NOT FINAL UNTIL TIME EXPIRES
TO FILE REHEARING MOTION,
AND IF FILED, DISPOSED OF

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

MIAMI-DADE COUNTY,
Petitioner,

CASE NO. 23-31-AP-01

APPELLATE DIVISION

v.

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

OPINION[1]

Opinion filed: April 12, 2024.

Before TRAWICK, SANTOVENIA and ARECES, R., JJ.

James Edwin Kirtley, Jr., Esq., for Petitioner.

Kerri L. McNulty, Esq., for Respondent, City of Miami.

David J. Winker, Esq., for Respondents, Anthony Vinciguerra and Courtney Berrien.

[1] This Court's prior Opinion filed on February 9, 2024 is withdrawn and replaced with this Opinion.

ARECES, R., J.

Petitioner Miami-Dade County ("Petitioner") filed a Writ of Certiorari wherein it contends this Court should quash Resolution No. PZAB-R-23-037, issued by the City of Miami Planning and Zoning Appeals Board (the "Resolution"). This Court agrees. Petitioner's Writ of Certiorari is GRANTED.

On a petition for writ of certiorari, this Court must determine "(1) whether procedural due process is accorded, (2) whether the essential requirements of the law have been observed, and (3) whether the administrative findings are supported by competent substantial evidence." *Miami-Dade Cnty. v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 199 (Fla. 2003). In this case, Respondent City of Miami's Planning and Zoning Appeals Board (the "PZAB") applied the wrong law, made a decision unsupported by competent substantial evidence and deprived Petitioner of due process.

This case is not complicated.

Pursuant to sec. 3.3 of the Coconut Grove Neighborhood Conservation District NCD-3, "[a]ll demolition permits shall require a Waiver and be referred to the Planning Department *for review under*

the Tree Preservation Ordinance."[2] *See* Miami, FL., Code Appx. A at 3.3 (emphasis added). Section 3.3 also requires "[a]ll submittals shall contain *a tree survey* by a certified arborist." *Id.* (emphasis added).

Section 7.1.2.5 of the Miami Code sets forth the review criteria and approval process for the aforementioned waiver. *See* Miami, FL., Code at § 7.1.2.5. Importantly, sec. 7.1.2.5(d) provides, in part,

> Approvals **shall** be granted when the application complies with all applicable regulations.

Id. (emphasis added). The "applicable regulations," in the context of the particular Waiver sought here, quite obviously do not encompass regulations *inapplicable* to trees and their preservation. If this was not immediately apparent from the plain text of the code provisions at issue, then it should have been following this Court's 2019 Opinion in *Cube 3585, LLC v. City of Miami, et. al.,* Case No. 18-050, 44 Fla. L. Weekly D2248b (Fla. Cir. Ct. App. Jan. 31, 2019) ("The NCD is very specific to the nature of what this Waiver was for to make certain that the tree canopy is not being affected and is protected."). The City of Miami, in fact, appears to agree and has filed a Confession of Error

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[2] "Tree Preservation Ordinance" can be found in Chapter 17 of the City Code of Ordinances. *See* Miami, FL., Code at §§ 17-1 – 17.77.

wherein it "admits that, based on the pertinent code provisions and this court's prior decision in the *Cube 3585, LLC...*, the Planning and Zoning Appeals board erred when it granted the appeal at issue."

The two individual respondents, Anthony Vinciguerra and Courtney Berrien (collectively, the "Individual Respondents"), however, continue to argue that the Writ of Certiorari should be denied because, among other things, Petitioner is merely asking this Court to reweigh the evidence.[3] The Individual Respondents are mistaken.

There is no *competing* evidence to reweigh.

The only relevant, competent and substantial evidence in this case established that Petitioner had satisfied all applicable regulations and was entitled, by the City's own Code, to the Waiver. The PZAB, having heard from the City's own Zoning Administrator that Petitioner had satisfied all applicable requirements and was entitled to the Waiver, nevertheless proceeded to debate the merits of

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[3] Individual Respondents' other arguments for denying the Writ of Certiorari are entirely without merit. For example, the Individual Respondents inexplicably maintain that the property has an open lien despite overwhelming evidence that there is not, in fact, an open lien. Individual Respondents' remaining arguments for denying the Writ of Certiorari, therefore, are rejected without further discussion.

historic preservation, demolition, the existence (or lack thereof) of a lien that had been released in 2014, a certificate of appropriateness and even the definition of the term "minor." These matters have no bearing on the Waiver at issue in this case, and the PZAB deprived Petitioner of due process when, without notice, it unlawfully expanded the scope of the hearing to include matters over which it had zero authority.

In summary, the PZAB (1) applied the incorrect law and, in so doing, ignored this Court's prior precedent; (2) rendered a decision that was unsupported by competent, substantial evidence; and (3) deprived Petitioner of the due process of law. [4]

Accordingly, the Petition for Writ of Certiorari is GRANTED. Resolution No. PZAB-R-23-037, issued by the City's Planning and Zoning Appeals Board is QUASHED.

TRAWICK and SANTOVENIA, JJ, concur.

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[4] This majority opinion does not address whether the Acting Chair should have recused himself from the proceedings below. Petitioner failed to preserve that issue.

TRAWICK, J., specially concurring.

Contrary to the arguments made in Respondent's motion for rehearing which was filed prior to this corrected opinion being issued, the record contains competent substantial evidence addressing and demonstrating the County's compliance with the tree preservation standards. First, Planning Director Daniel Goldberg testified before the PZAB that the County's Waiver Application[5] included the required tree survey and arborist report and complied with the tree standards. Mr. Goldberg told the PZAB that: "in my review of the waiver, what I always check for every demolition waiver, is to make sure that the required arborist report is there, and it is. And to make sure that the – aside from the arborist report, that it has been reviewed by environmental resources, which it is - which it has been." (App. at 1183). Mr. Goldberg explained that the hearing is "just a review of tree protection" (App. at 1177), and "the demolition waiver was

[5] Mr. Goldberg's Memo (the Final Decision regarding the Waiver) stated that the Office of Zoning received a Wavier Application that included.... "[a]n Existing Tree Disposition Plan and Tree Inventory dated October 3, 2022, signed and certified by Surveyor of Record, Oria J. Suarez"... and "an Arborist Report and Tree Inventory dated August 10, 2021, by Certified Arborist, Jeff Shimonski." (App. at 1437-1438).

reviewed by HEP staff and environmental resource for tree protection which is the standard for this waiver." (App. at 1182). The record is bereft of any relevant competing evidence to counter Mr. Goldberg's testimony.

Individual Respondents argue that Petitioner included materials in the Appendix which were not part of the Record on Appeal – specifically Exhibits C, F, G, and H.[6] Individual Respondents further argue that the tree survey was not part of the record below and was submitted for the first time as part of Petitioner's Appendix. I disagree. The County submitted all of the application materials for a demolition waiver, including an extensive fifty-one page report from certified arborist Jeff Shimonski, and that Petitioner's exhibits C, F, G, and H were properly included in the Appendix.

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[6] Exh. C is the Petitioner's Application materials for an administrative demolition waiver which includes the arborist report. Exh. F is an email exchange between Code Compliance Supervisor Michael R. Lytel and Code compliance staff, Mr. Goldberg and the staff, and related emails between staff. Exh. G is a composite exhibit pertaining to lien and Code enforcement documents – (proof of lien satisfaction, estoppel report). Exh. H is an email exchange regarding the tolling of the certificate of appropriateness.

Additionally, it must be noted that nowhere in the record do Individual Respondents argue that Petitioner failed to include a tree survey/arborist report. Accordingly, Individual Respondents failed to preserve that objection. The Third District Court of Appeal has held that "the rule of preservation, which is a keystone in our appellate process, dictates that in the absence of fundamental error, an appellate court will not consider an issue that has been raised for the first time on appeal. *Vorbeck v. Betancourt,* 107 So. 3d 1142, 1147-48 (Fla. 3d DCA 2012).

As a result, the arguments made in Respondent's motion for rehearing are not well taken. From my perspective, this is why the motion for rehearing is being denied.

I also write separately to express my concern regarding the failure of the Acting Chairperson of the Planning and Zoning Appeals Board to recuse himself. This issue was not preserved, and as a result is not addressed in the majority opinion. However, the conflict and bias, or at the very least the appearance of a conflict and bias, raised in the record below is so startlingly apparent that it cannot be ignored. Acting Chair Parrish disclosed that he had been directly involved with and gave support to objectors of the County's plan for

the restoration of the Coconut Grove Playhouse. At the March 15, 2023 appeal hearing before the PZAB, the Acting Chair stated the following:

> My involvement with the Coconut Grove Playhouse began when I was chair of the HEPB Board on October 5, 2005, when the Board voted 8 to zero to designate the entire exterior of the Playhouse historic.
>
> Since then, I have written letters to the editor of the Herald and many others, some of which have been published, recounting my memories of that HEPB Board meeting, for which I have the court reporter transcript showing conclusively that the entire exterior of the Playhouse was designated and not just a so-called front building.
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> I got directly involved in [sic] again when I spoke to the Miami City Commission on May 8th, 2019, when I testified as to the HEPB Board vote designating the entire exterior of the Playhouse as historic.
>
> I also attended the May 2019 mayor's veto rally at the Playhouse, where Mayor Suarez recounted his reasons for vetoing the City commission's vote to demolish most of the Playhouse except for the front façade.
>
> In the fall of 2021, a half dozen Groveites, including me, who were in favor of preventing the demolition of all but the façade of the Playhouse raised $5,000 to pay for a billboard on U.S. 1 protesting the proposed demolition of most of the Playhouse.

> My company, Wind & Rain Properties, offered to collect the $5,000 for the billboard because that company already had a bank account, was able to segregate and keep track of the monies collected. My contribution was $15, one – [sic] $15.
>
> In August of 2022, I was one of the 14 original plaintiffs in a lawsuit based upon a 2004 voter-approved bond issue to restore the Playhouse. This lawsuit was brought by the attorney here tonight, David Winker. My wife and I are social friends with Attorney Winker and his wife Christina, although we have not met with them at least for the last six months.
>
> Then in September 2022, with the billboard collection mechanism as a precedent, I was requested by other Groveite citizens in favor of saving the Playhouse to again allow my company, Wind & Rain Properties, to collect GoFundMe donations in a segregated account. I agreed to
> that, but contributed no funding whatsoever myself. That segregated account no longer has any funds in it, having been dispersed to the citizen's group that started it.

I can certainly appreciate and applaud Acting Chair Parrish's sacrifice of his time and effort to participate on a volunteer civic board. I also agree with his statement that "civic activism should not automatically result in disqualification from participation on [the PZAB] or any other City Board . . . ." However, the level of civic

participation here, as well as his relationship with counsel for the Individual Respondents, crossed the line to the point that the Acting Chair in a quasi-judicial proceeding had passed from a neutral arbiter to an interested party. While the PZAB rejected a motion requiring Acting Chair Parrish to recuse himself, such a vote should not have been necessary. Given the concerns raised by his activities related to the Playhouse, actual conflict and bias, or at least the appearance of conflict and bias, should have resulted in the Acting Chair Parrish recusing himself.[7] *See Int'l Ins. Co. v. Schrager,* 593 So. 2d 1196, 1197 (Fla. 4th DCA 1992); *Junior v. LaCroix,* 263 So. 3d 159, 168 (Fla. 3d DCA 2018 (Rothenberg, C.J., specially concurring) ("[T]he trial court impermissibly crossed the line between neutral arbiter of the facts to that of an advocate. . . ."). Had the issue of the Acting Chair's recusal been properly preserved, I believe that this

[7] My concern regarding the Acting Chair's partiality in this matter is further borne out by his expressed disagreement with a precedent of this Court, *Cube 3585.* He apparently felt that the PZAB could disregard that opinion and act in direct contravention of it. While anyone, including board members, may disagree with a decision of this Court, a Board such as the PZAB is not free to ignore a precedent which interprets the same code provision that is at issue in a pending case before the Board.

issue would have been another basis to quash the PZAB's decision due to a procedural due process violation.[8]

[8] While the Court chose not to address alleged ethical lapses of counsel for the Individual Respondents, they are also a cause for concern. One glaring example is counsel's presentation of a City code enforcement report to the PZAB in support of his argument that there were ongoing enforcement proceedings against the subject property. In presenting that report, counsel omitted the fifth and final page of the document which directly refuted counsel's argument. That page was not presented by counsel until a board member asked him about the missing page. Such conduct is troubling to say the least.