IN THE THIRD DISTRICT COURT OF APPEAL
STATE OF FLORIDA

CASE NO. **3D20-1195**
LT CASE NO. **19-167 AP**

MIAMI-DADE COUNTY,

Petitioner,

vs.

CITY OF MIAMI,

Respondent.

CITY OF MIAMI'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

VICTORIA MÉNDEZ, City Attorney
KERRI L. McNULTY, Senior Appellate Counsel
Attorneys for **CITY OF MIAMI**
444 S.W. 2nd Avenue, Suite 945
Miami, FL 33130-1910
Tel.: (305) 416-1800
Fax: (305) 416-1801
Primary E-mail: klmcnulty@miamigov.com
Secondary E-mail: CSantos@miamigov.com

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The Respondent, City of Miami ("City"), by and through undersigned counsel, files its response to the petition for writ of certiorari filed by Miami-Dade County ("the Petition"). This Petition seeks second-tier certiorari review of the July 22, 2020, decision of the appellate division below, which dismissed the County's petition below for lack of jurisdiction based on that court's determination that the mayoral veto at issue did not constitute a quasi-judicial decision from which certiorari review under Florida Rule of Appellate Procedure 9.100(c) was available. That narrow, procedural determination of the appellate division is all that is before this Court in the extremely limited review capacity afforded under the second-tier certiorari standard. Looking everywhere but the text of the City Charter and Code to make arguments as to what the mayoral veto *should be*, rather than what *it is*, the County argues before this Court that the appellate division's reading of the pertinent charter and code provisions constitutes a departure from the essential requirements of law because any such reading of the statutory language would result in violation of the County's due process rights here and of the due process rights of future applicants before the City. These arguments amount to nothing more than an impermissible attempt by the County to assert that the mayoral veto, as written in City Charter and Code, is unconstitutional. This Court, however, lacks jurisdiction on second-tier certiorari to declare the pertinent

provisions unconstitutional. Rather, this Court's review is limited to whether the appellate division's dismissal amounts to a "violation of clearly established law resulting in a miscarriage of justice." *Miami–Dade County v. Omnipoint Holdings, Inc*., 863 So.2d 195, 199 (Fla. 2003). Because the appellate division properly applied established law related to statutory construction in reaching its determination that the mayoral veto was not a quasi-judicial act, this Court should deny the Petition.

JURISDICTION

The City agrees with the County that this Court has jurisdiction to review the final decision of appellate division, dismissing the County's petition before that court for lack of jurisdiction, within the confines of the very narrow review permitted on second-tier certiorari. The City would note, however, that a determination regarding the constitutionality of the City Charter and Code provisions at issue, which provide for mayoral veto authority of quasi-judicial decisions of the City Commission, is not within this Court's limited jurisdiction on second-tier certiorari review. *See Hernandez-Canton v. Miami City Com'n*, 971 So. 2d 829, 832 (Fla. 3d DCA 2007) (*quoting Miami–Dade County v. Omnipoint Holdings, Inc*., 863 So.2d 195, 199 (Fla. 2003)) ("a petition seeking certiorari review is not the proper procedural vehicle to challenge the constitutionality of a statute or ordinance. A challenge to the constitutionality of an ordinance must be

determined in original proceedings before the circuit court, not by way of a petition for writ of certiorari.").

FACTS & PROCEDURAL BACKGROUND

This second-tier certiorari petition arises from the dismissal by the appellate division of the County's certiorari petition below, which sought review of the mayoral veto of a resolution of the City Commission. The appellate division dismissed the petition, finding that the mayoral veto was not a quasi-judicial decision from which certiorari review could be taken. The mayor had vetoed a quasi-judicial decision of the City Commission that granted the County's appeal of a decision of the City's Historic and Environmental Preservation Board ("the Board"), which had denied the County an approval—called a certificate of appropriateness—necessary to allow the County to move forward with its proposed plan to redevelop the Coconut Grove Playhouse ("the Playhouse"). The certificate of appropriateness was required in this circumstance because the Playhouse has been designated historic by the City.

The Historic Preservation Code

Designation of historic resources and the varied processes and procedures related to those resources is governed within the City by Article I, Chapter 23 of the City of Miami Code—titled "Historic Preservation." Ch. 23, City of Miami

Code. (A. 44-68).[1] The Code defines "historic site" as "[t]he location of a significant event, a prehistoric or historic occupation or activity, or a vanished structure, where the location itself possesses historic, cultural, archaeological, or paleontological value." § 23-2, City of Miami Code. A "locally designated historic resource" under the Code is

> Any archaeological site or zone; individual building; structure, object, landscape feature, historic district, or multiple property designation that has been approved for designation by the city's HEPB, as prescribed by the provisions of this chapter, and shown in the historic and environmental preservation atlas.

Id.

With respect to any construction or alteration of a historic property, the Code states that "[a] certificate of appropriateness shall be required for any new construction, alteration, relocation, or demolition within a designated historic site or historic district or for thematically-related historic resources within a multiple property designation." § 23-6.2(a), City of Miami Code. The Code adds that "[a]ll certificates of appropriateness and certificates to dig shall be subject to the applicable criteria in this section and any other applicable criteria specified in this chapter, as amended." *Id*. The Code addresses special certificates of appropriateness, as follows:

[1] Citations to the consecutively paginated appendix submitted with the County's Petition, will be made as "A." followed by the pertinent page number(s). The opinion of the appellate division, which can be found at tab A of the appendix, will be cited as "Op." followed by the pertinent page number(s).

> Where the action proposed in an application involves a major addition, alteration, relocation, or demolition, as specified by the rules of procedure of the board; where the preservation officer finds that the action proposed in an application involving a minor alteration is not clearly in accord with the guidelines as set forth in subsection (c); or when the applicant is requesting a waiver, or exception or exclusion from the requirements of the zoning code the application shall be classified as a special certificate of appropriateness, and the following procedures shall govern.

§ 23-6.2(b)(4), City of Miami Code.

Historic Designation of the Playhouse

The Playhouse was originally designated as a historic site by the City in 2005. (A. 22). The designation report supports designation based on *both* historical and architectural bases. (A. 25-42). In the section describing "contributing structures and/or landscape features," the report states:

> Contributing structures within the site include the Coconut Grove Playhouse itself. Only the south and east facades possess architectural significance. There are no contributing landscape features.

(A. 38). The designation report, therefore, identifies the *entire Playhouse* as a "contributing structure." The fact that the report indicates that only the south and west facades have "architectural significance" does not mean that the entire Playhouse was not recommended for historic designation because of the *historical significance* of the property.

The Board resolution which designated the Playhouse—Resolution No. HEPB-2005-60—states that it is "designating the Coconut Grove Playhouse . . . as

a historic site, after finding that it has significance in the historical heritage of the City of Miami, possesses integrity of design, setting, materials, workmanship, feeling and association; and meets criteria 3, 5, and 6 of Section 23-4(a) of the Miami City Code." (A. 22). That resolution specifically "incorporate[ed] herein the designation report" for the Playhouse. *Id*. The Playhouse in its entirety was designated as a historic site by the City in 2005.

The Conditional Certificate of Appropriateness

On April 4, 2017, the County submitted a letter of intent and application to the City ("the 2017 Application"). (A. 648-653). The letter of intent indicated that the County was seeking a certificate of approval for a "masterplan concept." It is clear from the letter of intent that the design of this proposed redevelopment of the Playhouse was still ongoing, at the time the County submitted its application—the design of the project is referenced as still ongoing and the letter indicates that "[d]uring the design and construction process, the Department of Cultural Affairs will be maintaining updates on the progress of the project on its website." *Id*. Interestingly, the 2017 Application did not indicate under "application type" that the application was for either "demolition," "new construction," or "alteration" of a historic property. (A. 648). Rather, the application had the box "other" selected, and the line for explanation of what the application is for is left blank. *Id*.

On April 4, 2017, the Board conducted a hearing on the 2017 Application. At the conclusion of the public hearing, the Board voted to grant the conditional certificate of appropriateness, with conditions. (A. 655-656).

The 2017 Appeals

Barbara Lange and Katrina Morris, two nearby residents of Coconut Grove, took an appeal of the Board's decision to the City Commission. (A. 658-660). Following the public hearing on the merits of the appeal, the Commission rendered its decision adopting Resolution R-17-0622, which affirmed in part and denied in part the appeal. (A. 664-666). The County Appealed the Commission's decision to the appellate division, which rendered an opinion on December 3, 2018, reversing the Commission. (A. 668-675). The panel in that case determined that the Commission had erred in determining that the Grove residents had standing to bring the appeal. *Id*. The prior appellate division panel also determined that the Commission had denied the County due process by considering the issue of preservation of the interior of the Playhouse, because the appeal was "governed by the existing designations" and the interior of the building had not been specifically included in the 2005 designation report. (A. 674-675). This brief discussion was made in the context of what the prior panel determined that the City Commission's imposition of additional conditions on the conditional certificate of appropriateness

was a due process violations, where the Board had specifically not considered those conditions below. *Id*.

The Current Application

Shortly following that decision of the prior panel of the appellate division, on December 17, 2018, the County submitted a letter of intent and application for a special certificate of appropriateness to the Board. (A. 677-686). This application, unlike the prior application for the conceptual master plan, indicated under "application type" that it was for "new construction," "alteration," and "demolition." (A. 677). In keeping with the representations it had made during the public hearing on the conditional certificate of appropriateness, the County was moving forward with the understanding that this current special certificate of appropriateness would be necessary for any of these things—new construction, alteration, or demolition, to happen with respect to the Playhouse. *Id*.

The Hearings Before the Board

The Board conducted a public hearing on the merits of the current application on March 5, 2019. The Board held a lengthy and robust hearing that included opinions—both expert and lay—on all sides of the issue. There was much testimony on the whether the auditorium should be restored, instead of demolished and replaced. One piece of evidence that was submitted on the record was a March 1, 2019 Letter from the state Division of Historical Resources. The members and

various speakers during the public comment period discussed the significance of the Letter, and it featured prominently in the debate. One Board member pointed out that the Playhouse's listing on the National Register postdated the conditional certificate of appropriateness granted in 2017. At the conclusion of the public hearing, a motion was made to deny the County's application because "the plans do not satisfy the standard of the Secretary of the Interior." That motion passed by a vote of six-to-four. (A. 688).

The County's Appeal to City Commission

The County appealed the Board's decision to the City Commission. (A. 690-95). Following a public hearing on May 8, 2019, the Commission adopted resolution R-19-0169, which granted the County's appeal. (A. 1183-1184).

The Mayoral Veto

On May 17, 2019, the mayor vetoed resolution R-19-0169. (A. 1186-1188). The veto message and memo, which must accompany the veto per the City Code, express a number of bases for the veto. *Id*. The City Commission considered the veto for an override on May 23, 2019, but the veto was not overridden.

Proceedings Before the Appellate Division

The County subsequently filed its petition for writ of certiorari to the appellate division. (A. 1456-1517). The City initially filed a motion to dismiss based on lack of jurisdiction, which the appellate division entered an order

deferring ruling on pending merits briefing. (A. 1413-1439). Following merits briefing and oral argument, however, the appellate division ultimately granted the City's motion to dismiss for lack of jurisdiction. (A. 6-20). That decision was based on the appellate division's determination that the mayoral veto from which the County sought review, was not a quasi-judicial decision subject to certiorari review under Florida Rule of Appellate Procedure 9.100(c). *Id*. It is this narrow ruling that the County seeks review on second-tier certiorari.

STANDARD OF REVIEW

This Court has recognized the limited scope of second-tier certiorari review, which is restricted to an analysis of "whether the circuit court afforded procedural due process and whether it applied the correct law." *City of Miami v. Diocese of Newton Melkite Church*, 176 So. 3d 388, 389 (Fla. 3d DCA 2015) (citations omitted). This is because "[a]s a case travels up the judicial ladder, review should consistently become narrower, not broader." *Custer Med. Ctr. v. United Auto. Ins. Co*., 62 So. 3d 1086, 1092 (Fla. 2010). Further, an analysis of whether the circuit court has applied the "correct law" is distinguishable from whether the court committed an error, which would not necessarily require the exercise of certiorari jurisdiction by this Court. *See Ivey v. Allstate Ins. Co*., 774 So. 2d 679, 682 (Fla. 2000). However, "[t]he circuit court's failure to obey the plain language of a statute can form the basis for second-tier review." *14269 BT LLC v. Vill. of*

Wellington, Florida, 240 So. 3d 1, 3 (Fla. 4th DCA 2018); *see also Nader v. Fla. Dep't of Highway Safety & Motor Vehicles*, 87 So. 3d 712, 727 (Fla. 2012) ("[S]tatutes also constitute 'clearly established law,' meaning that a district court can use second-tier certiorari to correct a circuit court decision that departed from the essential requirements of statutory law."). This concept applies equally to municipal ordinances. *Surf Works, L.L.C. v. City of Jacksonville Beach*, 230 So. 3d 925, 930 (Fla. 1st DCA 2017), *reh'g denied* (Dec. 18, 2017), *review denied sub nom. City of Jacksonville Beach v. Surf Works, LLC*, SC18-25, 2018 WL 1479116 (Fla. Mar. 27, 2018) (granting second-tier certiorari where circuit court misconstrued a city ordinance, observing that "City ordinances, like the Code sections at issue here, are subject to the same rules of construction as state statutes.").

ARGUMENT

I. THE CIRCUIT COURT PROPERLY DETERMINED THAT IT LACKED JURSIDICTION OVER THE COUNTY'S PETITION BELOW BECAUSE THE MAYORAL VETO AT ISSUE IS NOT A QUASI-JUDICIAL DECISION SUBJECT TO CERTIORARI REVIEW

This Court should deny the County's Petition, because the appellate division properly determined that it lacked jurisdiction over the County's petition below. The County invoked the appellate division's jurisdiction pursuant to Florida Rules of Appellate Procedure 9.030(c)(2)-(3) and 9.100(c)(2). (A. 1456). Under Florida

Rule of Appellate Procedure 9.100(c), titled, in part, "petitions for certiorari," "a petition to review quasi-judicial action of agencies, boards, and commissions of local government, which action is not directly appealable under any other provision of general law but may be subject to review by certiorari," "shall be filed within thirty days of rendition of the order to be reviewed." Fla. R. App. P. 9.100(c). Under Rule 9.100(c), *quasi-judicial* decisions of municipal "agencies, boards, and commissions," are reviewable by petition for writ of certiorari to the appellate division. *See, e.g., Teston v. City of Tampa*, 143 So. 2d 473, 476 (Fla. 1962) ("If the order is quasi-judicial, . . . then it is subject to review by certiorari."); *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) ("commenting that for quasi-judicial decisions of agencies, "[i]t is clear that certiorari is in the nature of an appellate process. It is a method of obtaining review, as contrasted to a collateral assault."); *Terry v. Bd. of Trustees of City Pension Fund*, 854 So. 2d 273, 274 (Fla. 4th DCA 2003) ("certiorari will not lie to review legislative decisions"); *MRO Software, Inc. v. Miami-Dade County*, 895 So. 2d 1086, 1086 (Fla. 3d DCA 2004) (affirming transfer to general division of circuit court because "such an award is the exercise of an executive function, rather than a quasi-judicial act subject to certiorari review by the Appellate Division"). Because, however, the mayoral veto provided by the City Charter and Code is not quasi-judicial, review by way of a petition for writ of certiorari was unavailable here.

The Florida Supreme Court, in addressing the issue of how various administrative decisions are reviewed, has stated:

> The initial problem involved in deciding the appropriate method of obtaining relief against administrative action is to look first to the statute under which the administrative agency operates. If a valid method of review is there prescribed it should be followed. In the absence of specific valid statutory appellate procedures to review the particular order, it becomes necessary to ascertain whether the order is quasi-judicial or quasi-legislative. If the order is quasi-judicial, that is, if it has been entered pursuant to a statutory notice and hearing involving quasi-judicial determinations, then it is subject to review by certiorari.

Teston v. City of Tampa, 143 So. 2d 473, 475–76 (Fla. 1962) (internal citations omitted). The issue presented, therefore, is whether mayoral veto is quasi-judicial. Based on the clear language of the City Charter and City Code, as well as relevant precedent, the mayoral veto is not quasi-judicial.

The Board and City Commission Decisions At Issue Were Quasi-Judicial

To start, it is important to acknowledge that the decisions of the Board—in denying the certificate of appropriateness, and the City Commission—in granting the County's appeal, were both quasi-judicial decisions. The City Code, addressing applications for certificates of appropriateness, states:

> When a complete application is received, the preservation officer shall place the application on the next regularly scheduled meeting of the board. The board shall hold a public hearing to review the application. All public hearings on all certificates of appropriateness conducted by the board and hearings on appeals of board decisions to the city commission regarding certificates of appropriateness shall be noticed as follows:

> 1. The applicant shall be notified by mail at least ten calendar days prior to the hearing.
>
> 2. Any individual or organization requesting such notification and paying any established fees therefore shall be notified by mail at least ten calendar days prior to the hearing.
>
> 3. An advertisement shall be placed in a newspaper at least ten calendar days prior to the hearing.
>
> 4. Any additional notice deemed appropriate by the board.

§ 23-6.2(b)(4)(a), City of Miami Code. Florida Courts have made very clear that:

> when notice and a hearing are required and the judgment of the board is contingent on the showing made at the hearing, then its judgment becomes judicial or quasi-judicial as distinguished from being purely executive.

De Groot v. Sheffield, 95 So. 2d 912, 915 (Fla. 1957); *see also Broward County v. La Rosa*, 505 So. 2d 422, 423 (Fla. 1987) ("An administrative agency conducts a quasi-judicial proceeding in order to investigate and ascertain the existence of facts, hold hearings, and draw conclusions from those hearings as a basis for their official actions."); *Anoll v. Pomerance*, 363 So. 2d 329, 331 (Fla. 1978) ("a judgment becomes judicial or quasi-judicial, as distinguished from executive, when notice and hearing are required and the judgment of the board is contingent on the showing made at the hearing"); *Teston v. City of Tampa*, 143 So. 2d 473, 476 (Fla. 1962) (quasi-judicial actions are "entered pursuant to a statutory notice and hearing

involving quasi-judicial determinations"). Here, the decision of the Board, which followed a robust noticed hearing, meets this definition of quasi-judicial.

Similarly, the City Commission hearing on the County's appeal of the Board's decision was also quasi-judicial. Under the City Code,

> The applicant, the planning department, or any aggrieved party may appeal to the city commission any decision of the board on matters relating to designations and certificates of appropriateness by filing within fifteen (15) calendar days after the date of the decision a written notice of appeal with the hearing boards department, with a copy to the preservation officer. The notice of appeal shall set forth concisely the decision appealed from and the reasons or grounds for the appeal. Each appeal shall be accompanied by a fee of $525.00, plus $3.50 per mailed notice required pursuant to 23-4. The city commission shall hear and consider all facts material to the appeal and render a decision as promptly as possible. The appeal shall be de novo hearing and the city commission may consider new evidence or materials. The city commission may affirm, modify, or reverse the board's decision. The decision of the city commission shall constitute final administrative review, and no petition for rehearing or reconsideration shall be considered by the city. Appeals from decisions of the city commission may be made to the courts as provided by the Florida Rules of Appellate Procedure.

§ 23-6.2(e), City of Miami Code. The City Commission's May 8, 2019, hearing on the County's appeal was a quasi-judicial public hearing, following required notice, during which the County was permitted to introduce evidence and testimony upon which the City Commission's decision was rendered.

The Mayoral Veto is Not Quasi-Judicial

In contrast to the underlying Board and City Commission decisions, however, the mayoral veto does not meet the definition of quasi-judicial found in the case law. Under the City Charter,

> The mayor shall, within ten days of final adoption by the city commission, have veto authority over any legislative, quasi-judicial, zoning, master plan or land use decision of the city commission. . . .

§ 4(g)(5), City of Miami Charter. Under the City Code, "[t]he veto provisions of Section 4(g)(5) of the City Charter shall be exercised exclusively in accordance with the terms and conditions herein." § 2-36, City of Miami Code. That code section goes on to explain the timing and format of the veto and veto message. *Id*. Noticeably absent from this process, however, is any required notice or opportunity to be heard (through either public hearing or written submissions) on the mayoral veto.

Similarly, section 2-36 of the City Code also explains the timing and process for the City Commission to consider an override of the veto. *Id*. Specifically, the Code states with respect to City Commission consideration of any vetoed item that

> Notwithstanding any other rule of the commission, *items vetoed by the mayor shall* not be subject to the "5 day rule" as provided in section 2-33; not be deferred to a future meeting; not require committee review; not be subject to a motion to reconsider, except at the same meeting; not require first reading; *not require publication or additional public hearings*; or not be amended if the item required special publication or a public hearing to be originally adopted or enacted. Members of the public shall have a reasonable opportunity to speak on vetoed items

> consistent with F.S. § 286.0114, and subsection 2-33(c)(2) of the City Code.

§ 2-36(5), City of Miami Code (emphasis supplied).

Under the Code, therefore, it is clear that no notice or hearing is required for consideration of either the mayoral veto or the veto override. As such, these two stages of any commission action—the mayoral veto and the City Commission consideration of whether to override that veto, are different in nature from the hearings before the Board or the City Commission in considering the County's appeal. Because no "notice and a hearing are required" and the decision of the mayor to veto and/or the City Commission to override that veto, if exercised, are not "contingent on the showing made at [a] hearing," the mayoral veto is not quasi-judicial, but, rather, executive. *De Groot*, 95 So. 2d at 915 ("when notice and a hearing are required and the judgment of the board is contingent on the showing made at the hearing, then its judgment becomes judicial or quasi-judicial as distinguished from being purely executive").

There is no *binding* Florida precedent addressing the specific issue of whether a mayoral veto of quasi-judicial action is itself quasi-judicial. In *The Viscayans, et al. v. City of Miami, et al*., 15 Fla. L. Weekly Supp. 657a (Fla. 11th Jud. Cir. App. Div. July 3, 2014), a panel of the appellate division reversed a decision of the City Commission with respect to a zoning matter, in part because it determined that *ex parte* communications by the mayor during the ten-day veto

period constituted a denial of due process. (A. 1579-1585). The dissenting judge disagreed, noting that:

> The Mayor of Miami did not argue in *ex parte* communications, because he was not one of the "arbitrators" of the zoning case, as he did not participate in the hearings in any way. Rather, he was properly acting in his executive capacity, and lawfully governing the city by attempting to incorporate the concerns of a group of residents in a city decision.

(A. 1584).

First, it should be noted that in *The Viscayans*, the actions under review were an ordinance and a resolution of the City Commission acting in its quasi-judicial capacity—not a mayoral veto, because the mayor there did not exercise his veto authority. There was, therefore, no issue in that case with respect to the jurisdiction of the appellate division to review the matter. And although a partial basis for the decision was the panel's conclusion that the mayoral veto period of quasi-judicial decisions of the City Commission is subject to the same prohibition on *ex parte* communications as the City Commission's consideration of the matter, that decision is inconsistent with the City Charter and Code provisions addressing the mayoral veto authority, and was not binding on the appellate division below. *See Allstate Fire & Cas. Ins. Co. v. Hallandale Open MRI, LLC*, 253 So. 3d 36, 38 n.2 & 41-49 (Fla. 3d DCA 2017) (majority and dissenting opinions discuss issue of intra-circuit conflict between appellate division decisions, which are not binding on other appellate division panels).

In determining whether an act is quasi-judicial or not, Florida courts have made clear that it is necessary to "examine[] the underlying statute to determine if it [has] any requirement of a quasi-judicial hearing." *Volusia County v. City of Daytona Beach*, 420 So. 2d 606, 609 (Fla. 5th DCA 1982) (*citing Bay National Bank and Trust Company v. Dickinson*, 229 So. 2d 302 (Fla. 1st DCA 1969)). As the First District has explained:

> It thus appears that before an administrative order may be considered quasi-judicial in character and therefore subject to review by certiorari, the statute authorizing the entry of such an order must also require that the administrative agency give due notice of a hearing to be held on the question to be considered, and provide a fair opportunity to be heard in a proceeding in which the party affected is accorded the basic requirements of due process of law. A careful examination of the statute now under consideration . . . contains no provision requiring that an applicant for registration be given due notice of a hearing at which the question of eligibility for registration will be heard in accordance with the basic requirements of due process. . . .The absence of such protective language . . . denudes the Commissioner's order denying registration of any of the characteristics or attributes of a quasi-judicial order. An order of the Commissioner denying registration under the provisions of the statute here considered must, therefore, be considered administrative in character, and not such a quasi-judicial order as may be reviewed by certiorari . . . .

Bloomfield v. Mayo, 119 So. 2d 417, 421–22 (Fla. 1st DCA 1960). Here, the appellate panel properly looked to the underlying statutory scheme—the City Charter and Code, to determine whether the mayoral veto at issue was quasi-judicial in nature. Op. at 10-15. Because those statutory provisions do not require any notice or opportunity to be heard with respect to the mayoral veto, the

appellate panel concluded that the veto is not itself a quasi-judicial act, regardless of the nature of the decision subjected to the veto. *Id*.

It is notable that the County's argument in favor of a finding that the mayoral veto is a quasi-judicial act looks not to the pertinent statutory scheme, but, rather, to the nature of the underlying decision that is subject to the veto. Pet. at 15-25. The County asserts that the veto must be quasi-judicial here because it has been exercised with respect to an underlying quasi-judicial decision. But this interpretation of the mayoral veto ignores the language of the underlying statutory scheme and, more importantly, the fact that the statutory scheme makes no distinction between the veto process regardless of the type of decision that is being subjected to the veto. § 2-36, City of Miami Code. Section 2-36 of the City Code contains the same statutory process and requirements for any mayoral veto. This Court should decline the County's invitation to add language to a statutory scheme where it does not exist. *See Pub. Health Tr. of Miami-Dade County v. State, Agency for Health Care Admin*., 751 So. 2d 112, 114 (Fla. 3d DCA 2000) ("courts, in construing a statute, may not invoke a limitation or add words to the statute not placed there by the legislature") (citation omitted).

The County Impermissibly and Belatedly Attempts to Bring a Constitutional Challenge to the City Charter's Veto Provision

In its Petition to this Court, the County now takes the position that the appellate panel's decision is erroneous because it would be an unconstitutional

violation of the County's due process rights for an executive veto process to apply to a quasi-judicial decision of the City Commission. Pet. at 15-35. In fact, the County's Petition essentially asserts that the City Charter and Code provisions that permit the mayor to exercise an executive veto over a quasi-judicial decision of the City Commission are facially invalid, because the "circuit court's holding," according to the County, "would create a glaring loophole in any quasi-judicial review conducted by the local government . . .and result in the systematic denial of due process to all parties at the local level." Pet. at 27-28.[2]

This Court lacks jurisdiction on certiorari review to opine on the constitutionality of the City's Charter and Code provisions that provide for this

[2] It should be noted that the County Charter contains a very similar provision with respect to the veto authority of the County mayor, stating:

> The Mayor shall within ten days of final adoption by the Commission, have veto authority over any legislative, quasi-judicial, zoning, master plan or land use decision of the Commission, including the budget or any particular component contained therein which was approved by the Commission; provided, however, that (1) if any revenue item is vetoed, an expenditure item in the same or greater dollar amount must also be vetoed and (2) the Mayor may not veto the selection of the chairperson or vice-chairperson of the commission, the enactment of commission committee rules, the formation of commission committees, or the appointment of members to commission committees. The Commission may at its next regularly scheduled meeting after the veto occurs, override that veto by a two-thirds vote of the Commissioners present.

§ 2.02(D), Miami-Dade County Charter.

veto authority and detail the process and form of any such veto. As this Court has explained:

> a petition seeking certiorari review is not the proper procedural vehicle to challenge the constitutionality of a statute or ordinance. A challenge to the constitutionality of an ordinance must be determined in original proceedings before the circuit court, not by way of a petition for writ of certiorari.

Hernandez-Canton v. Miami City Com'n, 971 So. 2d 829, 832 (Fla. 3d DCA 2007) (*quoting Miami–Dade County v. Omnipoint Holdings, Inc*., 863 So.2d 195, 199 (Fla. 2003)) (citations and internal quotations omitted). In fact, the County could not raise such a challenge to the appellate panel here either. *See Nannie Lee's Strawberry Mansion v. City of Melbourne*, 877 So. 2d 793, 794 (Fla. 5th DCA 2004) ("constitutional challenges to a zoning ordinance must be raised in an original declaratory judgment action or other equitable proceeding in circuit court, not in a certiorari petition in a reviewing court"). But even if the constitutionality of the veto power at issue here could have been raised below, the County's failure to do so means that any such challenge is not preserved.

Because the constitutionality of the veto provision is not properly before this Court, this Court should reject the County's attempts to establish both a departure from the essential requirements of law and a miscarriage of justice based on this premise. The County cannot make an end run around the Charter and Code language at issue by covertly asserting that the veto authority is unconstitutional, as

written. Instead, the County must establish that the appellate division misconstrued the plain language of the Charter and Code provisions at issue. The County has not done so in a manner that does not rely entirely on its improper covert constitutional challenge.

II. DICTA IN THE CIRCUIT COURT OPINION DISMISSING THE COUNTY'S PETITION FOR LACK OF JURSIDICTION CANNOT FORM THE BASIS FOR RELIEF IN THIS COURT ON SECOND-TIER CERTIORARI REVIEW

The appellate division determined that it lacked jurisdiction over the County's petition below, because the mayoral veto at issue is not a quasi-judicial act subject to certiorari review under Florida Rule of Appellate Procedure 9.100(c). Op. at 11-15. The County argues in its Petition on second-tier certiorari, however, that the section of the opinion which sets out the *factual history* of the dispute should serve as a basis for certiorari review. Pet. at 36-44. The County acknowledges with respect to certain alleged "factual errors," that the errors are "not determinative of the legal issues in this appeal." Pet. at 43 n.8. The same can be said of all of the alleged factual errors that the County raises here. The section of the opinion detailing the factual background of the matter is just that—background. It does not contain any legal rulings from which second-tier certiorari would appropriately be sought. In fact, the dicta that the County takes issue with does not even include a "finding" that the interior of the Playhouse was designated.

Op. at 6. The comment is simply an aside in the narrative related to the procedural history of the case. The language at issue does not even conclude that the interior of the Playhouse was designated. Dicta should not properly form the basis for certiorari relief before this Court, particularly here, where the language complained of does not even contain holding that could be objected to. *See Heid v. Florida Ins. Guar. Ass'n*, 45 Fla. L. Weekly D523 (Fla. 2d DCA Mar. 6, 2020), review denied, SC20-912, 2020 WL 5269717 (Fla. Sept. 4, 2020) ("When a court makes a pronouncement of law that is ultimately immaterial to the outcome of the case, it cannot be said to be part of the holding in the case.").

CONCLUSION

Based on the foregoing, the City respectfully requests that this Court deny the County's Petition.

Respectfully submitted,

VICTORIA MÉNDEZ, City Attorney
KERRI L. McNULTY, Sr. Appellate Counsel
Attorneys for **City of Miami**
444 S.W. 2nd Avenue, Suite 945
Miami, FL 33130-1910
Tel.: (305) 416-1800
Fax: (305) 416-1801
Email: klmcnulty@miamigov.com
Secondary Email: CSantos@miamigov.com

By: */s/ Kerri L. McNulty*
Kerri L. McNulty, Sr. Appellate Counsel
Florida Bar No. 16171

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to those individuals listed below by e-mail this 26th day of October 2020.

By: */s/ Kerri L. McNulty*
Kerri L. McNulty
Senior Appellate Counsel
Florida Bar No. 16171

SERVICE LIST

Abigail Price-Williams, Miami Dade County Attorney
James Edwin Kirtley, Jr., Assistant County Attorney
Dennis A. Kerbel, Assistant County Attorney
Stephen P. Clark Center
111 N.W. 1st Street, Suite 2810
Miami, FL 33128
Email: kirtley@miamidade.gov
dkerbel@miamidade.gov
Counsel for Miami-Dade County