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

APPELLATE DIVISION
CASE NO. 2023-31-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.
_____/

MIAMI-DADE COUNTY'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Respondents[1] reassert the ill-founded jurisdictional arguments from their Motion to Dismiss but without addressing the actual standard and dispositive case law previously cited by Miami-Dade County ("County"). Respondents instead invent an unsupported standard and disregard the fact that the County filed and served its Petition by the jurisdictional deadline.

[1] "Respondents" refers only to Respondents Anthony Vinciguerra and Courtney Berrien. Respondent City of Miami is referred to as the "City".

Respondents also ignore the City Code's plain language, the City's consistent interpretation, and this Court's previous decision on the same type of application. Respondents' jurisdictional arguments must be rejected.

Respondents' arguments on the substance fare no better. First, the City has conceded error, which alone supports quashing the decision below.[2] Second, Respondents' arguments are premised on misrepresentations of key facts, disregard for the record, and misreading of or disregard for applicable law. This Court should grant the Petition.

ARGUMENT

I. The County Timely Filed Its Petition for Writ of Certiorari

As in their unsuccessful Motion to Dismiss, *see* Doc. 15, Respondents incorrectly assert that the County filed its Petition one day late. Pet. Resp. at 6-11. The County hereby incorporates its response to that Motion. Pet. 2d Supp. App. Ex. 1.

As explained therein, the County timely filed its Petition electronically with the Clerk of the Circuit Court on May 10, the jurisdictional deadline. *Id.* at 9-15. Respondents present misleading screenshots of a portion of the docket and a portion of a case caption that is not from the Petition. Resp. at

[2] On August 31, 2023, the City filed a response to the Petition confessing error and agreeing that the City's Planning, Zoning and Appeals Board (PZAB) had no legal basis to deny the Waiver application. Doc. 20.

8-9. The actual Petition's stamp shows it was timely filed with the Clerk: "Filing # 172890434 E-Filed 05/10/2023 05:09:02 PM."[3] That the Petition was docketed with the Appellate Division section the following day does not make it untimely. Florida law is clear that jurisdiction was timely invoked upon filing with the Clerk and that filing in a different division of the same court is merely an administrative issue, not a jurisdictional one. Fla. R. App. P. 9.100(b) ("original jurisdiction of the court shall be invoked by filing a petition . . . ***with the clerk of the court having jurisdiction***") (emphasis supplied); *see also, e.g.*, *Burnett v. Starwood Hotels & Resorts Management Co.*, 251 So. 3d 223, 226 (Fla. 3d DCA 2018); *Pettway v. City of Jacksonville*, 264 So. 3d 210, 212 (Fla. 1st DCA 2018); *State v. Johnson*, 139 So.3d 968, 969 (Fla. 1st DCA 2014); *Malave v. Malave*, 178 So. 3d 51, 54 (Fla. 5th DCA 2015).

Respondents disregard this law and instead invent a standard whereby jurisdiction depends on mitigating circumstances for filing in a different section. Resp. at 10-11. Respondents cite no case law adopting this self-serving standard, because none exists. Under the actual case law, Respondents' jurisdictional challenge fails.

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[3] Filing the Appendix on May 11 does not change the analysis, as the filing of an appendix is not jurisdictional. *See, e.g.*, *Dragomirecky v. Town of Ponce Inlet, Bd. of Adjust.*, 917 So. 2d 410, 411-12 (Fla. 5th DCA 2006) (quashing dismissal of certiorari petition, even though appendix was not filed with petition and appendix later filed in response to court order was "incomplete, confusing and contradictory").

II. The City Commission Has No Jurisdiction over this Appeal

Respondents repeat their incorrect argument that jurisdiction lies with the City Commission, which the County addressed in its incorporated response to the motion, Pet. 2d Supp. App. Ex. 1. The County here addresses Respondents' new—but still meritless—arguments.

Respondents' interpretation of the City Code appears to invoke the doctrine of the last antecedent, which provides that "relative and qualifying words, phrases and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to, or including, others more remote." *City of St. Petersburg v. Nasworthy*, 751 So. 2d 772, 774 (Fla. 1st DCA 2000). Respondents contend that the phrase "made in connection with a proposed Affordable Housing Development qualifying under [s]ection 3.15" in section 7.1.1.5(i) of the City Code modifies only "any other administrative decision or determination," which is the nearest antecedent, rather than the entire list.

As the Florida Supreme Court has cautioned, "the doctrine of the last antecedent is not an absolute rule." *Penzer v. Transp. Ins. Co.*, 29 So. 3d 1000, 1007 (Fla. 2010). Importantly, "the doctrine cannot be applied in a way that ignores the plain reading of the language," and "[w]hen several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that

the clause be read as applicable to all." *Id.* (citation omitted). Here, the phrase at issue is naturally as applicable to all items on the list as it is to the last item, "any other administrative decision or determination."

Moreover, "the doctrine [of the last antecedent] can 'be overcome by other indicia of meaning.'" *Principal Life Ins. Co. v. Halstead*, 310 So. 3d 500, 503 (Fla. 5th DCA 2020). It should not be applied "if an alternative construction is more reasonable," especially when read *in pari materia* with other relevant provisions. *A.J.R. v. State*, 206 So. 3d 140, 143 n.1 (Fla. 2d DCA 2016). Indeed, statutory meaning is to be "determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." *Conservancy of Sw. Florida, Inc. v. Collier Cnty.*, 352 So. 3d 481, 489 (Fla. 2d DCA 2022).

When considering other Code provisions, a Waiver decision may only be appealed from the PZAB to the City Commission if it is "made in connection with a proposed Affordable Housing Development qualifying under [s]ection 3.15," and otherwise is appealed directly to court. First, article 7, diagram 14 of the Code illustrates the City process, and this diagram does not show an appeal to the City Commission for Waiver decisions. Respondents argue that "the cited illustration doesn't even show that waiver decisions are appealable to PZAB." Resp. at 13. But Respondents must not be looking at the same graphic, because diagram 14 plainly shows "Appeal

PZAB" for Waivers, followed by "Building Permit," with no appeal to the City Commission in between.

Respondents further claim that "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." Resp. at 13-14. Again, Respondents must be looking at a different diagram, because the one in question plainly shows "Appeal City Comm." for Warrants, Variances, and Exceptions. Respondents confuse the depiction of matters that are heard directly by the City Commission after a PZAB ***recommendation***—rezonings, *see* §§ 7.1.1.4(b)(6) and 7.1.1.5(b), Miami 21—with matters that are ***appealable*** to that body after PZAB ***decisions***— warrants, exceptions, and variances. The diagram plainly does not depict an appeal from PZAB to the City Commission for waiver decisions, such as the one at issue here. Moreover, section 7.1.5, entitled "Appeals," does not provide for a Waiver appeal to the City Commission and—unlike appeals it does provide for—excludes any timeframe for filing one. *Id.*

That section 7.1.1.5 differentiates appeals from PZAB related to affordable housing development from appeals of other applications is further evident from subsection (e) providing for appeals to the City Commission of

PZAB decisions on Warrants, Variances, and Exceptions,[4] all three of which also appear in subsection (i). Pet. 2d Supp. App. Ex. 1 at Ex. B. Unless "made in connection with a proposed Affordable Housing Development" is applied to the entire list in subsection (i), the provision would be rendered superfluous and duplicative of subsection (e) as to Warrants, Variances, and Exceptions. "It is an elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of the statute if possible, and words in a statute should not be construed as mere surplusage." *Hechtman v. Nations Title Ins. of N.Y.*, 840 So. 2d 993, 996 (Fla. 2003). The Court must "reject an interpretation that would render . . . an essential section of the [code] superfluous." *See Kipp v. Amy Slate's Amoray Dive Ctr., Inc.*, 251 So. 3d 941, 946 (Fla. 3d DCA 2018).

Reading these provisions *in pari materia*, the City Code does not provide for City Commission appeals of PZAB Waiver decisions, except for affordable housing developments. This reading conforms with the City's own historical interpretation and this Court's prior exercise of certiorari jurisdiction

[4] Subsection (e) provides in full that the City Commission has jurisdiction "[t]o hear appeals of the ruling of the Planning, Zoning and Appeals Board on the appeal of a zoning interpretation, Certificate of Use denial or revocation, planning determination of Use, Warrant, Variance or Exception." § 7.1.1.5(e), Miami 21. Again, notably absent from this list of PZAB decisions appealable to the City Commission is a Waiver.

over an appeal of a PZAB decision on the exact same type of Waiver in the exact same zoning district, *Cube 3585, LLC v. City of Miami*, Case No. 18-050 AP, at 6 (Fla. Cir. Ct. App. Jan. 31, 2019).

III. Pursuant to *Cube 3585*, the Sole Focus of the PZAB Hearing is Compliance with Tree Preservation Standards, and the Record Below Contains Substantial Competent Evidence Showing Compliance and No Contrary Evidence

Respondents incorrectly assert that PZAB members had not been provided a tree survey or other evidence relating to tree preservation, citing one Board Member's complaint that he'd "heard nothing about trees to even make a decision." Resp. at 20, 28. Respondents' selective reference strips that quote of all context: it was a commentary on the PZAB hearing having been overwhelmed by other (legally irrelevant) matters, such as liens and historic preservation requirements. In fact, the record contains unrebutted and substantial competent evidence addressing, and demonstrating the County's compliance with, the tree preservation standards.

First, the Zoning Administrator testified that the County's application included the required tree survey and arborist report, that it was reviewed for compliance with tree preservation standards, that the relevant City departments conducted independent reviews, and that the application complied with the standards. *See* Pet. App. Ex. E at 1182-84. The referenced materials were on file with the Zoning Administrator and available to the

PZAB and the public for inspection during the hearing.

Second, no one offered ***any*** evidence of a failure to comply with tree preservation requirements. Recognizing this fact, the City has conceded that "based on the pertinent code provisions and this court's prior decision in *Cube 3585 . . .* , the Planning and Zoning Appeals board erred" in reaching the decision below. Doc. 20.

Respondents attempt to distinguish *Cube 3585* by arguing that partially demolishing a historic resource is not a "minor deviation" for which a Waiver may issue. Resp. at 25-26. But the City Code does not define "minor" or provide for denial based on that undefined term. And the term "minor deviation" appears only in section 7.1.2.5, which is the very intent provision that *Cube 3585* held does not supply the "standard or criteria for a Waiver" and thus cannot be considered. Pet. App. Ex. B at 058. The applicable standard is set forth in Appendix A, section 3.3, and concerns solely tree preservation standards. *Id.* The only record evidence showed the County's compliance. Yet the PZAB denied the application anyway.

Respondents mischaracterize the County's argument and the actual record evidence, *see* Resp. at 16-17. Evidence does not exist on both sides of the issue such that the PZAB had discretion to decide: rather, ***no evidence*** addressing the only applicable standards supported the PZAB decision. As the City has itself conceded, the PZAB decision must thus be

quashed. *See City of W. Palm Beach Zoning Bd. of Appeals v. Educ. Dev. Ctr.*, 504 So. 2d 1385, 1386 (Fla. 4th DCA 1987) (decision must be quashed where record below is devoid of evidence supporting it).

IV. Respondents Mischaracterize Section 7.1.3.7

Respondents contend that section 7.1.3.7 precludes approval if the property at issue "has any City lien or invoice due and owing to the City[.]" Resp. at 21-23. But at the time of the PZAB hearing, section 7.1.3.7 ***did not*** include any such language regarding liens. The City Commission adopted that provision months after the PZAB hearing. Respondents misrepresent the governing law to the Court.

The law in effect at the time of the PZAB hearing differed significantly from what Respondents now cite to this Court, as Respondents' counsel well knows. Respondents' counsel made the same argument at the hearing, and the Zoning Administrator specifically responded by explaining that the applicable code said nothing about liens:

> ***Section 7.1.3.7, Miami 21 doesn't mention liens***. What it says is this: ["]No approval may be issued if the business, enterprise, occupation, trade, profession, property or activity is the subject of an ongoing city enforcement procedure, 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 subject of the application would cure the outstanding violation. 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.["] ***Again, no mention of liens***, and there's no open violation at this time. So that section doesn't

apply.

Pet. App. Ex. E at 1253 (emphasis supplied); *id.* at 1283.

On May 23, 2023—more than two months ***after*** the PZAB decision at issue—the City adopted Ordinance No. 14178 to add new language regarding liens to section 7.1.3.7. *See* Pet. 2d Supp. App. Ex. 2. That subsequently adopted language cannot govern this proceeding. And even if it did, Respondents ignore the new exception for property "wholly owned by a governmental entity," *id.*, which applies to the State-owned Playhouse.

Finally, even if liens were relevant, the record evidence conclusively showed no unpaid liens. Respondents cite an estoppel report they obtained from the City purporting to show a lien, but the City Attorney at the hearing explained that the report was incorrect:

> Hearing board staff searched that lien number, and . . . it shows that the lien was released in 2014 and it shows a zero balance. . . . And it's inexplicable why a report that showed up in February of this year reflects a lien, but the system shows there is no lien and there's zero amount due.

Pet. App. Ex. E at 1305-06; *Id.* Ex. G.

When the PZAB decided this matter, section 7.1.3.7 only precluded an approval if the property was the subject of an "ongoing city enforcement procedure," which did not exist here. Pet. at 16-18. Indeed, Respondents' own estoppel report indicated in prominent lettering that the property had "NO OPEN VIOLATIONS." Pet. App. Ex. E at 1285-87; *id.* Ex. G at 1400.

Thus, section 7.1.3.7 furnished no basis to deny the Waiver, and the Court should not reward Respondents for misrepresenting the applicable law in the hopes of avoiding this obvious conclusion.

V. The County's Certificate of Appropriateness is Irrelevant to This Proceeding and Has Not Expired

Respondents incorrectly argue that the County's certificate of appropriateness has expired and that, on account of such expiration, the PZAB properly denied the Waiver. Resp. at 26-28. As explained in the Petition, this argument remains both legally and factually incorrect.

First, a certificate of appropriateness is an independent process, not a prerequisite to a demolition waiver. *See* Pet. at 28-31. As the Zoning Administrator explained, while compliance with each may be needed for a demolition ***permit***, the demolition ***waiver*** process is distinct from both the building permit and historic preservation processes. Pet. App. Ex. E at 1255. This is reflected on the administratively approved Waiver, which made "[f]ull compliance with all other aspects of the Code" a ***condition*** of—not a ***prerequisite*** to—such approval. *Id.* Ex. L at 1443.

Second, the County and City agree that the certificate of appropriateness was tolled until June 7, 2022, when the prior litigation ended at the Third District Court of Appeal. *Id.* Ex. E at 1261-62. Respondents' contention that "there is no statutory or case law to support the County's

argument" is simply wrong. The concept of equitable tolling is widely recognized. *See, e.g.*, *Machules v. Dep't of Admin.*, 523 So. 2d 1132, 1134 (Fla. 1988) ("The doctrine [of equitable tolling] serves to ameliorate harsh results that sometimes flow from a strict, literalistic construction and application of administrative time limits contained in statutes and rules."); *Fromer v. Two Hundred Post Associates*, 631 A.2d 347 (Conn. Ct. App. 1993) ("[O]n the facts of this case, in which a valid permit was issued to conduct a regulated activity within a specified time period and appeals from the granting of the necessary permits to conduct that activity were not resolved within the time period during which the activity was required to begin, that time period is tolled until all litigation is completed."); R. Fuller, Land Use Law and Practice (1993) § 24.10 at 453 ("[A]n appeal from the granting of an issuance or permit is a defense to the fact that the successful applicant did not use the permit or variance within the time period otherwise provided by law."). The certificate of appropriateness thus presented no basis to deny the Waiver.

VI. The Waiver Application was Complete

Respondents erroneously contend that the Waiver application was incomplete. Resp. at 23. Respondents presented only argument of counsel, which is not evidence. *See Skinner v. State*, 31 So. 3d 940, 943 (Fla. 1st DCA 2010). The only record evidence demonstrates the completeness of the

application: the Waiver application itself, and the Zoning Administrator's testimony to that fact. Pet. App. Ex. E at 1179-80. Respondents' bald assertion must be rejected.

VII. The Biased Acting Chair's Participation Violated Due Process

Respondents do not argue that the Acting Chair was an impartial and unbiased decision-maker. On this record, how could they? As detailed in the Petition, the Acting Chair was a consistent advocate against the very project he was reviewing: he was the antithesis of impartiality. Pet. at 40-47.

Respondents instead argue that the County waived this challenge. Resp. at 29-30. Respondents cite three cases: *Murphy v. Int'l Robotic Sys., Inc.*, 766 So. 2d 1010, 1026 (Fla. 2000); *Phelps v. Johnson*, 113 So. 3d 924, 926 (Fla. 2d DCA 2013); and *First City Sav. Corp. of Tex. v. S&B Partners*, 548 So. 2d 1156, 1158 (Fla. 5th DCA 1989). None concern remotely analogous facts. In each case, an issue was in no manner raised to, or addressed by, the lower tribunal, and each court thus found the issue had not been preserved for appellate review. Here, the lower tribunal directly addressed the issue.

The Acting Chair himself introduced the bias issue with a lengthy disclosure at the beginning of the hearing and a request that the other members opine on his recusal. The PZAB members then discussed his bias

and entertained a motion to recuse him from the proceedings—a motion that ultimately failed. The PZAB did not invite the County or anyone else to be heard on this issue. But while the County could not make a contemporaneous objection, it didn't need to. By the time the County was given an opportunity to speak—after public hearing and Respondents' presentation, *see* Pet. App. Ex. E at 1242—an objection would have served no purpose: the PZAB had already considered and rejected the only thing that the County could have conceivably requested—the Acting Chair's recusal. *Cf. S&B Partners*, 548 So. 2d at 1158 (if issue had been raised below, the county commission could have addressed it). Because the lower tribunal expressly raised and considered the bias issue, this Court may consider it.

Respondents also argue that the Acting Chair was "only 1 of 6 members . . . that voted against the County and the result would have been the same if his vote is [sic] disqualified[.]" Resp. at 29. As explained in the Petition, the Acting Chair's participation was not harmless. First, Board Member Gersten left the hearing because of his discomfort participating in a hearing tainted by the Acting Chair's obvious bias. Pet. App. Ex. E at 1159-60. Second, the Acting Chair forcefully argued against the County's application and introduced improper standards, *id.* at 1310-15, which may have influenced other Board Members to vote against the Waiver, and for

the wrong reasons. *See Dellinger v. Lincoln Cnty.*, 832 S.E.2d 172, 179 (N.C. Ct. App. 2019). The PZAB thus violated due process by allowing the biased Vice Chair to participate in the hearing.

VIII. Exhibits Should Not Be Stricken

Respondents contend that County's Appendix Exhibits C, F, G, and H were not part of the record and should thus be stricken. Resp. at 17-20. Respondents are mistaken.

Exhibit C is the subject Waiver application itself. It was introduced into the record by reference in the administrative decision on appeal, which references and grants that application, *see* Pet. App. Ex. L, and in the Zoning Administrator's testimony on the application's completeness, *see id.* Ex. E at 1179, 1182-83.

Exhibit F is an email exchange the Zoning Administrator had with code enforcement staff, which he introduced on-screen and incorporated into the record during his testimony. *See id.* at 1180-82.

Exhibit G is a composite exhibit incorporating documents introduced to the PZAB about the (irrelevant) lien issue. First is the estoppel report that Respondents' counsel himself introduced, albeit incompletely. Respondents' counsel electronically presented all but the fifth page—which he initially hid from the PZAB—in his presentation. *See id.* at 1190. And the PZAB ultimately forced Respondents' counsel to display the fifth page, which

states, “NO OPEN VIOLATIONS” (belying his claim that an ongoing code enforcement procedure precluded issuance of the waiver, *see supra* § IV). *See* Pet. App. Ex. E at 1285-87 (testifying when asked for the fifth page, “I’ll have to look at what I’ve got. . . . Oh, here it is. So that’s page 5”).

Exhibit G also includes lien and code enforcement documents that the City Attorney referenced and incorporated in his statements to the PZAB. *See id.* at 1305-06 (stating that “I’m ready to show this [lien and code report] to Mr. Winker,” and “I’ll be more than happy to circulate this to Mr. Winker and then the Board”). Thus, these documents were all made part of the record.

Exhibit H is an email exchange regarding the tolling of the certificate of appropriateness, which, although irrelevant, the PZAB discussed. *See id.* at 1261-75. Exhibit H is only included in the Appendix in response to the Respondents’ legally irrelevant argument that the certificate of appropriateness had expired. Even if it is disregarded, the City Attorney opined during the hearing that “the certificate of appropriateness has not expired due to the tolling of the underlying appellate process,” thus introducing the pertinent fact into the record. *Id.* at 1262.

The Court should reject Respondents’ effort to censor the record, should consider the entire record, and should quash the decision below.

CONCLUSION

The County's and City's submittals demonstrate that the PZAB, led by an irredeemably biased Vice Chair, wrongly denied the Waiver application by applying the wrong law, disregarding this Court's binding precedent, and failing to adduce any supporting evidence. This Court should grant the writ of certiorari and quash the PZAB's decision.

Dated: September 8, 2023

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Certificate of Service

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Certificate of Compliance Regarding Computer Briefs

I HEREBY CERTIFY that this reply 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(k).

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