IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

CASE NO. 3D21-1411

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

CITY OF MIAMI,

Petitioner /
Cross Respondent,

v.

MIAMI-DADE COUNTY,

Respondent /
Cross Petitioner.
_____/

MIAMI-DADE COUNTY'S
CROSS PETITION FOR WRIT OF CERTIORARI[1]

Some theatrical revivals, like the works of Rodgers and Hammerstein, are so classic and timeless that they never get old. The same cannot be said of this case, which is before the Court for the second time too soon. The first time around, on second-tier certiorari review, this Court held that the mayoral veto of a quasi-judicial decision is, unremarkably, itself quasi-judicial and

[1] Herein, the County only presents its cross petition. The County will respond to the City's petition for writ of certiorari upon the issuance of an order to show cause.

thus subject to certiorari review.[2] Upon remand from that decision, the Circuit Court found that the mayoral veto of the City Commission's historic preservation permit approval violated due process because, during the veto period, the City Mayor engaged in *ex parte* communications that he failed to disclose. But while ultimately quashing the City's decision on due process grounds, the Circuit Court also erroneously rejected the balance of the County's arguments as to why the veto, which constituted the City's final decision on the County's application, must be quashed.

On June 10, 2021, the City of Miami City Commission voted to appeal the Circuit Court's post-remand decision.[3] And, on July 6, 2021, the City filed its petition for writ of certiorari with this Court, requesting second-tier review of the Circuit Court's due process ruling. The County, having prevailed on a case-dispositive issue, would not normally seek second-tier review of issues that proved to be non-dispositive. But nothing in this case has followed a

[2] In fact, this proceeding marks the third time this Court has been asked to review some aspect of this case. After the City moved to dismiss the County's petition below for lack of jurisdiction and the Circuit Court deferred ruling and carried the jurisdictional issue with the case, the City unsuccessfully sought a writ of prohibition from this Court. *See City of Miami Miami-Dade Cnty.*, 301 So. 3d 952 (Fla. 3d DCA 2019).

[3] The decision was originally issued on April 7, 2021, but did not become final until June 3, 2021, when the Circuit Court denied the City's motion for rehearing.

normal course, so the City's appeal of the part of the opinion that the Circuit Court decided correctly necessitates bringing to this Court's attention those parts that were decided in violation of the essential requirements of the law.

Of course, should the Court affirm on the dispositive due process issue, a review of whether the City Mayor applied the correct law when he vetoed the City Commission's approval and whether the veto was supported by substantial competent evidence would be unnecessary. But if the Court finds merit in the City's challenge to the case-dispositive due process ruling (and it should not), then consideration of the entire decision below is necessary to avoid a piecemeal series of remands and appeals that would add yet more acts to this already overlong production. The public deserves finality at this point, as the County's efforts to return great theater to the Coconut Grove Playhouse have been stalled for more than four years by partial appeal after partial appeal—notwithstanding that the County Commission and the City Commission, by majority vote, have each approved this renovation plan. It is time for the curtain to close and for the City to leave the stage.

II. Procedural Facts and Background

A. The County's 2017 application and the *Playhouse I* decision

The City designated the Coconut Grove Playhouse (the "Playhouse") as a historic site in 2005. Pet. App. Ex. B.[4] The City has acknowledged, and agreed with the County, that the 2005 City-adopted designation did not expressly include preservation of the interior of the Playhouse structure. *Id.* Ex. D at MDC0142; Ex. E at MDC0314; Ex. F at MDC0420-21. As both parties have also acknowledged and agreed, 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.*

In 2014, the County entered into a lease agreement with the State of Florida, the owner of the site, and with Florida International University, as co-lessee, to rehabilitate the Playhouse and return theater to its "ancestral home" in Coconut Grove. *Id.* Ex. G at MDC0477. Because of the City's

[4] The County's *Appendix to Cross Petition for Writ of Certiorari* has been filed concurrently with this petition. Documents included in the Appendix are cited as "Pet. App. Ex. __ at MDC__" with page references corresponding to the bates-stamped numbers at the bottom right of each page in the Appendix. The Circuit Court's opinion is Exhibit A to the Appendix and is cited as "Op. at __." The order on rehearing is also included in Exhibit A and is similarly cited as "Rehr'g Op. at __." All emphasis to excerpts from the Appendix and from cases cited herein is supplied unless otherwise noted.

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historic designation, the County's plan to renovate the Playhouse required a certificate of appropriateness from the City to make alterations to, and rehabilitate, the site. *Id.* 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 MDC0059. Due to the nature of the rehabilitation plan and scope of alterations, this project requires a special certificate of appropriateness that the City of Miami Historic and Environmental Preservation Board (HEPB) may only approve after a quasi-judicial public hearing. *Id*. at MDC0075-76.

At City staff's suggestion, the County applied for a certificate of appropriateness for a conceptual master plan early in the design process, to allow for more public input and transparency in a quasi-judicial setting before expending resources on final designs. *Id.* Ex. G. In April 2017, the HEPB conducted a public hearing and approved the County's master plan application, with conditions. *Id*. Ex. H.

However, 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. *Id.* Ex. I; Ex. D. The City Commission heard the appeal in December 2017 and granted it in part with a series of conditions, including conditions that required preservation of certain interior

elements of the Playhouse, even though such interior elements were, as noted above, beyond the scope of the designation and, thus, not subject to regulation. *Id.* Ex. J.

Thereafter, the County timely petitioned for first-tier certiorari review of the City Commission's decision. In December 2018, the Circuit Court granted the County's petition. *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*"); Pet. App. Ex. K (slip op.). The court agreed with the County that: the two residents who had appealed 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 MDC0503. Importantly, the court's holding recognized what both the City and the County had long acknowledged: that "[t]he 2005 Designation Report did not include the interior of the building." *Id.* at MDC0504. Accordingly, the court quashed the City's decision and remanded for further proceedings. *Id.*

B. The Playhouse is listed on the National Register of Historic Places

While the certificate of appropriateness proceedings and related appeal unfolded, an effort to include the Playhouse on the National Register of Historic Places (the "National Register") was also being pursued. The State Division of Historical Resources ("DHR") began the nomination process in 2017. *Id.* Ex. V (Playhouse National Register Composite Exhibit).

In contrast to local historic site designation, the National Register is not a regulation; rather, it is solely an honorary listing. As such, it does not preclude modifications to a historic property, including complete demolition of a structure.[5] Nonetheless, National Register listing is, in fact, an honor and does confer various important federal benefits on a property, including eligibility for federal grants and tax exemptions. *See* 36 C.F.R. § 60.2(b)-(c) (2019). Once listed on the National Register, a property remains there regardless of further alteration, unless affirmative steps are taken to de-list the property for an authorized reason. *See* 36 C.F.R. § 60.15.

[5] *See* 36 C.F.R. § 60.2 (2019) ("Listing of private property on the National Register does not prohibit . . . any actions which may otherwise be taken by the property owner with respect to the property."); DHR's "Results of Listing a Property in the National Register of Historic Places," available at: https://dos.myflorida.com/historical/preservation/national-register/results-of-listing/ ("Listing in the National Register . . . does not keep a property from being modified or even destroyed.").

The City Code contains a process to address National Register nominations, which is separate from the designation and certificate of appropriateness processes. Pet. App. Ex. C (§ 23-5) atMDC0065. The National Register process requires the HEPB to review nominations and to obtain the County's written recommendation. *Id.*

Here, the County had supported the nomination while objecting to certain portions of the narrative history provided in the application as inaccurate. *Id.* Ex. V at MDC0897-99, 909. But the HEPB disregarded those objections and, on February 6, 2018, approved the nomination as drafted. *Id.* at MDC0927. On August 9, 2018, the state review board forwarded the nomination to the National Park Service for listing in the National Register. *Id.* at MDC0956. The Playhouse was listed on the National Register on October 19, 2018, shortly before the Circuit Court decided *Playhouse I*. *Id.* at MDC0969.

C. The HEPB's rejection of the County's final plans

In quashing the City Commission's decision that imposed unlawful conditions requiring preservation of the interior, *Playhouse I* in effect reinstated the HEPB's 2017 approval that had been appealed to the City Commission. *Id.* Ex. K. Thus, with the master plan approved, all that remained was for the HEPB to consider and approve the County's final plans,

which the County had prepared in reliance on, and in conformance with, the 2017 master plan 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—the professional recommendations and testimony of both the City's and County's historic preservation professionals—as well as its own prior approval and the decision in *Playhouse I*, and instead denied the County's application based on a letter issued by the state's DHR. *Id.* at MDC0332; Ex. M. However, as explained below, the DHR letter was incompetent evidence because it did not analyze the applicable criteria in reference to the governing regulation, and its very existence was the result of a due process violation. The details of the HEPB hearing and the DHR letter are central to this appeal because the City Mayor purported to reinstate the HEPB decision with his veto, and the Circuit Court below found he acted properly in seeking to reinstate that decision. In addition, the DHR letter was the veto's only potential evidentiary support. *See id.* Ex. Q.

DHR's letter, which was made part of the record, explained that "our office has reviewed Miami-Dade's plans and we are responding to the HEPB's questions based on the historic and architectural characteristics of

the property described ***in the National Register nomination***." *Id.* Ex. U (DHR Letter & 11/2017 DHR Email). On its face, then, the DHR letter made plain that it was not based on the City's 2005 designation that governed the property or the applicable certificate of appropriateness criteria, but instead resulted from an analysis of the wholly separate—and non-regulatory—National Register listing process.

Based on the National Register report, DHR responded to the question of whether "demolition of the Playhouse structure (except solely its Southerly and Easterly facades which the County plans to preserve in its new proposed program) [is] consistent with the Secretary of the Interior's Standards" by opining that such demolition "is not consistent with [those] Standards (Standards 1, 2, 4, 5, 6, 9, and 10)." *Id.* at MDC0839. But beyond this conclusory statement, DHR provided no analysis of why, or how, the County's project fails to meet those standards. Instead, DHR cited only a November 2017 email from Dr. Timothy Parsons to Michael Spring, finding that the County's project was not eligible for a state grant. But the determination of grant ineligibility was based entirely on the fact that "[t]he ***entire interior*** of the building would be replaced as part of the proposed structural work," even though the interior was not included in the designation and, thus, beyond the scope of local regulatory control. *Id.* at MDC0844.

Again, the County and the City have agreed throughout these proceedings that the City's governing 2005 designation did not include the interior of the building. *See supra*. Accordingly, impacts to the interior are not among the applicable certificate of appropriateness criteria. Yet DHR's analysis was based entirely on the Playhouse interior and on the non-regulatory National Register nomination, and DHR opined only about the County project's purported impact on the National Register status.

Nowhere did DHR analyze the County's plans in the same manner as the City's professional historic preservation staff did—i.e., under the governing 2005 designation report or the applicable regulatory standards set forth in the City Code. Because it was instead based on inapplicable law and inapplicable facts, the DHR letter was incompetent and inapposite to the certificate of appropriateness application.

The record otherwise contained no evidence that the County's plan failed to meet the Secretary of the Interior standards when measured against the governing local designation report, as opposed to the non-regulatory National Register narrative premised on the interior features. The HEPB's denial of the County's application was thus without evidentiary support.

And the HEPB's decision—indeed, the very existence of the DHR letter that purported to support that decision—was further tainted by the

participation of the HEPB's biased vice-chair. The vice-chair had been engaged in an *ex parte* campaign with objectors and DHR staff, in an apparent effort to defeat the County's project; and her efforts even included requesting from DHR staff the very analysis that she would use at the hearing to justify denial of the County's plan.[6] *Id.* Ex. N at MDC0521-22; Ex. T.

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, even though the County's final plans were carefully and thoughtfully developed in reliance upon, and in conformance with, that very same prior approval. *Id.* Ex. E at MDC0331; Ex. M at MDC0517.

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[6] At the February 2019 HEPB meeting, after the County's application was deferred because of technical issues in viewing the plans, the vice-chair made a motion, which the HEPB adopted and the County did not oppose, directing City staff to request that DHR provide immediate guidance on the County's plans, with specific emphasis on the demolition of a National Register structure. Pet. App. Ex. W at MDC0987. After the meeting concluded, the vice-chair "ghost wrote" questions for the City historic preservation officer and emailed them to him with the suggestion that he submit them to DHR—despite the fact that the HEPB never approved those questions or authorized the vice-chair to submit them on its behalf, and notwithstanding that the County had no knowledge of, or opportunity to comment on, the questions after the conclusion of the HEPB meeting. *Id.* Ex. T. DHR ultimately received and responded to those very questions in its letter, discussed above. *Id.* Ex. U at MDC0835. Finally, the vice-chair made the motion, which was ultimately approved, to deny the County's application based on DHR's opinion. *Id.* Ex. E at MDC0331. The City Mayor later cited DHR's letter in support of his veto. *See infra.*

D. 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. N; Ex. O. After the close of the public hearing, the City Commission approved the County's plans, subject to conditions acceptable to the County. *Id.* Ex. P.

E. 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 setting forth the reasons for his veto. *Id.* Ex. Q. Among other things, the statement explained that the veto "seeks to affirm [that] the HEP Board's decision is supported by competent and substantial evidence." *Id.* at MDC0669. The veto statement further contended that "the County's proposal would jeopardize the National Register [ ] designation for the Coconut Grove Playhouse because the proposal is not consistent with the guidance provided by the Secretary of the Interior's Standards for the Treatment of Historic Properties," citing DHR's letter. *Id.* at MDC0669-70. The City Mayor also noted that "acceptance of the County's proposal could effectively remove the Coconut Grove Playhouse from the National Register," which would be "a troublesome outcome for the residents of Miami." *Id.* at MDC0670. Finally, the veto statement explained 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.*

At the next City Commission meeting, the veto was placed on the agenda. A majority of the City Commission voted to override the mayoral veto, but the effort failed to obtain the required supermajority. *Id.* Ex. R at MDC0709. 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.

F. The County's second first-tier certiorari petition, the Circuit Court's dismissal for lack of jurisdiction, and this Court's decision that the mayoral veto of a quasi-judicial decision is quasi-judicial

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-overridden veto. *Id.* at Ex. X. As the County argued below, the City Mayor's veto of the quasi-judicial approval was not supported by substantial competent evidence, he failed to apply the right law, and the veto violated due process. In response, 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 he had acted in accordance with the requirements for quasi-judicial proceedings.

Over a year later, and after hearing oral argument, the Circuit Court issued its decision on July 22, 2020, agreeing with the City that the mayoral veto was not quasi-judicial and, thus, that the court lacked jurisdiction over the County's challenge. The County then timely petitioned for second-tier review, which this Court granted on December 23, 2020. *See Miami-Dade Cnty. v. City of Miami*, 315 So. 3d 115 (Fla. 3d DCA 2020).

Quashing the Circuit Court's decision, this Court held that the City Mayor's veto was itself quasi-judicial, because it was part of, and inseparable from, the quasi-judicial process from which it emanated. *Id.* at 124 ("the Mayor's veto was inextricably intertwined with the quasi-judicial process"). As the Court explained, "in excising the Mayor's veto from the quasi-judicial proceedings of which the veto was a part of, the circuit court departed from the essential requirements of the law." *Id.* This Court thus held that "the circuit court had jurisdiction to review the County's petition for certiorari," and remanded for that court to address the County's arguments on the merits. *Id.*

G. The Circuit Court's decision quashing the veto on due process grounds, while rejecting the balance of the County's arguments

Upon remand, the Circuit Court issued a decision on the merits on April 7, 2021, quashing the mayoral veto because the City Mayor had engaged in

undisclosed *ex parte* communications[7] during the ten-day veto period, in violation of the County's due process rights. Op. at 12-14, 19.

Despite quashing the veto on the case-dispositive due process ground, the Circuit Court rejected the County's arguments that the City Mayor applied incorrect law and that his decision was unsupported by substantial competent evidence. *Id.* at 14-19. As explained further below, in addressing those arguments, the Circuit Court made independent factual findings that were unsupported by the record and contrary to both the parties' agreement throughout these proceedings and the law of the case established in *Playhouse I*. *Id.* at 6 n.3, 14-19.

[7] The County obtained the undisclosed *ex parte* communications through a public records request to which the City responded on or about June 7, 2019—well after any public hearing at which the communications could have been disclosed or introduced into the hearing board record. The documents produced by the City in response to the County's public records request constitute an admission that the City Mayor had *ex parte* communications during the ten-day veto period, and the City has never denied this fact. Accordingly, this Court may take judicial notice of the existence of these public records, which are contained in Exhibit S to the County's Appendix. *See, e.g.*, *Fla. Accountants Ass'n v. Dandelake*, 98 So. 2d 323 (Fla. 1957) ("This court takes judicial notice of the public records of this state"); 1 Fla. Prac., Evidence § 901.7 ("Florida courts have frequently . . . tak[en] judicial notice of the existence and the contents of the [public] record.").

On June 3, 2021, the Circuit Court denied the City's motion for rehearing, reaffirming its due process decision.[8] Rehr'g Op. at 4. Should this Court decide that the Circuit Court erred on the dispositive due process determination, it should reach these additional issues to provide complete guidance to the Circuit Court on remand.

III. Legal Standard

Parties may twice seek judicial review of a local government's quasi-judicial decision: "a party may seek certiorari review at the circuit court level," and "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 review on second-tier certiorari is narrower and limited to whether the lower court afforded due process and applied the correct law. *Id.*

On second-tier review, the due process inquiry concerns the circuit court's actions, rather than the underlying actions of the local government.

[8] On rehearing, the Circuit Court "[e]xercis[ed] [its] inherent authority" to "correct the relief granted" such that it only "grant[ed] the writ and quash[ed] the Mayor's veto." Rehr'g Op. at 3-4 (citing this Court's recent opinion in *Miami-Dade County v. Snapp Indus, Inc.*, 3D21-308, 2021 WL 1773502 (Fla. 3d DCA May 5, 2021)). In its original opinion, the Circuit Court had also affirmatively "reinstate[d] City Commission resolution R-19-169 – Coconut Playhouse Appeal." *Id.* at 3. While the Circuit Court was correct to do no more than quash and remand, the effect of quashing the mayoral veto is nevertheless to reinstate the City Commission resolution.

Seminole Entm't, Inc. v. City of Casselberry, Fla., 813 So. 2d 186, 188 (Fla. 5th DCA 2002). Regarding whether the lower court applied the correct law, the challenging party must show not only that the court erred, but also that the error resulted in a miscarriage of justice. *Omnipoint*, 863 So. 2d at 199.

IV. Argument

As will be addressed in the County's response to the City's petition, the City's request for second-tier certiorari relief should be denied because the Circuit Court applied the correct law and afforded due process in finding that the City Mayor's veto must be quashed on the ground that he engaged in undisclosed *ex parte* communications during the ten-day veto period.

If the Court nevertheless finds any merit in the City's arguments, the Court should also review the balance of the lower court's decision, which is the subject of this cross-petition. In those portions of the opinion, the lower court exceeded its first-tier certiorari jurisdiction in finding that the Playhouse interior was subject to regulation, misapprehended the applicable code-prescribed criteria for certificates of appropriateness, and improperly found that the City Mayor applied the correct legal criteria based on his intent to reinstate the HEPB's decision. As explained herein, those portions of the decision departed from the essential requirements of the law and, if left unreviewed here, would result in a miscarriage of justice.

A. The Circuit Court exceeded its role on first-tier certiorari review and applied the wrong law in finding that the Playhouse interior was subject to regulation

As the City and the County have agreed throughout this case, the 2005 designation, which governs these proceedings, did not regulate the interior features of the Playhouse*. See, e.g.*, Ex. D at MDC0142; Ex. E at MDC0314; Ex. F at MDC0420-21. *Playhouse I* recognized this fact, 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 MDC0504.

But contrary to the parties' own stipulations and the decision in *Playhouse I*, the Circuit Court revisited this issue in its opinion below. It thus reached an issue that the parties did not raise, second-guessed the City historic preservation staff's expert opinion, and ignored *Playhouse I*, finding instead that the interior ***is*** subject to regulation:

> Although the County repeatedly relies upon the (now expired) 2017 City of Miami Certificate of Appropriateness which found that only the exterior of the Playhouse was protected, ***the 2005 Historical Designation and incorporated report did not limit designation to the Playhouse interior*** [sic].

Op. at 18 n.7. As the Circuit Court further found:

> The 2017 staff analysis concluded that demolition of the theater was permissible because the 2005 historic designation report described only the "original Kiehnel structure containing the South and East facades" as requiring preservation. In so doing, the staff misapprehended that while only the South and East facades possessed *architectural* significance, ***the entire theater***

> possessed *historical* significance. In reliance upon this faulty staff analysis, the HEPB approved this 2017 Certificate of Appropriateness.

Id. at 6 (emphasis original, excluding bolded text). The court also independently found that "[d]emolition of the Playhouse would eliminate all contributions made by [Alfred] Browning Parker," *see id.* at 18, even though that finding appears nowhere in the record and is primarily relevant only to the purported impacts on the interior, because Parker's work was principally done inside the Playhouse.

In rewriting facts that neither party contested, the Circuit Court cherry-picked statements from the record to supplant its judgment for that of the City as to the scope of a City designation report, even though the court possesses no expertise in historic preservation and in how designations of interior features must be described to comply with the City Code. In this regard, the Circuit Court appears to have confused the designation report's narrative history of the Playhouse—which, naturally, comprehensively details the Playhouse both inside and out—with the City Code requirement that, for particular interior features to be preserved, those features must be expressly identified as subject to regulation—a requirement that the City Attorney's

Office and City historic preservation staff recognized was not met here.[9] *See id.* Ex. H at MDC0314 (Assistant City Attorney: "I'm only going to speak about things which I think there's unequivocal certainty. The interior is not designated."); Ex. K at MDC0420 (City staff report: "The [HEPB] has no purview over what occurs to the interior.").

Lastly, the Circuit Court disregarded *Playhouse I*, finding that "the prior panel's view [that] the interior of the theater was not designated" was wrong because it "relied upon the 2017 staff analysis which misconstrued the scope of the 2005 historical designation." *Id.* at 6 n.3.

As explained below, each of these findings and rulings exceeded the Circuit Court's certiorari jurisdiction and violated the essential requirements of the law.

1. The Circuit Court violated the essential requirements of the law by reaching an issue not raised by the parties

"Florida courts have held that a circuit court, acting in its appellate capacity on first-tier certiorari review, fails to apply the correct law when the circuit court goes beyond the appropriate standard/scope of review." *Dep't of*

[9] 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 Cnty. v. P.J. Birds*, 654 So. 2d 170, 175 (Fla. 3d DCA 1995) (government's interpretation of its own regulation is entitled to deference where reasonable and consistent with legislative intent).

Highway Safety & Motor Vehicles v. Sperberg, 257 So. 3d 560, 562 (Fla. 3d DCA 2018) (footnote omitted). Here, the Circuit Court did just that: it exceeded the proper scope of its review in reaching an issue that the parties did not contest.

In *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 200-01 (Fla. 2003), which addressed a district court panel that made the same error on second-tier review, the Florida Supreme Court held that the district court "exceeded the proper scope of . . . review when it, sua sponte," decided "an issue neither party raised in any phase of the proceedings."

In this case, neither party argued below that the Playhouse interior had been designated; in fact, the City has repeatedly acknowledged that the 2005 designation ***does not*** regulate the interior. *See* Ex. D at MDC0142; Ex. E at MDC0314; Ex. F at MDC0420-21. By reaching an issue that the parties did not contest, the Circuit Court exceeded its certiorari jurisdiction, contrary to binding Florida Supreme Court precedent, and thereby violated the essential requirements of the law. *See Sperberg*, 257 So. 3d at 562-63 (circuit court "failed to apply the correct law" when it "consider[ed] issues not raised by any party in any phase of the proceedings").

2. The Circuit Court violated the essential requirements of the law by making independent factual findings

The Circuit Court further exceeded its certiorari jurisdiction by "embark[ing] on an independent review of the [designation report] and ma[king] 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 who had made misrepresentations to the county commission was estopped from challenging the county's partial denial of a plat application. On second-tier review, the district court granted the petition. Accepting review but quashing on other grounds, the Florida Supreme Court held that the circuit court had exceeded the proper scope of its review:

> [R]ather than limiting its review of the [county's] decision to the three "first-tier" factors [for certiorari review], ***the [circuit] 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]). . . .
>
> 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)***.

Id. at 844-45.

Like the circuit court in *G.B.V.*, the Circuit Court here exceeded its review authority and applied the wrong law when it made its own factual finding as to the scope of the 2005 designation—a finding that was, moreover, wholly contrary to the record. *See also Evergreen Tree Treasurers of Charlotte County, Inc. v. Charlotte County Bd. of County Comm'rs*, 810 So. 2d 526, 530 (Fla. 2d DCA 2002) ("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.").

The City Code provides that a historic designation does not include interior areas unless the designation report ***expressly*** provides otherwise. *See* Pet. App. Ex. C at MDC064 (§ 23-4(2)(c) providing that "[t]he 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."). The designation report contained no such expression here. But the Circuit Court, reaching a factual issue neither party raised, latched onto the designation report's descriptive narrative of the Playhouse's history and used that narrative to improperly conclude that the interior may be regulated.

This was no idle error. The Circuit Court's improper historical revisionism infected the rest of its opinion, as it made defensible the City Mayor's reliance upon evidence that considered impacts to the interior. Op. at 6, 18. Indeed, in the Circuit Court's view, there was no difference between the scope of regulation of the designation report and that of the non-regulatory National Register narrative, even though the latter expressly includes interior features and the former does not. *See* Op. at 7 ("In describing the historical significance of the interior, the [National Register] report in support of the listing stated: . . . 'The theater's auditorium retains a high level of integrity from the period of significance associated with George Engles and Zev Buffman and the productions they coordinated and sponsored. . . . While the interior has been altered and degraded, it still maintains its historic feeling as well.' . . . ***These findings mirror the conclusions in the 2005 City of Miami Historic Designation.***").

But the record makes clear that the designation report did not "precisely describe" any interior features in any portion of the site that would be subject to review and did not "set forth standards and guidelines" for such regulation, as required by the City Code. *See* Pet. App. Ex. C at MDC064. Nor did the Circuit Court identify any such provision in the designation report—because, in fact, no such provision exists.

In rewriting the designation report to fit its, and only its, interpretation of the facts, the Circuit Court misapprehended the governing certiorari standard and violated the essential requirements of the law resulting in a miscarriage of justice. *See G.B.V. Int'l*, 787 So. 2d at 844-45.

3. The Circuit Court violated the essential requirements of the law in failing to heed the law of the case

The Circuit Court also applied the wrong law when it ignored the law of the case doctrine. As noted above, *Playhouse I* recognized, and expressly held, that the 2005 designation did not encompass the interior. 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, this Court has repeatedly held that the prior decision becomes the law of the case, meaning that 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 ex rel. Eisenberg v. City of Miami*, 89 So. 3d 963, 966 (Fla. 3d DCA 2012); *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 agreed that *Playhouse I* is the law of the case in the proceedings before the City below. *See* Pet. App. Ex. E at MDC0314 (Assistant City Attorney: "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"). And, in fact, *Playhouse I* is law of the case because it was an earlier decision in the same matter, involving the same parties. *See, e.g.*, *United Auto. Ins. Co.*, 173 So. 3d at 1065.

It is irrelevant whether the Circuit Court agreed with the prior panel's decision or regarded that decision as correct. *Id.* In making its own independent finding that the Playhouse interior is subject to regulation, the Circuit Court ignored the law of the case, thereby violating the essential requirements of the law. *Dougherty*, 89 So. 3d at 966.

B. In finding that the City Mayor applied the correct law, the Circuit Court failed to apply the code-prescribed criteria for certificates of appropriateness, thereby violating the essential requirements of the law

As explained above, the City Mayor justified his veto on the view that "the County's proposal would jeopardize the National Register [ ] designation for the Coconut Grove Playhouse because the proposal is not consistent with the guidance provided by the Secretary of the Interior's Standards for the Treatment of Historic Properties," citing only to DHR's incompetent letter. Pet. App. Ex. Q at MDC0669-70. The City Mayor also noted that "acceptance of the County's proposal could effectively remove the Coconut Grove Playhouse from the National Register," which would be "a troublesome outcome for the residents of Miami." *Id.* at MDC0670. Finally, the veto statement explained that the City Mayor sought to reinstate the HEPB's denial of the County's application. *Id.*

Despite the City Mayor's express reliance on the non-regulatory National Register to justify his veto, the Circuit Court found that the City Mayor applied the correct legal standard. In doing so, the Circuit Court itself departed from the essential requirements of the law.

The Circuit Court first attempted to sever the City Mayor's reference to the code criteria from his reference to the National Register designation. Op. at 14-15. In particular, the court found, "it is clear that the Mayor did not veto

the resolution relying upon the legal criteria set by the National Register, but rather, justified his veto, in part, based upon his concern that the demolition of the theater would jeopardize the property's listing on the National Register, a loss for the City and its residents." Op. at 15.

The Circuit Court's stated reasoning is circular. The City Mayor's veto statement identified no basis for rejecting the application under the applicable criteria. Instead, it was based only on the City Mayor's desire to "reinstate [the HEPB's] decision" and his concern about the effect the application would purportedly have on the Playhouse's National Register status. Pet. App. Ex. Q at MDC0669-70. And, the HEPB decision was itself supported only by DHR's legally incompetent analysis, based on the National Register narrative that considered impacts to the interior features, rather than on the governing designation report, which did not include the interior.

To be sure, the governing code criteria do not include National Register status as an applicable consideration. *See id.* Ex. C at MDC0077-78 (§ 24-6.2(h), *Guidelines for issuing certificates of appropriateness*). Thus, contrary to the Circuit Court's finding, the City Mayor was not permitted to veto based on "his concern that the demolition of the theater would jeopardize the property's listing on the National Register[.]" Op. at 15. Rather, the veto decision was required to be governed by whether the application satisfies

the Secretary of the Interior's standards ***as measured against the governing local designation***, not the National Register listing. *See* Pet. App. Ex. C (§ 23-6.2(h)(1)).

The Circuit Court thus allowed the City Mayor to import a new criterion into the code-required standards applicable to a quasi-judicial application. In allowing the City Mayor to rewrite the governing standards at the end of a quasi-judicial proceeding, the Circuit Court applied the wrong law.[10]

C. The Circuit Court violated the essential requirements of the law in finding competent substantial record evidence to support denial of the County's application

As this Court has explained, the lower court "fail[s] to correctly apply the correct law" on first-tier certiorari review when "its decision allows the use of incompetent evidence to support the [local government's] decision[.]" *See Jesus Fellowship, Inc. v. Miami-Dade Cnty.*, 752 So. 2d 708, 709 (Fla. 3d DCA 2000). "The mere presence in the record of [certain] items is not . . . sufficient. They must be or contain relevant valid evidence which supports the [local government's] decision." *Id.* at 710.

Here, in finding that the City Mayor's decision was supported by substantial competent evidence, "the circuit court missed its mark." *Id.* at

[10] In doing so, the Circuit Court also violated the County's right of due process by allowing a quasi-judicial determination to be based on factors outside of what the City Code allows. *See* Pet. App. Ex. K (*Playhouse I*).

709. The Circuit Court cited to only two things: the 2005 designation report itself, and DHR's opinion that the County's project "may affect the Playhouse's National Register designation." Op. at 18-19. But as explained above, any analysis that considers the interior is incompetent, because the interior was not in fact designated pursuant to the applicable code criteria. And the designation report, standing alone, does not support denial of the County's application, because it does not, on its own terms, include any analysis of any purported impacts of the County's project—as, of course, it could not, since it necessarily predates the County's application. *See* Pet. App. Ex. B.

In fact, the record contains no analysis that measures the County's proposal against the governing designation and finds that it does not meet the applicable code-prescribed standards. And neither the City Mayor, nor the Circuit Court, was competent to make any independent finding—much less one that is unsupported by the actual record—that the County's project is inconsistent with the governing designation report. *See G.B.V. Int'l*, 787 So. 2d at 844-45. Thus, the designation report, standing alone, does not support the mayoral veto.

Nor can the mayoral veto legitimately find support in DHR's opinion—the only other evidence the Circuit Court identified as supporting the veto.

That opinion cannot constitute substantial competent evidence as to compliance with the code-prescribed criteria, because DHR's opinion improperly measures the County plan against something that the City Code does not authorize—the National Register nomination document, as opposed to the 2005 designation report. *See supra*. Moreover, DHR's analysis on its face addresses preservation of the interior, which is beyond the scope of the governing designation, as explained above. Thus, because DHR's opinion is premised on matters outside of the code-prescribed criteria, that opinion cannot be substantial competent evidence to support a veto decision that is bound by the code-prescribed criteria.

In short, in accepting incompetent evidence to sustain the City Mayor's veto, the Circuit Court applied the wrong law to its review of the record evidence, thereby violating the essential requirements of the law. *Jesus Fellowship*, 752 So. 2d at 711 ("When the circuit court decided there was *evidence* (substantial, competent) to support the [local government's] denial of the application, it failed to apply the correct law . . . as to what constitutes competent evidence[.]") (emphasis original).

D. The Circuit Court violated the essential requirements of the law in finding that the City Mayor applied the correct legal criteria based on his intent to reinstate the HEPB's decision

In finding that the City Mayor applied the correct legal standard, the Circuit Court expressly referenced the City Mayor's desire to reinstate the HEPB's decision, as if the mere existence of that decision could insulate the City Mayor's decision from review. Op. at 14. But, in doing so, the Circuit Court ignored, and declined to review, the County's arguments that that very same HEPB decision was infirm and failed to comply with the law. Op. at 8 n.4.

In declining to address the County's objections to the tainted HEPB proceeding, the Court overlooked that the only material in the record supporting the HEPB's decision to deny the County's application is DHR's incompetent opinion, which, in fact, the HEPB vice-chair used as the basis for her motion to deny. *See* Pet. App. Ex. U; Ex. E at MDC0331. And DHR's opinion was only in evidence because of the machinations of this very biased board member. As her many *ex parte* email exchanges[11] demonstrated, the

[11] The HEPB vice-chair's *ex parte* communications, which were obtained through a public records request, are contained in Exhibit T to the Appendix. At the outset of the HEPB's public hearing on the County's final application, undersigned counsel conducted a *Jennings* inquiry of the vice-chair regarding her many troublesome *ex parte* communications and thereafter unsuccessfully sought her recusal based on her demonstrated bias against the County's plan. Pet. App. Ex. C at MDC0179-188.

vice-chair had been coordinating with DHR prior to the hearing to solicit aid in defeating the application. *See id.* Ex. T. And during the HEPB's deliberations on her motion to deny the application, the vice-chair attempted to rebut other HEPB member's comments that were favorable to the County, which may have swayed the vote of those, or other, board members. *Id.* Ex. E. And she did much more than that, as detailed in the County's petition below. *Id.* Ex. X (Cnty. Pet. at 56-60).

The cumulative effect of the vice-chair's actions and statements demonstrates her bias, rising to the level of a due process violation and tainting the entire hearing process, up through the City Mayor's veto, which expressly sought to reinstate the results of her prejudice. *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); *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"). Indeed, the vice-chair is the "but for" cause of this entire proceeding, and the City Mayor's express embrace of the decision she engineered means he could not have applied the correct law.

In finding that the City Mayor applied the correct law by seeking to reinstate the HEPB's decision, the Circuit Court provided only a cursory description of the HEPB decision and nowhere considered the violations of due process, essential requirements of law, and substantial competent evidence that infected that underlying decision. Accordingly, the Circuit Court itself departed from the essential requirements of the law by failing to review the infirmities in the HEPB's decision.

V. Conclusion

The Circuit Court correctly quashed that the mayoral veto on due process grounds because of the City Mayor's undisclosed *ex parte* communications. Should this Court agree and reject the City's petition, then it need not address the arguments in this cross petition. But should the Court quash the Circuit Court's dispositive due process holding, it should also quash the balance of the decision because it violates the essential requirements of the law resulting in miscarriage of justice, for the reasons argued above.

Dated: July 6, 2021

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this 6th day of July, 2021 via e-mail generated by My Florida Courts E-Filing Portal 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(g).

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