IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT

CASE NO. 3D2024-1048
Lower Tribunal Case No. 23-31 AP 01

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ANTHONY VINCIGUERRA and
COURTNEY BERRIEN,
Petitioners,

vs.

MIAMI-DADE COUNTY,
Respondent.

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# PETITION ON DENIAL OF WRIT OF CERTIORARI

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On Appeal from an Opinion of the Appellate Division of the Eleventh Judicial Circuit in and for Miami-Dade County

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David J. Winker, Esq.
Fla. Bar. No. 73148
David J. Winker, P.A.
4720 S. LeJeune Rd
Coral Gables, FL 33146
dwinker@dwrlc.com
305 801 8700

Counsel for Petitioners

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## INTRODUCTION

Listed on the National Register of Historic Places, the Coconut Grove Playhouse (the "Playhouse") opened in 1927 and served as the center of the Miami theater scene, hosting some of America's most renowned theatrical performers and notable productions over the ensuing decades, including the world premiere of Tennessee Williams' "Sweet Bird of Youth", the U.S. premiere of Samuel Beckett's "Waiting for Godot," and the world premiere of "Fame".

In 2005, the entire exterior of the 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, leasing the Playhouse from its owner, the State of Florida.

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 includes demolishing over 80% of the Playhouse, 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 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, the HEPB decision was appealed to the Miami City Commission. The City Commission heard the appeal on December 14, 2017 and 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 and the circuit court granted the County's petition. 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.

Afterwards, the County again submitted its application for a certificate of appropriateness, including an application for a demolition permit, 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 County has since changed its demolition plan for the Playhouse from

the plan approved by the City Commission.

On January 27, 2023 the City approved demolition waiver PZ-22-15336-WA (the “Admin Waiver Decision”).

Anthony Vinciguerra and Courtney Berrien timely appealed the Admin Waiver Decision to PZAB on the grounds that the Decision failed to comply with Miami 21 because the City’s own records indicate that there is an outstanding lien against the property and the Certificate of Appropriateness has expired.

On March 15, 2023, the PZAB granted the appeal and denied the County’s application for demolition waiver.

The Appellate Division of the 11th Circuit issued an Opinion dated February 9, 2024 [DE 28 and DE 29].

Petitioners filed a Motion for Rehearing on February 26, 2024 [DE 31].

The Appellate Division replaced their earlier Opinion with a new one dated April 12, 2024 [DE 36].

Petitioners filed a Motion for Rehearing on April 29, 2024 [DE 38], which was denied on May 7, 2024 [DE 41].

Petitioners timely filed a Notice of Appeal on June 6, 2024 [DE 42].

## JURISDICTION

This Court has jurisdiction to review this decision pursuant to Article V, Section 4 of the Florida Constitution and Rule 9.030(b)(2)(B) of the Florida Rules of Appellate Procedure, which grants Florida district courts of appeal "certiorari jurisdiction" to "review. . . final orders of circuit courts acting in their review capacity," including denials of writs of certiorari.

## STANDARD OF REVIEW

The proper inquiry under certiorari review is "whether the circuit court afforded procedural due process and whether it applied the correct law." *Ivey v. Allstate Insurance Co*. (774 So. 2d 679, 682 (Fla. 2000)) quoting *Haines City Community Development v. Heggs*, 658 So.2d 523, 528 (Fla. 1995); see also *Combs v. State*, 436 So.2d 93, 95 (Fla. 1983)

In a quasi-judicial proceeding, "certain standards of basic fairness must be adhered to in order to afford due process." *Jennings v. Dade County*, 589 So.2d 1337, 1340 (Fla. 3d DCA 1991).

An "impartial decision-maker is a basic constituent of minimum due process" in quasi-judical proceedings. *Cherry Comm'n, Inc. v. Deason*, 652

So. 2d 803, 804 (Fla. 1995).

**A. Essential Requirements of Law Standard**

Observing the essential requirements of law means applying the correct law in proper fashion. *Haines City Cnty. Dev. V. Heggs*, 658 So.2d 523, 530 (Fla. 1995). Failure of municipal government to follow its own Code constitutes a departure from the essential requirement of the law. *Miami-Dade County v. Omnipoint Holdings, Inc*., 863 So. 2d 195, 199 (Fla. 2003). Similarly, overlooking sources of established law or applying an incorrect analysis to the law considered result in a departure from the essential requirements of law. See *City of Tampa v. City Nat. Bank of Florida*, 974 So. 2d 408, 411 (Fla. 2d DCA 2007).

**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). The court is required to examine whether such evidence in fact exists and is empowered to quash the decision where "the record is devoid of substantial competent evidence to the 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).

In its appellate capacity, the court must determine if the administrative board made a decision supported by "competent substantial evidence." *City of Hialeah Gardens v. Miami-Dade Charter Foundation, Inc. and Machado*, 857 So.2d 202, 205 (Fla. 3d DCA, 2003). Competent evidence is evidence that is relevant to the final decision that "a reasonable mind would accept it as adequate to support the conclusion." *Id* at 204. Substantial evidence is evidence that provides "a factual basis from which a fact at issue may reasonably be inferred." *Id* at 204. Under this standard, fact-based testimony constitutes substantial competent evidence while generalized statements unsupported by any discernible, factually-based chain of underlying reasoning should be disregarded. *Id* at 204.

**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." *Jennings v. Dade County*, 589 So.2d 1337, 1340 (Fla. 3d DCA 1991).

The United States Supreme Court has held that "[a]n elementary and

fundamental requirement of due process in any proceeding which is to be accorded finality is noticed reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co*., 339 U.S. 306 (1950), 70 S.Ct. 652, 94 L.Ed. 865 (citing *Milliken v. Meyer*, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278, 132 A.L.R. 1357; *Grannis v. Ordean*, 234 U.S. 385, 34 S.Ct. 779, 58 L.Ed. 1363; *Priest v. Board of Trustees of Town of Las Vegas*, 232 U.S. 604, 34 S.Ct. 443, 58 L.Ed. 751; *Roller v. Holly,* 176 U.S. 398, 20 S.Ct. 410, 44 L.Ed. 520).

## II. ARGUMENT

### A. PROCEDURAL ARGUMENTS

**COUNTY'S PETITION FOR WRIT OF CERTIORARI WAS UNTIMELY**

It is well-established that a notice of appeal must be timely filed with the appropriate court for jurisdiction to be conferred upon an appellate tribunal. See, e.g., *State ex rel. Diamond Berk Ins. Agency v. Carroll,* 102 So. 2d 129, 131 (Fla. 1958) ("Despite what might appear to be the imposition of a hardship, we are compelled to conclude that under applicable rules the timely filing of a notice of appeal at the place required by the rules is essential to confer jurisdiction on the appellate court. We have on numerous

occasions held in similar situations that jurisdiction could not even be conferred by consent of the parties, when the notice of appeal was not filed as required by applicable rules.")

As outlined below, the County's Petition was not timely filed at the place required by the rules, and this Court is without jurisdiction to consider the Petition.

The decision in this matter was rendered on April 10, 2023. As such, any petition for writ of certiorari would have to be filed within 30 days, which fell on May 10, 2023.

Pursuant to Fla. R. App. P. 9.100(b), commencement of an original proceeding (which includes an action for certiorari) "shall be invoked by filing a petition, accompanied by a filing fee if prescribed by law, with the Clerk of the Court deemed to have jurisdiction."

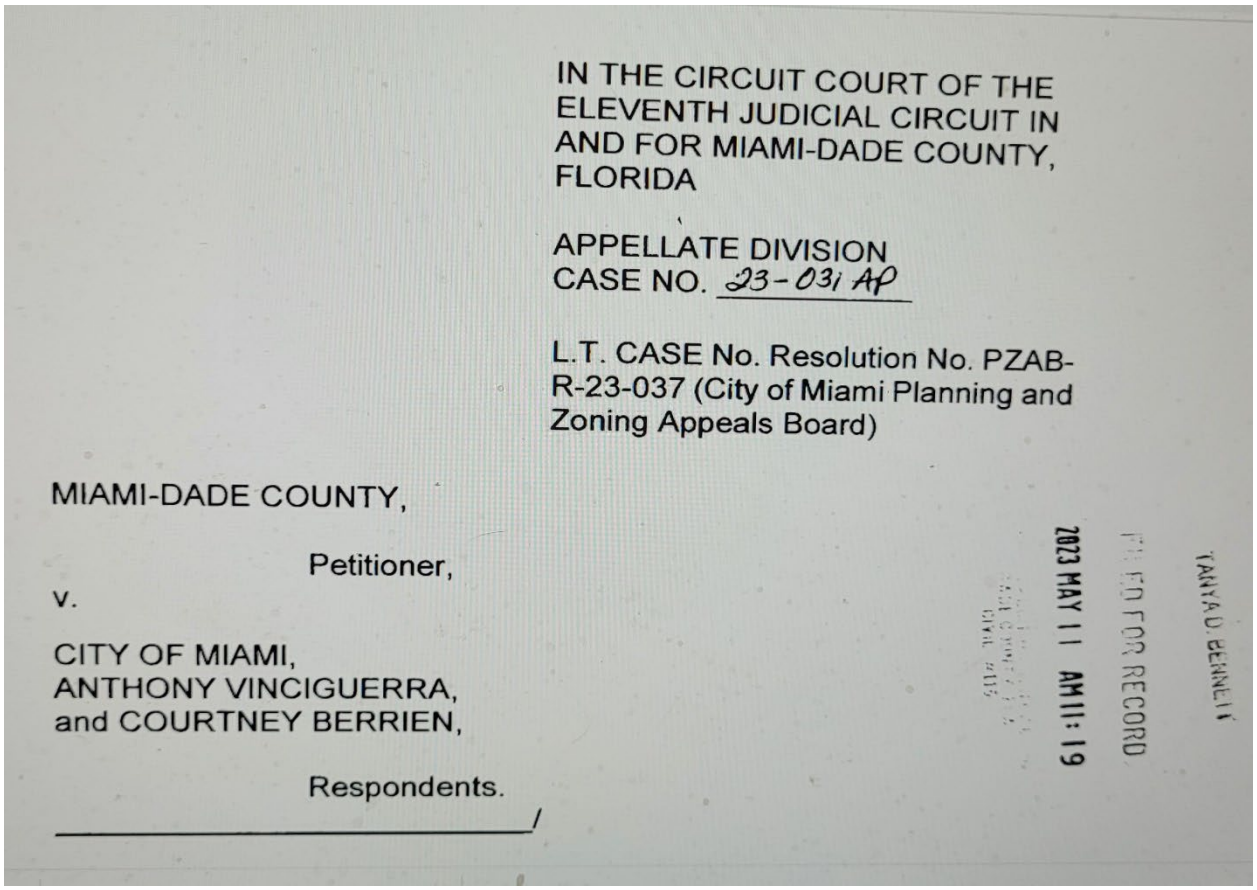
This procedure is confirmed on the Miami-Dade County Clerk of Court's website https://www.miamidadeclerk.gov/clerk/appellate-division.page, which provides:

> The Appeals Unit is located on the 3rd floor of the Miami-Dade County Courthouse East Building.
>
> Notices or Petitions are to be filed with the Civil Division, Appeals

Unit, 22 NW 1st Street Miami, FL 33128 Room 301.

While the County attempted to file its Petition on May 10, 2023 via the eportal, which stamped the petition at 5:09pm, such filing was promptly and properly rejected by the Clerk, as the eportal provides no mechanism for filing an appeal to the Circuit Court Appellate Division.

Whereupon, the County delivered a copy of the Petition and Appendix to the Clerk for the Appeals Unit on May 11, 2023, which stamped the documents and correctly lists the "filing date" as May 11, 2023 on the clerk's site:



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

APPELLATE DIVISION
CASE NO. 23-031 AP

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.
_____/

2023 MAY 11 AM 11:19

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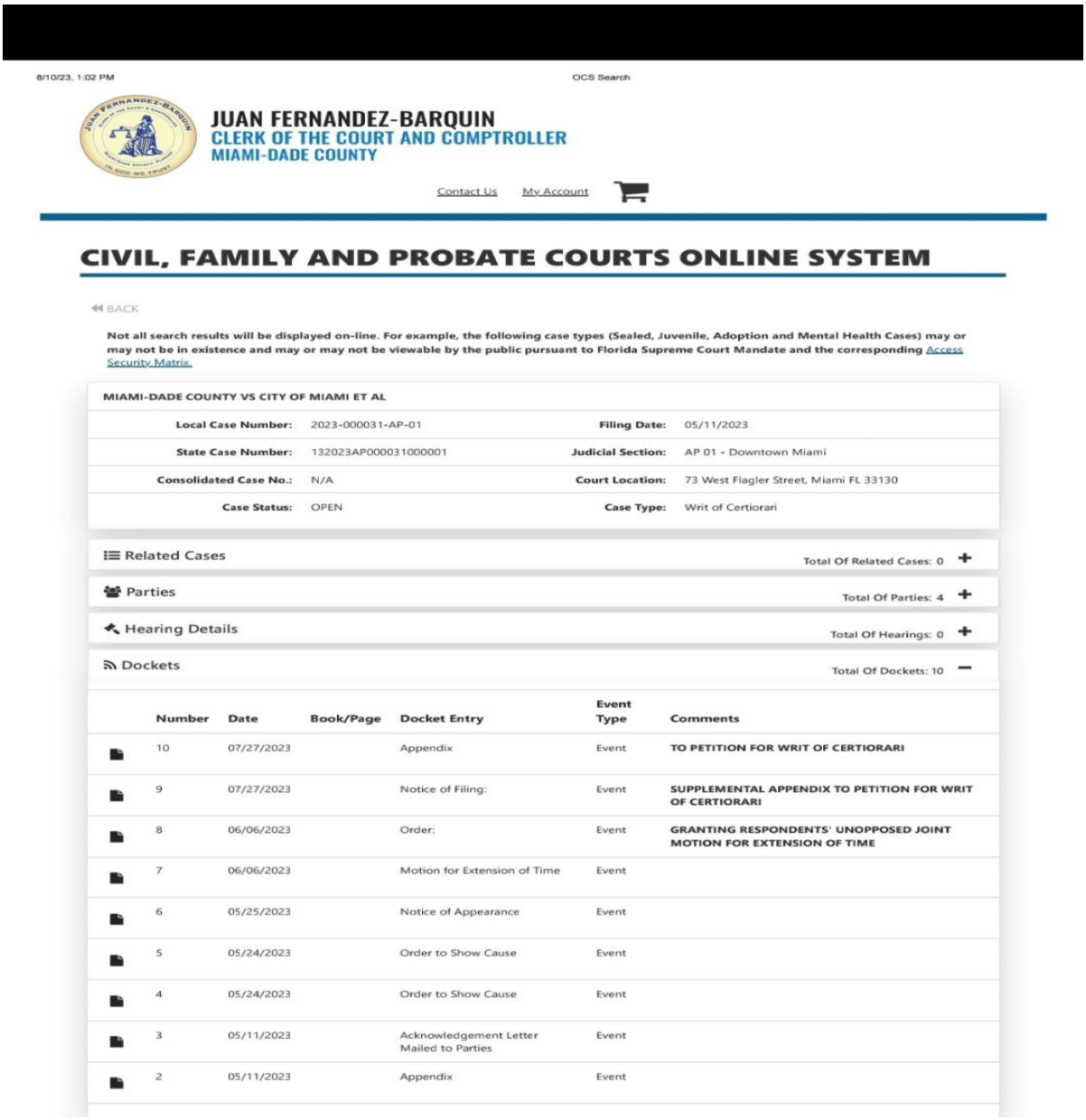
TANYA D. BENNETT



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MIAMI-DADE COUNTY

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BACK

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MIAMI-DADE COUNTY VS CITY OF MIAMI ET AL

| | | | |
|---|---|---|---|
| Local Case Number: | 2023-000031-AP-01 | Filing Date: | 05/11/2023 |
| State Case Number: | 132023AP000031000001 | Judicial Section: | AP 01 - Downtown Miami |
| Consolidated Case No.: | N/A | Court Location: | 73 West Flagler Street, Miami FL 33130 |
| Case Status: | OPEN | Case Type: | Writ of Certiorari |

Related Cases — Total Of Related Cases: 0 +

Parties — Total Of Parties: 4 +

Hearing Details — Total Of Hearings: 0 +

Dockets — Total Of Dockets: 10 −

| Number | Date | Book/Page | Docket Entry | Event Type | Comments |
|---|---|---|---|---|---|
| 10 | 07/27/2023 | | Appendix | Event | TO PETITION FOR WRIT OF CERTIORARI |
| 9 | 07/27/2023 | | Notice of Filing: | Event | SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI |
| 8 | 06/06/2023 | | Order: | Event | GRANTING RESPONDENTS' UNOPPOSED JOINT MOTION FOR EXTENSION OF TIME |
| 7 | 06/06/2023 | | Motion for Extension of Time | Event | |
| 6 | 05/25/2023 | | Notice of Appearance | Event | |
| 5 | 05/24/2023 | | Order to Show Cause | Event | |
| 4 | 05/24/2023 | | Order to Show Cause | Event | |
| 3 | 05/11/2023 | | Acknowledgement Letter Mailed to Parties | Event | |
| 2 | 05/11/2023 | | Appendix | Event | |

Because the Petition and Appendix were submitted to the Clerk's office on May 11, 2023, the County's Petition was untimely and this Court has no jurisdiction over such Petition. *Amos v. Reich*, 208 So. 3d 796, 796 (Fla. 3d DCA 2016) (quoting *Rice v. Freeman*, 939 So. 2d 1144, 1145 (Fla. 3d DCA 2006)); *Miami-Dade Cntv. v. Peart*, 843 So. 2d 363, 364 (Fla. 3d DCA 2003)

(finding "respondents' notice of appeal was untimely" because the notice was filed thirty-one days after the decision was rendered).

There are no mitigating circumstances to excuse the County's failure to comply with the rules of this Court. For inexperienced appellants and their counsel, such oversight may be chalked up to unfamiliarity with this Court's rules. But that is not the case here. The lawyers involved in this appeal are experienced lawyers, who have filed dozens of these Petitions correctly. In fact, they have twice filed Petitions regarding the Playhouse against the City of Miami and Respondents. They knew the rules, and deliberately chose not to follow them.

Further, there is no excuse that the County can argue for flouting the rules. There was no time crunch, as the decision in the matter was made at a hearing on March 15, 2023, which gave the County almost 2 months to prepare the Petition because it was not officially rendered by the City until April 10, 2023. App. 1409.

There were no mitigating circumstances or excuses for the late filing, as the Appellate Clerk's office was open and there were no weather events or other circumstances to prevent the proper filing of the Petition.

Because the Petition was untimely filed, this Court has no jurisdiction in this

matter and the Petition should therefore be dismissed.

**PZAB WAIVER DECISIONS ARE TO BE APPEALED TO CITY COMMISSION**

The Miami21 zoning code[1] sets forth the appeal process for appeals of zoning decisions.

The appeal process for waiver decisions by the City of Miami Planning Zoning and Appeals Board is set forth in only one place, Section 7.1.1.5:

> **7.1.1.5 City Commission**
>
> The City Commission, in addition to its duties and obligations under the City Charter, the City Code, and other applicable law, shall have the following duties specifically in regard to the Miami 21 Code:
>
> To hear appeals from the Planning and Zoning Appeals Board in connection with decisions on a Variance or Exception, or any appeals of any administrative decision on a Waiver or Warrant application, or any other administrative decision or determination made in connection with a proposed Affordable Housing Development qualifying under Section 3.15. Such appeals shall be specially set for the first available City Commission hearing that is at least fifteen (15) days after the Planning, Zoning and Appeals Board hearing.

A plain reading of the provision makes clear that "made in connection with a proposed Affordable Housing Development qualifying under Section 3.15"

[1] http://www.miami21.org/finalcode.asp

does not modify each of the preceding enumerated items:

> To hear appeals from the Planning and Zoning Appeals Board in connection with decisions on a Variance or Exception, or any appeals of any administrative decision on a Waiver or Warrant application, or any other administrative decision or determination made in connection with a proposed Affordable Housing Development qualifying under Section 3.15.

In order for this provision to read as desired by the County, it is necessary to ignore the punctuation.

The interpretation of this Court requires the Court to both (i) ignore the comma before "or any other administrative decision or determination made in connection with a proposed Affordable Housing Development qualifying under Section 3.15"; and (ii) insert a non-existent comma before the phrase "made in connection with a proposed Affordable Housing Development qualifying under Section 3.15".

However, it is clear from the punctuation that the drafters desired that the phrase "or any other administrative decision or determination made in connection with a proposed Affordable Housing Development qualifying under Section 3.15" is a stand-alone phrase and the qualifier "made in

connection with a proposed Affordable Housing Development qualifying under Section 3.15" does not modify the prior enumerated items in the section.

In order to get around the plain language of this section, the County points to the illustrative diagram at the beginning of Article 7 and argues it "*clearly does not show any appeal from the PZAB to the City Commission for Waiver decisions*." Petitioners Response to Motion to Dismiss page 5 [DE 13]

This argument is unavailing because the cited illustration doesn't even show that waiver decisions are appealable to PZAB, which is also not correct.

Further, the flow chart shows that the only decisions appealable to the City Commission are zoning changes, which is also erroneous as Warrants, Variances and Exceptions are appealable to the City Commission under Section 7.1.5.

This issue of where any appeal from the PZAB would take place was also discussed by PZAB at the hearing:

> *BOARD MEMBER ROBERT RODRIGUEZ: So if they're successful tonight, you're going to - well, it still has to go to the Commission. You're going to appeal. How long is that process, more or less?*
>
> *MR. WINKER: So to appeal to the Commission --*

*MR. KERBEL: This wouldn't go to the Commission.*

*BOARD MEMBER ROBERT RODRIGUEZ: Okay. SO you would appeal to the Commission.*

*MR. WINKER: Right.*

App. 1302

## B. SUBSTANTIVE ARGUMENTS

### SUBSTANTIAL COMPETENT EVIDENCE SUPPORTS PZAB 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*." App. 1407.

The County's overarching argument is that it simply disagrees with PZAB's decision. As outlined below, a review of the record establishes that PZAB's decision is supported by competent substantial evidence, that was determined by applying the essential requirements of the law, and that the requirements of due process were satisfied in reaching that decision.

Instead of directly addressing the standard of review, Petitioner asked the Lower Court to reweigh the evidence—something that it cannot do—because the County believes PZAB should have sided with the County. Not

only does the law not support such an undertaking by the Lower Court, but the record does not support such a finding.

## COUNTY'S MISREPRESENTATIONS OF THE RECORD MUST BE STRICKEN

A writ of certiorari appeal to the appellate court is a closed, record-based proceeding.

The County included materials in its Appendix that are not part of the Record on Appeal by including the following:

Exhibit C
Exhibit F
Exhibit G
Exhibit H

The proscription against submitting to the appellate court documents that were never presented to, or considered by, the lower tribunal is a fundamental canon of appellate procedural law:

> Appellate review is limited to the record as made before the trial court at the time of the entry of a final judgment or the orders complained of. It is entirely inappropriate and subjects the movant to possible sanctions to inject matters in the appellate proceedings which were not before the trial court.

*Rosenberg v. Rosenberg*, 511 So. 2d 593, 595, n.3 (Fla. 3d DCA 1987); *Rampart Life Assocs., Inc. v. Turkish*, 730 So. 2d 384 (Fla. 4th DCA 1999);

*Keller Indus., Inc. v. Yoder*, 625 So. 2d 82, n.1 (Fla. 3d DCA 1993); A*rnowitz v. Equitable Life Assur. Soc'y of U.S.*, 539 So. 2d 605, 606 (Fla. 3d DCA 1989); *Thornber v. City of Fort Walton Beach*, 534 So. 2d 754, 755 (Fla. 1st DCA 1988); *Hayes v. State*, 488 So. 2d 77, 81 n.3 (Fla. 2d DCA 1986); *Altchiler v. State, Dept. of Prof'l Regulation, Div. of Professions, Bd. of Dentistry*, 442 So. 2d 349, 350 (Fla. 1st DCA 1983).

In *Thornber*, the First District commented, the violation of this proscription "is so elemental there is no excuse for an attorney to attempt to bring such matters before the court." 534 So. 2d at 755

Courts routinely strike such extra-record submissions. See *Finchum v. Vogel*, 194 So. 2d 49, 51 (Fla. 4th DCA 1966) (striking document from appendix because document was "not shown to have been offered, received or in any way made a part of the trial record"); *Agency for Health Care Admin. v. Orlando Reg'l Healthcare Sys., Inc.*, 617 So. 2d 385, 389 (Fla. 1st DCA 1993); *Arnowitz*, 539 So. 2d at 606; *Thornber*, 534 So. 2d at 755; *Rosenberg*, 511 So. 2d at 595 n.3; *Altchiler*, 442 So. 2d at 350–51; *Mann v. State Rd. Dept.*, 223 So. 2d 383, 385 (Fla. 1st DCA 1969). And see, *Hutchins v. Hutchins*, 501 So. 2d 722 (Fla. 5th DCA 1987) (striking portions of brief containing factual misrepresentations, and imposing sanctions, with the observation that briefs submitted to an appellate court must be "truthful

and fair in all respects").

The County included Exhibits C, F, G and H in its Appendix although they were not part of the Record below. The materials that were available to the PZAB are listed and available on the City's Website at http://miamifl.iqm2.com/Citizens/Detail_Meeting.aspx?ID=3391 include:

6. PZAB-R-23-037 : A RESOLUTION OF THE MIAMI PLANNING, ZONING AND APPEALS BOARD ("PZAB") GRANTING THE APPEAL OF AND THEREBY REVERSING WAIVER NO. PZ-22-15336 ISSUED BY THE OFFICE OF ZONING PURSUANT TO ARTICLE 7, SECTION 7.1.2.5(D) OF ORDINANCE NO. 13114, AS AMENDED, THE ZONING ORDINANCE OF THE CITY OF MIAMI, FLORIDA ("MIAMI 21"), FOR THE PROPERTY LOCATED AT APPROXIMATELY 3500 MAIN HIGHWAY, MIAMI, FLORIDA; MAKING FINDINGS AND PROVIDING FOR AN EFFECTIVE DATE.

a. 13513 - Final Decision Waiver -Exhibit A
b. 13513 - Appeal Submission Request
c. 13513 - Appeal Letter
d. 13513 - Proof of Payment
e. 13513 - Meeting Submittal Document Mr. Winker Presentation
f. 13513 - Online Public Comment

The only additional items entered into the record at the PZAB hearing were the City's PowerPoint (Exhibit J) and the County's letter in reply to the appeal (Exhibit K).

The fact that these materials were not before the PZAB is illustrated in the record, as PZAB members indicated that they had not even been provided a tree survey:

> BOARD MEMBER MANN: **I mean, I heard nothing about trees to even make a decision about. I mean, I don't know whether you're in compliance or not. No one has talked about trees.**
>
> App. 1305

The issue of what constitutes record evidence in this matter is simple- what was available to PZAB members as they made their decision. Exhibits C, F, G and H of the County's Appendix were not available to PZAB members as they made their decision. As a result, these Exhibits, and all references thereto in the County's Petition, should be stricken to preserve the integrity of the Record and these appellate proceedings.

**"lien or invoice due and owing to the City"**

Miami 21, Section 7.1.3.7 prohibits the City from issuing any waiver approval if the property for which the approval is granted is subject to an outstanding lien:

> 7.1.3.7 No Approval Available if Code Enforcement Violations
>
> Except as provided in Section 7.1.2.1 (b) (3) for Certificate of Use or in the City Code for development permits including but not limited to Waivers, Warrants, Exceptions, and Variances, no approval or permit may be issued, and no application may be

scheduled for public hearing, for a non-homestead property if the business, enterprise, occupation, trade, profession, property or activity is the subject of an ongoing city enforcement procedure, is the subject of any building violation(s), has any City lien or invoice due and owing to the City, or is the subject of a notice of violation of a state law or county ordinance where the business enterprise is located or is to be located, unless the permit or approval is required to cure life safety issues, is required to bring outstanding violations into compliance, is for unit(s) within building to which violations or monies owed are not attributable to the permit applicant, or the property is wholly owned by a governmental entity. In addition, if an approval or permit required to cure the existing violation(s) has been applied for, with a complete application that is being reviewed by the appropriate department, additional approvals or permits may be scheduled for hearing and/or issued for the property that is the subject of violations or monies owed. Additional permits issued are conditioned to prohibit the issuance of a certificate of occupancy or completion (including temporary or partial certificates of occupancy or completion) until the permit to cure the original outstanding Code Enforcement violation has been finalized and closed and all monies owed, inclusive of costs, to the City are paid. Any exemption listed herein may not be utilized for multi-unit structures wherein the violation has created a life safety issue for either the adjacent units or the structure in its entirety. This Section also applies to covenants, including but not limited to Unities of Title and Covenants in Lieu of Unity of Title. Failure to comply with conditions and safeguards, when attached to a grant of a development order or permit, shall be deemed a violation of this Miami 21 Code. This prohibition shall not apply to buildings or properties owned by governmental entities.

(emphasis added)

**The only record evidence before the PZAB was the results of a Lien/ Violation Search ordered by undersigned counsel through the City of Miami website at: https://www.miamigov.com/Permits-Construction/Property-Information/Run-a-Lien-or-Violation-Search**

The City's lien search was provided in advance of the hearing by

undersigned counsel. App. 249. The City's search showed that the property is in fact subject to ongoing code enforcement action in the form of unpaid liens owed to the City of Miami for code violations.

As such, Miami 21 compelled the immediate rescission of the demolition waiver approval and that the City refrain from further approval until all pending code enforcement proceedings and liens are fully resolved.

The County now wants the Court to look at materials that were not before the PZAB in making its decision on whether the property was subject to "ongoing code enforcement action". After the hearing, the County filed with the Court documents that purport to show that the lien has been resolved. [DE 10]

However, these filings should be stricken from the docket as they contain materials that are not part of the record below.

**Decision was based upon an incomplete application**

The Record evidence shows that the Decision was based on an incomplete application that lacks significant pieces of information about the project without which a legally appropriate review is impossible.

The decision itself acknowledges this situation in its conditions, which

requires “full review by the Office of Zoning at time of Building permit application. Any substantial changes that arise may require a new Waiver.” App. 1443

The proposed project differs significantly from the original plan approved by the City Commission and no waiver application should be approved until such time as the plan is re-reviewed by PZAB and the City of Miami Historic and Environmental Protection Board (“HEPB”).

**Failure to comply with HEPB R-17-023 Conditions 11, 12 and 13**

The demolition permit is being issued in connection with a Certificate of Appropriateness issued by HEPB, which includes the following conditions:

> 11. No demolition permit will be issued until the plan comes back to the HEPB and is approved.
> 12. The concept that is being approved in this plan is in concept only, the HEPB has the purview to require different configurations, heights, setback etc. for the development of each individual building.
> 13. All the buildings will come collectively in one application to the HEPB.

As a result of these conditions, and the fact that the waiver application is for demolition of a building designated historic by the City of Miami HEPB and subject to a special certificate of appropriateness, the County’s reliance on

CUBE 3585 in support of its Waiver application is misplaced.

The Miami 21 Code contains 26 examples of “specified minor deviations,” ranging from barbed wire fences to reduction of reservoir parking spaces.

The County points to number 6 on that list: Review of Development within Neighborhood Conservation Districts for compliance with NCD regulations (Appendix A). Note that “demolition” is not mentioned in number 6, but just a reference to look at Appendix A which itself is a lengthy document involving Neighborhood preservation in general. This was the basis upon which the County was asking to be allowed to demolish the Playhouse.

Appendix A, directs you to COCONUT GROVE NEIGHBORHOOD CONSERVATION DISTRICT NCD-3 which leads to Section 3.2 Intent

> The community of Coconut Grove predates the City of Miami, and is known for its…special character imparted by its tropical vegetation and historic structures.

Section 3.3 goes on to state:

> 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.

The PZAB decision on the Playhouse waiver is distinguishable from the *CUBE 3585* decision. In *Cube*, the Court found PZAB departed from the essential requirements of the law by utilizing Intent provisions of the Zoning Code as a standard, thereby imposing an arbitrary and impossible standard for the issuance of a Waiver. Here the Waiver section itself provides two dozen other specific examples of what is meant by "specified minor deviations from the Miami 21 Code." To argue that demolishing a historically designated building pursuant to an expired certificate of appropriateness is a "minor deviation" is simply absurd.

**Certificate of appropriateness for the project has expired**

Pursuant to section 23-62(g) of the City Code:

> g. *Expiration of certificates of appropriateness.* Any certificate of appropriateness issued pursuant to the provisions of this section shall 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. The preservation officer may grant an extension of time not to exceed 12 months upon written request by the applicant, unless the board's guidelines as they may relate to the authorized work have been amended.

The Record evidence makes clear that the County's 2019 special certificate of appropriateness for the project expired in 2020:

> *BOARD MEMBER SILVA: What was the time frame for the certificate of appropriateness?*

*MR. GOLDBERG: 12 months.*

App. at 1194-95; 1262

The County attempts to argue that the certificate of appropriateness did not expire as a result of certain appeals, even though no stay was even requested by the County in those cases in any of the appellate courts.

The City Code says what is means and means what is says: "**Any certificate of appropriateness issued pursuant to the provisions of this section shall 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."** (emphasis added)

There are only two exceptions to the 12-month expiration date and neither apply here.

And the code provides for an extension process ("*The preservation officer may grant an extension of time not to exceed 12 months upon written request by the applicant, unless the board's guidelines as they may relate to the authorized work have been amended*") which the County did not take advantage of.

The transcript of the hearing makes clear that there is no statutory or case

law to support the County's argument. And the County did not attempt to provide any further statutory or case law basis in its Petition.

**PZAB was not presented with any evidence regarding trees**

The County argues that PZAB's review should be "limited to compliance with tree preservation requirements."

However, the County failed to provide PZAB members with any evidence regarding the tree preservation issue. This was illustrated by PZAB members indicating that they had not even been provided a tree survey:

> BOARD MEMBER MANN: **I mean, I heard nothing about trees to even make a decision about. I mean, I don't know whether you're in compliance or not. No one has talked about trees.**

App. 1305

Because there simply is no evidence, let alone competent substantial evidence, in the record regarding tree preservation, the County's Petition should be denied.

## SUBSTANTIAL COMPETENT EVIDENCE SUPPORTS PZAB 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*." App. 1407.

Despite this statement by the PZAB after an almost 4-hour hearing, the Lower Court concluded that:

There is no *competing* evidence to reweigh.

The Record shows that this is simply not true.

Entered into evidence was a Lien Report produced by the City of Miami which showed that there was an existing lien on the property.

The Court states in the Opinion at page 4:

> *For example, the Individual Respondents inexplicably maintain that the property has an open lien despite overwhelming evidence that there is not, in fact, an open lien.*

This statement by the Court demonstrates that the Court is doing exactly what it cannot do- weighing the evidence.

The City's own Lien Report is substantial competent evidence that there is a lien.

But the Court's statement that the evidence is "overwhelming" that there is no lien is the definition of weighing the evidence.

And it is important to point out that the Board was skeptical of the City's

testimony that there was no lien despite the City's own Lien Report:

> *BOARD MEMBER MANN:*
>
> *I think that if we assume that City did not know that there was $4,500 owed, and besides the fact that the County maybe can never be forced to pay it, there's got to be some way for that lien to disappear, to be closed. And maybe possibly the violation that produced it was satisfied.* ***But the lien is still sitting there****. So I could vote to approve the denial of the waiver just based on that technicality that we need to clean that up.*

App. 1304

At the time of the hearing, Miami 21, Section 7.1.3.7 prohibited the City from issuing any waiver approval if the property for which the approval is granted is subject to an "ongoing city enforcement procedure."

**In a special concurring opinion, Judge Trawick writes in footnote 5 that undersigned counsel played "fast and loose" with the evidence:**

> *5 While the Court chose not to address alleged ethical lapses of counsel for the Individual Respondents, they are also a cause for concern. One glaring example is counsel's presentation of a City code enforcement report to the PZAB in support of his argument that there were ongoing enforcement proceedings against the subject property. In presenting that report, counsel omitted the fifth and final page of the document which directly refuted counsel's argument. That page was not presented by counsel until a board member asked him about the missing page. Playing "fast and loose" with evidence in this manner is a violation of counsel's duty of candor toward a tribunal pursuant to Rule 4-3.3 of the Florida Bar's Rules of Professional Conduct.*

Undersigned counsel respectfully suggests that the Record shows that there was (i) no omission of any evidence by undersigned counsel, and (ii)

the evidence referenced does not refute counsel's argument in any way.

## NO OMISSION OF EVIDENCE

Undersigned counsel provided in advance of the hearing the results of a Lien/ Violation Search ordered through the City of Miami website at: https://www.miamigov.com/Permits-Construction/Property-Information/Run-a-Lien-or-Violation-Search. See Exhibit D of County's Appendix

The City's lien report showed that the property was in fact subject to ongoing code enforcement action in the form of unpaid liens owed to the City of Miami for unpaid code violations.

And the allegation made by the County that the Board was not shown all pages of the report is belied by the Record. Early in the presentation, undersigned counsel stated:

> *There is no gotcha here, guys. I will show now -- and I provided it to the clerk prior to the meeting --* ***I want to show you the entire document*** *so you can see there's no funny business here about what's going on. A simple request was made. It's the only way that I know how to find out if there's a lien, to be honest with you, is you send in your $100 or whatever it is, and you get the following letter. And I'm going to go through it.*
>
> *Again, this is what I received via email: Welcome to the City of Miami. This package is intended to provide you with all open code enforcement violations and liens as of the current date and time. That's underlined. As of the current date and time.*

*It goes on to helpfully explain how does a violation become a lien. It becomes a lien when the property owner does not timely remedy the violation. There is an ongoing violation.*

*You go to the next page. It's one of five.* ***I'm going to show you each page.***

App. 1258

The fact that all 5 pages were in fact shown to the PZAB is confirmed later in the hearing when a Board member asked about the final page **that had been previously shown**:

*BOARD MEMBER SILVA: I think we saw something that said no open violation.*

App. 1286

Whereupon, undersigned counsel brought up page 5 again on the screen for the Board to review.

As a result, the County's argument that undersigned counsel didn't show the entire Lien Report to the PZAB until asked by a Board member is refuted by the Record.

**PAGE 5 DOES NO REFUTE COUNSEL'S ARGUMENT**

And it is important to note that the Court's allegation that "*the fifth and final page of the document which directly refuted counsel's argument*" is incorrect.

The statement on the final page of "no open permit violations" does not refute Respondents' argument that there was an outstanding lien and that outstanding lien constituted an ongoing city enforcement procedure.

As stated on the record,

> *This is a perfect example. http://7.l.3.7 says - it doesn't say anything about open code violations. What it says is, shall not be issued if the property is the subject of an ongoing City enforcement procedure. There is no argument, a lien is a very ongoing City enforcement procedure.*

App. 1279

Board members rightfully expressed skepticism of the City's efforts to distance themselves from their own Lien Report:

> *BOARD MEMBER SILVA: So, question, I understand the part about the non-collectability of liens. If the City missed whatever this lien was, right, because you guys did your own search and somehow it didn't come up, but then he requested it from someone and he got something that whenever you guys did your search was completely missed. Is it possible if that's researched that, in fact, there is some kind of perhaps ongoing code enforcement action that was also missed by your code enforcement system in the same way that your lien search was deficient?*
>
> *MR. GOLDBERG: I don't think our lien search was deficient. And I can't prove the absence of something. So the fact that there's no code case listed on that lien search doesn't mean there's a code case and we missed it. The simplest explanation that there's no code case.*

*To the extent there's a lien and it was asserted in the appeal letter, it would have been nice for that to have been backup so that could have been reviewed.*

*That said, doing our search, asking the appropriate department, we were told there was no lien.*

*To the extent there is a lien, it doesn't matter. Because http://7.1.3.7--*

*BOARD MEMBER SILVA: It doesn't matter so long as your search for open code enforcement violations is also just as correct as your -*

*MR. GOLDBERG: Well, we can't have it both ways. That can't be a correct lien search with a correct lien, but it happened to miss the code case. It's the same system. So it can't be both. It can't be right for one purpose and wrong for another.*

*BOARD MEMBER SILVA:* ***So how was the lien missed in your lien search?***

App. 1284

Undersigned counsel repeatedly made clear that the lien itself, not an open code violation, was the ongoing city enforcement action:

*MR. WINKER: But, again, remember, that's not the standard. The standard is code enforcement activities.*

*MR. GOLDBERG: And if there's no open violations, there's no code enforcement activity.*

*BOARD MEMBER SILVA: Is there a written clear legal definition within our code of what an open code enforcement activity is, that defines the beginning and end of such activity?*

*MR. GOLDBERG: It's not defined. It just goes to common sense, which is that there's no code case. No code*

*compliance officer citing, no Board action, the department not looking at it, not actively prosecuting it. It's not an open violation.*

*BOARD MEMBER SILVA: The only thing I would say is that I would feel better if we actually understood what this particular lien that was mysteriously missing was actually imposed for. And if that specific code violation, if there's an affidavit of compliance on file for that.*

*MR. WINKER: Can they just look it up? I mean, I got the ticket violation. Can they just look it up now?*

*BOARD MEMBER SILVA: Well, that was my question before. Do any of you-*

App. 1287

## CONCLUSION

**WHEREFORE,** Petitioner respectfully request this Honorable Court quash the lower court's denial of Petitioner's petition for writ of certiorari.

## CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the type style utilized in this brief is 14 point Arial font proportionally spaced with a word count of 7178.

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished electronically via the Florida Courts E-filing Portal upon all parties to this litigation on this 24th day of July, 2024.

Respectfully submitted,

*s /davidwinker/*

David J. Winker, Esq.,
Fla. Bar. No. 73148
David J. Winker, PA
4720 S. Le Jeune
Rd Coral Gables, Fl
33146 305-801-8700
dwinker@dwrlc.com

Attorney for Petitioners