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 REPLY IN SUPPORT OF
CROSS PETITION FOR WRIT OF CERTIORARI

The City attempts to legitimize the Mayor's improper veto by reading express provisions of the City Code out of existence and relying on the utterly circular logic that merely introducing a document into the record makes that document competent substantial evidence, regardless of its actual competence. The City also offers no persuasive defense to the Circuit Court's disregard of *Playhouse I* and the parties' own agreement that the designation did not include interior features. For these reasons and others discussed below, the Court should grant the cross petition.[1]

[1] If the Court denies the City's petition, it need not address this cross petition.

I. Argument

A. The Circuit Court violated the essential requirements of law in finding that the Playhouse interior was subject to regulation

The City defends the Circuit Court's improper consideration of the interior by contending that "[n]either the circuit court nor the [City] Mayor's veto implicate the interior of the Playhouse," because the proposed "demolition would eliminate the historic significance of the entire structure." Resp. at 42. The City cites no support for this view and, as explained *infra*, the record contains no such support. Moreover, that the entire structure is historically significant is not a license to consider impacts to the interior in disguise. But the Circuit Court did not even attempt to disguise its consideration of the interior: it is plain on the face of the opinion.

Indeed, the Circuit Court reached an issue that the parties did not raise, second-guessed the City historic preservation staff's expert opinion, and ignored *Playhouse I*, finding instead that the interior ***is*** subject to regulation. Op. at 18 n.7, 6. As explained in the cross petition, each of these findings and rulings exceeded the Circuit Court's certiorari jurisdiction and violated the essential requirements of the law. The City offers no persuasive response to these compelling arguments.

1. The Circuit Court violated the essential requirements of the law by reaching an issue not raised by the parties

The City wholly fails to address the argument that the Circuit Court violated the essential requirements of the law by reaching an issue not raised by the parties, contrary to *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 200-01 (Fla. 2003). Accordingly, this argument should be deemed conceded, which is reason enough to grant the County's cross-petition.

2. The Circuit Court violated the essential requirements of the law by making independent factual findings

The City invokes "historical significance" of the Playhouse as a whole to justify improper regulation of the interior. Resp. 42-44. But as explained further below, this argument violates canons of statutory construction. And even if it were legally tenable, this argument cannot explain away either the Mayor's express reliance upon evidence that was itself premised on the interior or the Circuit Court's express and improper finding that the interior was fair game for regulation. The Circuit Court's express and independent factual finding was no mere logical conclusion that could be drawn from the record, either. Rather, it was the exact type of factual finding on certiorari review that the Florida Supreme Court admonished against in *Broward County v. G.B.V. International, Ltd.*, 787 So. 2d 838, 844 (Fla. 2001). While

the City contends *G.B.V.* is inapposite, in fact the Circuit Court here committed the exact same error as the lower court did there: it made its own factual finding that was wholly contrary to the record and that it was jurisdictionally foreclosed from making. This, too, warrants second-tier relief.

3. The Circuit Court violated the essential requirements of the law in failing to heed the law of the case

The City misrepresents the record in contending that the County waived its law of the case argument. In fact, the County raised the law of case at the HEPB hearing and has consistently maintained throughout these proceedings that *Playhouse I* precludes regulation of the interior—a position that the City has repeatedly agreed with. *See, e.g.*, Pet. App. Ex. E at MDC0313.

But the City now brushes aside as dictum the prior panel's holding that "[t]he 2005 Designation Report did not include the interior of the building" and thus was "not within the purview of the Historical Board." Resp. at 43. The City further contends *Playhouse I* does not apply here because that case involved the County's master plan, whereas this proceeding concerns the County's final plans. *Id.* at 43-44. In each respect, the City is wrong.

a. The prior ruling was not dictum.

It is well established that "[a] holding consists of those propositions along the chosen decisional path or paths of reasoning that (1) are actually

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decided, (2) are based upon the facts of the case, and (3) lead to the judgment." *Pedroza v. State*, 291 So. 3d 541, 547 (Fla. 2020) (citations omitted). To reach its decision, *Playhouse I* held that the City Commission violated the essential requirements of the law by conditioning the master plan approval on preservation of the interior. That *Playhouse I* also ruled upon standing does not make the decision regarding the interior gratuitous or any less a part of its holding.

Tellingly, and contrary to its argument now, the City has previously and expressly agreed that the interior decision constitutes a holding and is law of the case. *See* Pet. App. Ex. E at MDC0314 (Assistant City Attorney: "I do agree with the county that it's the law of the case because there was a finding made in the decision; it has not been appealed"); *id.* at Ex. O at MDC0550 (Assistant City Attorney: "The Court also found that the interior of the Playhouse was not designated. So, at this point in time, that's the law of the case."). Having agreed throughout these proceedings that *Playhouse I* determined the issue of the interior, the City is estopped from arguing otherwise now.

b. The prior ruling on the interior relates directly to the regulation of the entire building.

The City contends that *Playhouse I* was "unrelated to the designation of the building" because "the entire building had historic significance." Resp.

at 43. This unsupported, conclusory, and undeveloped two-sentence argument should be rejected as insufficiently raised. *See Manatee Cnty. Sch. Bd. v. NationsRent, Inc.*, 989 So. 2d 23, 25 (Fla. 2d DCA 2008). But even if it were properly argued, it has no merit. Just because the entire building has historic significance, that fact alone does not license the City to regulate the interior since it was not expressly included in the designation. *See infra*.

Moreover, the City's argument does not excuse the Circuit Court from heeding the law of the case, because the doctrine requires a second panel to follow the holding of a prior one regardless of the earlier decision's correctness. *See, e.g.*, *United Auto. Ins. Co. v. Comprehensive Health Ctr.*, 173 So. 3d 1061, 1065 (Fla. 3d DCA 2015); *Dougherty v. City of Miami*, 23 So.3d 156, 158 (Fla. 3d DCA 2009) (Wells, J., specially concurring) (explaining that the later panel was compelled to follow the earlier panel's decision, even if the earlier decision was wrong).

c. The prior ruling governs all stages of this process.

Finally, *Playhouse I* is no less law of the case because it involved the first step in this application process, whereas this proceeding concerns the final step. Both proceedings are part of a single process to obtain permission to rehabilitate the Playhouse. That the interior is beyond the scope of the

regulation applies equally to all phases of this application process. As this Court has said, the law of the case applies "through all subsequent stages of the proceedings." *United Auto. Ins. Co.*, 173 So. 3d at 1065. Accordingly, the City has no meritorious defense to the Circuit Court's failure to follow the law of the case, and second-tier relief is warranted.

B. In failing to apply the code-prescribed criteria for certificates of appropriateness, the Circuit Court applied the wrong law

The City argues that the Circuit Court applied the correct law because the City Mayor's veto was based on "historic significance" and because the City's code provides that certificates of appropriateness shall be guided by the code's "general purpose and intent." Resp. at 35. But these arguments are belied by the text of both the veto statement and the code.

First, the City Mayor's veto statement nowhere says that it is based on the Playhouse's "historic significance." Pet. App. Ex. Q. Even if it had, there is simply no competent substantial evidence in the record to support a finding that the County's project would diminish that historic significance. The ***only*** competent evidence in the record—the professional analyses of both the City's own historic preservation staff and the County's historic preservation experts—is exactly to the contrary. *See* Pet. App. Ex. X at MDC1065-66.

Second, a regulation's "general purpose and intent" cannot rewrite its express terms to add new criteria. *See Heine v. Lee County*, 221 So. 3d

1254, 1258 (Fla. 2d DCA 2017); *Capeletti Bros., Inc. v. Dep't of Transp.*, 499 So. 2d 855, 857 (Fla. 1st DCA 1986). The code's purpose and intent section, with respect to certificates of appropriateness, "[a]ssure[s] that alterations and new construction . . . are compatible with the property's historic character." Sec. 23-1(b)(8). But that section is implemented through the remaining code provisions. And those provisions expressly allow demolition. *See* Sec. 23-6.2(a) ("A certificate of appropriateness shall be required for any . . . ***demolition*** within a designated historic site") (emphasis supplied). So, it must be true that demolition can be compatible with a property's historic character in some instances,[2] otherwise it would be altogether prohibited. And because the code expressly allows for demolition, allowing it here cannot inherently violate the code's purpose and intent.

The City also argues that the Mayor properly considered the risk of delisting from the National Register. Resp. at 37. But the City Code does not include National Register status as a criterion for evaluation. *See id.* Ex. C at MDC0077-78 (Sec. 24-6.2(h), *Guidelines for issuing certificates of appropriateness*). Thus, contrary to the Circuit Court's finding, Op. at 15, the veto could not be based on this issue. Rather, the veto decision was constrained to the Secretary of the Interior's standards ***as measured***

[2] Indeed, that was City staff's opinion here. *See* Pet. App. Ex. F.

against the governing local designation, not the National Register listing. *See* Pet. App. Ex. C (Sec. 23-6.2(h)(1)); *Playhouse I*.

C. The Circuit Court violated the essential requirements of the law in its review of the record evidence

The only record material that purportedly supports the decision requiring the County to maintain the entire Playhouse structure—including a non-descript portion with no architectural significance—is DHR's opinion letter.[3] But DHR's analysis was incompetent, inapposite, and irrelevant to this proceeding, and thus cannot be competent substantial evidence supporting denial of the County's application. The City contends otherwise and also argues that the County waived its objections. Resp. at 37-42. Again, the City is wrong in all respects.

The City's waiver argument is again belied by the record. The County in fact objected to DHR's opinion in multiple ways, multiple times: it sent a letter to the HEPB prior to the hearing explaining the flaws with DHR's analysis; undersigned counsel objected at the HEPB hearing that DHR's analysis was "legally problematic" and "suffers from several analytical and

[3] The City has never contended otherwise, nor could it. Indeed, the other professional opinions in the record—those of the City's historic preservation officer, the County's historic preservation chief, and historic preservation expert Jorge Hernandez—reached the opposite conclusion of DHR: that the County's plan did, in fact, satisfy the relevant standards.

practical flaws"; the County based its appeal to the City Commission in part on acceptance of the DHR letter; and the County objected to the letter during that appeal proceeding. *See* Pet. App. Ex. E at MDC0189; Ex. N; Ex. O at MDC0558. Moreover, the City Commission hearing was *de novo* and could thus include new evidence and arguments. Because the County presented its objection to the DHR letter as an express basis for its appeal, it clearly preserved its objections at that hearing if not before.

The City's argument fares no better on the merits. Competent substantial evidence is such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Smith v. Dep't of Health & Rehab. Servs.*, 555 So. 2d 1254, 1255 (Fla. 3d DCA 1989) (citation omitted). DHR's letter does not meet this definition. It is conclusory, as it merely recites the Secretary of the Interior's Standards without any supporting analysis. *See* Pet. App. Ex. U. While the letter cites to a November 2017 email in support of its conclusions, that citation makes matters worse, not better: the referenced email plainly demonstrates DHR's fundamental reliance on the Playhouse interior, not on any value ascribed to the exterior structure or the Playhouse as a whole. In addition, that email was not related to any certificate of appropriateness application or even the National Register listing; it was in response to a state

grant application and thus even more removed from the local review process and the regulations at issue here.

Nevertheless, the City contends that DHR's analysis "constitutes the professional evaluation of an expert in the field as to whether the County plan is consistent with the Standards," while ignoring its own concessions that the interior was not included in the designation report and was thus not subject to regulation. Resp. at 41. But this argument is circular: the City contends DHR's letter is evidence merely because it was produced by an expert, regardless of its actual content. Moreover, the City's argument totally ignores the County's principal point: that the contents were conclusory and, to the extent they contained any actual analysis, were incompetently based on the wrong standards—that is, the non-regulatory National Register instead of the governing local designation. The City's defense thus ignores applicable law and the County's actual argument. *See, e.g.*, *City of Hialeah Gardens v. Miami-Dade Charter Found., Inc.*, 857 So. 2d 202, 204 (Fla. 3d DCA 2003) (conclusory expert opinions are not competent substantial evidence).

The question before the City Mayor was not whether the County's application would impact the National Register narrative, but whether the County's project meets the Secretary of the Interior's Standards within the scope of the governing local designation. This nuance is significant, because

the governing designation and the non-regulatory National Register narrative do not have the same scope: the former does not encompass the interior, whereas the latter does. Because DHR considered impacts to the interior in reference to the National Register narrative, its professional evaluation was not "sufficiently relevant and material that a reasonable mind would accept it as adequate to support" denial of the County's application. *See Smith*, 555 So. 2d at 1255.

A simple hypothetical illustrates the incompetence of DHR's opinion in addressing the governing criteria: had the County sought ***only*** to gut the Playhouse interior and replace it with, say, an H&M retail store, that interior renovation would "not be subject to review" under the City's code and permission from the City would thus not have been required. See 23-4(c)(2)c. But DHR's analysis would disallow that project too because, as with the County's proposed demolition, "[t]he ***entire interior*** of the building would be replaced as part of the proposed structural work." Pet. App. Ex. U (emphasis supplied). Thus, by merely renovating the interior—a space that the designation does not preserve—DHR would prohibit a project that the County could do without review by the HEPB, the City Commission, or the City Mayor. And that DHR's opinion would lead to such an absurd result further evidences its incompetence. *See, e.g.*, *Wiggins v. Florida Dep't of*

Hghwy. Safety & Motor Vehicles, 209 So. 3d 1165, 1173 (Fla. 2017) ("Competent, substantial evidence must be reasonable and logical.").

Finally, the City contends that DHR's "reasoning stands independent of any analysis of the architectural integrity of the auditorium interior" and "is based on the fact that the auditorium space is the location of the historic theatrical performances that make the Playhouse *historically significant*." Resp. at 41. But the City's characterization is again belied by the text of DHR's opinion. Indeed, DHR's November 2017 email makes plain that its analysis is based entirely on the interior. DHR's concern about "the historic theater space where the activities that make this property significant [occurred]" obviously refers to the interior. *See* Pet. App. Ex. U. DHR's email also opines that "this project will result in the loss of integrity of the building" because "[t]he ***entire interior*** of the building would be replaced as part of the proposed structural work." *Id.* (emphasis supplied).

Because the Circuit Court's "decision allows the use of incompetent evidence" to support the veto, it departed from the essential requirements of the law and second-tier relief is warranted. *Jesus Fellowship, Inc. v. Miami-Dade Cnty.*, 752 So. 2d 708, 709 (Fla. 3d DCA 2000).

D. The Circuit Court violated the essential requirements of the law in allowing the City Mayor to rely on the HEPB's decision

Referring to the County's objections to the HEPB proceedings, the City contends that "this Court should [not] overturn the veto based on a proceeding two steps removed." Resp. at 45. But the Circuit Court expressly approved of the City Mayor reinstating the HEPB's decision—as if the mere existence of that decision insulated the veto from review—and then declined to review the County's arguments that the HEPB decision was itself legally infirm. Op at 8 n.4, 14. The Circuit Court failed to apply the correct law.

Besides its incorrect assertion that the HEPB proceeding is too far removed to matter, the City addresses only the vice chair's bias and contends that the County waived its objection by failing to seek a writ of prohibition ***before*** the HEPB issued its decision. Resp. at 46-48. But the County made an extensive record of the vice chair's bias and sought her recusal. *See* Pet. App. Ex. E at MDC0175-89. It is absurd to say that when she refused, the County had to do more and actually stop the hearing—further prejudicing its own construction timeline—to seek court intervention to preserve its objection.

Moreover, the City's reliance on cases about judicial disqualification are inapposite because this is a ***quasi***-judicial matter. In such matters, a party need not seek a writ of prohibition before the quasi-judicial body acts.

Florida Water Services Corp. v. Robinson, 856 So. 2d 1035 (Fla. 5th DCA 2003). In *Florida Water Services*, a quasi-judicial applicant asserted that, in denying its application, the county commission was biased and motivated by self-interest. The court held that the applicant's remedy was not a contemporaneous writ of prohibition, but rather a subsequent writ of certiorari to review the board's decision for due process; indeed, a writ of prohibition was improper. *Id.* at 1040. The City's waiver argument is thus directly contrary to applicable law.

Similarly meritless is the City's contention that the vice chair's bias "is insufficient to warrant reversal." Resp. at 47. The City argues that the vice chair was not biased because she said that she would consider the evidence presented. *Id.* But the City's cramped reading of her testimony is belied by everything else that transpired. The vice chair ***did*** ignore evidence that demolition was appropriate and instead solicited the incompetent DHR opinion, which she used to deny the application. And she did much more than that, as detailed in the County's petition below. Pet. App. Ex. X at MDC1073-77. The cumulative effect of her actions and statements—not just her "inclination to preserve"—demonstrates her bias and the due process violation. *See, e.g.*, *Villages, LLC v. Enfield Planning & Zoning Comm'n*, 89

A.3d 405, 414 (Conn. App. Ct. 2014) (evidence of bias may be cumulative; specific evidence of bias is not examined in isolation).

Finally, the City wrongly contends that the vice chair's bias was harmless because the HEPB denied the application 6-votes-to-4. Resp. at 48. But the only record material supporting denial was DHR's incompetent opinion, on which the vice chair based her motion to deny. And the DHR letter only exists because of the vice-chair's biased machinations. Pet. App. Ex. X at MDC1073-74.

Thus, the vice-chair's bias was the opposite of harmless: it tainted the entire hearing and violated due process. *See Dellinger v. Lincoln Cnty.*, 832 S.E.2d 172, 179 (N.C. Ct. App. 2019) (rejecting claim that board member's bias and refusal to recuse was harmless error, where board's vote was 4-to-1 to deny application; "[board member's] biased recitation of his 'condensed evidence' could have influenced the votes of the two other commissioners who also voted against issuing the permit after his presentation," and thus "[his] bias and commitment to deny Petitioners' request . . . is sufficient basis to reverse and remand"). And in sanctioning the City Mayor's reliance upon the HEPB decision to support his veto, the Circuit Court compounded the violations of due process and essential requirements of law. For this reason, too, second-tier relief is necessary.

E. The Circuit Court's decision on these issues would result in a miscarriage of justice

The City claims that the County failed to argue miscarriage of justice and has therefore waived the right to obtain second-tier relief. Resp. at 48. This argument is pure sophistry.

The County's cross petition cited cases granting second-tier relief for errors analogous to the Circuit Court's errors here. Because second-tier relief is only available to remedy a violation of the essential requirements of the law that results in a miscarriage of justice, the errors at issue in those cases—and thus here—necessarily meet that standard. *See, e.g., City of Jacksonville v. Taylor*, 721 So. 2d 1212, 1214 (Fla. 1st DCA 1998) (where, in a prior case, the court "granted certiorari relief because the circuit court failed to apply the correct law," but "did not discuss whether a miscarriage of justice occurred as a result of the misapplication of law, the necessary, if implicit, holding in [that prior case] is that the failure to apply the correct law there, by itself, constituted a miscarriage of justice").

The City also argues that the County cannot show a miscarriage of justice because the Circuit Court ruled in its favor on the case dispositive due process issue. Resp. at 49-50. In the City's view, "[t]he County's cross-petition is nothing more than a tipsy coachman argument that should have been addressed in the response to the City's petition." *Id.* But, ironically,

when the County raised these very arguments in response to the City's petition for rehearing below, the City moved to strike, arguing that the County failed to move for rehearing and, thus, the arguments could not be considered. Now, the County having invoked this Court's jurisdiction by filing the cross petition, the City argues that the County should have simply raised these issues in response to the City's petition. The City cannot have it both ways, and this Court should reject its transparent gamesmanship.

Moreover, the City misunderstands the tipsy coachman doctrine: it applies when a court reaches the right result for the wrong reason; not where, as to the issues in the cross petition, the court reaches the wrong result for the wrong reason. *See Robertson v. State*, 829 So. 2d 901, 906 n.2 (Fla. 2002).

In short, contrary to the City's argument, should this Court grant the City's petition, it would be a miscarriage of justice not to address the non-dispositive portions of the decision below, for the reasons stated in the cross petition. *See* MDC Pet. at 3.

V. Conclusion

The Circuit Court correctly quashed the mayoral veto on due process grounds. But should this Court find error in that decision, then it should quash

the balance of the decision for violating the essential requirements of the law resulting in a miscarriage of justice.

Dated: September 8, 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 September 8, 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).

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