IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR MIAMI-DADE COUNTY, FLORIDA

APPELLATE DIVISION

CASE NO.: 23-31 AP 01

MIAMI-DADE COUNTY,
Petitioner,

vs.

CITY OF MIAMI,
ANTHONY VINCIGUERRA, and
COURTNEY BERRIEN,
Respondents.
_____/

ANTHONY VINCIGUERRA and COURTNEY BERRIEN RESPONSE TO MIAMI-DADE'S PETITION FOR WRIT OF CERTIORARI

RESPONDENTS, ANTHONY VINCIGUERA and COURTNEY BERRIEN, through undersigned counsel, file this RESPONSE TO MIAMI-DADE'S PETITION FOR WRIT OF CERTIORARI, and state:

Summary

Miami-Dade County's Petition should be dismissed because it was not timely filed. Even if this court were to decide that the Petition was timely filed, the

City of Miami Planning, Zoning & Appeals Board ("PZAB") applied the correct law, rendered its decision based upon the competent substantial evidence before it, and afforded the County due process.

Notwithstanding the sound and extensive evidence, the County asks this Court to reweigh the evidence, which it cannot do. The only issue before this Court is whether there is competent, substantial evidence to support the decision of the PZAB and whether the minimal requirements of due process were provided to Petitioner. The answer to both questions is a resounding yes. Accordingly, the Petition should be denied in all respects.

BACKGROUND

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

In 2005, the entire exterior of the Playhouse was designated a historic site, as defined by City of Miami Code, section 23-2.

Miami-Dade County and Florida International University (FIU) are co-tenants of the Playhouse property located at 3500 Main Highway in the City of Miami, Florida 33133, leasing the Playhouse from its owner, the State of Florida.

Due to the Playhouse's historic site status, the County was required to apply for an historic preservation permit, known as a certificate of appropriateness, from the City's Historic and Environmental Preservation Board (HEPB).

Section 23-6.2(a) of the City of Miami Code addresses certificates of appropriateness for historic sites and when they are required. Section 23-6.2(b) addresses the procedures for issuing certificates of appropriateness. Specifically, section 23-6.2(b)(4) addresses "Special certificates of appropriateness" such as the one sought by the County in the underlying case, due to it involving "a major addition, alteration, relocation, or demolition." The process requires a public hearing, with notice to the applicant and to any other individual or organization requesting notice, before a decision of the HEPB is made. See City of Miami Code, § 23-6.2(b)(4)a.-b.

The County's proposed plan includes demolishing over 80% of the Playhouse, building various new elements, and building a completely new, smaller theater, while retaining the building's historic façade. On April 4, 2017, the HEPB held a public hearing and conditionally approved the County's application for the certificate of appropriateness. As part of the plan approval, the County was required to go back to the HEPB when the County had its plans completed to obtain the HEPB's final approval before the County could proceed with the rehabilitation of the Playhouse and before a demolition permit could be issued.

Thereafter, the HEPB decision was appealed to the Miami City Commission. The City Commission heard the appeal on December 14, 2017 and reversed the HEPB's approval in part, affirmed it in part, and imposed some new conditions on the County's plan. The County filed a timely petition for writ of certiorari in the Eleventh Judicial Circuit's Appellate Division and the circuit court granted the County's petition. The circuit court reversed and remanded the case with instructions that the City Commission's decision denying the certificate of appropriateness be quashed. Thus, the HEPB's approval of the County's application for the certificate of appropriateness was reinstated.

Afterwards, the County again submitted its application for a certificate of appropriateness, including an application for a demolition permit, in order to conform with the HEPB's prior approval in April 2017. The HEPB heard the merits of the County's application at its March 5, 2019 meeting. At the end of the hearing, the HEPB denied the County's application. The County then timely appealed the HEPB's denial to the City Commission. After a public hearing was held on May 8, 2019, the City Commission granted the County's appeal and reversed the HEPB's decision to deny the County's application.

The County has since changed its demolition plan for the Playhouse from the plan approved by the City Commission.

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

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

On March 15, 2023, the PZAB granted the appeal and denied the County's application for demolition waiver. App. 1407[1]

I. PROCEDURAL ARGUMENTS

THIS COURT LACKS JURISDICTION BECAUSE THE COUNTY'S PETITION FOR WRIT OF CERTIORARI IS UNTIMELY

It is well-established that a notice of appeal must be timely filed with the appropriate court for jurisdiction to be conferred upon an appellate tribunal. See, e.g., *State ex rel. Diamond Berk Ins. Agency v. Carroll*, 102 So. 2d 129, 131 (Fla. 1958) ("Despite what might appear to be the imposition of a hardship, we are compelled to conclude that under applicable rules the timely filing of a notice of appeal at the place required by the rules is essential to confer jurisdiction on the appellate court. We have on numerous occasions held in similar situations that jurisdiction could not even be conferred by consent of the parties, when the notice of appeal was not filed as required by applicable rules.")

[1] References to Petitioners Appendix [DE 10] shall be as follows: App. [page#]

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

The decision in this matter was rendered on April 10, 2023 [App. 1409]. As such, any petition for writ of certiorari would have to be filed within 30 days, which fell on May 10, 2023.

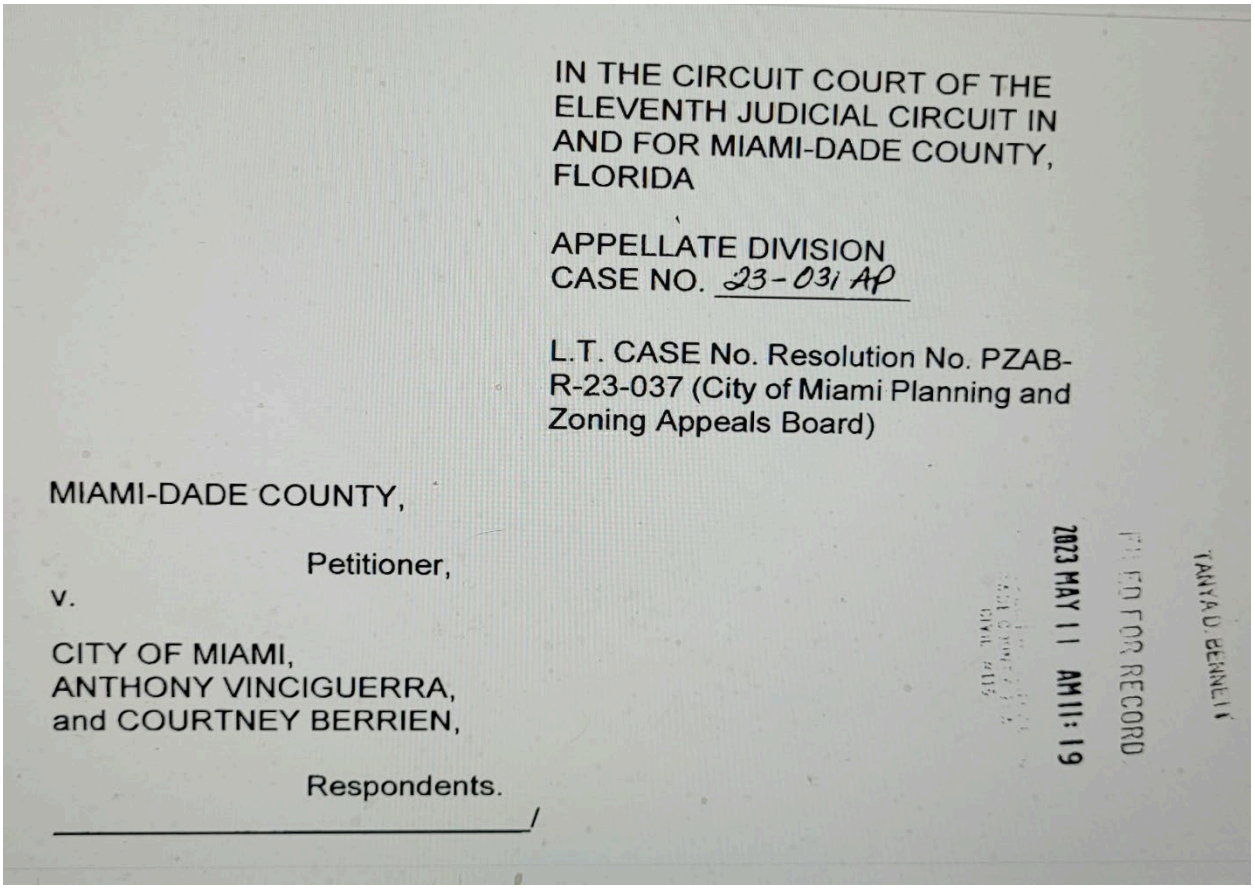
Pursuant to Fla. R. App. P. 9.100(b), commencement of an original proceeding (which includes an action for certiorari) "shall be invoked by filing a petition, accompanied by a filing fee if prescribed by law, with the Clerk of the Court deemed to have jurisdiction."

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

> **The Appeals Unit is located on the 3rd floor of the Miami-Dade County Courthouse East Building.**
>
> **Notices or Petitions are to be filed with the Civil Division, Appeals Unit, 22 NW 1st Street Miami, FL 33128 Room 301.**

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

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



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

APPELLATE DIVISION
CASE NO. 23-031 AP

L.T. CASE No. Resolution No. PZAB-R-23-037 (City of Miami Planning and Zoning Appeals Board)

MIAMI-DADE COUNTY,

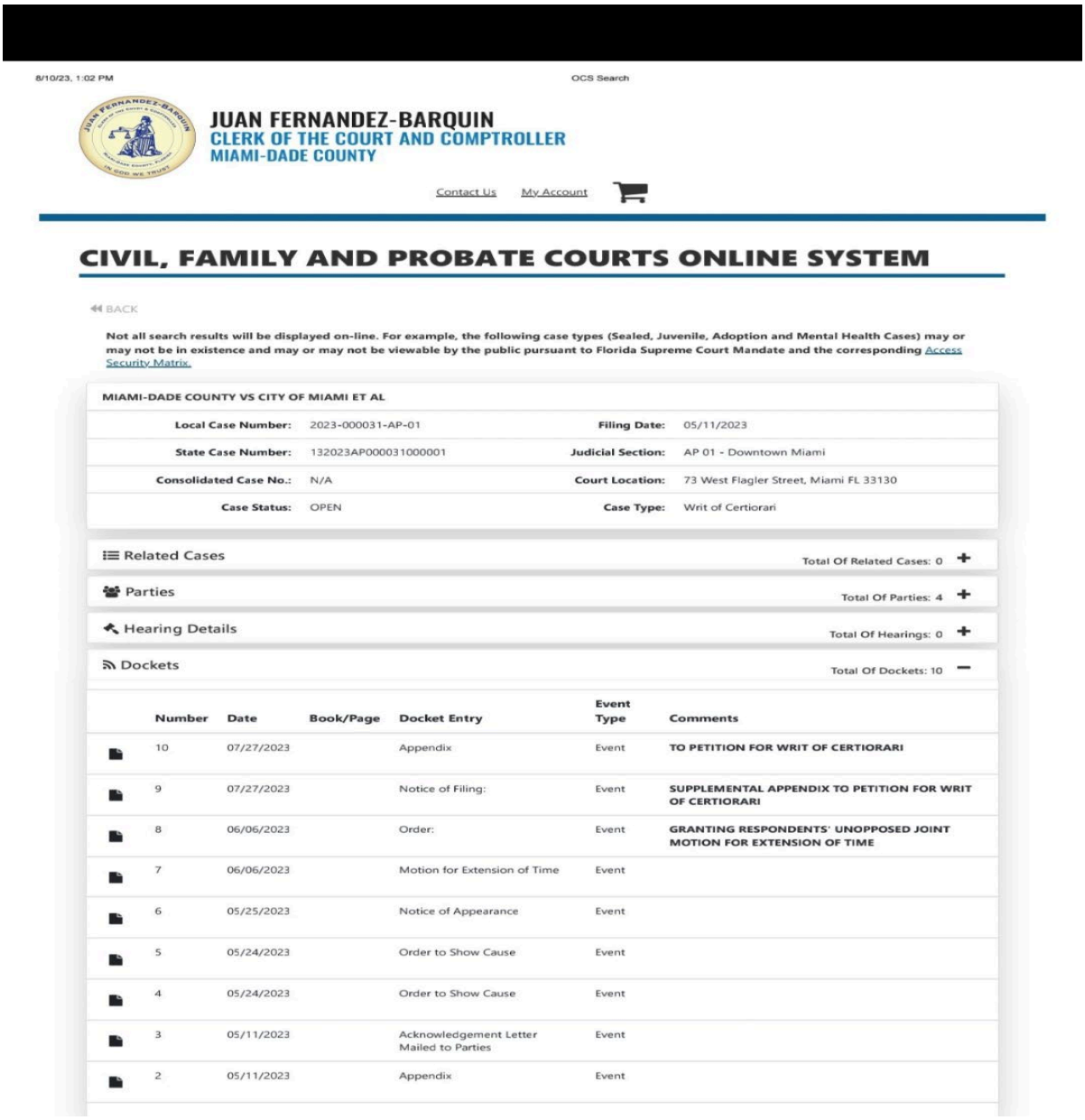
Petitioner,

v.

CITY OF MIAMI,
ANTHONY VINCIGUERRA,
and COURTNEY BERRIEN,

Respondents.
_____/

FILED FOR RECORD
2023 MAY 11 AM 11:19
TANYA D. BENNETT



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JUAN FERNANDEZ-BARQUIN
CLERK OF THE COURT AND COMPTROLLER
MIAMI-DADE COUNTY

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CIVIL, FAMILY AND PROBATE COURTS ONLINE SYSTEM

BACK

Not all search results will be displayed on-line. For example, the following case types (Sealed, Juvenile, Adoption and Mental Health Cases) may or may not be in existence and may or may not be viewable by the public pursuant to Florida Supreme Court Mandate and the corresponding Access Security Matrix.

MIAMI-DADE COUNTY VS CITY OF MIAMI ET AL

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

Related Cases — Total Of Related Cases: 0 +

Parties — Total Of Parties: 4 +

Hearing Details — Total Of Hearings: 0 +

Dockets — Total Of Dockets: 10 −

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

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

2006)); *Miami-Dade Cntv. v. Peart*, 843 So. 2d 363, 364 (Fla. 3d DCA 2003) (finding "respondents' notice of appeal was untimely" because the notice was filed thirty-one days after the decision was rendered).

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

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

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

Because the Petition was untimely filed, this Court has no jurisdiction in this matter and the Petition should therefore be dismissed.

PZAB WAIVER DECISIONS ARE TO BE APPEALED TO CITY COMMISSION

The Miami21 zoning code[2] sets forth the appeal process for appeals of zoning decisions.

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

> **7.1.1.5 City Commission**
>
> The City Commission, in addition to its duties and obligations under the City Charter, the City Code, and other applicable law, shall have the following duties specifically in regard to the Miami 21 Code:

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

i. To hear appeals from the Planning and Zoning Appeals Board in connection with decisions on a Variance or Exception, or any appeals of any administrative decision on a Waiver or Warrant application, or any other administrative decision or determination made in connection with a proposed Affordable Housing Development qualifying under Section 3.15. Such appeals shall be specially set for the first available City Commission hearing that is at least fifteen (15) days after the Planning, Zoning and Appeals Board hearing.

A plain reading of the provision makes clear that "made in connection with a proposed Affordable Housing Development qualifying under Section 3.15" does not modify each of the preceding enumerated items:

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

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

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

"made in connection with a proposed Affordable Housing Development qualifying under Section 3.15".

However, it is clear from the punctuation that the drafters desired that the phrase "or any other administrative decision or determination made in connection with a proposed Affordable Housing Development qualifying under Section 3.15" is a stand-alone phrase and the qualifier "made in connection with a proposed Affordable Housing Development qualifying under Section 3.15" does not modify the prior enumerated items in the section.

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

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

Further, the flow chart shows that the only decisions appealable to the City Commission are zoning changes, which is also erroneous as Warrants,

Variances and Exceptions are appealable to the City Commission under Section 7.1.5.

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

> *BOARD MEMBER ROBERT RODRIGUEZ: So if they're successful tonight, you're going to - well, it still has to go to the Commission. You're going to appeal. How long is that process, more or less?*
>
> *MR. WINKER: So to appeal to the Commission --*
>
> *MR. KERBEL: This wouldn't go to the Commission.*
>
> *BOARD MEMBER ROBERT RODRIGUEZ: Okay. SO you would appeal to the Commission.*
>
> *MR. WINKER: Right.*

App. 1302

WHEREFORE, the appeal should be dismissed with instructions that the County file an appeal to the City Commission.

STANDARD OF REVIEW

On certiorari review of a local governmental board's quasi-judicial decision, this Court applies a three-part review standard, inquiring whether the administrative tribunal: (i) accorded due process of law; (ii) applied the

correct law, i.e., whether the essential requirements of law were observed in the proceedings; and (iii) based its decision on competent, substantial evidence. E.g., *Wiggins v. Fla. Dep't of Highway Safety & Motor Vehicles*, 209 So. 3d 1165, 1170 (Fla. 2017); *Dusseau v. Metro. Dade Cnty. Bd. of Cnty. Comm'rs*, 794 So. 2d 1270, 1274 (Fla. 2001); *Town of Manalapan v. Gyongyosi*, 828 So. 2d 1029, 1032 (Fla. 4th DCA 2002). The Court can neither reweigh the evidence nor substitute its judgment for that of the local governmental board, and de novo review is prohibited. *Dusseau*, 21 So. 2d at 1275-76; *Fla. Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1093 (Fla. 1993).

Instead, this Court applies an exacting—and constrained— review standard to the evidence presented:

> [T]he "competent substantial evidence" standard cannot be used by a reviewing court as a mechanism for exerting covert control over the policy determinations and factual findings of the local agency. Rather, this standard requires the reviewing court to defer to the agency's superior technical expertise and special vantage point in such matters. The issue before the court is not whether the agency's decision is the "best" decision or the "right" decision or even a "wise" decision, for these are technical and policy-based determinations properly within the purview of the agency. The circuit court has no training or experience—and is inherently unsuited—to sit as a roving "super agency" with plenary oversight in such matters. *Dusseau*, 794 So. 2d at 1275-

76; accord *Miami-Dade County v. Torbert,* 69 So. 3d 970, 974 (Fla. 3d DCA 2011).

"As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful," and the Court's "job is ended." *Dusseau*, 794 So. 2d at 1276.

II. SUBSTANTIVE ARGUMENTS

SUBSTANTIAL COMPETENT EVIDENCE SUPPORTS PZAB DECISION

The PZAB resolution provides that "*based on the testimony and evidence presented, . . . there is substantial evidence in the record to grant the appeal and deny the County's application for the waiver*." App. 1407.

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

Instead of directly addressing the standard of review, Petitioner asks this Court to reweigh the evidence—something that it cannot do—because Petitioner believes PZAB should have sided with the County. Not only does the law not support such an undertaking by this Court, but the record does not support such a finding.

COUNTY'S MISREPRESENTATIONS OF THE RECORD MUST BE STRICKEN

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

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

Exhibit C
Exhibit F
Exhibit G
Exhibit H

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

> Appellate review is limited to the record as made before the trial court at the time of the entry of a final judgment or the orders

> complained of. It is entirely inappropriate and subjects the movant to possible sanctions to inject matters in the appellate proceedings which were not before the trial court.

Rosenberg v. Rosenberg, 511 So. 2d 593, 595, n.3 (Fla. 3d DCA 1987); *Rampart Life Assocs., Inc. v. Turkish*, 730 So. 2d 384 (Fla. 4th DCA 1999); *Keller Indus., Inc. v. Yoder*, 625 So. 2d 82, n.1 (Fla. 3d DCA 1993); A*rnowitz v. Equitable Life Assur. Soc'y of U.S*., 539 So. 2d 605, 606 (Fla. 3d DCA 1989); *Thornber v. City of Fort Walton Beach*, 534 So. 2d 754, 755 (Fla. 1st DCA 1988); *Hayes v. State*, 488 So. 2d 77, 81 n.3 (Fla. 2d DCA 1986); *Altchiler v. State, Dept. of Prof'l Regulation, Div. of Professions, Bd. of Dentistry*, 442 So. 2d 349, 350 (Fla. 1st DCA 1983).

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

Courts routinely strike such extra-record submissions. See *Finchum v. Vogel*, 194 So. 2d 49, 51 (Fla. 4th DCA 1966) (striking document from appendix because document was "not shown to have been offered, received or in any way made a part of the trial record"); *Agency for Health Care Admin. v. Orlando Reg'l Healthcare Sys., Inc*., 617 So. 2d 385, 389 (Fla. 1st DCA 1993); *Arnowitz*, 539 So. 2d at 606; *Thornber*, 534 So. 2d at 755; *Rosenberg*,

511 So. 2d at 595 n.3; *Altchiler*, 442 So. 2d at 350–51; *Mann v. State Rd. Dept.*, 223 So. 2d 383, 385 (Fla. 1st DCA 1969). And see, *Hutchins v. Hutchins*, 501 So. 2d 722 (Fla. 5th DCA 1987) (striking portions of brief containing factual misrepresentations, and imposing sanctions, with the observation that briefs submitted to an appellate court must be "truthful and fair in all respects").

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

> 6. PZAB-R-23-037 : A RESOLUTION OF THE MIAMI PLANNING, ZONING AND APPEALS BOARD ("PZAB") GRANTING THE APPEAL OF AND THEREBY REVERSING WAIVER NO. PZ-22-15336 ISSUED BY THE OFFICE OF ZONING PURSUANT TO ARTICLE 7, SECTION 7.1.2.5(D) OF ORDINANCE NO. 13114, AS AMENDED, THE ZONING ORDINANCE OF THE CITY OF MIAMI, FLORIDA ("MIAMI 21"), FOR THE PROPERTY LOCATED AT APPROXIMATELY 3500 MAIN HIGHWAY, MIAMI, FLORIDA; MAKING FINDINGS AND PROVIDING FOR AN EFFECTIVE DATE.
>
> a. 13513 - Final Decision Waiver -Exhibit A
> b. 13513 - Appeal Submission Request
> c. 13513 - Appeal Letter

d. 13513 - Proof of Payment
e. 13513 - Meeting Submittal Document Mr. Winker Presentation
f. 13513 - Online Public Comment

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

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

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

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

“lien or invoice due and owing to the City”

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

> **7.1.3.7 No Approval Available if Code Enforcement Violations**
>
> Except as provided in Section 7.1.2.1 (b) (3) for Certificate of Use or in the City Code for development permits including but not limited to Waivers, Warrants, Exceptions, and Variances, no approval or permit may be issued, and no application may be scheduled for public hearing, for a non-homestead property if the business, enterprise, occupation, trade, profession, property or activity is the subject of an ongoing city enforcement procedure, is the subject of any building violation(s), has any City lien or invoice due and owing to the City, or is the subject of a notice of violation of a state law or county ordinance where the business enterprise is located or is to be located, unless the permit or approval is required to cure life safety issues, is required to bring outstanding violations into compliance, is for unit(s) within building to which violations or monies owed are not attributable to the permit applicant, or the property is wholly owned by a governmental entity. In addition, if an approval or permit required to cure the existing violation(s) has been applied for, with a complete application that is being reviewed by the appropriate department, additional approvals or permits may be scheduled for hearing and/or issued for the property that is the subject of violations or monies owed. Additional permits issued are conditioned to prohibit the issuance of a certificate of occupancy or completion (including temporary or partial certificates of occupancy or completion) until the permit to cure the original outstanding Code Enforcement violation has been finalized and closed and all monies owed, inclusive of costs, to the City are paid. Any exemption listed herein may not be utilized for multi-

> unit structures wherein the violation has created a life safety issue for either the adjacent units or the structure in its entirety. This Section also applies to covenants, including but not limited to Unities of Title and Covenants in Lieu of Unity of Title. Failure to comply with conditions and safeguards, when attached to a grant of a development order or permit, shall be deemed a violation of this Miami 21 Code. This prohibition shall not apply to buildings or properties owned by governmental entities.

(emphasis added)

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

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

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

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

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

Decision was based upon an incomplete application

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

The decision itself acknowledges this situation in its conditions, which requires "full review by the Office of Zoning at time of Building permit application. Any substantial changes that arise may require a new Waiver." App. 1443

The proposed project differs significantly from the original plan approved by the City Commission and no waiver application should be approved until

such time as the plan is re-reviewed by PZAB and the City of Miami Historic and Environmental Protection Board ("HEPB").

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

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

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

As a result of these conditions, and the fact that the waiver application is for demolition of a building designated historic by the City of Miami HEPB and subject to a special certificate of appropriateness, the County's reliance on CUBE 3585 in support of its Waiver application is misplaced.

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

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

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

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

Section 3.3 goes on to state:

> All demolition permits shall require a Waiver and be referred to the Planning Department for review under the Tree Preservation Ordinance. All submittals shall contain a tree survey by a certified arborist.

The PZAB decision on the Playhouse waiver is distinguishable from the CUBE 3585 decision. In Cube, the Court found PZAB departed from

the essential requirements of the law by utilizing Intent provisions of the Zoning Code as a standard, thereby imposing an arbitrary and impossible standard for the issuance of a Waiver. Here the Waiver section itself provides two dozen other specific examples of what is meant by "specified minor deviations from the Miami 21 Code." To argue that demolishing a historically designated building pursuant to an expired certificate of appropriateness is a "minor deviation" is simply absurd.

Certificate of appropriateness for the project has expired

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

> g. *Expiration of certificates of appropriateness.* Any certificate of appropriateness issued pursuant to the provisions of this section shall expire 12 months from the date of issuance, unless the authorized work is commenced within this time period, or a building permit has been obtained. The preservation officer may grant an extension of time not to exceed 12 months upon written request by the applicant, unless the board's guidelines as they may relate to the authorized work have been amended.

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

> *BOARD MEMBER SILVA: What was the time frame for the certificate of appropriateness?*
>
> *MR. GOLDBERG: 12 months.*

App. at 1194-95; 1262

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

The City Code says what is means and means what is says: "**Any certificate of appropriateness issued pursuant to the provisions of this section shall expire 12 months from the date of issuance, unless the authorized work is commenced within this time period, or a building permit has been obtained."** (emphasis added)

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

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

The transcript of the hearing makes clear that there is no statutory or case law to support the County's argument. And the County did not attempt to provide any further statutory or case law basis in its Petition.

PZAB was not presented with any evidence regarding trees

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

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

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

App. 1305

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

NO CONFLICT OF INTEREST

Although the County failed to raise any concerns about PZAB member Andy Parrish's participation in the PZAB's decision-making process at the hearing, it now for the first time claims that his participation somehow deprived them of due process.

Besides the fact that he was only 1 of 6 members of the PZAB that voted against the County and the result would have been the same if his vote is disqualified, the County waived any objection by failing to raise the issue at the hearing.

Anyone seeking to disqualify a member of a decision-making body from participating in a decision must raise the challenge as soon as the basis for disqualification is made known. Where the basis is known or should reasonably have been known prior to the issuance of a decision and is not raised, it may not be relied on to invalidate the decision.

The Record reflects that Petitioner did not object or request a continuance to allow an opportunity to review and respond to the conflict of interest it now claims deprived it of due process. Accordingly, any such objection is waived by Petitioner's inaction during the PZAB hearing. *Murphy v. Int'l Robotic*

Sys., Inc., 766 So. 2d 1010, 1026 (Fla. 2000); accord *Phelps v. Johnson*, 113 So. 3d 924, 926 (Fla. 2d DCA 2013) ("contemporaneous objection requirement prevents an attorney from sandbagging the court and his opponent"); *First City Sav. Corp. of Tex. v. S&B Partners*, 548 So. 2d 1156, 1158 (Fla. 5th DCA 1989) (refusing to consider alleged error on certiorari review because petitioner "'sandbagged' the county commission by raising this issue for the first time in the circuit court certiorari proceeding").

Because it did not object to Mr. Parrish's participation, the County waived any objection to his participation in the PZAB's determination.

CONCLUSION

WHEREFORE, RESPONDENTS, ANTHONY VINCIGUERRA and COURTNEY BERRIEN, respectfully request that this Court dismiss the County's Petition.

CERTIFICATE OF COMPLIANCE

I hereby certify that this Response was prepared in Arial 14-point and contains 5,162 words, in compliance with Rule 9.045 and Rule 9.100 of the Florida Rules of Appellate Procedure.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Florida Court's E-Filing Portal and that I have effectuated service on all attorneys registered to receive service on this case in compliance with Fla. R. Jud. Admin. 2.516 this 21st day of August, 2023.

Respectfully submitted,

s/davidwinker/
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