IN THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

CASE NO. 3D21-1411

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

CITY OF MIAMI,

Petitioner /
Cross Respondent,

v.

MIAMI-DADE COUNTY,

Respondent /
Cross Petitioner.

_____/

MIAMI-DADE COUNTY'S RESPONSE TO
CITY OF MIAMI'S PETITION FOR WRIT OF CERTIORARI

On first-tier certiorari review, the Circuit Court correctly determined that the mayoral veto of the City Commission's quasi-judicial approval violated due process because, during the veto period, the City Mayor engaged in *ex parte* communications that he failed to disclose. In its petition for second-tier review, the City of Miami (the "City") argues that the Circuit Court violated the essential requirements of the law and due process because the City Mayor's *ex parte* communications occurred outside the hearing record and the City Mayor was entitled to an evidentiary hearing pursuant to *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991), to determine whether

the communications were actually prejudicial. The City's argument misapplies governing law, misconstrues the crux of the Circuit Court's ruling, and misunderstands the due process issue in this proceeding. This Court should deny the petition and affirm the unsurprising determination that engaging in—not simply passively receiving—*ex parte* communications that are never disclosed in a quasi-judicial proceeding is inherently a due process violation and does not require an evidentiary hearing.

As an initial matter, the City Mayor's *ex parte* communications were, contrary to the City's argument, part of the record before the decisionmaker, as they were furnished to and considered by him before he rendered his decision, albeit without notice to the applicant. Also, they were inherently improper because they occurred when disclosure would not normally be available, and the City Mayor made no effort to disclose them in an appropriate forum prior to issuing his veto decision. The City Mayor is differently situated than City Commissioners with respect to *ex parte* communications: the City Commission acts in a public forum, and Commissioners thus have a means to disclose such communications at a public meeting before making a quasi-judicial decision; but the City Mayor does not typically have a public meeting before issuing a veto and thus no

opportunity to disclose communications that occur after the City Commission meeting adjourns.

Given this distinction, when the City Mayor engaged in undisclosed *ex parte* communications during the ten-day veto period, the County—as the quasi-judicial applicant—was deprived of due process, because it had no opportunity to learn of, and meaningfully respond to, the City Mayor's communications before he rendered his decision. An evidentiary hearing to assess prejudice is not needed: the mere fact that the record before the City Mayor included undisclosed *ex parte* communications inherently means that the County's due process rights were violated, and no additional evidence can change this immutable fact. *See* Op. at 13[1] ("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.").

Finally, while the Court need not consider the substance or content of the *ex parte* communications to sustain the Circuit Court's decision, the City's attempt to characterize those communications as mere "unsolicited emails"

[1] As in the County's Cross Petition for Writ of Certiorari, references herein to the County's *Appendix to Cross Petition for Writ of Certiorari* are cited as "Pet. App. Ex. __ at MDC__," while references to the Circuit Court's opinion are noted as "Op. at __." All emphasis to excerpts from the Appendix and cited cases is supplied unless otherwise noted.

and “non-substantive email replies” strains credulity. The City Mayor was not merely the passive recipient of communications that he could not avoid. To the contrary, as the Circuit Court correctly observed, “these communications were particularly troubling, as they directly addressed the justification for and substance of the mayor’s veto message.” Op. at 8-10, 14.

In short, this Court should not reward the City Mayor for failing to disclose his *ex parte* communications during the quasi-judicial proceeding by now requiring an additional and unnecessary process to determine that he violated due process. Requiring an unnecessary hearing would accomplish nothing more than compounding the prejudice to the County by introducing yet more delay into a production that the City has already made overlong.

I. Procedural Facts & Legal Standard

In the interest of brevity, the County hereby incorporates by reference the procedural facts and legal standard included in its *Cross Petition for Writ of Certiorari*, filed on July 6, 2021.

II. Argument

The City contends that the Circuit Court departed from the essential requirements of the law in finding a due process violation on first-tier certiorari review, because the City Mayor’s *ex parte* communications are not part of the appellate record and *Jennings* requires an evidentiary hearing to

assess the prejudice of those extra-record communications. The City is mistaken in both respects.

First, *Jennings* was decided before adoption of the appellate rule of procedure defining the "record" in an original proceeding. That definition unquestionably encompasses the City Mayor's written *ex parte* communications here. Second, *Jennings* involved a due process claim and procedural posture disanalogous to this case: in *Jennings*, the plaintiff commenced an original action with a specific demand for an evidentiary hearing to assess the prejudicial effect of *ex parte* communications—communications that were presumptively oral and thus could only be discerned through witness testimony that had not been presented to the lower tribunal. But the same does not hold true here: in the unique context of this case, *Jennings* would not require an evidentiary hearing, because the necessary materials were all in the record before the quasi-judicial decisionmaker. And the due process violation here results not from the effect of the *ex parte* communications on the decisionmaker, which would require new testimony and evidence to determine, but from the sheer fact that the City Mayor—as the sole decisionmaker—engaged in, and failed to disclose, *ex parte* communications and, thus, deprived the County—as the quasi-

judicial applicant and only real party in interest—of any opportunity to respond to those communications before his decision was made.

Under such circumstances, the Circuit Court appropriately considered on first-tier certiorari review the County's objections to the fact that *ex parte* communications occurred, and it reached the correct result in finding a due process violation. This was no miscarriage of justice.

A. The City Mayor's *Ex Parte* Communications are Part of the Record in this Quasi-Judicial Proceeding

The City erroneously contends that the City Mayor's *ex parte* communications are not part of the record and, thus, cannot be considered on certiorari review. *See, e.g.*, City Pet. at 2, 13-14. In fact, the City Mayor's communications are part of the record, even though they were not disclosed in a public hearing setting.

Materials are considered part of the lower tribunal's record if they are "furnished to and reviewed by" the decisionmaker before a decision is rendered. Fla. R. App. P. 9.190(c)(1) ("the record shall include only materials furnished to and reviewed by the lower tribunal in advance of the administrative action to be reviewed by the court").[2] The City Mayor's written

[2] Rule 9.190 governs the review of local government quasi-judicial decisions. *See* Fla. R. App. P. 9.190(b)(3).

ex parte communications plainly fit this definition: the City admits[3] that he received, and engaged in, those communications while contemplating his veto of the City Commission's approval, and, as the Circuit Court observed, the communications "directly addressed the justification for and substance of the mayor's veto message." Op. at 8-10, 14.

The City essentially contends that by refusing to disclose to a party documents actually provided to the decisionmaker, those documents cease to be part of the record. But a decisionmaker hiding, or failing to disclose, materials received prior to making a decision (as the City Mayor did here) cannot magically remove those materials from the record before the decisionmaker. Were it otherwise, a decisionmaker could engage in wrongdoing and then insulate that very wrongdoing from meaningful judicial review by concealing the evidence and then proclaiming such evidence to be outside of the record. But as the Florida Rules of Appellate Procedure make clear, what is determinative is whether the materials were "furnished to and reviewed by" the decisionmaker in advance of the decision, not

[3] The County obtained the communications through a public records request to which the City responded on or about June 7, 2019—well after any public meeting at which the communications could have been disclosed. The City has never disputed that the City Mayor had *ex parte* communications during the ten-day veto period, and the documents produced by the City in response to the County's public records request constitute an admission of that fact. *See* Pet. App. Ex. S.

whether those materials are publicly disclosed at a hearing or even shown to all parties. *See id.*

Just because the City Mayor's *ex parte* communications do not appear in the hearing record of the proceedings before the City, the Circuit Court had, and this Court has, the authority to allow the appellate record to be supplemented to include them as materials that were before the City Mayor when he rendered his decision.[4] *See* Fla. R. App. P. 9.190(c)(2) & 9.200(f). Moreover, even if the ***substance*** of the communications were considered outside the record, the Circuit Court could, and this Court can, take judicial notice of the ***existence*** of these public records, as it is the mere ***existence*** of such communications, undisclosed by the City Mayor, that violated due process. *See, e.g.*, *Fla. Accountants Ass'n v. Dandelake*, 98 So. 2d 323 (Fla. 1957) ("This court takes judicial notice of the public records of this state"); 1 Fla. Prac., Evidence § 901.7 ("Florida courts have frequently . . . tak[en] judicial notice of the existence and the contents of the [public] record.").

[4] This case is unlike *Dade County v. Marca, S.A.*, 326 So. 2d 183 (Fla. 1976)—which concerned a request to supplement the record with materials from a wholly separate, and subsequently held, proceeding, *see infra*—and the cases cited by the City—all of which concern materials that had not actually been presented to the lower tribunal, *see* City Pet. at 13-14. Here, the written *ex parte* materials were known to, and considered by, the decisionmaker prior to rendering the decision, and they relate to this proceeding, not some other proceeding or matter separate and apart from it.

In short, the City Mayor's undisclosed *ex parte* communications are part of the record of this proceeding, and the Circuit Court properly considered the existence of those undisclosed communications in determining that a due process violation occurred.

B. *Jennings* Does Not Mandate an Evidentiary Hearing to Review the City Mayor's *Ex Parte* Communications

In *Jennings*, this Court held that due process requires decisionmakers in quasi-judicial proceedings to avoid *ex parte* communications because they are inherently improper and corruptive of the decision-making process. *Jennings* did not, however, hold that the exclusive avenue for addressing such due process violations is an original action in circuit court. While the procedural posture and specific claim raised in *Jennings* necessitated an original action to determine, through testimony and evidence, the effect that *ex parte* communications had upon the quasi-judicial decision, an original action is neither necessary nor appropriate in this case.

1. The result in Jennings was dictated by its procedural posture, facts, and the relief requested

In *Jennings*, an applicant for a zoning variance employed a lobbyist to assist him with gaining the County Commission's approval, and the lobbyist registered as such several days in advance of the zoning hearing. 589 So. 2d at 1339. Jennings, an objector to the zoning application, either knew or

should have known that the lobbyist communicated *ex parte* with County Commissioners, but "Jennings did not attempt to determine the content of any communication between the lobbyist and the commission or otherwise challenge the propriety of any communication prior to or at the hearing." *Id.* at 1329.

After the applicant's zoning request was approved, "Jennings filed an action for declaratory and injunctive relief in circuit court wherein he alleged that [the applicant's] lobbyist communicated with some or all of the county commissioners prior to the vote, thus denying Jennings due process[.]" *Id.* Significantly, "Jennings requested the court to conduct a hearing to establish the truth of the allegations" and, thereafter, to enjoin the applicant from using his property in the manner approved by the County. *Id.* at 1339-40. But the lower court dismissed Jennings's due process claim, with leave for him to file an amended complaint in the appellate division.

On common law certiorari review, this Court quashed the lower court's decision and held that "since the content of ex parte contacts is not part of the existing record," and "Jennings would be entitled solely to a review of the record as it now exists," mere appellate review of his due process claim "would prohibit the ascertainment of the [ex parte] contacts' impact on the commission's determination." *Id.* at 1341. Accordingly, this Court said, the

appropriate course was for Jennings to pursue an original action wherein "proof that an ex parte contact occurred" would be presumed prejudicial, "unless the defendant proves the contrary by competent evidence." *Id.*

The core principle announced in *Jennings*—that "[e]x parte communications are inherently improper and are anathema to quasi-judicial proceedings"—remains true and applies here. But the original action requirement was based on the unique facts, procedural posture, and specific due process claim at issue in *Jennings* and, for several reasons, is inapposite to this proceeding.

First, a few years after *Jennings* proclaimed that "the content of ex parte contacts is not part of the existing record," Florida Rule of Appellate Procedure 9.190(c) was adopted. The new rule was designed "to identify more clearly what constitutes the record in appeals from administrative proceedings" and to clarify that the record includes "materials that were furnished to and reviewed by the lower tribunal" in advance of its decision. *See* Fla. R. App. P. 9.190, committee notes to 1996 amendment. As discussed above, the communications at issue here readily fit Rule 9.190's definition of the "record": they were written communications and were thus readily ascertainable; they were furnished to, and reviewed by, the final decisionmaker in advance of his veto decision; and they related directly to

whether he should veto. *See supra*. By contrast, the lobbyist communications in *Jennings* appear to have been oral, and there was no written evidence showing such communications were before the County Commission when it rendered the zoning decision. Thus, even if Rule 9.190(c) had been in effect, the content of the communications could not have been ascertained without questioning witnesses in an evidentiary proceeding.

Second, Jennings had notice of the *ex parte* communications at the time of the zoning hearing, but he failed to inquire about them on the record despite having the opportunity to do so. *Jennings*, 589 So. 2d at 1329. Here, the City Mayor's *ex parte* communications all occurred after the City Commission's public hearing, and the County did not learn of them until after the City Mayor vetoed, so the County had no opportunity to inquire about the communications in any public forum. *See supra*.

Third, Jennings filed an original action, not a certiorari appeal, and he specifically sought an evidentiary hearing to determine the prejudicial effect of the oral communications on the County Commission's decision. But the lower court dismissed his claim and forced him to proceed in the appellate division. This Court said that was wrong because what Jennings sought was not readily ascertainable from the quasi-judicial record and, in recognition of

the well-establish principle that the pleader is the master of his own complaint, this Court's ultimate decision relates back to the relief Jennings originally sought. The County seeks different relief here: a determination, based on the record, that the City Mayor's failure to disclose his *ex parte* communications, and to provide the County an opportunity to respond to them before issuing his veto, violates due process.

Moreover, *Jennings'* original action requirement was premised upon the Florida Supreme Court's decision in *Marca,* which is even less analogous to this case. 326 So. 2d at 183. In *Marca*, a zoning objector sought to supplement the appellate record with materials relating to a wholly different zoning application—an application that was not even decided until after the application on appeal. *Id.* at 183-84. This case, by contrast, concerns written *ex parte* materials about the very application at issue that were presented to and, considered by, the decisionmaker before he rendered his decision on that same application.

Accordingly, while the core due process principle enunciated in *Jennings*—that *ex parte* communications are "anathema to due process" and thus should be avoided at all cost—applies with full force here, the specific relief ordered in *Jennings* does not because it was based on different claims,

facts, and procedures. Thus, the Circuit Court was not required to order the same relief issued in *Jennings* to address this disanalogous case.

2. *The Circuit Court correctly determined, on first-tier certiorari review, that the City Mayor's ex parte communications violated due process*

Although *Jennings* held that an original action was appropriate to address *ex parte* communications, it did not—contrary to the City's argument—mandate an original action to adjudicate all due process violations. *Jennings*, 589 So. 2d at 1341. Rather, *Jennings* recognized that where a claimed due process violation hinges on the ***effect*** undisclosed *ex parte* communications had on the decision, an original action would be needed because review of the hearing record alone "would prohibit the ascertainment of the contacts' impact on the [local government's] determination." *Id.* As noted above, the communications at issue in *Jennings* also appear to have been oral communications, the content of which could not be ascertained without witness testimony at an evidentiary proceeding. *See supra*.

But where either *ex parte* communications are evident on the face of the hearing record or where the due process claim stems from the local government decisionmaker's failure to disclose such communications, an original action is not required. Put differently, while the due process claim in *Jennings* stemmed from the alleged prejudicial effect of presumptively oral

ex parte communications that Jennings could have inquired about before the decision but didn't, the County's claim here stems from the lack of opportunity to learn of, and respond to, undisclosed written communications before the decision was rendered. And because those written communications were presented to the final decisionmaker before he rendered his decision and were readily ascertainable, the Circuit Court did not need to look beyond the record to rule on due process.

Other Florida courts have, in similar circumstances, entertained due process challenges based on *ex parte* communications on first-tier certiorari review.[5] *See, e.g.*, *Mafera v. Manatee Cnty.*, 27 Fla. L. Weekly Supp. 511b (Fla. 12th Cir. Ct. App. Div. June 27, 2019) ("[T]he Court rejects the County's argument that, as a general rule, claims that officials failed to disclose ex parte communications cannot be raised in a petition for writ of certiorari."); *Power U Ctr. for Social Change, Inc. v. Miami City Commission*, 14 Fla. L. Weekly Supp. 814a (Fla. 11th Cir. Ct. App. Div. July 9, 2007) (finding petitioners' due process rights violated under *Jennings* where they had no opportunity to object or rebut independent investigation that was not properly disclosed).

[5] The Circuit Court decisions cited herein are included in the County's *Supplemental Appendix*, filed concurrently with this Response.

The Circuit Court's prior decision in *The Vizcayans v. City of Miami*, 15 Fla. L. Weekly Supp. 657a (Fla. 11th Cir. Ct. App. Div. July 3, 2014), remains instructive.[6] There, on first-tier certiorari review, the Circuit Court addressed a substantially similar matter concerning the then-mayor's *ex parte* communications during the ten-day veto period in a quasi-judicial land use proceeding. The court rejected the argument that the due process claim had been waived because the petitioners failed to object to the communications on the record below, noting that such an objection was impossible because the communications "occurred ***after*** the public hearings, and therefore, could not have been disclosed and addressed during those hearings." *Id.* (emphasis original). Ultimately, the court held that the *ex parte* communications violated due process because they "all took place after the hearings had concluded, away from public earshot[.]" *Id.* Undergirding this decision is the basic due process notion that a party to a quasi-judicial proceeding is entitled an opportunity to know of, and respond to, all facets of evidence before the decisionmaker.

[6] The City's petition labels *Vizcayans* as wrongly decided and inconsistent with *Jennings*, *see* City Pet. at 15 n.3, but its argument is unpersuasive; indeed, this Court implicitly rejected that argument when it determined that the mayoral veto was subject to quasi-judicial procedures, *see Miami-Dade County v. City of Miami*, 315 So. 3d 115 (Fla. 3d DCA 2020). Moreover, the City was a party to *Vizcayans* and did not appeal it, so its holding remains both relevant and binding on the City.

In *Friends of the Oleta River, Inc. v. City of North Miami Beach*, 22 Fla. L. Weekly Supp. 427a (Fla. 11th Cir. Ct. App. Div. Oct. 16, 2014), a Circuit Court panel also considered, on first-tier certiorari review, due process claims premised on the failure to properly disclose *ex parte* communications. The court found due process violated where city council members failed to disclose substantive details about their *ex parte* communications. While the city had adopted a procedure for disclosure of such communications, the council members' disclosures had insufficient detail to comport with that procedure. Even though those details were not disclosed during the hearing before the zoning board, the court nevertheless entertained the due process claim on first-tier review. The court held that "[the city's] failure to follow its own procedural safeguards regarding ex parte communications did not afford the Petitioners a reasonable opportunity to refute or respond to the communication," meaning that "[t]he basic notion of due process was not afforded to Petitioners." *Id.*

Similarly here, the City Mayor violated due process by the mere act of engaging in *ex parte* communications that he knew he would have no opportunity to disclose in accordance with state law and the City's Code, and thus no way to provide the County with a reasonable opportunity to inquire about, and respond to, those communications. Although the City has

adopted a procedure pursuant to section 286.0015, Florida Statutes, which purports to remove the presumption of prejudice for *ex parte* communications through their disclosure, the City Mayor did not use that procedure here, because his communications all occurred after the City Commission's public hearing. Thus, the City Mayor had no regular public forum in which to make the necessary disclosure before exercising his veto authority.

Because he would have no opportunity to properly disclose the communications and provide the County with an appropriate opportunity to respond to them, the City Mayor's active engagement in *ex parte* communications was inherently prejudicial. *See, e.g.*, *Power U Ctr. for Social Change, Inc.*, 14 Fla. L. Weekly Supp. at 814a (holding that "the [City] Commission violated the Petitioners' due process rights under *Jennings* as the presumption of prejudice was never removed by any statute or any procedure because Petitioners had no opportunity to object or rebut the [City Commissioner's] independent investigation which was not properly disclosed"). It is the mere existence of these communications—which no one, not even the City Mayor, disputes occurred after the City Commission hearing but prior to the veto—and his failure to disclose them, standing alone, that constitute the due process violation. *See id.* Applying *Friends of*

the Oleta River to this proceeding, the City Mayor's failure to disclose his *ex parte* communications in a timely and meaningful manner means that the County was not afforded "a reasonable opportunity to refute or respond to the communication[s]," such that "[t]he basic notion of due process was not afforded to" the County. 22 Fla. L. Weekly Supp. at 427a.

Now, after the fact, there is nothing that the City Mayor can say or do at an evidentiary hearing to make this situation other than it is. Indeed, requiring the County to pursue an original action and undertake an evidentiary hearing to determine the impact of *ex parte* communications that are inherently prejudicial because they weren't disclosed would literally add nothing to the due process analysis, because the County's due process claim—unlike the one in *Jennings*—is not premised on the prejudicial effect that the content of such communications had on the decisionmaker's decision. Instead of serving any useful purpose here, an evidentiary hearing would prejudice the County by introducing yet more delay into the County's efforts to obtain relief for what is unquestionably a due process violation under any metric.

For these reasons, the Circuit Court properly concluded on first-tier review that the City Mayor's undisclosed *ex parte* communications violated the County's right of due process.

C. Because the City Fails to Demonstrate a Miscarriage of Justice, Second-Tier Certiorari Relief is Not Warranted

The City argues that, absent second-tier certiorari relief, a miscarriage of justice would result because "the Circuit Court denied the [City] Mayor due process by imposing an irrebuttable presumption on him in this case and relieving the County of the ultimate burden of demonstrating prejudice." City Pet. at 19. The City's argument turns due process on its head: the rule against *ex parte* communications is about protecting the parties to the quasi-judicial process from the unchecked authority of the decisionmaker, not about protecting the decisionmaker's ability to engage in communications that this Court has said are inherently improper. *Jennings*, 589 So. 2d at 1341.

Failing to afford the City Mayor an evidentiary hearing here to attack the presumption of prejudice owing to his own *ex parte* communications is no miscarriage of justice because—as should be abundantly clear by now—the due process violation here results not from the effect of the communications, but from the failure to disclose them. Nothing short of a time machine could cure the City Mayor's failure to disclose. And since time travel is not yet available, no injustice can result from failing to provide for a useless hearing.

To be sure, the City complains that there was no way for the City Mayor to make the necessary disclosure because "[t]here was no formal hearing at which to disclose the communications," *see* City Pet. at 2, but the City's argument is wrong in two respects.

First, it overlooks that due process is not about protecting a quasi-judicial decisionmaker's ability to engage in *ex parte* communications; it is about protecting the parties' rights to a fair proceeding. *See Miami-Dade Cnty. v. City of Miami*, 315 So. 3d 115, 126 (Fla. 3d DCA 2020) (noting that "certain standards of basic fairness must be adhered to in order to afford due process," including the right to an impartial decisionmaker whose decision is "based on evidence submitted at the hearing," and not "on [his] own information") (quoting *Jennings*, 589 So.2d at 1341). And *ex parte* communications are by their very nature "anathema" to due process in any event. *Jennings*, 589 So. 2d at 1341. So if the City Mayor had no opportunity to disclose his *ex parte* communications consistent with due process prior to issuing his decision, then the solution was for him to avoid ***actively*** engaging in *ex parte* communications.

Second, if the City Mayor were truly concerned about whether his *ex parte* communications were prejudicial, he could have convened an appropriate public meeting to make a *Jennings* disclosure and allow the

County to learn of, and inquire about, his *ex parte* communications. As unusual as that may sound, it was not impossible because the City Code grants him the authority to call a special meeting. *See* Sec. 2-33(l) of the City Code (authorizing City Mayor to convene special meetings). But, as the record reflects, the City Mayor made no such effort.

Alternatively, at a bare minimum, the City Mayor could have disclosed his *ex parte* communications during the City Commission's veto override hearing. Even if that hearing was too late for the County to respond to them prior to what was ultimately the final decision (i.e., the mayoral veto), perhaps the disclosure and the County's response might have swayed the veto override vote. Unfortunately, we will never know because, again, the City Mayor made no such effort.

It is therefore the City Mayor's fault—and his fault alone—that his *ex parte* communications remained known only to him prior to the veto: despite avowing on the record that his veto decision was governed by quasi-judicial standards, the City Mayor was silent and did not make any *Jennings* disclosure at any point during the City proceedings below. Pet. App. Ex. Q; Ex. R at MDC0706. Indeed, he failed to disclose the communications until required to respond to a public records request, and his response did not come until after the veto and the unsuccessful override hearing. The County

was thus unable to inquire about his *ex parte* communications at all—much less in a timely and meaningful manner.

Allowing the City to defeat the County's due process argument by hiding behind the City Mayor's failure to disclose the *ex parte* materials that he had before him, and that he considered prior to issuing his veto, would violate principles of "fair play and essential justice." *See, e.g., Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077 (Fla. 2001) ("Equitable estoppel is based on principles of fair play and essential justice and arises when one party lulls another party into a disadvantageous legal position," and "presupposes a legal shortcoming in a party's case that is directly attributable to the opposing party's misconduct. The doctrine bars the wrongdoer from asserting that shortcoming and profiting from his or her own misconduct. Equitable estoppel thus functions as a shield, not a sword, and operates against the wrongdoer, not the victim."); *Branca v. City of Miramar*, 634 So. 2d 604, 607 (Fla. 1994) (applying equitable estoppel against a governmental entity based on factual representations).

Moreover, contrary to the City's argument, the Circuit Court's due process ruling is not "pervasive and widespread resulting in adverse precedential effect in other cases." *See* City Pet. at 20. The City is correct that a miscarriage of justice may arise if the decision below "is likely

pervasive and widespread in its effects," as opposed to being "isolated in its effect" or "particularly fact-specific and fact-dependent." *State v. Jones*, 283 So. 3d 1259, 1269 (Fla. 2d DCA 2019). But this is not that case. Indeed, the Circuit Court's due process ruling is a paradigmatic example of a decision that is "fact-specific and fact-dependent," because it applies only to the mayoral veto of a quasi-judicial approval, where the mayor engages in *ex parte* communications during the veto period that he fails to disclose in accordance with the local government's disclosure process.

The lower court's decision, while perhaps instructive to city mayors who find themselves contemplating the veto of a quasi-judicial decision, does not redound to all quasi-judicial board decisions, and has no new implications for local government boards that decide the vast majority of quasi-judicial applications. Those boards are already subject to *Jennings*, and nothing in the Circuit Court's decision requires those board members to make any changes to whatever process they already follow to address *ex parte* communications. Nor does the decision have any new implications for mayoral vetoes of legislative or executive, as distinguished from quasi-judicial, local government actions. Moreover, the Circuit Court's decision is not only correct but is also a straightforward application of the due process principles set forth in *Jennings* to this unique set of facts.

Finally, while neither the County's argument nor the Circuit Court's ruling hinges on the substance of the City Mayor's *ex parte* communications, it bears mentioning when considering any miscarriage of justice that the communications here were highly prejudicial. The City's attempt to hand-wave away the *ex parte* communications as mere "unsolicited emails" and "non-substantive replies," *see* City Pet. at 3, misunderstands both the County's argument and the Circuit Court's ruling. The due process violation here did not result solely from the City Mayor's passive receipt of unsolicited public communications. Rather, the due process violation results from what the City Mayor actually did in response to receiving those communications.

As the Circuit Court chronicled in its opinion, the City Mayor actively engaged with the individuals who reached out to him, asking for their phone numbers so that he could call them, presumably to have a private discussion about whether to veto. He also requested that his staff schedule meetings with them, presumably to have a private discussion about whether to veto. And perhaps most prejudicial of all, the City Mayor forwarded, to the staff member assisting in preparing his veto statement, an email and attachment from Richard Heisenbottle, a rival architect and fervent objector to the County's plan. *See* Op. at 8-10, 14. Mr. Heisenbottle's email, sent the day before the veto deadline, implored the City Mayor to veto and attached a

proposed draft veto message with the note, "[f]eel free to use any of this as you wish." Pet. App. Ex. S at MDC0786.

Plainly, this case is not about *ex parte* communications that the City Mayor could not have avoided. It is about what the City Mayor actively did in response to those communications, knowing that, unlike the City Commissioners, he would have no regular public forum to disclose those communications before issuing his veto. There is simply no conception of due process that would authorize a quasi-judicial decisionmaker to consider, in secret and behind the applicant's back, the views of various objectors, much less to review and consider a dispositive veto message drafted by an objector. Under such circumstances, no miscarriage of justice results from finding that the City Mayor's actions and failure to disclose his communications—particularly written communications that are readily ascertainable—violated the County's right to due process.

In truth, the only miscarriage of justice that could result from this appeal would be from granting the City's petition and thereby rewarding its procedural due process failures. Indeed, granting the City's petition would set a regrettable and troubling precedent, as it would incentivize and encourage decisionmakers to hide *ex parte* communications, avoid accountability, and draw out legal challenges by forcing the parties whose

rights have been violated to litigate multiple lawsuits in separate forums for no real purpose.

For all these reasons, the City fails to show that the Circuit Court's due process decision—which is, in fact, correct—results in any miscarriage of justice warranting this Court's intervention on second-tier certiorari review.

III. Conclusion

As explained herein, the City Mayor's *ex parte* communications are part of the record in this proceeding; they are written materials that were furnished to and considered by the final decisionmaker before rendering the decision. Moreover, the County's due process challenge did not require the Circuit Court to consider the substance or effect of the communications. Rather, the County objects to the fact that it was not afforded either an opportunity to learn of, or an appropriate forum in which to respond to, those *ex parte* communications ***before*** the City Mayor made his decision. And addressing the County's due process challenge did not require the Circuit Court to supplement the lower tribunal record with additional witness testimony or materials not actually considered by the quasi-judicial decisionmaker. Based on the fact that the City Mayor engaged in undisclosed *ex parte* communications, the Circuit Court correctly held that he violated due process. This application of existing law to this unique set of

facts is no miscarriage of justice. Accordingly, the City's petition should be denied.

Dated: August 9, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on August 9, 2021 via e-mail generated by My Florida Courts E-Filing Portal to all parties listed below:

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Certificate of Compliance Regarding Computer Briefs

I HEREBY CERTIFY that this petition is in Arial 14-point font, in compliance with Fla. R. App. P. 9.045(b), and is consistent with the word count limit requirements of Fla. R. App. P. 9.100(g).

s/ James Edwin Kirtley, Jr.
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