NOT FINAL UNTIL DISPOSITON
OF TIMELY-FILED MOTION FOR
REHEARING OR CLARIFICATION

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

MIAMI-DADE COUNTY,
Petitioner,

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

v.

CITY OF MIAMI,
Respondent.
_____/

OPINION ON REMAND

Opinion filed: April 7, 2021

On Petition for Writ of Certiorari from City of Miami mayoral veto of City Commission Resolution R-19-0169

Abigail Price-Williams, Miami-Dade County Attorney and James Edwin Kirtley, Jr., Assistant County Attorney, for Petitioner

Victoria Méndez, City Attorney, John A. Greco, Deputy City Attorney, and Kerri L. McNulty, Senior Appellate Counsel, for Respondent

Before: TRAWICK, WALSH and ZAYAS, JJ.

WALSH, J.

On July 22, 2020, this Court issued an opinion dismissing Miami-Dade County's Petition for Writ of Certiorari challenging City of Miami ("City") Mayor Francis Suarez's veto of a resolution approving demolition and renovation of the

City's historic Coconut Grove Playhouse. We opined that a mayoral veto is not a quasi-judicial act and therefore, we lacked jurisdiction to address this petition for writ of certiorari. On a second-tier petition for writ of certiorari, the Third District Court of Appeal quashed our opinion and remanded this case with directions to reinstate the petition and for consideration of the merits. The court held:

> We conclude that the Mayor's veto is inextricably intertwined with the quasi-judicial proceedings, as his action was in response to a quasi-judicial proceeding. Thus, it was reviewable by the circuit court's appellate division, and the circuit court had jurisdiction to address the merits of the County's petition.

Miami-Dade County v. City of Miami, 2020 WL 7636006 at *7 (Fla. 3d DCA Dec. 23, 2020).

Accordingly, upon consideration of the mandate, we set aside the opinion and order of this court issued on July 22, 2020 and reinstate Miami-Dade County's Petition for Writ of Certiorari for consideration on the merits.

The Mayor of the City of Miami, Francis Suarez, vetoed a City of Miami Commission resolution quashing a decision by the Historical and Environmental Preservation Board ("HEPB"). Miami-Dade County (the "County") filed a petition for writ of certiorari to quash the Mayor's veto and reinstate the Commission's resolution approving demolition and renovation of the historic Coconut Grove Playhouse.

Historical Background of the Coconut Grove Playhouse

The City of Miami owns the historic Coconut Grove Playhouse ["Playhouse"], located on Main Highway in Coconut Grove. Miami-Dade County and Florida International University currently hold a lease on the Playhouse and seek to renovate the property. The current renovation plan, approved by the City Commission but vetoed by the Mayor, would demolish the theater, build new elements and a new, smaller theater, and retain only the historic façade and a few interior elements.

The Playhouse was designed in 1926 by the architectural firm of Kiehnel and Elliott and renovated and redesigned in 1955 by renowned architect Robert Browning Parker. (Resp. App. 19-36)[1] In 2005, the City of Miami initiated a process to designate the Playhouse as historic. The City of Miami Preservation Officer prepared a report to the HEPB in support of historic designation. In recommending historic designation of the Playhouse, the report relied upon three factors set forth in the City of Miami Code:[2]

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1 Both the City and the County have filed appendices. The Appendix to the County's Petition will be referred to by "Pet. App." And the Appendix to the City's Response will be referred to as Resp. App." The 2005 Report of the City of Miami Preservation Officer to the Historic and Environmental Preservation Board, the document which governs historical protection of the Playhouse, is included in the City's Appendix to the Response. (Resp. App. 19-36)

2 §§ 23-3, 23-4(c), City of Miami Code of Ordinances. Pursuant to Section 23-4, City of Miami Code of Ordinances, designation of a site as historic requires consideration of factors set by the United States Secretary of the Interior.

3. Exemplifies the historical, cultural, political, economical, or social trends of the community.

The Coconut Grove Playhouse exemplifies the historical, cultural economical, and social trends of Coconut Grove during the twentieth century, particularly the Boom and Bust cycles that characterize the history of Miami. The theater was built as the Coconut Grove Theater during the heyday of the 1920's real estate boom. Designed in a flamboyant "Spanish Baroque" style, the theater reflects the optimism and disposable wealth of Miami's citizens and the fascination with Mediterranean architectural precedents. Reborn in 1955 as the Miami's first live, legitimate theater, the Coconut Grove Playhouse evolved into one of the most important regional theaters in the country.

5. Embodies those distinguishing characteristics of an architectural style, or period, or method of construction.

The design of the Coconut Grove Playhouse embodies the Mediterranean Revival style, and featured a highly decorative entrance, enriched window surrounds, and decorative detail associated with the design. Despite a few alterations, the Playhouse still retains enough integrity to convey its original Mediterranean Revival style and still exhibits its major character-defining elements.

6. Is an outstanding work of a prominent designer or builder.

The Coconut Grove Playhouse is associated with two of South Florida's most prominent architects. Richard Kiehnel, who designed the original building, is considered one of South Florida's most outstanding architects. Kiehnel completed much of his work during the real estate boom of the 1920s, but also went on to make contributions into the 1930s and 1940s. As editor of the publication *Florida Architecture and the Allied Arts*, Kiehnel also influenced generations of new architects. Alfred Browning Parker is considered an outstanding living architect whose work is more aptly described as "Modernist." Parker remodeled the interior of the theater, dramatically changing its style from a highly decorative Mediterranean revival tour de force to a building that reflected the "clean," unornamented, geometrically defined architecture of the era to which he belonged.

(Resp. App. at p. 24); *See* Section 23-4 of the City of Miami Code of Ordinances.

Thus, Miami's decision to grant Historical Designation was based upon multiple factors, including the historical significance of the Playhouse, the architectural design of its original architect, Richard Kiehnel, and architect Alfred Browning Parker's subsequent 1950s "modernist" restyling of the theater. The 2005 Report also specifically defined "contributing structures" to include the **entire theater**, not merely the façade:

> **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. (emphasis added)

Id. at p. 26. Under the 2005 historical designation, while only the south and east facades possess *architectural* significance, the entire theater was designated based on "historical, cultural, political, economical, or social trends" as well as "distinguishing characteristics of an architectural style, or period."

The parties agree that the 2005 Historic Designation and its incorporated report of the preservation officer control whether any plan of demolition or renovation proposed by Miami-Dade County may be granted a certificate of appropriateness.

2017 First Certificate of Appropriateness

In 2017, Miami-Dade County applied for its first special certificate of appropriateness to the HEPB to develop the Playhouse. *See* § 23-6.2(b)(4), City of

Miami Code. The application set forth, in broad strokes, a "Masterplan Concept" for the Playhouse. It proposed to restore *only* the "entire front historic building to the original 1927 Kiehnel & Elliott design," and survey the remaining interior elements. The 2017 "Masterplan Concept" therefore proposed to retain only the front façade, demolish the theater, and build a new theater on the original footprint.

The 2017 staff analysis concluded that demolition of the theater was permissible because the 2005 historic designation report described only the "original Kiehnel structure containing the South and East facades" as requiring preservation. In so doing, the staff misapprehended that while only the South and East facades possessed *architectural* significance, the entire theater possessed *historical* significance. (Resp. App. at pp. 23-26). In reliance upon this faulty staff analysis, the HEPB approved this 2017 Certificate of Appropriateness.[3]

Listing on the National Register of Historic Places

In 2018, after the Certificate of Appropriateness was granted, the City of Miami applied for and obtained a listing for the Playhouse in the National Register

3 On a petition for writ of certiorari brought by city residents challenging this 2017 certificate of appropriateness, a panel of this Court held: (1) that residents had no standing to appeal and (2) the City of Miami violated due process by expanding the requirements of the certificate of approval because, in the prior panel's view, the interior of the theater was not designated as a historical structure. *Miami-Dade County v. City of Miami*, 26 Fla. L. Weekly Supp. 800b (Fla. 11th Cir. Ct. Dec. 3, 2018) ("*Playhouse I*"). Thus, in its opinion, a panel of this court relied upon the 2017 staff analysis which misconstrued the scope of the 2005 historical designation.

of Historic Places. In describing the historical significance of the interior, the report in support of the listing stated:

> While the levels of architectural integrity vary depending on the portion of the building examined, the Playhouse still retains a high degree of associative integrity with the events that occurred at that location.
> The theater's auditorium retains a high level of integrity from the period of significance associated with George Engles and Zev Buffman and the productions they coordinated and sponsored.
> * * *
> The Coconut Grove Playhouse retains to a high degree its integrity of feeling. The building clearly conveys a sense of early twentieth-century glamor, which Kiehnel and Elliott built and Parker maintained. While the interior has been altered and degraded, it still maintains its historic feeling as well.
>
> Overall Integrity
>
> The building retains sufficient integrity of location, setting, design, materials, workmanship, association and feeling for listing on the National Register of Historic Places.

These findings mirror the conclusions in the 2005 City of Miami Historic Designation.

Second Certificate of Appropriateness -- Current Demolition and Development Plan

In 2018, after approval by the planning and zoning board, the County applied again to the HEPB for a special certificate of appropriateness to develop the Playhouse. The County's new plan proposed to preserve only the front structure of the Playhouse, demolish the existing theater, build a new 300-seat theater and additional structures, attempt to preserve certain interior elements and redesign new

elements to echo the style of the original 1927 theater. After a hearing, the HEPB denied this application.[4]

On appeal, the City of Miami Commission reversed the denial and granted the Certificate of Appropriateness in a 3-2 vote in Resolution R-19-0169—Coconut Grove Playhouse Appeal.

Mayoral Veto and *Ex Parte* Communications

In the 10-day period between the City Commission passing resolution R-19-0169 and the mayoral veto, the City Mayor received and responded to *ex parte* email communications from members of the public. Most notably, on the day before the veto, Richard Heisenbottle, an interested witness before the HEPB hearing and City Commission hearings, emailed the Mayor with the following:

> Good morning Francis,
> Hope all is well.
> As the deadline is fast approaching, I took the liberty of drafting the attached Veto Message and suggested Compromise because I want you to know there is a profoundly strong intellectual and legal basis for you to exercise your Veto power and do what so many of us have asked you to do, Help Save the Coconut Grove Playhouse.
> Feel free to use any of this as you wish.
>
> Rich

4 The County argues that it was denied due process at the HEPB proceeding because of *ex parte* communications involving the chair of the HEPB, in addition to other due process challenges. Because our decision quashes the veto and reinstates the City Commission decision on the appeal from the HEPB, we decline to address these claims.

This message was flagged, and the Mayor forwarded it to his counsel. The attachment to Mr. Heisenbottle's email is not contained in the Petitioner's Appendix and therefore not in the record. It is unknown whether Mr. Heisenbottle's proposed veto language found its way into the Mayor's veto message.

On May 9, Martin Blaya wrote the Mayor:

> . . . . I, along with many, as evidenced by the turnout at yesterday's meeting, agree that we must preserve the few remaining historic structures in our City and that the County plan does not achieve that goal. . . . As pointed out by many yesterday, the original vote of the residents was to restore the entire exterior of the Playhouse, not just the front façade, and all of the historical designations include the entire exterior, not just the façade. The County has intentionally misrepresented the history of the vote, historic designations and its remodeling plan . . . .

The Mayor responded to this email requesting Mr. Blaya's cell phone and flagged and forwarded the message to staff.

On May 9, Joe Cardona emailed the Mayor,

> . . . [I]if there was ever a great time for a Mayoral veto – tis now (Coconut Grove Playhouse) . . . Giminez and his folks (Dennis Kerbel) came into the city and ran roughshod – making all kinds of unfounded accusations about the Historical Preservation Board, twisting reality and spewing half-truths . . . .

The Mayor requested Mr. Cardona's phone number and forwarded the email to staff.

In a May 13th email to the Mayor, Carmen Pelaez, who testified at the public hearing on the appeal to the City Commission, wrote:

> I'm an award winning playwright and actor and have performed my play RUM & COKE to sold out audiences at the Playhouse plus I got an off broadway run out of it. I am the EMBODIMENT of a stakeholder.
> * * *
> . . . I want to make sure you have the financial and legal coverage you need to take on this fight. I would love to come in and give you my specific points which I believe would be useful to you to substantiate a veto . . . .

In response, the chief of staff and the Mayor arranged for a group meeting with Ms. Pelaez and historic preservation experts.

On April 10, 2019 (before the City Commission appeal), Barry White wrote to all commissioners offering "an objective and in depth review of the issues involved." On the same day, the Mayor responded and asked if Mr. White would be interested in a discussion with his staff and policy people. On May 13 (after the commission vote and before the Veto), the Mayor directed his staff to note and schedule the meeting.

On May 17, 2019, the City of Miami Mayor vetoed the Commission's resolution. In his veto, the Mayor stated:

> We must uphold historic preservation requirements in our community, and the Coconut Grove Playhouse should be no exception. The Playhouse is "a signature building reflecting the heyday of Coconut Grove." *See* City of Miami Preservation Officer 2005 Report. The HEP Board recognized this fundamental truth and I seek to reinstate that decision.

Although initially opining that the appeal was premature, the Mayor reached the merits of the appeal:

> To the extent that the merits of the appeal could have been reached, my veto that seeks to affirm the HEP Board's decision is supported by competent and substantial evidence. Based on the record before the HEP Board and Commission, the County's proposal would jeopardize the National Register of Historic Places ("National Register") designation for the Coconut Grove Playhouse because the proposal is not consistent with the guidance provided by the Secretary of Interior's Standards for the Treatment of Historic Properties. . . . National Register provides significant benefits for designated properties, including but not limited to federal tax incentives, grant eligibility, and the prestige of the recognition.

The Mayor mentioned the possibility of delisting the Playhouse from the National Register, a "troublesome" outcome for the residents. The Mayor further stated, "[t]he County's current plan that cannibalizes the historic structure will not meet my approval." Finally, the Mayor concluded that the County's application is "fatally flawed because no request for demolition is included in the application of request" and the County would likely be unsuccessful in obtaining such a permit.

The County sought an override of this veto pursuant to Section 4(g)(5) of the City Charter which failed by a Commission vote of 3-2. The County then filed this petition seeking to quash the veto and restore the City Commission resolution.

Jurisdiction

We have jurisdiction to hear this petition for certiorari seeking to quash a mayoral veto:

> We conclude that the Mayor's veto is inextricably intertwined with the quasi-judicial proceedings, as his action was in response to a quasi-judicial proceeding. Thus, it was reviewable by the circuit court's

> appellate division, and the circuit court had jurisdiction to address the merits of the County's petition.

Miami-Dade County v. City of Miami, 2020 WL 7636006 at *7 (Fla. 3d DCA Dec. 23, 2020). *See also* Art. V, § 5(b), Fla. Const; *Haines City Community Development v. Heggs*, 658 So.2d 523, 530 (Fla. 1995), *citing De Groot v. Sheffield*, 95 So. 2d 912 (Fla.1957).

We apply a three-part standard of review to a petition for writ of certiorari challenging a final quasi-judicial order: (1) whether procedural due process was afforded; (2) whether the essential requirements of law have been observed; and (3) whether the findings and judgment are supported by competent substantial evidence. *Heggs*, 658 So. 2d at 530 (Fla. 1995); *Board of County Comm'rs of Brevard County v. Snyder*, 627 So. 2d 469, 476 (Fla. 1993); *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982).

Due Process Violation

During the 10-day period between the vote of the City Commission to override the decision of the HEBP Board and the May 17, 2019 Veto, the Mayor received and responded to several *ex parte* communications.[5] The most notable was the email

5 The *ex parte* email communications with the Mayor are contained in the Petitioner's Appendix at Volume 4, Exhibit Q.

from Richard Heisenbottle[6] offering proposed language to be used in the Veto Message.

In its opinion quashing our decision dismissing the petition, the Third District concluded, "we find that the veto of a quasi-judicial decision is still part of a quasi-judicial proceeding." *Id.* at *7. As a quasi-judicial decision, this mayoral veto is subject to the due process requirements set forth in *Jennings v. Dade County*, 589 So. 2d 1337, 1340 (Fla. 3d DCA 1991). In *Jennings*, the Court explained:

> Ex parte communications are inherently improper and are anathema to quasi-judicial proceedings. Quasi-judicial officers should avoid all such contacts where they are identifiable. However, we recognize the reality that commissioners are elected officials in which capacity they may unavoidably be the recipients of unsolicited ex parte communications regarding quasi-judicial matters they are to decide. The occurrence of such a communication in a quasi-judicial proceeding does not mandate automatic reversal. . . . Upon the aggrieved party's proof that an ex parte contact occurred, its effect is presumed to be prejudicial unless the defendant proves the contrary by competent evidence. § 90.304.

The *ex parte* communications between the Mayor and interested members of the public about his pending veto are presumed to be prejudicial. No evidence was introduced which would allay any prejudice to the County. Nor could there be any such evidence in the record because no public hearing was convened to disclose the communications.

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6 Since the 2017 certificate of appropriateness for the County's conceptual master plan, Architect Richard Heisenbottle has advocated publicly to reopen the issue of preserving the Playhouse. He also engaged in a series of *ex parte* communications with the Vice Chair of the HEPB prior to the public meeting before the HEPB.

Engaging in *ex parte* communications is presumed to be prejudicial. Even if the County did not enjoy a presumption in its favor, these communications were particularly troubling, as they directly addressed the justification for and substance of the mayor's veto message. We therefore conclude that the County's due process rights were violated, and for this reason, we must quash the veto.

Departure from the Essential Requirements of Law

The County argues that the veto departed from the essential requirements of law (1) by erroneously concluding that the appeal was not ripe, (2) by relying upon criteria from the National Register, rather than the City's governing documents, and (3) by incorrectly concluding that no demolition request by the County constituted a flaw in the County's application. We find that the Mayor's veto did not depart from the essential requirements of law.

The County argues that the Mayor relied upon the incorrect law -- the criteria in the National Register -- rather than the binding HEPB Report from 2005. This argument is factually incorrect in two respects. First, the Mayor specifically relied upon the correct legal criteria, the 2005 HEPB Designation, which incorporated the report of the Preservation Officer:

> The Playhouse is "a signature building reflecting the heyday of Coconut Grove." *See* City of Miami Preservation Officer 2005 Report. The HEP Board recognized this fundamental truth and I seek to reinstate that decision.

Second, the Mayor did not rely upon the criteria in the National Register as the legal basis to veto the resolution. Instead, with respect to the National Register, the Mayor stated in his Veto,

> [M]y veto that seeks to affirm the HEP Board's decision is supported by competent and substantial evidence. Based on the record before the HEP Board and Commission, the County's proposal would jeopardize the National Register of Historic Places ("National Register") designation for the Coconut Grove Playhouse because the proposal is not consistent with the guidance provided by the Secretary of Interior's Standards for the Treatment of Historic Properties. *See* March 1, 2019 letter from Mr. Aldridge, Deputy State Historic Preservation Officer. National Register provides significant benefits for designated properties, including but not limited to federal tax incentives, grant eligibility, and the prestige of the recognition.

Examining the text of the Veto Message, it is clear that the Mayor did not veto the resolution relying upon the *legal criteria* set by the National Register, but rather, justified his veto, in part, based upon his concern that the demolition of the theater would jeopardize the property's listing on the National Register, a loss for the City and its residents. As for reference to the criteria provided by the Secretary of Interior's Standards for the Treatment of Historic Properties, these standards are specifically incorporated into City Ordinance 23-6.2(h)(1), and the Mayor was well within his rights to cite them.

Further, the Mayor's concerns that the Playhouse would be removed from the National Register were not fanciful. The Deputy Preservation Officer for the State of Florida opined in a March 1, 2019 letter to the HEPB that demolition may well

affect the Playhouse's listing. (Resp. App. at pp. 1-4) In relying upon evidence that the Playhouse may be delisted, the Mayor did not rely upon the incorrect law and therefore no departure from the essential requirements of law occurred.

The County next argues that in concluding that the appeal was not ripe, the Mayor departed from the essential requirements of law. We reject this argument as well, because the Mayor reached the merits of the veto of the ordinance. *See, e.g., D.R. Horton, Inc.--Jacksonville v. Peyton*, 959 So. 2d 390 (Fla. 1st DCA 2007) (upholding mayoral veto based upon tipsy coachman doctrine).

Finally, the County argues that the Mayor incorrectly bases his veto on the failure of the County to include a petition for demolition in its application. The County argues that because the earlier 2017 certificate of appropriateness approving a "Masterplan Concept" reserved authority of the HEPB to issue demolition permits, there was no need for the County to seek demolition permits now, and the Mayor's citing this reason rendered his veto invalid. Because the Mayor also relies upon other valid reasons for his veto, his decision is sustained under the tipsy coachman doctrine, *See D.R. Horton*, 959 So. 2d at 397.

Further, the 2017 Certificate of Appropriateness did not authorize demolition of the entire Playhouse, but provided that further permitting would be necessary. The Mayor simply reasoned that it was unlikely that the County would obtain permits for demolition, because, under the current ordinance, "no demolition permit will be

issued until the plan comes back to the HEBP and is approved." Resolution R-17-023. We find no departure from the essential requirements of law.

Competent, Substantial Evidence

We are next required to determine "'whether the administrative findings and judgment are supported by competent substantial evidence.'" *Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089 (Fla. 2000) (quoting *City of Deerfield Beach v. Vaillant*, 419 So. 2d 624, 626 (Fla. 1982)). Our role is "to review the entire record for any competent, substantial evidence" supporting the determination, not to weigh and determine the competing evidence provided by the objecting party. *See Miami-Dade County v. Publix Supermarkets, Inc.*, 305 So. 3d 668, 672 (Fla. 3d DCA 2020).

In support of his decision to veto, the Mayor cited the City of Miami Preservation Officer's 2005 Report. Both parties agree that historical designation of the Playhouse is premised upon the findings and conclusions contained in this 2005 report. In the body of the Veto Message, the Mayor stated:

> We must uphold historic preservation requirements in our community, and the Coconut Grove Playhouse should be no exception. The Playhouse is "a signature building reflect8ing the heyday of Coconut Grove." *See* City of Miami Preservation Officer 2005 Report. The HEP Board recognized this fundamental truth and I seek to reinstate that decision.

The 2005 report of Preservation Officer was incorporated into Resolution No. HEPB-2005-60, designating the "Coconut Grove Playhouse . . . as a historic site." The 2005 report basis its conclusions upon both historical and architectural criteria.

(Resp. App. at p. 24). In particular, the Report found, "[d]espite a few alterations, the Playhouse still retains enough integrity to convey its major character-defining elements." *Id.* The Report further notes the contributions of **both** its prominent architects, Richard Kiehnel, who originally designed the Playhouse, and Alfred Browning Parker, who renovated it in the 1950s with a "modernist" flair. Demolition of the Playhouse would eliminate all contributions made by Browning Parker. This 2005 Report indisputably constitutes competent, substantial evidence supporting the mayoral veto.[7]

In addition, the Mayor based his veto upon a concern that demolition of the theater could jeopardize the Playhouse's listing on the National Register. The Mayor explained that the City enjoys multiple benefits resulting from the listing on the National Register, including federal tax incentives, grant eligibility, and prestige. The County's proposal would demolish the theater, retaining only the front façade and some interior architectural elements, placing the Playhouse at risk of losing its prestigious listing. The County responds that there is no assurance that the property would in fact be delisted. The County's appendix contains voluminous records related to the Sears Roebuck Tower (now part of the Adrienne Arsht Center for the

7 Although the County repeatedly relies upon the (now expired) 2017 City of Miami Certificate of Appropriateness which found that only the exterior of the Playhouse was protected, the 2005 Historical Designation and incorporated report did not limit designation to the Playhouse interior. See § 23-6.2(g), City of Miami Code of Ordinances.

Performing Arts), which endured significant demolition yet still maintains its listing. But in a March 1, 2019 letter to the HEBP, Deputy State Preservation Officer Jason Aldridge opined:

> [yes], demolition may affect the Playhouse's National Register designation. If the proposed plans are implemented the property will no longer possess the historic character and integrity that allowed the property to be listed in the National Register. Therefore, the Playhouse could be removed from the National Register.

(Resp. App. at p. 2)

Again, our role in evaluating the record for competent, substantial evidence is not to weigh competing evidence or quibble with the likelihood of the property's delisting. Rather, we are tasked with determining if there was competent evidence *supporting* the decision. We conclude that the mayoral veto is supported by competent, substantial evidence.

Accordingly, because we find that the County's due process rights were infringed, we quash the Mayor's veto and reinstate City Commission Resolution R-19-169 – Coconut Playhouse Appeal.

TRAWICK AND ZAYAS, JJ., CONCUR.

TRAWICK, J. specially concurring

I write separately because I do not believe that this court has jurisdiction to entertain this petition. In my humble opinion, this court correctly dismissed this action. With all due respect to our colleagues on the Third District Court of Appeal,

all of whom I hold in the highest regard, I disagree with their decision in *Playhouse II*. The decision of this court was thoughtfully analyzed and well-reasoned. That opinion was dispatched with a sweeping pronouncement that the mayoral veto exercised here was inextricably intertwined with the quasi-judicial functioning of the Miami City Commission. It is quite telling that the *Playhouse II* opinion cited no authority for such a far-reaching conclusion. Indeed, I believe that precedent compels a contrary result. As the *Playhouse II* decision noted,

> Moreover, in categorizing a governmental function, the focus should be on the nature of the proceedings. It is the character of a hearing which determines whether or not county or municipal action is legislative or quasi-judicial.

Playhouse II, 2020 WL 7636006 (Fla. 3d DCA Dec. 23, 2021)*, citing Board of County Commissioners of Brevard County,* 627 So.2d 469, 474 (Fla. 1993). *Playhouse II* then cited *West Flagler Amusement Company v. State Racing Commission,* 165 So. 64, 65 (Fla. 1935) and quoted the following language:

> . . . [q]uasi-legislative and quasi-executive orders, after they have already been entered, may have a quasi-judicial attribute if capable of being arrived at and provided by law to be declared by the administrative agency **only after express statutory notice, hearing and consideration of evidence to be adduced as a basis for the making thereof**. *Emphasis added.*

While *Playhouse II* agrees that the Miami City Code does not provide for notice and a hearing as part of the Mayoral veto process, the court disagreed that "the focus on these hallmarks alone turns the Mayor's veto into an executive or quasi-legislative

action. Then, without any reason provided as to why the lack of these "hallmarks" is not controlling here,[8] *Playhouse II* reaches its penultimate conclusion – that the Mayor's veto is "inextricably intertwined" with the quasi-judicial proceedings before the City Commission and thus a continuation of those proceedings. Again, there is no authority – code provision, case or legal treatise - cited for this conclusion. This lack of authority supports my belief that the decision of a legislative entity and a mayor are separate actions with separate procedural requirements. They are not inextricably intertwined. While this court did not categorize the Mayor's veto as an executive action, but simply concluded that his veto was not quasi-judicial in nature, I would go so far as to ask whether there can there be any function more within the realm of executive prerogative than the exercise of a veto of an action from a legislative body.[9] *Playhouse II* turns a Mayor's veto into something it clearly is not – an appendage of the quasi-judicial functioning of the City Commission, blurring the distinction between roles of the City's Executive and its Legislative body.[10]

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8 Rather than provide a reason, *Playhouse II* states that this court "did not look at the basic nature of the proceedings as a whole." I believe that a reading of our opinion demonstrates the contrary. We considered the entire process, from the proceedings before the Historic and Environmental Preservation Board through the Mayoral veto, and carefully analyzed why the veto was not quasi-judicial in nature.

9 As we said in our opinion, Miami City Charter Section 4(g)(5) spells out the Mayor's veto power, including the power to veto any quasi-judicial decision of the Commission. This provision also gives the Commission the power to override that veto with a four-fifths vote. Nothing about this provision is in the nature of quasi-judicial action by the Mayor.

10 *Playhouse II* also took issue with this Court's "comparison of "the Mayor's veto power to the State of Florida governor's veto power," saying that this was error. Respectfully, this was a misreading of our opinion. We only mentioned in footnote 7 of that opinion that the Mayor is not

I also note that *Playhouse II* chides this court for finding that there was no avenue for review of the Mayor's veto when in fact there is – a Commission override. Yet Playhouse II says that our decision resulted in a miscarriage of justice because it rendered the Mayor's veto unreviewable. First, as *Playhouse II* correctly reminded this court, the Mayor's veto is subject to the review of the Commission through the veto override process. As to judicial review, I share the concerns of *Playhouse II* that a party who has an adverse decision as a result of a veto may be denied an opportunity to challenge that decision in a court of law. The law is quite clear – an executive or quasi-executive decision is not reviewable. *Fisher Island Holdings, LLC v. Miami-Dade County Commission on Ethics and Public Trust,* 748 So. 2d 381, 382 (Fla. 3d DCA 2000). No court - not this one nor my esteemed colleagues on the Third District Court of Appeal - can create jurisdiction where none exists to assuage concerns about a lack of judicial review.

While we must abide by the dictates of the *Playhouse II* decision, for the reasons stated herein I believe that this court correctly dismissed the underlying petition for lack of jurisdiction.

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described as an executive in the Miami Charter in the way that the Florida Constitution describes the Governor as "the supreme executive power." While we noted this difference, this observation played no part in our decision.

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