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

APPELLATE DIVISION
CASE NO. 18-032AP

L.T. CASE No.
City of Miami Resolution No. R-17-0622

FILED FOR RECORD
2018 FEB -1 PM 2:38
CLERK, CIRCUIT COURT, DADE COUNTY, FLA.
CIVIL #92
TANYA D. BENNETT

MIAMI-DADE COUNTY,

Petitioner,

v.

CITY OF MIAMI,

Respondent.

_______________________________/

MIAMI-DADE COUNTY'S
PETITION FOR WRIT OF CERTIORARI

Miami-Dade County, Florida (the "County") hereby seeks certiorari review of the Miami City Commission's decision reversing in part the issuance of a certificate of appropriateness to the County for a conceptual master plan to rehabilitate the Coconut Grove Playhouse. This Court has original jurisdiction pursuant to Florida Rules of Appellate Procedure 9.030(c)(2)-(3) and 9.100(c)(2).

In furtherance of a lease, operating agreement, and business plan approved by the County and Florida International University ("FIU") as co-tenants, and the State of Florida as landlord, the County applied to the City of Miami (the "City") to make alterations to, and rehabilitate, the historic Coconut Grove Playhouse (the

"Playhouse"), which lies within the City's borders. The City's Historic and Environmental Preservation Board (the "HEP Board") overwhelmingly approved the County's conceptual master plan for the project, which calls for fully restoring the architecturally-significant, iconic historic front building and replacing the dilapidated auditorium with a new state of the art theater that respects the history of the place, incorporates its most historic elements, and is sensitive to the surrounding neighborhoods.

Following the HEP Board's approval, two Coconut Grove residents took an appeal to the City Commission, arguing that the existing theater building should be fully restored in its exact current configuration, not demolished and replaced. The County opposed the appeal on standing grounds, as well as on the merits. But following a public hearing, the City Commission granted in part and denied in part the appeal, imposing a series of conditions on the County's project—many of which are untethered to historic preservation and lack evidentiary support in the record.

Indeed, the City Commission went well beyond its historic preservation authority in reversing the HEP Board's approval of the County's well-thought-out proposal to responsibly rehabilitate the Playhouse and return live theater to Coconut Grove. Because, as explained below, the City's decision departs from the essential requirements of the law, violates due process, and is unsupported by substantial

competent evidence, this Court should issue a writ of certiorari quashing City of Miami Resolution No. No. R-17-0622.

I. Statement of Facts

Designed by the critically important architectural firm of Kiehnel & Elliott, the Coconut Grove Playhouse opened in 1927 as a silent movie theater house with approximately 1,500 seats. Pet. App. Ex. A at 8 (2005 Designation Report).[1] Its dramatic entrance portal and front building exemplify the Mediterranean Revival style of architecture that features so prominently in Florida's architectural history. *Id.* at 10.

In 1955, noted Florida architect Alfred Browning Parker was commissioned to transform the old silent movie house into a venue for live theater. *Id.* at 8. Parker's alterations were principally to the interior of the building, enlarging the lobby area to accommodate pre-theater dining and social functions. *Id.* at 11; Pet. App. Ex. B at 103-08 (12/14/2017 Appeal Tr.). In the process, Parker altered Kiehnel & Elliott's original interior by compressing the auditorium volume, removing seats, and partially burying in concrete the theater's arcade of solomonic columns and other decorative features, to create a steeper floor rake and improve the sightlines needed for live theater. *Id.* Parker's altered interior contained 800 seats.

[1] Citations herein to "Pet. App." refer to the County's *Appendix to Petition for Writ of Certiorari*, which is filed concurrently with this petition.

Id. at 107. Parker subsequently introduced a mezzanine to make up for the lost seats, increasing the number to 1,100, but further altering the configuration of Kiehnel & Elliot's original movie house. *Id.* Indeed, Parker's modifications dramatically changed the original Kiehnel & Elliott interiors, which were then further eroded by additional renovations to the Playhouse in the 1970s and 80s. Pet. App. Ex. A at 11, 14; Pet. App. Ex. B at 109-10.

In the forty years that followed Parker's alterations, the Playhouse faced financial trials and tribulations and changed ownership several times, eventually ending up in the hands of the State of Florida after languishing vacant, shuttered up, and in a state of disrepair for more than a decade. *Id.* at 92, 109-10

In 2005, the City designated the Playhouse as a local historic site. Pet. App. Ex. C (Res. No. HEPB-2005-60). The designation report prepared by City staff, which was incorporated into the resolution designating the property, found that "[o]nly the south and east facades [of the original Kiehnel & Elliott design] possess architectural significance." Pet. App. Ex. A at 14. While the designation encompassed the entire site, as is typical of historic designations, it did not include the interior. Significantly, Section 23-4(c)(2)(c) of the City Code provides that interior spaces that the designation report does not precisely describe as historically significant and subject to regulation "shall not be subject to review[.]" Pet. App. Ex.

D (Chap. 23, City Code). The 2005 designation report did not purport to regulate any such interior spaces. Pet. App. Ex. A.

In 2013, the State of Florida Board of Trustees of the Internal Improvement Trust Fund (the "State"), as owner of the Playhouse property, entered into a lease agreement with the County and FIU to allow the County to undertake the design and construction work to rehabilitate the Playhouse and return great theater to Coconut Grove. Pet. App. Ex. B at 92-93. The lease agreement incorporates and requires the County to comply with the Coconut Grove Playhouse Business Plan submitted by the County, FIU, and local theater company GableStage, Inc., to develop an approximately 300-seat regional theater at the Playhouse property. Pet. App. Ex. E (MDC Res. Nos. R-621-13, R-797-13, R-293-15, R-294-15).

The FIU Board of Trustees, the Board of County Commissioners, and the Governor and Cabinet all approved the lease and incorporated Business Plan. Pet. App. Ex. B at 92-93. The Board of County Commissioners also approved an agreement with GableStage to operate and manage the redeveloped Playhouse for an initial term of 25 years, with three 25-year options to renew. Pet. App. Ex. E. Finally, through a public bid process, the County selected iconic Miami-based architectural firm Arquitectonica International Corporation ("Arquitectonica") to master plan and design the Playhouse in accordance with the Business Plan approved

by the State. *Id.* The County has committed $20 million of secured bond funding to the project. *Id.*; *see also* Pet. App. Ex. B. at 93.

The County's rehabilitation project envisions a full restoration of Kiehnel & Elliott's iconic and historically-significant front building, along with a new, state-of-the-art theater that is sited in the footprint of, and on axis with, the existing auditorium, incorporates important historic elements of the existing playhouse, and is separated from the front building by a lushly landscaped courtyard and breezeway that assumes the position of the old Playhouse lobby. Pet. App. Ex. B at 96-100.

Because the City designated the Playhouse as a historic site, the County sought a certificate of appropriateness from the City for the rehabilitation project. Pet. App. Ex. D (Sec. 23-6.2(a), City Code). 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.* When an application contemplates "a major addition, alteration, relocation, or demolition," as it does here, a special certificate of appropriateness is required, meaning that approval may only be given after a quasi-judicial public hearing before the HEP Board. *Id.* at Sec. 23-6.2(b)(4), City Code. Importantly, a public hearing on a certificate of appropriateness is not a do-over as to the scope of the designation itself; indeed, the parameters of the existing designation constitute the yardstick by which the

application for certificate of appropriateness must be measured. *Id.* at Sec. 23-6.2(h).

Rather than present the HEP Board with a final set of plans at the end, the County took the extraordinary step of first applying for a certificate of appropriateness for a conceptual master plan to rehabilitate the Playhouse early on in the design process, to allow for more public input and transparency before producing final designs. Pet. App. Ex. F (County's application). On April 4, 2017, the HEP Board conducted a public hearing on the County's application. Pet. App. Ex. G (4/4/2017 HEP Board Tr.). City staff introduced the application, noting at the outset that "the local Historic Designation Report for the Coconut Grove Playhouse does not reference the interior of the structure as architecturally significant," and "as such, the Historical and Environmental Preservation Board has no purview over what occurs to the interior." *Id.* at 5.

Citing the dual goals of the Secretary of the Interior's Standards for the Treatment of Historic Properties—to preserve historic materials and to preserve a building's distinguishing character—City staff opined that "the defining features of the historic Playhouse built by Kiehnel & Elliott that should be preserved are the south and east facades," as set forth in the designation report. *Id.* at 6. As the County's plan contemplates a complete restoration of the entire historic front

building encompassing the south and east facades, City staff recommended approval of the application, subject to a series of conditions. *Id.* at 6-9.

During the public hearing, Jorge Hernandez, the historic preservation architect and specialist retained by the County for the project, provided expert testimony as to the Playhouse's history and the changes it has endured over time. *Id.* at 22-54. Hernandez opined that the front building is the only architecturally significant structure on the site that retains its historical integrity—a necessary precondition to any preservation requirement. *Id.* at 45-52. As he further explained, the Playhouse interiors and the auditorium itself, by contrast, have lost their historical integrity:

> It's very clear that that front building is where Kiehnel spent the greatest amount of his artistry. . . . Now, if we go inside, the Kiehnel auditorium, as you see is no more. It's been compressed by two-thirds of the depth of the time. And I just showed you very quickly, you know, the buried Solomonic columns, the mezzanine, the taking away, the changing of the profiles and so on.

Id. at 51.

Also providing testimony at the HEP Board hearing was historic preservation architect Richard Heisenbottle, who opposes the County's plan. *Id.* at 81. But Heisenbottle is not simply an opposing witness or concerned citizen; his architectural firm was one of eight that the County rejected in the competitive selection process for the master planning and design of the Playhouse project. Pet.

App. Ex. M.[2] Although Heisenbottle disagreed with Hernandez's expert opinion that the historical integrity of the Playhouse interior has been lost, Heisenbottle conceded that the 2005 designation report governs the application and that it did not designate the interior spaces. Heisenbottle thus recognized, perhaps begrudgingly, that the County's application to replace the existing auditorium with a new one could not be denied for failure to preserve the Playhouse interior, absent a revision to the designation report:

> Unfortunately, in our professional opinions, you are working with a very flawed local historic Designation Report. A report that totally ignores the playhouse interior. In fact, the playhouse interior is not included in the local Designation Report at all. . . . Rather than accepting staff's recommendation for approval of the [County's application] and the notion that the [HEP] Board has no authority over this playhouse interior, because of a flawed Designation Report, the HEP[Board] has responsibility to direct staff to amend the flawed and inadequate historic Designation Report to include the auditorium interior[.]

Pet. App. Ex. G at 85-89.

Heisenbottle and Hernandez also agreed upon one other thing: that Parker's 1955 renovations were insensitively done and do not possess independent historic significance separate and apart from the original Kiehnel & Elliott design. As

[2] This Court may take judicial notice of this fact, which "are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned," namely the attached public records of the public solicitation process. § 90.202(10), (12), Fla. Stat.; *see also City of Miami v. F.O.P., Miami Lodge 20*, 571 So. 2d 1309, 1318 n.10 (Fla. 3d DCA 1991).

Heisenbottle explained, "a greater amount of fabric exists today of Kiehnel & Elliott work than exist[s] today of Alfred Browning Parker work, more because of what happened with Mr. Schuster," who further insensitively renovated the Playhouse in the 1980s, and "[t]here's just not much of anything left of Alfred Browning Parker's work in this particular case." *Id.* at 112.

In addition to taking the above expert testimony on the historic preservation issues, the HEP Board also heard from Bernardo Fort-Brescia of Arquitectonica, who provided an architectural overview of the County's conceptual master plan for the project. *Id.* at 54-70. Members of the public also weighed in, offering comments regarding, for example, traffic impacts of the proposed project, the design of the parking garage, access to the site from the West Grove, and the need to preserve the theater for the community's benefit. *Id.* at 125-88.

At the close of the public hearing, one HEP Board member remarked that "I think this Board should be involved with the interiors of the Playhouse," and "should be involved in looking at both the Kiehnel & Elliott and Alfred Browning Parker elements," and "I think the Designation Report from 2004 [sic] should be modified." *Id.* at 202. She thereafter made a motion to deny the County's application, but her motion died for lack of a second. *Id.* at 206-10. Subsequently, another HEP Board member moved to approve the application and grant a certificate of appropriateness

for the County's conceptual master plan, with, among others, the following staff recommended conditions:

- "The original Kiehnel structure containing the South and East facades shall be preserved";
- "The South and East facades shall be restored to the Kiehnel phase of architecture";
- "This Certificate of Appropriateness is subject to approval by zoning, building, and all other required city and county departments";
- "No demolition permit will be issued until the plan comes back to the HEP[Board] and is approved"; and
- "The concept that is being approved in this plan is in concept only, the HEP[Board] has the purview to require different configurations, heights, setback etc. for the development of each individual building."

Id. at 220-22; Pet. App. Ex. H (Res. No. HEPB-R-17-023). The motion, with conditions, received a second and was adopted, four votes to one. Pet. App. Ex. G at 225.

On April 19, 2017, Grove residents Barbara Lange and Katrina Morris (the "HEPB Appellants"), represented by counsel, timely filed an appeal of the HEP Board's approval with the City Commission. Pet. App. Ex. I (4/19/2017 Appeal

Letter). As grounds for standing, appellants alleged that they were "aggrieved parties" pursuant to Section 23-6.2(e) of the City Code:

1. Barbara Lange is a resident of Miami-Dade County, and who lives in Coconut Grove at 3901 Braganza Ave. Miami FL 33133, spoke at the HEPB meeting on April 4, 2017. Ms. Lange is an aggrieved party because she is a homeowner in the City of Miami in close proximity to the Playhouse and she also spoke and presented evidence at the April 4, 2017 HEP Board hearing. Ms. Lange is a member of several neighborhood associations concerned with historic preservation and development issues in Coconut Grove and has long-standing involvement in these issues. As a resident of Miami-Dade County, Ms. Lange will be affected by any decision(s), including the April 4, 2017 resolution HEPB R-17-023, regarding the Playhouse due to the fact that Miami-Dade County has funded a portion of the project ($15 million) with monies from the 2004 Building Better Communities GOB and additional monies ($5 million) from the 2005 Convention Development Tax Bond, both of which have been issued.

2. Katrina Morris is a resident of Miami-Dade County, and who lives in Coconut Grove at 1430 Lybyer Ave. Miami FL 33133, spoke at the HEPB meeting on April 4, 2017. Ms. Morris is an aggrieved party because she is a homeowner in the City of Miami in close proximity to the Playhouse and she also spoke and presented evidence at the April 4, 2017 HEP Board hearing. As a resident of Miami-Dade County, Ms. Morris will be affected by any decisions regarding the Playhouse due to the fact that Miami-Dade County has funded a portion of the project ($15 million) with monies from the 2004 Building Better Communities GOB and additional monies ($5 million) from the 2005 Convention Development Tax Bond, both of which have been issued.

Id. at 2. Neither address is located adjacent to the Playhouse, nor on the same block or street. Indeed, both 3901 Braganza Avenue and 1430 Lybyer Avenue are situated over a mile away from the Playhouse.

On the merits, appellants principally argued that the HEP Board should have postponed consideration of the County's application until the interior of the Playhouse could be properly evaluated as to its historical significance; the 2005 designation report should be amended to include preservation of the interior; the HEP Board should have denied the County's application because it was incomplete; the approval was not supported by substantial competent evidence; and the HEP Board approval was contrary to the City Code because it allowed for demolition of the existing theater "while the applicant continues to finalize the final 90% of the details of the additional buildings within the site." *Id.*

On June 16, 2017, the County provided a written response to the appeal, arguing that appellants did not have standing; the City lacked the authority to re-evaluate the interior of the building in the course of a certificate of appropriateness proceeding more than a decade after the initial designation of the site; the HEP Board's decision was amply supported by substantial competent evidence; and the HEP Board's decision does not permit any demolition on the site until final approval is obtained, per the conditions of the resolution. Pet. App. Ex. J (6/16/2017 Appeal

Response). Appellants in turn submitted counterpoints in a written reply dated November 28, 2017. Pet. App. Ex. K.

After several deferrals, the City Commission conducted a de novo public hearing on the appeal on December 14, 2017. Pet. App. Ex. B. At the appeal, members of the public were once again heard. *Id.* at 1-70. Then, counsel for appellants presented argument and offered expert testimony from Heisenbottle. *Id.* at 70-91. Heisenbottle opined that the County's application did not satisfy the Secretary of the Interior's Standards for Rehabilitation (particularly Standards 1, 2, 4, 5, 6, and 9), because the County seeks to restore only the historic front building while replacing the existing auditorium with a new one. *Id.* at 78-81. According to Heisenbottle, the interior of the auditorium still retains historic integrity: "the original auditorium, with its elaborate plaster work, still exist[s], although much obscured by plywood ceiling panels added in the 1950s." *Id.* at 82. But recognizing that the interior of the theater is beyond the scope of the subject application, because it was not protected when the Playhouse was designated in 2005, Heisenbottle again argued that the 2005 designation report should be amended to include the interior of "the historic theater space, where the activities that make this property significant occurred[.]" *Id.* at 80-83.

After the HEPB Appellants' presentation, the County first provided testimony from Michael Spring, Senior Advisor to the County Mayor and Director of the

Department of Cultural Affairs, regarding the history of the project and the County's goals for restoring great theater to the site. *Id.* at 91-96.

The County then called Hernandez to provide expert testimony, opining in detail that the existing auditorium no longer retains historical integrity and that, contrary to Heisenbottle's contentions, the Secretary of the Interior Standards do not apply:

> Significant alterations over time have eroded the authenticity of Kiehnel's original interior. . . . [A]ll of the criteria that you've heard about the Secretary of the Interior's guidelines and standards rely and hinge on the fact that you must prove that the building retains its integrity. If the building does not retain its integrity, then those criteria fall away. So that's why this establishment of integrity is so important. . . . [T]he designation report from 2005, got it right. Your report got it right the first time. I concluded and agreed [with] the report that the entire auditorium and lobby spaces have indeed lost their integrity, but we are able to preserve the entire front building, not [just] the façade, which is set over again, but the entire building, front, sides and back, depths and functions.

Id. at 102-11.

Hernandez further explained that, even though not obligated to do so by the governing designation report, the County has nonetheless surveyed the interior space for any original elements that remain intact, with the intent of re-incorporating such features into the new design:

> We committed to survey the interior of the building . . . [a]nd we continued doing so in preparation for the next [certificate of appropriateness] submittal to the HEP Board. We committed to survey the interior as well. These are examples of the proscenium arch, of the concrete grills, of the cornices over the vaults, fragments which remain.

> We are incorporating these into the space of the new theater and we are re-appropriating the double proscenium arch in the new auditorium space.

Id. at 111-12.

Finally, Hernandez testified that the County's plan honors the historic nature of the site by respecting spatial relationships and siting the new auditorium in the footprint of the old one, so that theater may once again take place in the very same location:

> By imbedding the new 300-seat theater and fly stage at the center of the parcel, the spatial promenade of entry is restored to the site. . . . Kiehnel's auditorium – on the matter of integrity, Kiehnel's auditorium was gutted by Parker and Parker's auditorium was gutted by subsequent, expedient changes. The building beyond the front building has lost its integrity. In preservation, history can endure and are [sic] given meaning by interpretation and sustained use. Old buildings survive, indeed thrive and change in new ways for new generation[s]. When it is proper to restore all of significant parts of the original use, then the place accrues additional value. That is what this project does, it restores theater to this site and ensures its sustainability in the very place known as the ancestral home of theater in this community and it uses preservation appropriately and creatively towards that end.

Id. at 114-15.

Following Hernandez's testimony, the County responded to the HEPB Appellants' legal arguments and challenged their standing to pursue the appeal. *Id.* at 118-25. Among other points, the County pointed out that "[a]ppellants have not even attempted to argue that what was done below is inconsistent with the governing

designation," instead arguing only that the 2005 designation is flawed because it failed to preserve the Playhouse interior. *Id.* at 121.

Upon close of the public hearing, the City Commission turned to the issue of whether the HEPB Appellants had standing to advance the appeal and asked for the City Attorney's advice. *Id.* at 135. The City Attorney opined that the City Commission had the discretion to accord standing to the HEPB Appellants, based on the nature of the proceeding and the proximity of their homes to the Playhouse:

> [I]n zoning matters, we've opined in the past that usually an aggrieved party is somebody who's right next door, is within 500 feet, is definitely more aggrieved than any other person in the community. Here, for HEP reasons, though, it's a little different. One, the code really doesn't define who an aggrieved party is, but in this case, you have a facility where it's of great communal import, important to the community. Both appellants do live in Coconut Grove in close proximity to this – to this facility. I would say in a zoning context, they may not have standing. However, in this type of appeal, they could arguably have standing, because of the difference of the facility. The fact that, you know, they can attend the facility, that they want to see the facility preserved, that they live in close proximity. And obviously this is all based on their written appeal letter. . . . So it's something that definitely the Commission could grant standing, if they are so inclined[.].

Id. at 135-37.

Following that opinion, the City Commission, by unanimous vote, found that the HEPB Appellants had standing. *Id.* at 138. Then turning to the merits, a lengthy motion was offered to grant in part and deny in part the appeal (although, as described below, the motion did not specifically identify the aspects of the appeal that were denied). *Id.* at 139-53. The elaborate motion contained several conditions,

including that: contingent on an additional $20 million being pledged within 100 days, the rehabilitated auditorium shall have no less than 600 seats; and the entire Playhouse structure, including the auditorium, shall be preserved with, at a minimum, the Solomonic Columns, Proscenium Arches, and Cherubs contained in the interior protected, restored, and maintained. *Id.* at 139-53; Pet. App. Ex. L (Res. No. R-17-0622).

The 600-seat condition was explained in the motion as follows:

> If you're going to try to honor the historic aspect of the size of the theater, you want to try to get towards the larger theater that existed. To honor the grand Coconut Grove Playhouse with 300 seats, I don't believe it serves it from a historic perspective. From a financial perspective or a theater perspective, I can't speak to that, but from a historic perspective, it certainly does not.

Pet. App. Ex. B at 143-44.

The motion also included the following description of the condition to preserve, and not demolish, the exterior shell of the existing auditorium, and certain interior elements:

> In 2005, when the decision was made, this is very key, because if the back building is not historically designated, how is it possible for me or even the historic environmental preservation board to rule on whether or not it can be preserved or not. And so there are facts presented on both sides. And I simply [would] like to read the minutes from that evening [at the public hearing when the Playhouse was historically designated], because the resolution itself can capture one sentiment, if interpreted one way, but, as always, you really have to go into the intent of those who made the vote to understand what that resolution – how that resolution should be interpreted. . . . With that interpretation of the minutes and the resolution that passed in 2005, it's my understanding

> that the entire structure is historically designated. It does not speak to the interior. It speaks to the entire structure and the property. . . . Now, the exterior of the back building is nothing to write home about. And that's why it's very easy to look at it and say that's not a historic structure, the front building is. There's a lot of attention paid to the design. The back building is not, but here's where I think we go into the sentiment of the designation, that what happened in that building matters. And once I got passed the obscene graffiti, and the broken rooftop and the flooring that I had to step over, I started seeing the elements of the history there.

Id. at 139-43. And, as to the condition of interior preservation, the motion additionally included the following:

> [I]nterior preservation of the Solomonic columns. The proscenium, the various fixtures as was intended, but the goal is to preserve more [of] the interior structure where all the magic happened. . . . So in this particular case, if we're trying to preserve the original shell, those items will simply stay where they are or, you know, be restored in place. . . . [W]e're just elevating the level of preservation by keeping it in the original structure.

Id. at 150-51, 156-57. The motion, as presented and explained, was seconded and adopted three votes to two.[3] *Id.* at 204-05.

II. Legal Standard

In a challenge to a quasi-judicial decision, this Court conducts a "first-tier review" and considers: (1) whether the Board accorded the parties procedural due process; (2) whether it observed the essential requirements of the law; and

[3] Prior to the vote on the motion above, another City Commissioner offered a substitute motion to defer resolution of the appeal by 45 days to see whether funding for a larger theater could be found, but that motion did not carry. Pet. App. Ex. B at 195-96, 204.

(3) whether its decision is supported by substantial competent evidence. *See, e.g.*, *Miami-Dade Cnty. v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 198-99 (Fla. 2003).

Due process in a quasi-judicial hearing is generally satisfied if the parties are provided notice of the relevant hearing and an opportunity to be heard in the course of that proceeding. *See Jennings v. Dade Cty.*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991); *Sem. Entm't. v. City of Casselberry*, 811 So. 2d 693, 696 (Fla. 5th DCA 2001). But adequate notice means that the correct scope of the hearing has been provided: "The granting of relief, which is not sought by the notice of hearing or which expands the scope of a hearing and decides matters not noticed for hearing, violates due process." *Connell v. Capital City Partners, LLC*, 932 So. 2d 442, 444 (Fla. 3d DCA 2006).

Observing the essential requirements of law means applying the correct law in proper fashion. *See Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995). The court must ascertain whether the board overlooked sources of established law, or applied an incorrect analysis to those sources it considered. *City of Tampa v. City Nat'l Bank of Fla.*, 974 So. 2d 408, 411 (Fla. 2d DCA 2007). To warrant relief, there must be "an inherent illegality or irregularity, an abuse of judicial power, an act of judicial tyranny perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice," *see Sucart v. Office of*

Comm'r, 129 So. 3d 1112, 1115 (Fla. 3d DCA 2013), or "a serious error of fundamental dimensions," *see City Nat'l Bank of Fla.*, 974 So. 2d at 410-11.

Substantial competent evidence has been defined as "such evidence as will establish a substantial basis of fact from which the fact at issue can be reasonably inferred" or such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Smith v. Dep't of Health & Rehab. Servs.*, 555 So. 2d 1254, 1255 (Fla. 3d DCA 1989) (citation omitted). Although a local government's quasi-judicial decision must generally be upheld if any substantial competent evidence supports it, the Court is required to examine whether such evidence in fact exists and is empowered to quash the decision where "the record is devoid of substantial competent evidence to support the [ ] decision." *City of W. Palm Beach Zoning Bd. of Appeals v. Educ. Dev. Ctr.*, 504 So. 2d 1385, 1386 (Fla. 4th DCA 1987); *see also Jesus Fellowship, Inc. v. Miami-Dade County*, 752 So. 2d 708, 711 (Fla. 3d DCA 2000).

III. Argument

This Court must issue a writ of certiorari because the City Commission departed from the essential requirements of the law: (1) in finding that the HEPB Appellants had standing to appeal the HEPB Board's decision; (2) in requiring that the County's plan be modified to include a larger theater of at least 600 seats, contingent on fundraising of $20 million in 100 days; and (3) in requiring that the

exterior shell of the auditorium, along with certain interior elements, be preserved. These aspects of the City Commission's decision go beyond mere legal error and constitute "inherent illegalit[ies] or irregularit[ies] . . . perpetrated with disregard of procedural requirements, resulting in a gross miscarriage of justice." *Sucart*, 129 So. 3d at 1115. The latter two requirements are also infirm because the record below lacks any evidence to support them. *See Educ. Dev. Ctr.*, 504 So. 2d at 1386. And, the third requirement violates due process because it exceeded the scope of the City Commission's jurisdiction in this proceeding: rather than address whether the certificate of appropriateness at issue was consistent with the 2005 resolution designating the Playhouse, the City Commission essentially rewrote the 2005 designation to require preservation of the Playhouse interior, without going through an appropriate legal process to amend the scope of the governing designation. Each of these arguments is explored in turn below.

A. The City Commission Departed from the Essential Requirements of the Law in Finding that the HEPB Appellants had Standing to Appeal the Issuance of the Certificate of Appropriateness

The City Commission departed from the essential requirements of the law when it found that HEPB Appellants Barbara Lange and Katrina Morris established standing to appeal the HEP Board's decision. The HEPB Appellants are no differently situated than, and suffer no special injury distinct from, the 450,000 other

City of Miami residents who benefit from the City's preservation of historic buildings.

The City of Miami Code provides that "any aggrieved party," an undefined term, "may appeal to the city commission any decision of the [HEP] board on matters relating to designations and certificates of appropriateness[.]" Pet. App. Ex. D (Sec. 23-6.2(e), City Code).

In their appeal letter and again before the City Commission, the HEPB Appellants alleged that they are "aggrieved parties" because: they reside in Coconut Grove at 3901 Braganza Avenue and 1430 Lybyer Avenue, respectively; they "spoke and presented evidence at the April 4, 2017 HEP Board hearing"; and as County residents, they are impacted by the decision "due to the fact that Miami-Dade County has funded a portion of the project ($15 million) with monies from the 2004 Building Better Communities GOB and additional monies ($5 million) from the 2005 Convention Development Tax Bond[.]" Pet. App. Ex. I at 2.

At the appeal hearing, the City Attorney opined that the City Commission had the discretion to accord appellants standing, because "the code really doesn't define who an aggrieved party is," and both appellants live in "close proximity" to the Playhouse, which is "important to the community," and "they can attend the facility, . . . they want to see the facility preserved." Pet. App. Ex. B at 135-37. Following that opinion, the City Commission by unanimous vote found that the

HEPB Appellants had standing, as reflected in Resolution No. R-17-0622. Pet. App. Ex. L ("The City Commission finds that the Appellants have standing pursuant to Chapter 23 of the City Code due to their proximity to the Playhouse and specifically finds that the Appellants are aggrieved parties.").

The City Commission's decision to grant appellants standing is at odds with governing case law and, accordingly, departs from the essential requirements of the law. While the City Code does not define "aggrieved party," *see* Secs. 23-2, 23-6.2(e), Florida courts interpreting similar terms have held that being "aggrieved" or "adversely affected" requires the party to show a specific injury, such as a direct impact to the party's property or legal rights, and not just a "general interest" in the matter that is no greater than that of other residents. *See Renard v. Dade Cnty.*, 261 So. 2d 832, 837 (Fla. 1972) (standing requires "a definite interest exceeding the general interest in community good shared in common with all citizens"); *O'Connell v. Florida Dept. of Cmty. Affairs*, 874 So. 2d 673, 675 (Fla. 4th DCA 2004) ("a mere interest in a problem, no matter how longstanding the interest" is insufficient to render an appealing party "adversely affected or aggrieved") (internal citations omitted); *Pichette v. City of N. Miami*, 642 So. 2d 1165, 1166 (Fla. 3d DCA 1994) (appellants, who did not live adjacent to rezoned parcel, lacked standing because "there is no genuine issue raised by this record that [they] would be affected by noise, traffic impact, land value diminution, or in any other respect" by the rezoning).

Appellants failed to make the required showing to the City Commission because neither of them live adjacent to the Playhouse, or down the block, or even down the next one. Both live over a mile away, which means they experience no greater impact from alterations to the Playhouse property than any other residents in the City.

Nor does the fact that they provided public comment at the HEP Board hearing confer standing upon them. Again, they are in no different a position than the great number of other community residents who have spoken at hearings and public meetings regarding the Playhouse project. *See* Pet. App. Ex. G at 125-88; Pet App. Ex. B at 1-70 (collectively, more than 130 transcript pages of public comment regarding the County's application).

Finally, the use of bond funds is inapposite to standing on this regulatory historic preservation matter because the County's application only asked for approval of a building design, not for any funding for the project. Moreover, even if the use of bond funds could appropriately be considered here (which it cannot), the HEPB Appellants are simply taxpayers and not bondholders. Therefore, they would still have to show a special injury distinct from other taxpayers in the community—something they've failed to do here. *See Dep't. of Rev. v. Markham*, 396 So. 2d 1120, 1121 (Fla. 1981) ("a taxpayer may bring suit only upon a showing

of special injury which is distinct from that suffered by other taxpayers in the taxing district"); *Solares v. City of Miami*, 166 So. 3d 887, 888 (Fla. 3d DCA 2015).

At bottom, appellants have merely shown the same interest in the preservation of the Playhouse that is common to all other City residents. But a general interest in preserving a historic building, absent a specific injury to individual property values or rights, is insufficient to confer standing. *See, e.g.*, *Harris Trust & Sav. Bank v. Duggan*, 449 N.E.2d 69, 73 (Ill. 1983) (allegation that "issuance of a demolition permit would cause an immense and irreparable loss to the petitioners by destroying the Kellogg mansions' unique contribution to the cultural heritage and history of the City of Chicago" was insufficient to establish standing; petitioners failed to allege that demolition of those historic buildings would in itself decrease their property value and, as such, failed to show anything more than a "general interest" in preservation of the buildings); *Save Our Main Street Bldgs. v. Greene Cnty. Leg.*, 293 A.D.2d 907, 908-09 (N.Y. App. Div. 2002) (allegations that petitioners lived "in close proximity" to project that would alter their viewshed and character of historic district was insufficient to confer standing; "petitioners would not sustain the alleged visual impacts because their residences are not within sight of the Project and, as a result, any adverse effects on scenic view would be no different for them than for the public at large"); *Preservation Alliance of Savannah, Inc. v. Norfolk So. Corp.*, 413 S.E.2d 519, 521 (Ga. Ct. App. 1991) (historic preservation association

did not own property that would be affected by owner's demolition of pre-Civil War warehouses and, therefore, lacked standing to enjoin the demolition).

The City Commission nonetheless granted standing on a more liberal definition of "aggrieved party" than case law recognizes. It was not permitted to do so. In *Chabau v. Dade County*, 385 So. 2d 129 (Fla. 3d DCA 1980), a neighborhood association appealed a decision granting a developer's request for variances to the Board of County Commissioners, alleging that it was an "aggrieved party" within the meaning of Section 33-313 of the County Code, which at that time provided:

> Any appealable decision of the zoning appeals board may be appealed by an applicant, governing body of any municipality, if affected, or ***any aggrieved party*** whose name appears in the record of the zoning appeals board.

Sec. 33-313 of the County Code (1979) (emphasis supplied). There, as here, the Code did not define the term "aggrieved party." The neighborhood association argued that "if it is not 'aggrieved' sufficiently to have state court standing, it nevertheless is aggrieved for purposes of review by the Board of County Commissioners." *Chabau*, 385 So. 2d at 130. But the Third District Court of Appeal disagreed, explaining:

> Although the appellees have referred us to two foreign decisions in which the requirement of aggrievement was lowered to facilitate administrative appeal by representative groups, we are not disposed to embrace their holdings. ***If Dade County wishes to liberalize access to its local tribunals, it may undertake to do so.***

Id. (citations omitted; emphasis supplied).

Thus, absent an express provision in the local government's code setting forth a more liberal standard—which does not exist here—the same rules that govern standing in state court also govern whether a party is "aggrieved" in proceedings before the local government's decision making body. *See id.* The City Commission therefore departed from the essential requirements of the law when it "liberalize[d] access to its local tribunal[]," *id.*, without express authority in the City Code to do so, in effect allowing this appeal to proceed when it otherwise should not have.

B. The Condition that the Restored Playhouse Have at Least 600 Seats, Contingent on an Additional $20 Million Pledged within 100 days, Departs from the Essential Requirements of the Law, is Arbitrary, and is Unsupported by Substantial Competent Evidence

The City Commission departed from the essential requirements of the law when it imposed an arbitrary condition mandating that the restored Playhouse have at least 600 seats, and compounded the arbitrariness when it made that condition contingent upon the pledging of an additional $20 million within 100 days. The condition also lacks any evidentiary support in the record.

The Resolution provides, "The theater portion of the Playhouse shall be developed with a minimum of six hundred (600) seats, which number of seats, while it presents a compromise and reduction from the traditional seating, is more in keeping with the historic number of seats in effect during the active operations of the Playhouse as a renowned and celebrated Theater." Pet. App. Ex. L.

In truth, there is nothing about the number 600 that is "in keeping with the historic number of seats" in the theater during its heyday. The record evidence is exactly to the contrary, as Michael Spring explained when the condition was presented:

> I would point out to you that 600 seats has nothing to do with the historic nature of this building. The building opened as a movie theater in 1927 with 1100 seats. And as you heard testimony today, that seat count changed over the years and it was never 600 seats. And so I'm unclear about what 600 seats has to do with the issue before you tonight, which is the historic preservation appeal.

Pet. App. Ex. B at 164-65. Earlier in the appeal hearing, Jorge Hernandez had similarly testified that "[t]here were 1,100 seats in Kiehnel's original theater," and then 800 seats after the theater was compressed by Parker's work, with the number restored again to 1,100 between two levels when the mezzanine was subsequently added.[4] *Id.* at 107.

The record is devoid of any facts tethering the 600-seat requirement to historic preservation or to the historic number of seats in the theater. And tying the 600 seats to a funding issue—which is completely unrelated to the historic preservation matters at issue here—simply emphasizes the arbitrariness of the condition. Indeed, fundraising for some larger theater that the County never asked for, and that has no

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[4] While the governing designation report counted 1,500 seats in the original unmodified theater (*see* Pet. App. Ex. A at 8), 600 seats is nowhere in the ballpark of either 1,100 or 1,500 and, thus, lacks any basis in the record.

mooring to historic preservation, is far afield from the City Commission's proper purview in this matter: that is, determining, based on the 2005 designation, whether the County is entitled to a certificate of appropriateness to proceed with its plan to rehabilitate the Playhouse.

The Third District Court of Appeal has previously admonished against this type of arbitrary line-drawing in a quasi-judicial proceeding. In *Village of Palmetto Bay v. Palmer Trinity Private School, Inc.*, 128 So. 3d 19, 24 (Fla. 3d DCA 2012), a school sought a special exception to increase student enrollment from 600 to 1,150, but the village council capped the number at 900, without any evidence in the record to support that number. On appeal, the school argued that the 900-student cap was arbitrary and unsupported, and that it constituted a departure from the essential requirements of the law. The circuit court appellate division agreed, issuing a writ of certiorari and finding that the village council was not at liberty to arbitrarily impose a cap on the number of students, and the Third District Court of Appeal subsequently acknowledged and concurred in that result. *Id.* at 25-26.

Similarly, in *Jesus Fellowship v. Miami-Dade County*, 752 So. 2d 708 (Fla. 3d DCA 2000), the County Commission approved a church's zoning request to permit a private school and daycare facility, but limited the number of students to 150 as a result of a "suggestion" by the opponents' attorney after the close of the evidentiary hearing, even though County staff had recommended approval of 524

students. The Third District Court of Appeal ultimately quashed the decision, finding that "[n]owhere in the hearing record does there appear any evidence relating to the restriction to . . . 150 students." *Id.* at 710-11.

The same result is required here. In imposing the 600-seat requirement contingent on fundraising of $20 million in 100 days, the City Commission acted arbitrarily and in derogation of the record evidence, and departed from the essential requirements of the law.

C. The Condition that the Playhouse Structure, Including Certain Interior Elements, be Preserved in its Entirety Violates Due Process, Departs from the Essential Requirements of the Law, and is Unsupported by Substantial Competent Evidence

The City Commission violated due process, departed from the essential requirements of the law, and acted contrary to the undisputed record evidence in requiring that the exterior shell of the Playhouse auditorium, along with certain interior elements, be preserved in their current locations.

The County's conceptual master plan for the Playhouse project calls for fully restoring the architecturally-significant, iconic front building and replacing the existing dilapidated auditorium with a new state-of-the-art theater that respects the history of the site and that incorporates, in the footprint of the original theater's crescent-shaped lobby, a courtyard and breezeway that is more welcoming to, and compatible with, the surrounding community. Moreover, the County committed to the HEP Board, and again to the City Commission, that it would survey the interior

and incorporate into the new auditorium as many of the distinctive features, such as the double proscenium arch, as it could. Pet. App. Ex. B at 111-12.

But the City Commission took it upon itself to require more: that the entire existing auditorium, including certain interior elements in their original locations, be saved too. That requirement is inconsistent with the governing historic designation report and is beyond the scope of the City Commission's authority in this proceeding.

It is indisputable that the 2005 historic designation encompasses the entire site, and not just the iconic front building; that is reflected in the designation report's description of the property boundaries. Pet. App. Ex. A at 4. But it is also equally clear that a designation does not include interior areas, unless the designation report expressly provides otherwise; and the City Code states that unless precisely described therein, interior spaces are not deemed part of the designation. Pet. App. Ex. D (Sec. 23-4(c)(2)(c), City Code) ("Interior spaces not so described [in the designation report] shall not be subject to review[.]"); *see also* Pet. App. Ex. B at 202 (Assistant City Attorney advising that "[t]he code does provide that interiors are designated when it's specifically included in the designation report, otherwise not").

Here, the 2005 designation did not include the interior elements of the Playhouse. The designation report concluded that "[o]nly the south and east facades possess architectural significance." Pet. App. Ex. A at 14. It did not find that the

auditorium shell, or the interior of that shell, were architecturally significant and subject to historic designation. The Assistant City Attorney further confirmed that the 2005 designation did not include the interior spaces of the Playhouse and that the designation may not be amended in this proceeding to include such spaces. Pet. App. Ex. B at 202-04. Rather, any such amendment would have to occur in a separate proceeding that adheres to the processes set forth in the City Code. Pet. App. Ex. D (Sec. 23-4(c)(8), City Code) ("The [HEP] board may amend any designation by following the same procedures set forth in this section [pertaining to historic site designations].").

Nevertheless, the City Commission decided to do indirectly in this proceeding that which it could not do directly: require preservation of the interior of the Playhouse. A review of the relevant portion of the motion makes plain that the condition requiring preservation of the exterior shell of the auditorium was just a proxy to accomplish that end:

> Obviously, interior preservation of the Solomonic columns. The proscenium, the various fixtures as was intended, but ***the goal is to preserve more so [of] the interior structure where all the magic happened***. . . . So in this particular case, if we're trying to preserve the original shell, those items will simply stay where they are or, you know, be restored in place. . . . ***[W]e're just elevating the level of preservation by keeping it in the original structure***.

Id. at 142-43, 150-51, 156-57 (emphasis supplied).

Indirectly requiring the County to preserve the interior in its current configuration and location is problematic on several levels. First, it violates due process. Due process in a quasi-judicial hearing is generally satisfied if the parties are provided notice of the relevant hearing and what will occur there, and an opportunity to be heard in the proper forum. *See Jennings*, 589 So. 2d at 1340; *Seminole Entm't, Inc.*, 811 So. 2d at 696. But a forum is not proper if the matters being decided exceed the parameters of the noticed hearing, and are beyond the scope of what the Code allows. *Connell*, 932 So. 2d at 444.

As noted above, to preserve the Playhouse's interior spaces, the designation report from 2005 would have to be amended. And to amend a designation report, the City Code requires that certain procedures be followed. As the Assistant City Attorney explained:

> The code does provide that interiors are designated when it's specifically included in the designation report, otherwise not. And the procedures for designating are also set forth in the code. Specifically, you have to go through the same process as you do in the original designation. That's what's in the code. That's what's required. You have to give notices. You have to have someone moving for it.

Pet. App. Ex. B at 202-04. Here, that process was not followed.

Rather, all of the relevant proceedings concerned a certificate of appropriateness, which is governed by and subject to a preexisting designation resolution. Amending the governing designation is thus inherently beyond the scope of a proceeding in which that designation is being applied. Accordingly, because

the City exceeded the scope of the advertised proceeding, thereby failing to provide adequate notice and opportunity to be heard in the proper forum on the proper application, the City failed to accord due process.

Along similar lines, the condition also deviates from the essential requirements of the law, because the City Commission is not permitted to indirectly bootstrap preservation of the interior into this appeal of a certificate of appropriateness. The City Code simply does not allow for it, as explained above.

Finally, the condition is unsupported by substantial competent evidence. There is no evidence in the record that the exterior shell of the auditorium bears any historical architectural significance. In fact, all of the evidence is to the contrary: there is nothing particularly special about the exterior shell itself. *See* Pet. App. Ex. A at 14 ("Only the south and east facades possess architectural significance."); Pet. App. Ex. B at 111 (only the historic front building retains historical integrity); *id.* at 142 ("the exterior of the back building is nothing to write home about"). The significance it bears comes from what happened ***on the inside***, "where all the magic happened," as stated in the motion. *Id.* at 142-43, 150-51. Thus, there was no evidence to reverse the HEP Board's approval of demolishing and reconstructing the theater behind the iconic front building; rather, this condition appears to be just a proxy for impermissibly expanding the scope of the governing designation.

In sum, the resolution on its face requires that certain interior elements of the Playhouse be preserved, and that alone is impermissible. Pet. App. Ex. L ("The [County] shall protect, restore, and maintain the Solomonic Columns, Proscenium Arches, and Cherubs currently present ***in the interior*** of the Playhouse.") (emphasis supplied). What's more, the language of the motion itself shows that the condition requiring preservation of the exterior shell of the auditorium was merely an end-run used to save the interior. As such, the condition is infirm and cannot stand.

IV. Conclusion

Because the City exceeded the scope of its authority in this certificate of appropriateness proceeding to impermissibly rewrite the governing designation, and thereby failed to accord due process, observe the essential requirements of the law, or base its decision on substantial competent evidence, this Court should issue a writ of certiorari and quash the decision of the Miami City Commission below.

Dated: February 1, 2018

Respectfully Submitted,

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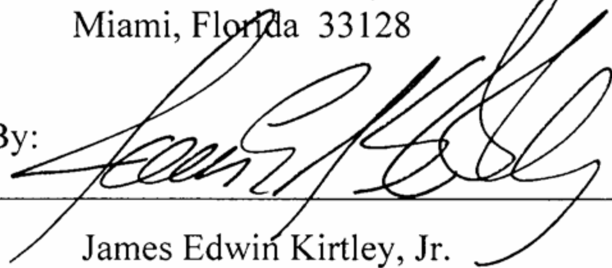

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Certificate of Service

I certify that a true and correct copy of this ***Petition for Writ of Certiorari*** was served upon the counsel listed below via regular mail and electronic mail, on February 1, 2018:

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Certificate of Compliance Regarding Computer Briefs

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

Assistant County Attorney

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

APPELLATE DIVISION
CASE NO. 18-000032-AP 01

L.T. CASE No.
City of Miami Resolution No. R-17-0622

MIAMI-DADE COUNTY,

Petitioner,

v.

CITY OF MIAMI,

Respondent.

_________________________________/

MIAMI-DADE COUNTY'S REPLY BRIEF

Miami-Dade County, Florida (the "County") hereby submits this brief in reply to the City of Miami's Response to Petition for Writ of Certiorari.

I. The HEPB Appellants Lacked Standing Below

In its petition, the County argues that the City Commission departed from the essential requirements of the law when it found that Barbara Lange and Katrina Morris (the "HEPB Appellants") had standing to appeal to the City Commission the HEP Board's decision granting the County's application for a certificate of appropriateness. Pet. at 22-28.[1]

[1] Citations herein to "Pet." refer to *Miami-Dade County's Petition for Writ of Certiorari*, while "Pet. App." refers to the County's *Appendix to Petition for Writ of Certiorari*, both of which were filed together on February 1, 2018.

The City responds that the HEP Appellants had standing and constitute "aggrieved part[ies]" within the meaning of the City Code because they are homeowners who live in "close proximity" to the Playhouse and Ms. Lange is also "a member of several neighborhood associations concerned with historic preservation in [C]oconut [G]rove and has long-standing involvement in these [historic preservation] issues." Resp. at 24.[2]

But Florida courts have held that being "aggrieved" or "adversely affected" for purposes of standing requires a party to show a specific injury, such as a direct impact to the party's property or legal rights, and not just a "general interest" in the matter that is no greater than that of other residents. *See Renard v. Dade Cnty.*, 261 So. 2d 832, 837 (Fla. 1972); *O'Connell v. Florida Dept. of Cmty. Affairs*, 874 So. 2d 673, 675 (Fla. 4th DCA 2004); *Pichette v. City of N. Miami*, 642 So. 2d 1165, 1166 (Fla. 3d DCA 1994).

The City does not contend that the HEPB Appellants have made the showing necessitated by this case law, nor could it.[3] Instead, the City contends that the City

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[2] Citations herein to "Resp." refer to *City of Miami's Response to Petition for Writ of Certiorari*, filed on June 1, 2018.

[3] Living more than a mile away from the Playhouse and having a general interest in historic preservation is insufficient to establish a specific injury; the HEPB Appellants have not shown, by virtue of where they live and what they've done, that they are situated any differently, and have suffered any greater injury, than other residents of the City living in Coconut Grove. *See* Pet. at 25-26 (citing cases).

Commission was entitled to construe its Code more liberally to find that the HEPB Appellants had standing notwithstanding such case law, and that the City's interpretation of its own Code is entitled to deference. Resp. at 25.

But, as the County explained in its petition, absent an express provision in the City Code setting forth a more liberal standard—which does not exist here—the same rules that govern standing in state court also govern whether a party is "aggrieved" in proceedings before the local government's decision making body. *See Chabau v. Dade County*, 385 So. 2d 129 (Fla. 3d DCA 1980).[4] Any contrary interpretation is therefore not reasonable and, as such, not entitled to deference. *See Legal Envtl. Assistance Found., Inc. v. Bd. of Cty. Comm'rs of Brevard Cty.*, 642 So. 2d 1081, 1084 (Fla. 1994) ("When an agency's construction amounts to an unreasonable interpretation, or is clearly erroneous, it cannot stand."); *Town of Longboat Key v. Islandside Prop. Owners Coal., LLC*, 95 So. 3d 1037, 1042 (Fla. 2d DCA 2012) ("As the wording of its laws binds a legislature, the Town is bound by the wording of its Code").

Accordingly, the City Commission departed from the essential requirements of the law when it concluded, contrary to applicable case law and the wording of its Code, that the HEPB Appellants had standing as "aggrieved part[ies]" below.

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[4] The City does not argue that *Chabau* is inapplicable here; it simply ignores the case. Resp. at 23-25.

II. The City Commission's Arbitrary Condition that the Restored Playhouse Have at Least 600 Seats, Contingent on an Additional $20 Million Pledged within 100 days, Departs from the Essential Requirements of the Law, is Unsupported by Substantial Competent Evidence, and is Also Now Moot

As the County argues in its petition, the City Commission departed from the essential requirements of the law when it imposed an arbitrary condition mandating that the restored Playhouse have at least 600 seats, and compounded the arbitrariness when it made that condition contingent upon the pledging of an additional $20 million within 100 days. The condition also lacks any evidentiary support in the record.

In response, the City maintains that the condition is not contrary to law and fact because 600 seats is closer to the number originally in the theater than the 300 seats proposed by the County. Resp. 28-29. But the theater never had 600 seats, and the record evidence does not support any such requirement. To the contrary, the uncontested record evidence is that the theater started out with 1,100 to 1,500 seats, and later housed between 800 and 1,100 seats during the course of its operation. Pet. App. Ex. A at 8; Pet. App. Ex. B at 107. When the City Commission raised the possibility of the condition during its deliberations below, the County specifically advised that "600 seats has nothing to do with the historic nature of this building." *Id.* at 164-65. Faced with such evidence, the City Commission was not at liberty to arbitrarily impose a 600-seat requirement on the County, contingent on sufficient

fundraising within a time certain. *See Jesus Fellowship v. Miami-Dade County*, 752 So. 2d 708 (Fla. 3d DCA 2000); *Village of Palmetto Bay v. Palmer Trinity Private School, Inc.*, 128 So. 3d 19, 24 (Fla. 3d DCA 2012).[5]

The City nevertheless contends that record evidence shows the 300-seat theater proposed by the County was itself inconsistent with the historic designation and that therefore "the [City] Commission could have denied the certificate of appropriateness outright, or required a minimum of 1500 seats[,] which was the original capacity."[6] Resp. at 29. Fair enough. But that's not what the City Commission did here. Instead, it did what it could not do: arbitrarily pick an alternative number with no evidentiary support in the record and then tie it to a fundraising contingency unrelated to historic preservation.

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[5] The City unavailingly argues that *Jesus Fellowship* and *Palmer Trinity* are not on point because: first, in those cases there was no substantial competent evidence to support the decisions made, while there is record evidence to support the 600-seat requirement here; and second, those cases involved zoning applications for special exceptions, whereas this case involves an application for certificate of appropriateness. As explained above, however, there is no more evidentiary support for the 600-seat requirement in this case than there was for the arbitrary student caps imposed in those cases. That each of those cases involved an application for special exception, rather than a certificate of appropriateness, is also irrelevant. Both types of applications are decided in quasi-judicial proceedings in which the decision reached must be supported by substantial competent evidence in the record, and in both of those cases—as here—such evidence was lacking.

[6] Although the theater did not originally house 300 seats, the County's plan to rehabilitate the Playhouse was supported by the City's historic preservation staff and approved by the HEP Board because it honors the historic nature of the site and respects historic spatial relationships within it. Pet. at 15-16.

Indeed, imposing the fundraising contingency went well beyond the City Commission's proper purview in this matter, as it has nothing to do with historic preservation and whether, based on the governing 2005 designation, the County is entitled to a certificated of appropriateness to carry out its plan to rehabilitate the Playhouse. Pet. 29-30

Notably, the City does not defend the fundraising contingency in its response. Instead, the City argues only that the County may not challenge the fundraising contingency because it was included to "defray any economic burden on the County" of adding additional seats and that the contingency thus inures to the County's benefit. *Id.* at 29-30 (citing *Clear Channel Communications, Inc. v. City of North Bay Village*, 911 So. 2d 188 (Fla. 3d DCA 2005), for the proposition that "[t]he County may not challenge a condition that inures to its benefit").[7]

But it is puzzling to think that the fundraising contingency would benefit the County when it is inextricably tied to the baseless and unsupported condition requiring the County to build a 600-seat theater that it never asked for. Moreover, how the County would receive or be able to use the $20 million for its plan to restore

[7] *Clear Channel* is inapposite to these facts. It did not concern whether a condition to a local government's quasi-judicial decision may be challenged where it purportedly inures to the appellant's benefit. Instead, the case was about preservation of error for appellate review and, in that context, the Third District Court of Appeal remarked that "[a]ppellate review is confined to issues decided adversely to appellant's position, or issues that were preserved with a sufficiently specific objection below." *Clear Channel Commc'ns, Inc.*, 911 So. 2d at 189-90.

the Playhouse remains a mystery, as the City did not specify as much in its resolution.

In any event, the 600-seat condition is now moot because the fundraising contingency was not satisfied in the time allowed. Conditions a. and c. of the City's resolution provide:

> a. The [t]heatre portion of the Playhouse shall be developed with a minimum of six hundred (600) seats, which number of seats, while it presents a compromise and reduction from the traditional seating, is more in keeping with the historic number of seats in effect during the active operations of the Playhouse as a renowned and celebrated [t]heatre. ***This subsection is subject to the funding contingency stated in subsection c below. If the funding is not timely and fully obtained as required by subsection c below, the [t]heatre seating will automatically revert to not less than three hundred (300) seats.***
>
> * * *
>
> c. If, ***by March 24, 2018***, a minimum of $20,000,000.00 is not pledged for the larger, 600-seat [t]heater, as ***shown by existing funds (cash or equivalent) in customary financial documents to the satisfaction of the City Manager or his designee***, then this subsection and subsection a [requiring that the theater be developed with a minimum of 600 seats] shall automatically [s]unset and be of no further force and effect and will be ***deemed void due to failure to have that required funding secured***. The [t]heater portion of the Playhouse shall then be developed with a minimum of three hundred (300) seats.

Pet. App. Ex. L (Res. No. R-17-0622) (emphasis supplied).

By correspondence dated March 28, 2018, the County inquired of the City whether the funding contingency had been satisfied and thereafter made a public

records request pursuant to Chapter 119, Florida Statutes, for all records received by the City regarding satisfaction of the funding contingency, including:

> copies of all documents received by the City Manager, the City Manager's designee, [the City Attorney's] office, or any other applicable City department or official concerning whether "a minimum of $20,000,000.00 is . . . pledged for the larger, 600-seat [t]heatre, as shown by existing funds (cash or its equivalent) in customary financial documents."

See Ex. A hereto. In response, the City advised that "[it] does not have any documents responsive to this request," meaning that the fundraising contingency was not timely (or, heretofore, even untimely) satisfied. *Id.* Accordingly, as stated in the resolution, the condition requiring the restored Playhouse to have at least 600 seats, contingent on an additional $20 million pledged within 100 days, is "of no further force and effect and will be deemed void[.]" Pet. App. Ex. L.

III. The Condition that the Playhouse Structure, Including Certain Interior Elements, be Preserved in its Entirety Violates Due Process, Departs from the Essential Requirements of the Law, and is Unsupported by Substantial Competent Evidence

The City attempts to justify the condition that the theater auditorium, including certain interior elements, be preserved in its entirety by pointing out that the 2005 historic designation of the property included the entire site and the entire Playhouse structure. Resp. at 31-33. But the County has not argued otherwise; as stated in the petition: "[i]t is indisputable that the 2005 historic designation

encompasses the entire site, and not just the iconic front building; that is reflected in the designation report's description of the property boundaries." Pet. at 32.

But it is equally clear that a designation does not include interior areas, unless the designation report expressly provides otherwise; and the City Code states that unless precisely described therein, interior spaces are not deemed part of the designation. Pet. App. Ex. D (Sec. 23-4(c)(2)(c), City Code) ("Interior spaces not so described [in the designation report] shall not be subject to review[.]"); *see also* Pet. App. Ex. B at 202 (Assistant City Attorney advising that "[t]he code does provide that interiors are designated when it's specifically included in the designation report, otherwise not").

In this case, the 2005 designation report did not precisely describe or include any interior elements of the Playhouse; hence, the interior elements were not part of the designation. Indeed, the governing designation report did not find that either the entirety of the interiors or the exterior shell of the Playhouse auditorium were architecturally significant. As detailed in the County's petition, the undisputed record evidence is that the exterior shell of the Playhouse auditorium ***lacks*** architectural significance. Pet. at 35.

And proving true the adage that a picture is worth a thousand words, photographs of the exterior shell included in Arquitectonica's presentation to the

HEP Board below show why this is so—the exterior shell is just a dilapidated, nondescript gray box:

See Ex. B hereto.

While a designation may be later amended to include interior elements, the City Code requires the same designation process to be followed that was used in the first instance to designate the building. Pet. App. Ex. B at 202-04. But here, it wasn't. Instead, the City Commission decided to do indirectly in the hearing below that which it could not do directly: require preservation of the interior of the Playhouse in the course of this certificate of appropriateness proceeding.[8]

[8] By the way, the City's own HEP Board—comprised of board members appointed for their historic preservation expertise and fluency—rejected a suggestion that the designation report should be amended to include the Playhouse

The City Commission's resolution nevertheless states that "[t]he [County] shall protect, restore, and maintain the Solomonic Columns, Proscenium Arches, and Cherubs currently present ***in the interior*** of the Playhouse." Pet. App. Ex. L. (emphasis supplied). Thus, on its face, the resolution violates due process and fails to hew to the essential requirements of the law because it requires preservation of the interior in derogation of the City Code process required to amend a designation. While the County committed to the HEP Board, and again to the City Commission, that it would survey the interior and incorporate into the new auditorium as many of the distinctive features, such as the double proscenium arch, as it could, *see* Pet. App. Ex. B at 111-12, the City Commission took it upon itself to require more: that the entire existing auditorium, including certain interior elements ***in their original locations***, be saved too.

Compounding the error, the language of the motion embodied in the resolution shows that the condition requiring preservation of the exterior shell of the auditorium was merely a proxy to save the Playhouse interior. Pet. App. Ex. B at 142-43, 150-51, 156-57 ("So in this particular case, if we're trying to preserve the original shell, those [interior] items will simply stay where they are or, you know,

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interiors when the matter was raised below. *See* Pet. at 10 (HEP Board member's motion to deny the County's application because "this Board should be involved with the interiors of the Playhouse," and "the Designation Report from 2004 [sic] should be modified," died for lack of a second).

be restored in place. . . . ***[W]e're just elevating the level of preservation by keeping it in the original structure***."). Again, that requirement is inconsistent with the governing historic designation report and is beyond the scope of the City Commission's authority in this proceeding. Pet. at 31-32.

To make the City Commission's action seem less infirm, however, the City points to U.S. Secretary of the Interior Standards and the standards in its Code that speak to the importance of respecting the entire site of a historically designated property and effecting a minimal amount of change when permission to alter a site is sought. Resp. at 33-34. But those requirements do not license the City Commission to ignore its Code requirements pertaining to designation of the interior, as discussed above.

Finally, the City cites record expert testimony from Steven Avdakov and Richard Heisenbottle to show that the City Commission's decision to preserve the shell of the auditorium and certain interior elements is supported by substantial competent evidence. *Id.* at 35. Both experts testified that the Playhouse draws historical significance from "the entire building, not just certain components of the building," and that the theater auditorium and its interiors bear historical significance. *Id.*

But rather than support the City Commission's action, such testimony in fact cuts the other way. In the hearing below, Heisenbottle recognized that the interior

of the theater is beyond the scope of the subject application, because it was not protected when the Playhouse was designated in 2005, arguing instead that the original designation report should be amended to include the interior. Pet. App. Ex. B at 80-83. Heisenbottle thus recognized that amending the governing designation through the proper process to include the Playhouse interior elements would be a necessary prerequisite to requiring the County to preserve those elements here. Far from supporting what the City Commission did in this proceeding, then, the cited testimony actually highlights the City's error: requiring interior preservation when the governing designation does not support it, and in contravention of the Code-mandated processes for amending a governing designation to include it.

Conclusion

Because the HEP Appellants lacked standing below, this Court should issue a writ of certiorari and quash the City Commission's decision on that ground alone.

But even if the appeal had been properly before the City Commission below, the decision it reached is infected by conditions that violate due process, fail to hew to the essential requirements of the law, and are unsupported by substantial competent evidence. Even though the County has only objected to certain conditions of the decision below, the Court may not simply strike out the offending conditions or portions of the decision under review. Instead, the Court must issue the writ and quash the decision below in its entirety, "leav[ing] the subject matter, that is, the

controversy pending before the [City Commission], as if no order or judgment had been entered" below. *Tamiami Trail Tours v. R.R. Com'n*, 174 So. 451, 454 (Fla. 1937). "The appellate court has no power when exercising its jurisdiction in certiorari to enter a judgment on the merits of the controversy under consideration, nor to direct the respondent to enter any particular order or judgment." *Id.*; *see also Nat'l Adver. Co. v. Broward Cnty.*, 491 So.2d 1262, 1263 (Fla. 4th DCA 1986) (scope of review "is limited to denying the writ of certiorari or quashing the order reviewed"). Accordingly, the Court should grant the County's petition and quash the decision below in its entirety.

Dated: June 21, 2018

Respectfully Submitted,

ABIGAIL PRICE-WILLIAMS
Miami-Dade County Attorney
Stephen P. Clark Center
111 N.W. 1st Street, Suite 2810
Miami, Florida 33128

By: /s/ James Edwin Kirtley, Jr.

James Edwin Kirtley, Jr.
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Telephone: (305) 375-5151
Dennis A. Kerbel
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Telephone: (305) 375-5151
Assistant County Attorneys
Counsel for Miami-Dade County

Certificate of Service

I certify that a true and correct copy of this ***Reply Brief*** was served upon the counsel listed below via electronic mail generated by My Florida Courts E-Filing Portal, on June 21, 2018:

John A. Greco
Deputy City of Miami Attorney
jagreco@miamigov.com
Office of the City Attorney
444 S.W. 2nd Avenue, Suite 945
Miami, Florida 33130

/s/ James Edwin Kirtley, Jr.
Assistant County Attorney

Certificate of Compliance Regarding Computer Briefs

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

/s/ James Edwin Kirtley, Jr.
Assistant County Attorney

Exhibit A

Kirtley, Eddie (CAO)

From: Gibbs, Domini <DGibbs@miamigov.com>
Sent: Tuesday, May 29, 2018 11:51 AM
To: Kerbel, Dennis A. (CAO)
Cc: Rizo, Monica (CAO); Spring, Michael (Office of the Mayor); Kirtley, Eddie (CAO); Mendez, Victoria; Suarez-Rivas, Rafael; Greco, John A.; PublicRecords
Subject: RE: Miami-Dade County v. City of Miami (Coconut Grove Playhouse) (18-00032-AP-01): Coconut Grove Playhouse Appeal

This is an EXTERNAL email. Exercise caution. DO NOT open attachments or click links from unknown senders or unexpected emails. Please click here if this is a suspicious message reportspam@miamidade.gov Enterprise Security Office

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Good morning Mr. Kerbel,

The City of Miami does not have any documents responsive to this request. As such, this public records request will be closed accordingly.

Thank you,

Domini Gibbs

Assistant City Attorney

City of Miami Office of the City Attorney
444 S.W. 2nd Avenue
Miami, Florida 33130
Telephone: 305-416-1811
Facsimile: 305-416-1801
DGibbs@miamigov.com

Deborah Bailey, Litigation Assistant, (305)416-1827

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Please consider the environment before printing this e-mail.

From: Greco, John A.
Sent: Wednesday, May 23, 2018 5:53 PM
To: Kerbel, Dennis A. (CAO) <Dennis.Kerbel@miamidade.gov>; PublicRecords <PublicRecords@miamigov.com>; Gibbs, Domini <DGibbs@miamigov.com>
Cc: Rizo, Monica (CAO) <Monica.Rizo@miamidade.gov>; Spring, Michael (Office of the Mayor) <Michael.Spring@miamidade.gov>; Kirtley, Eddie (CAO) <Eddie.Kirtley@miamidade.gov>; Mendez, Victoria

<VMendez@miamigov.com>; Suarez-Rivas, Rafael <RSuarez-Rivas@miamigov.com>
Subject: RE: Miami-Dade County v. City of Miami (Coconut Grove Playhouse) (18-00032-AP-01): Coconut Grove Playhouse Appeal

Hi Dennis, I am forwarding to ACA Domini Gibbs who handles Public Records requests.

John A. Greco, Deputy City Attorney

Board Certified, Appellate Practice
City of Miami Office of the City Attorney
Telephone: 305-416-1850
Facsimile: 305-416-1801
jagreco@miamigov.com

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Please consider the environment before printing this e-mail.

From: Kerbel, Dennis A. (CAO) <Dennis.Kerbel@miamidade.gov>
Sent: Wednesday, May 23, 2018 2:14 PM
To: Greco, John A. <jagreco@miamigov.com>
Cc: Rizo, Monica (CAO) <Monica.Rizo@miamidade.gov>; Spring, Michael (Office of the Mayor) <Michael.Spring@miamidade.gov>; Kirtley, Eddie (CAO) <Eddie.Kirtley@miamidade.gov>; Mendez, Victoria <VMendez@miamigov.com>; Suarez-Rivas, Rafael <RSuarez-Rivas@miamigov.com>
Subject: RE: Miami-Dade County v. City of Miami (Coconut Grove Playhouse) (18-00032-AP-01): Coconut Grove Playhouse Appeal
Importance: High

John,

I left you a voicemail about this last Friday but have not heard back. It has now been almost 2 months since the passage of the March 24 deadline and since our first request for these materials. Accordingly, please consider this a public records request pursuant to Chapter 119, Fla. Stat., for all records received by the City regarding satisfaction of the "funding contingency" set forth in City of Miami Resolution No. R-17-622. In particular, but without limitation, we seek copies of all documents received by the City Manager, the City Manager's designee, your office, or any other applicable City department or official concerning whether "a minimum of $20,000,000.00 is . . . pledged for the larger, 600-seat Theatre, as shown by existing funds (cash or its equivalent) in customary financial documents."

Should you deny this request, or any part thereof, please state in writing the basis for the denial, including the exact statutory citation authorizing the denial. Please let me know by the end of this week when we can expect fulfillment of this request, and what the copying costs will be.

Please feel free to call me if you would like to discuss this further.

Thank you,
Dennis

From: Kirtley, Eddie (CAO)
Sent: Tuesday, April 10, 2018 1:57 PM
To: jagreco@miamigov.com; 'Suarez-Rivas, Rafael' <RSuarez-Rivas@miamigov.com>
Cc: Kerbel, Dennis A. (CAO) <Dennis.Kerbel@miamidade.gov>; Rizo, Monica (CAO) <Monica.Rizo@miamidade.gov>; Spring, Michael (Office of the Mayor) <Michael.Spring@miamidade.gov>; 'Lowell J. Kuvin, Esq.' <lowell@kuvinlaw.com>
Subject: RE: Miami-Dade County v. City of Miami (Coconut Grove Playhouse) (18-00032-AP-01): Coconut Grove Playhouse Appeal

Good afternoon Mr. Greco – I hope this finds you well. I am following up on the attached correspondence, dated March 28, 2018, to inquire when we may anticipate receiving your response? Thank you for your assistance with this matter.

Sincerely,

EDDIE KIRTLEY
Assistant County Attorney
Miami-Dade County Attorney's Office
111 NW First Street, 28th Floor
Miami, Florida 33128
Direct: 305.375.2066

From: Morillo, Wilma (CAO)
Sent: Wednesday, March 28, 2018 10:47 AM
To: 'jagreco@miamigov.com' <jagreco@miamigov.com>
Cc: Kirtley, Eddie (CAO) <Eddie.Kirtley@miamidade.gov>; 'rsuarez-rivas@miamigov.com' <rsuarez-rivas@miamigov.com>; 'lowell@kuvinlaw.com' <lowell@kuvinlaw.com>; Spring, Michael (Office of the Mayor) <Michael.Spring@miamidade.gov>
Subject: Coconut Grove Playhouse Appeal

Good morning,

Please see attached letter of today's date.

Wilma Morillo
Legal Assistant to County Attorneys
Joni A. Mosely, Assistant County Attorney
James Edwin "Eddie" Kirtley, Jr., Assistant County Attorney
Abbie Schwaderer-Raurell, Assistant County Attorney
Michael Mastrucci, Assistant County Attorney

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March 28, 2017

John A. Greco, Deputy City Attorney
City of Miami Office of the City Attorney
444 S.W. 2nd Avenue, Suite 945
Miami, Florida 33130
jagreco@miamigov.com

VIA ELECTRONIC MAIL

Re: Coconut Grove Playhouse Appeal

Dear Mr. Greco:

I hope this finds you well. I write in regards to conditions a. and c. of City of Miami Resolution No. R-17-0622, which provide as follows (emphasis supplied):

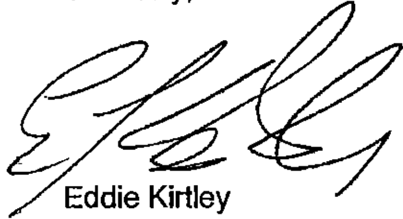
a. The Theatre portion of the Playhouse shall be developed with a minimum of six hundred (600) seats, which number of seats, while it presents a compromise and reduction from the traditional seating, is more in keeping with the historic number of seats in effect during the active operations of the Playhouse as a renowned and celebrated Theatre. ***This subsection is subject to the funding contingency stated in subsection c below. If the funding is not timely and fully obtained as required by subsection c below, the Theatre seating will automatically revert to not less than three hundred (300) seats.***

c. ***If, by March 24, 2018, a minimum of $20,000,000.00 is not pledged for the larger, 600-seat Theatre, as shown by existing funds (cash or its equivalent) in customary financial documents to the satisfaction of the City Manager or his designee, then this subsection and subsection a shall automatically Sunset and be of no further force and effect and will be deemed void due to failure to have that required funding secured.*** The Theatre portion of the Playhouse shall then be developed with a minimum of three hundred (300) seats.

As the March 24, 2018 deadline set forth in the conditions above has now passed, I am seeking the following information: whether any funding has been "pledged," pursuant to the conditions above; if so, how much funding has been "pledged," from what sources, and in what form; whether the City Manager or designee has determined the required contingencies set forth in conditions a. and c. to have been satisfied; and if not, whether the City deems those conditions to have "automatically Sunset[ted] and [to] be of no further force and effect and ... void," as stated in condition c. above.

Thank you for your assistance with this inquiry; I look forward to hearing back from you soon.

Sincerely,



Eddie Kirtley
Assistant County Attorney
Miami-Dade County

cc: Rafael Suarez-Rivas, Assistant City Attorney
Lowell J. Kuvin, Esq.
Michael Spring, Senior Advisor to the Mayor and
Director, Miami-Dade Department of Cultural Affairs

Exhibit B

EXSITING SITE CONDITION

VIEW 1

VIEW 2

VIEW 3

VIEW 4

VIEW 5

VIEW 6

VIEW 7

3043.0
ADDRESS
MIAMI, FL 33133

COCONUT GROVE PLAYHOUSE

ARCHITECT OF RECORD
ARQUITECTONICA
2900 Oak Avenue
Miami, Florida 33133

JORGE L. HERNANDEZ ARCHITECT

FISHER DACHS ASSOCIATES (FDA)

KIMLEY-HORN & ASSOCIATES, INC.

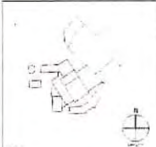
DOUGLAS WOOD & ASSOCIATES

FRAGA ENGINEERS, LLC

ARQUITECTONICA GEO

TALASKE

THE SPINNAKER GROUP



Date | Issued For

ARC Project No.: 3309
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Approved by: -

EXISTING
BUILDING
PHOTOGRAPHS

A0.4