So. 3d 940, 943 (Fla. 1st DCA 2010); *see also City of Apopka*, 299 So. 2d at 659 ("laymen's opinions unsubstantiated by any competent facts" are not evidence supporting denial).

In sum, then, because the record below was "devoid of substantial competent evidence" to support a denial, the PZAB's decision must be quashed. *See City of W. Palm Beach Zoning Bd. of Appeals*, 504 So. 2d at 1386.

C. The PZAB's Decision Violates Due Process

First, in denying the County's application based on matters other than the applicable tree preservation requirements, the PZAB effectively expanded the scope of the hearing in violation of due process. Due process in a quasi-judicial proceeding is generally satisfied if the parties are provided notice of the relevant hearing and what will occur there, and an opportunity to be heard in the proper forum. *See Jennings*, 589 So. 2d at 1340; *Seminole Entm't, Inc.*, 811 So. 2d at 696. But a forum is not proper if the matters considered and decided exceed the parameters of the noticed hearing, beyond the scope of what the City Code allows. *Connell*, 932 So. 2d at 444.

This was an appeal proceeding to consider whether the County should be granted a demolition waiver based on tree preservation standards, not a forum to rehash, reconsider, or relitigate historic preservation issues pertaining to the certificate of appropriateness, which are governed by a wholly different chapter of the City Code requiring different notice and procedures. Relevant to due process and expanding the scope of the

hearing, *Cube 3585* expressly held that the PZAB could not address historic preservation in a demolition waiver proceeding:

> [T]he intent provision of the NCD-3 zoning overlay [that the PZAB erroneously relied upon to deny the waiver application] is not an alternative means for historic designation because ***it does not include notice and any due process***, nor provisions that prevent causing a hardship by the designation process under Chapter 23, Historic Preservation of the City of Miami Code.

Pet. App. Ex. B at 060 (emphasis supplied). To that end, as noted above, the zoning administrator admonished the PZAB that matters relating to the certificate of appropriateness are within the "purview of the HEP Board," not the PZAB, and "the role of [the PZAB] isn't to second guess the HEP Board[.]" Pet. App. Ex. E at 1255. In ignoring this instruction and deciding the appeal on the basis of something other than tree preservation, the PZAB effectively and improperly expanded the scope of the hearing in violation of the County's right of due process. For this reason alone, the decision below must be quashed. *See Connell*, 932 So. 2d at 444.

Second, due process requires a quasi-judicial decision-maker to be impartial and free from bias and to make a decision based solely on the public hearing record. *Cherry Comm'n, Inc.*, 652 So. 2d at 804; *Thorn*, 146 So. 2d at 910. But Acting Chair Parrish, who presided over the PZAB hearing, was anything but impartial. As evidenced by his lengthy disclosure revealing his extensive conduct over a period of years as an opponent of the

County's efforts to rehabilitate the Playhouse, Acting Chair Parrish was an ***advocate*** against the very project he was charged with reviewing. *See supra* at 9-11.

To summarize, Acting Chair Parrish disclosed that he had served as chairperson of the HEP Board in 2005, which voted unanimously to designate the Playhouse as a local historic site. He wrote letters to the editor of various local newspapers, some of which were published, recounting his memories of the HEP Board's designation of the Playhouse. He also spoke against the County's request for a certificate of appropriateness before the City Commission in May 2019, and attended the City Mayor's veto rally at the Playhouse later that same month.

But his advocacy did not end there. In 2021, Acting Chair Parrish, along with several other residents "who were in favor of preventing the demolition of all but the facade of the Playhouse[,] raised $5,000 to pay for a billboard on U.S. 1 protesting the proposed demolition of most of the Playhouse." Pet. App. Ex. E at 1154-55. Acting Chair Parrish used his business, Wind & Rain Properties, "to collect the $5,000 for the billboard because that company already had a bank account, [and] was able to segregate and keep track of the monies collected." *Id.* at 1155. He personally contributed $15 to this fundraising effort. *Id.*

Then, in August 2022, Acting Chair Parrish joined a lawsuit filed by Mr. Winker as one of several plaintiffs against the County, alleging that the County's project was inconsistent with a bond referendum authorizing certain funding to restore the Playhouse. *Id.* In his PZAB disclosure, Acting Chair Parrish acknowledged the obvious—that the attorney representing him as a plaintiff against the County in that lawsuit relating to the very same Playhouse project was also the same attorney challenging the County's request for a demolition waiver before the PZAB. *Id.* Acting Chair Parrish also acknowledged that he and Mr. Winker, along with their respective wives, are "social friends." *Id.*

Additionally, in September 2022, Acting Chair Parrish again used his company to collect donations for a "citizens group" devoted to opposing the County's plan, although he stated that he did not personally contribute any money to that particular fundraising effort.[6] *Id.* at 1155-56.

[6] In emphasizing that he donated only $15 to the first fundraising campaign and nothing to the second, Acting Chair Parrish seemed to believe that the legal significance of his actions somehow hinged on the amount of financial investment he had put into opposing the County's project. But the problem is not how much or little money he contributed; rather, it is that he was involved in such a campaign at all, among the many other activities adverse to the County's plan detailed above. It is the advocacy, not the dollar amount, that creates the issue here.

Notwithstanding all of this, Acting Chair Parrish concluded that he has "no private or personal interest in the Playhouse" and "no financial interest in the Playhouse in any capacity," *id.* at 1156, as if this pronouncement on his financial interests were sufficient to cure the bias reflected by his consistent advocacy and efforts against the County's project over a period of years. And notwithstanding his active, consistent, and longstanding objections to the County's project, Acting Chair Parrish also proclaimed that he could be fair and decide the County's application based upon the evidence presented to the PZAB. *Id.* at 1156-57.

But this pronouncement was plainly farcical. In the first instance, as a quasi-judicial decisionmaker, Acting Chair Parrish must be judged by his actual conduct leading up to this proceeding, not just his hollow promise to be fair. There is simply no concept of due process that would countenance a judge in a quasi-judicial matter engaging in such extensive efforts in opposition to an applicant's project—through public speaking, newspaper letter writing, fundraising and publicity campaigns, and even suing the applicant about the very same project. As fellow board member Gersten stated after the disclosure, "you have actually spent money working against a particular point of view of an applicant[.]" *Id.* at 1160. Being a consistent and involved advocate is the very antithesis of an impartial decision-maker—

one whose past conduct evidences a clear agenda and bias favoring a particular outcome.

Importantly, to be clear and contrary to Acting Chair Parrish's protestations, this is not about his rights to engage in civic discourse: it is about the impossibility of a person being both an impartial quasi-judicial decision-maker and an advocate on the very same matter, just as a lawyer cannot be both a judge and an advocate for a client simultaneously. *Cf. Junior v. LaCroix*, 263 So. 3d 159, 168 (Fla. 3d DCA 2018) (Rothenberg, C.J., specially concurring) ("[T]he trial court impermissibly crossed the line between neutral arbiter of the facts to that of an advocate[.]"). Due process simply does not permit one to wear such antithetical hats at the same time.

The conduct summarized above, and more thoroughly detailed in the statement of facts, collectively paints a picture of a very biased decision-maker: a person who engaged in fundraising efforts to defeat the applicant's project and even joined a lawsuit as a plaintiff against the applicant concerning the very same project. *See, e.g.*, *Villages, LLC v. Enfield Planning & Zoning Comm'n*, 89 A.3d 405, 414 (Conn. App. Ct. 2014) (evidence of bias may be cumulative; specific evidence of bias is not examined in isolation). A decision-maker whose past conduct conclusively demonstrates that he is not impartial may not participate in the proceeding

as a judge, no matter how fair he proclaims he can be. Moreover, "the appearance of neutrality can be as important as neutrality itself because of the former's impact upon confidence in the proceedings," *Int'l Ins. Co. v. Schrager*, 593 So. 2d at 1197, and as board member Gersten put it, at a bare minimum here, "there is no way that [Mr. Parrish's conduct] cannot appear somewhat inappropriate," *see* Pet. App. Ex. E at 1160.

Accordingly, Mr. Parrish should have recused, and upon his refusal to do so voluntarily, the PZAB should have forced him. *See Ridgewood Properties, Inc.*, 562 So. 2d at 324; *Verizon Bus. Network Servs., Inc.*, 988 So. 2d at 1151.

Acting Chair Parrish's failure to recuse himself because of his obvious bias cannot be deemed harmless either, even though he was but one amongst the six votes to deny the County's application. After he made his disclosure, he asked his fellow board members if they believed he should recuse, and while a majority of those board members did not ultimately support a motion forcing him to recuse, several board members raised concerns. In particular, as already noted, board member Gersten expressed concern with Acting Chair Parrish's participation in the hearing, pointing out that he had "actually spent money working against a particular point of view of an applicant," and "there is no way that it cannot appear somewhat

inappropriate" in a quasi-judicial proceeding. Pet. App. Ex. E at 1159-60. Thereafter, Mr. Gersten himself left the hearing, having said he felt uncomfortable participating in the hearing because Acting Chair Parrish's involvement tainted the proceedings.

Thus, because of Acting Chair Parrish's failure to recuse, the County was not only sacked with a biased decision-maker, but, ironically, also deprived of another board member who may have actually listened to the evidence and made a decision based on the proper legal standard. In addition, during the PZAB's deliberations before the vote, Acting Chair Parrish showed his hand by using his platform to opine that the *Cube 3585* decision was wrong (even though it wasn't), that tree preservation should not be the sole focus of the demolition waiver (even though it is), that the County's plan to demolish 80 percent of the Playhouse was not a "minor deviation" for which a waiver should issue (even though that is not the standard), and that the County was using the waiver process "to avoid going back before the Historic and Environmental Preservation Board" (even though that is both irrelevant and untrue). *Id.* at 1310-15.

Having the presiding officer conclude the proceedings with a lengthy recitation of these purported rationalizations for denial—rationalizations that were, as explained above, all contrary to the essential requirements of the

law—may have influenced or swayed other board members to vote against the County's application and for the wrong reasons. *See Dellinger v. Lincoln Cnty.*, 832 S.E.2d 172, 179 (N.C. Ct. App. 2019) (rejecting claim that board member's bias and refusal to recuse was harmless error, where board's vote was 4-to-1 to deny application; "[board member's] biased recitation of his 'condensed evidence' could have influenced the votes of the two other commissioners who also voted against issuing the permit after his presentation," and thus "[his] bias and commitment to deny Petitioners' request . . . is sufficient basis to reverse and remand").

Accordingly, Acting Chair Parrish's bias cannot be characterized as harmless: it tainted the entire hearing in a clear violation of due process. And because his lack of impartiality tainted the entire proceeding and infected its outcome to the County's detriment, the PZAB's decision must be quashed on due process grounds.

IV. Conclusion

Given that the PZAB, led by a biased decision-maker, disregarded the actual code requirements for the waiver at issue, ignored the only evidence in the record relative to those requirements, flouted a prior decision of this Court concerning the exact same request in the exact same zoning district, and expanded the scope of the hearing to include matters outside the

auspices of the board's authority, this Court must issue a writ of certiorari and quash the PZAB's decision, thereby reinstating the administrative approval of the County's application for a demolition waiver.

Dated: May 10, 2023

Respectfully submitted,

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Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on May 10, 2023 via e-mail generated by My Florida Courts E-Filing Portal and by email to all parties listed below:

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Certificate of Compliance Regarding Computer Briefs

I HEREBY CERTIFY that this petition is in Arial 14-point font, in compliance with Fla. R. App. P. 9.045(b), and is consistent with the word count limit requirements of Fla. R. App. P. 9.100(j).

s/ James Edwin Kirtley, Jr.
Assistant County Attorney