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

APPELLATE DIVISION
CASE NO. 19-167-AP

L.T. CASE No. Mayoral Veto of City of Miami Resolution No. R-19-0169

MIAMI-DADE COUNTY,

Petitioner,

v.

CITY OF MIAMI,

Respondent.
_____/

MIAMI-DADE COUNTY'S RESPONSE TO THE CITY OF MIAMI'S MOTION FOR REHEARING OR CLARIFICATION

Because a mayoral veto in a quasi-judicial proceeding is itself quasi-judicial in nature—and thus subject to all due process requirements governing the dispositive act of any decision-maker in such a proceeding—this Court correctly concluded that the City of Miami ("City") violated due process because the City Mayor failed to disclose *ex parte* communications he received before rendering his final decision.

Despite the very straightforward nature of this decision given the applicable requirements, the City's Motion for Rehearing or Clarification (the

"Motion") requests reconsideration. But the Motion raises the very same arguments this Court already rejected and adds a new argument that, while available to the City since the outset, it chose not to raise. This is precisely the type of rehearing motion that Florida appellate courts have time and again admonished should never be filed. Indeed, the City fails to describe anything that the Court truly misapprehended or overlooked. Moreover, it also appears to misunderstand the crux of the Court's ruling on due process. The City Mayor's *ex parte* communications in the unique context of this proceeding were improper because they occurred when disclosure would not normally be available, and no effort was made to provide disclosure in an appropriate forum. It is thus the City, not the Court, that misapprehends the due process issue in this case, and there is no basis for the Court to revisit its ruling on that issue.

But if the Court were nevertheless inclined to revisit its ruling, it should also revisit the portions of its opinion rejecting the County's other arguments. Those portions of the opinion are unnecessary to the Court's ultimate, and ultimately correct, determination on due process. They are also based entirely on matters the Court misapprehended or overlooked: they rely on rewriting the facts contrary to the way the parties have understood and presented them; they misapprehend the law of the case doctrine; they

overlook that the City Mayor's veto statement identifies no proper basis to reject the County's application under the applicable criteria; and they overlook the historic preservation board's own violation of the applicable standards, in finding that the City's Mayor's effort to reinstate that board's decision reflected application of the correct law. Accordingly, to the extent the Court reconsiders any part of its opinion, it should either remove or revise its discussions of the essential requirements of the law and substantial competent evidence, along with the facts attendant to those analyses.

I. Legal Standard

"Because it is the 'exception to the norm,' a motion for rehearing filed under Florida Rule of Appellate Procedure 9.330 'should be done under very limited circumstances.'" *Dabbs v. State*, 230 So. 3d 475, 476 (Fla. 4th DCA 2017). Indeed, Rule 9.330(a) expressly limits the permissible scope of rehearing motions: "A motion for rehearing shall state with particularity the points of law or fact that, in the opinion of the movant, the court has overlooked or misapprehended in its decision, and shall not present issues not previously raised in the proceeding."

"[L]egal arguments . . . must be made between the parties before a judicial decision is rendered; not between one litigant and a tribunal which has already ruled." *Unifirst Corp. v. City of Jacksonville*, 42 So. 3d 247, 248

(Fla. 1st DCA 2009). Thus, a motion for rehearing must be "strictly limited to calling an appellate court's attention—without argument—to something the appellate court has overlooked or misapprehended." *Cleveland v. State*, 887 So. 2d 362, 364 (Fla. 5th DCA 2004). "It is not a vehicle through which 'an unhappy litigant or attorney [may] reargue the same points previously presented[.]" *McConnell v. Sanford Airport Authority*, 200 So. 3d 83 (Fla. 5th DCA 2015).

Nor is it appropriate to raise new arguments that were never before pressed. "Indeed, '[a] new issue raised for the first time in a motion for rehearing is improper under Rule 9.330,'" and will not be entertained. *Gonzalez v. State*, 208 So. 3d 143, 149 (Fla. 3d DCA 2016) (citation omitted).

II. Argument

A. The City's Motion is Improper

The City's Motion is procedurally improper because it both reargues points previously raised and introduces a new argument not previously presented. And in neither event does the City identify anything the Court truly misapprehended or overlooked.

The City seeks reconsideration of the Court's determination that the City Mayor's *ex parte* communications violated due process, based on the mistaken premises that such a determination cannot be made solely on the

appellate record and that *Jennings* requires an evidentiary hearing to assess prejudice. But these arguments are not new. Indeed, they appeared almost verbatim in the City's response brief. *See* City's Resp. at 49-52.

The City's effort to simply repress a position previously—and unsuccessfully—argued is a wholly improper basis for rehearing. As the First District cogently stated many years ago in denying a similar motion:

> Certainly it is not the function of a petition for rehearing to furnish a medium through which counsel may advise the court that they disagree with its conclusion, to reargue matters already discussed in briefs and oral argument and necessarily considered by the court, or to request the court to change its mind as to a matter which has already received the careful attention of the judges, or to further delay termination of litigation.

State v. Green, 105 So. 2d 817, 818-19 (Fla. 1st DCA 1958); *see also Lawyers Title Ins. Corp. v. Reitzes*, 631 So. 2d 1100, 1100 (Fla. 4th DCA 1993) ("The motion does what Rule 9.330(a) proscribes; it re-argues the merits of the case.").

In addition to improper re-argument, the Motion also includes a new argument that was not—but could have been—advanced by the City previously. For the first time while seeking rehearing, the City contends that the City Mayor's *ex parte* communications are not prejudicial when evaluated under the factors set forth in *Jennings*. But the County introduced the communications in its petition, and the City failed to include any such

argument in its response brief. It cannot ask this Court to consider that argument for the first time on rehearing. "A petition for rehearing which . . . presents new or additional arguments is improper and invites its rejection." *Kerr v. Schildiner*, 167 So. 2d 798, 800 (Fla. 3d DCA 1964). For these reasons alone, the Motion should be denied.

B. The City's Motion is Wrong on the Merits

The Motion is also wrong on the merits. As an initial matter, the Court was correct to entertain the County's due process argument based on the City Mayor's failure to disclose *ex parte* communications. Although *Jennings* held that an original action was appropriate to address *ex parte* communications, it did not—contrary to the City's argument—mandate an original action as the exclusive remedy for such due process violations. *Jennings*, 589 So. 2d at 1341.

In fact, courts have routinely entertained due process challenges based on *ex parte* communications on first-tier certiorari. *See, e.g.*, *Mafera v. Manatee Cnty.*, 27 Fla. L. Weekly Supp. 511b (Fla. 12th Cir. Ct. App. Div. June 27, 2019) ("[T]he Court rejects the County's argument that, as a general rule, claims that officials failed to disclose ex parte communications cannot be raised in a petition for writ of certiorari."); *Power U Ctr. for Social Change, Inc. v. Miami City Commission*, 14 Fla. L. Weekly Supp. 814a (Fla. 11th Cir.

Ct. App. Div. July 9, 2007) ("We therefore find that the Respondent Commission violated the Petitioners' due process rights under *Jennings* . . . because Petitioners had no opportunity to object or rebut the independent investigation which was not properly disclosed.").

This Court's prior decision in *The Vizcayans v. City of Miami*, 15 Fla. L. Weekly Supp. 657a (Fla. 11th Cir. Ct. App. Div. July 3, 2014), remains instructive. There, on first-tier certiorari review, the Court addressed a substantially similar matter concerning the then-mayor's *ex parte* communications during the ten-day veto period on a quasi-judicial land use matter. The Court rejected the argument that the due process claim had been waived because the petitioners failed to object to the communications on the record below, noting that such an objection was impossible because the communications "occurred ***after*** the public hearings, and therefore, could not have been disclosed and addressed during those hearings." *Id.* (emphasis original). Ultimately, the Court held that the *ex parte* communications violated due process because they "all took place after the hearings had concluded, away from public earshot[.]" *Id.* The City's Motion now labels that case as wrongly decided, but the City was a party to that case and did not appeal it, so its holding remains binding on the City.

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

Despite these clear precedents, the City improperly continues to argue that this Court cannot consider the City Mayor's *ex parte* communications in this proceeding. But the City does not deny that the City Mayor had *ex parte*

communications during the veto period.[1] Nor does the City deny that the City Mayor could at least have made those *ex parte* communications part of the record during the City Commission's veto override hearing, even if that hearing was too late for the County to respond to them prior to the City's final decision—i.e., the mayoral veto. Indeed, the only reason that the *ex parte* communications were not introduced prior to the County's petition is because the City Mayor failed to disclose them until required to respond to a public records request, after the veto and the unsuccessful override hearing.

As in *Friends of the Oleta River*, requiring the County to undertake an evidentiary hearing in this context would add nothing to the Court's due process analysis, because it is the mere existence of the communications and the failure to properly disclose them, standing alone, that constitutes the violation. The City Mayor cannot now say or do anything at an evidentiary

[1] The County obtained the *ex parte* communications through a public records request to which the City responded on or about June 7, 2019—well after any public hearing at which the communications could have been disclosed or introduced into the hearing board record. The documents produced by the City in response to the County's public records request constitute an admission that the City Mayor had *ex parte* communications during the ten-day veto period. This Court may take judicial notice of the existence of these public records, which are contained in Exhibit Q to Petitioner's Appendix. *See, e.g.*, *Fla. Accountants Ass'n v. Dandelake*, 98 So. 2d 323 (Fla. 1957) ("This court takes judicial notice of the public records of this state"); 1 Fla. Prac., Evidence § 901.7 ("Florida courts have frequently . . . tak[en] judicial notice of the existence and the contents of the [public] record.").

hearing to change those facts. Moreover, prohibiting an applicant from raising the existence of undisclosed communications on certiorari due process review would absurdly reward a quasi-judicial decision-maker for violating due process and encourage decision-makers to hide such communications.[2]

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

[2] Framed another way, this is a form of equitable estoppel. The City Mayor was silent and did not make any *Jennings* disclosure at any point during the City proceedings below, despite avowing on the record that his veto decision was governed by quasi-judicial standards. The County was thus unable to inquire about his *ex parte* communications. For the City to now use the City Mayor's failure to disclose his presumptively prejudicial *ex parte* communications to benefit its legal position, and defeat the County's due process challenge, violates principles of "fair play and essential justice." *Major League Baseball v. Morsani*, 790 So. 2d 1071, 1077 (Fla. 2001) ("Equitable estoppel is based on principles of fair play and essential justice and arises when one party lulls another party into a disadvantageous legal position," and "presupposes a legal shortcoming in a party's case that is directly attributable to the opposing party's misconduct. The doctrine bars the wrongdoer from asserting that shortcoming and profiting from his or her own misconduct. Equitable estoppel thus functions as a shield, not a sword, and operates against the wrongdoer, not the victim."); *see also Branca v. City of Miramar*, 634 So. 2d 604, 607 (Fla. 1994) (applying equitable estoppel against a governmental entity based on factual representations).

adopted a procedure pursuant to section 286.0015, Florida Statutes, which purports to remove the presumption of prejudice for *ex parte* communications through their disclosure, the City Mayor could not and did not use that procedure here, because his communications all occurred ***after*** the City Commission's public hearing. Thus, the City Mayor had no public forum in which to make the necessary disclosure ***before*** exercising his veto authority. Because he would have no opportunity to properly disclose the communications and provide the County with an appropriate opportunity to respond to them, the City Mayor's active engagement in *ex parte* communications[3] was inherently prejudicial.

One might question how the City Mayor was supposed to disclose his post-hearing *ex parte* communications when there was no public hearing or meeting at which such a disclosure could be made prior to the veto. But formulating the issue that way misses the point. Due process is not about protecting a quasi-judicial decision-maker's ability to engage in *ex parte*

[3] The City disingenuously describes the communications as "unsolicited emails . . . [and] non-substantive replies to the emails from the Mayor." Mot. at 2. But, as this Court correctly recognized, the City Mayor actively engaged with the correspondents, many of them objectors to the County's plan, and sought to follow up with them orally. That fact alone, and not whether his emails substantively discussed the merits of the application, demonstrates the problem and the prejudice.

communications: it is about protecting the parties' rights to a fair proceeding. And *ex parte* communications are by their very nature "anathema" to due process. *Jennings*, 589 So. 2d at 1341. So if the City Mayor had no opportunity to disclose his *ex parte* communications consistent with due process prior to issuing his decision, then the solution was for him to ***avoid actively engaging in ex parte communications***.[4]

In sum, the County's due process claim is not about the substance of the City Mayor's *ex parte* communications and therefore does not require this Court to review materials outside the record. Rather, the County challenges ***the fact*** that such *ex parte* communications occurred and ***when*** they occurred—neither of which the City disputes. Because the County was not afforded an opportunity to learn of, and an appropriate forum in which to respond to, these *ex parte* communications before the City Mayor made his decision, the City Mayor violated the County's right of due process. And this due process challenge to the City's final decision on the County's application is properly raised in this first-tier certiorari proceeding. *See, e.g.*, *Mafera*, 27

[4] Alternatively, the City Code authorizes the City Mayor to convene special meetings. *See* Sec. 2-33(l) of the City Code. As far as the County is aware, nothing prevented the City Mayor from calling a special meeting prior to his veto to make a *Jennings* disclosure and allow the County the opportunity to learn of, and inquire about, the *ex parte* communications. But the record does not reflect him making any such effort.

Fla. L. Weekly Supp. 511b; *Friends of the Oleta River*, 22 Fla. L. Weekly Supp. 427a; *Power U Ctr. for Social Change*, 14 Fla. L. Weekly Supp. 814a; *The Vizcayans*, 15 Fla. L. Weekly Supp. 657a. Accordingly, this Court correctly ruled that the City Mayor violated due process, and the City has presented no basis to revisit that decision now.[5]

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[5] While, as explained above, neither the County's argument nor the Court's ruling hinge on the substance of *ex parte* communications outside the record, the Court was entirely correct that the City Mayor's communications here were highly prejudicial. As noted above, the City's attempt to hand-wave the *ex parte* communications away as mere "unsolicited emails and non-substantive email replies," *see* Mot. at 8, misunderstands both the County's argument and the Court's ruling. The due process violation here did not result from the City Mayor's Office passively receiving unsolicited public communications. Rather, the due process violation was what the City Mayor actually did in response to receiving them. As this Court chronicled in its opinion, the City Mayor engaged with the individuals who reached out to him, asking for their phone numbers so that he could call them, presumably to have a private discussion about whether to veto. He also requested that his staff schedule meetings with them, presumably to have a private discussion about whether to veto. And perhaps most prejudicial of all, the City Mayor forwarded to Eddy Leal, the staff member assisting in preparing the veto statement, an email and attachment from Richard Heisenbottle, a rival architect and fervent objector to the County's plan. *See* Op. at 8-10, 14. Mr. Heisenbottle's email—which he sent the day before the veto deadline—implored the City Mayor to veto and attached a proposed draft veto message with the note, "[f]eel free to use any of this as you wish." Pet. App. Ex. Q. So this case is not about *ex parte* communications that the City Mayor could not have avoided. It is about what he actively did in response to those communications. And there is simply no conception of due process that would authorize a quasi-judicial decision-maker to consider, in secret and behind the applicant's back, the views of various objectors, much less review and consider a dispositive veto message drafted by an objector.

C. If the Court is Nevertheless Inclined to Reconsider its Ruling, then the Court Should Remove the Portions of the Opinion that are Unrelated to the Due Process Issue or Revise them to Avoid Matters that They Currently Misapprehend or Overlook.

As explained above, the City is not entitled to rehearing and has presented no basis to disturb this Court's ruling on due process. Nevertheless, should the Court disagree and opt to reconsider that ruling, it should also revisit the remaining portions of its decision regarding essential requirements of the law and substantial competent evidence, along with the facts attendant to those analyses. Those discussions should be deleted or revised because they are unnecessary to the due process decision, are based on misapprehensions of law, and overlook legally dispositive matters.[6]

1. The Court misapprehended its role on first-tier certiorari review and applied the wrong law in finding that the Playhouse interior was subject to regulation

The City and the County have agreed throughout these proceedings that the 2005 designation, which governs these proceedings, did not include the interior. *See, e.g.*, Pet. App. Ex. H at 248:11-14. The prior panel

[6] The County is cognizant of both the fact that this Court ultimately ruled in its favor and of its argument that the City's Motion violates the governing rehearing standard. But unlike the City's arguments, the County's discussion in this section specifically identifies matters that the Court misapprehended or overlooked and that the parties did not already address in their briefs on first-tier certiorari. Such issues may properly be revisited under Rule 9.330. *Dabbs*, 230 So. 3d at 476.

recognized this fact in *Playhouse I*, holding that "[t]he 2005 Designation Report did not include the interior of the building" and thus it was "not within the purview of the Historical Board." *Miami-Dade Cnty. v. City of Miami*, 26 Fla. L. Weekly Supp. 800b (Fla. 11th Cir. Ct. App. Div. Dec. 3, 2018).

But contrary to the parties' own stipulations and the decision in *Playhouse I*, this Court addressed an issue that the parties did not raise and found that the interior ***is*** subject to regulation:

> The 2017 staff analysis concluded that demolition of the theater was permissible because the 2005 historic designation report described only the "original Kiehnel structure containing the South and East facades" as requiring preservation. In so doing, the staff misapprehended that while only the South and East facades possessed *architectural* significance, the entire theater possessed *historical* significance. In reliance upon this faulty staff analysis, the HEPB approved this 2017 Certificate of Appropriateness.

Op. at 6 (emphasis original); *see also id.* at 18 n.7 ("[T]he 2005 Historical Designation and incorporated report did not limit designation to the Playhouse interior [sic]."). Further, the Court purported to reconsider *Playhouse I*, adding that "in its opinion, a panel of this court relied upon the 2017 staff analysis which misconstrued the scope of the 2005 historical designation." *Id.* at 6 n.3. Finally, the Court independently found that "[d]emolition of the Playhouse would eliminate all contributions made by [Alfred] Browning Parker," *see id.* at 18, even though that finding appears

nowhere in the record and is only relevant to the purported impacts on the Playhouse interior.[7]

In making these findings, which are unnecessary to the due process issue that is dispositive of this case, the Court misapprehended its certiorari jurisdiction and overlooked other applicable law.

a. The Court improperly reached an issue not raised by the parties.

First, the Court exceeded the proper scope of its review in reaching an issue that the parties did not contest. In *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So. 2d 195, 200-01 (Fla. 2003), which addressed the district court making the same error on second-tier review, the Florida Supreme Court held that the district court "exceeded the proper scope of . . .

[7] Cherry-picking statements from the record to supplant its judgment for that of the City as to the scope of a City designation report also violates the essential requirements of the law. Certainly, the Court has no expertise in historic preservation and in how designations of interior features must be described to comply with the City Code. Moreover, the Court appears to have confused the narrative history of the Playhouse with the City Code requirement that, for particular interior features to be preserved, those features must be expressly identified as subject to regulation—a requirement that the City Attorney's Office and City historic preservation staff recognized was not met here. *See id.* Ex. H at 248:11-14.; Ex. K. On this point, which the parties have not contested, the Court should have deferred to the City's technical expertise in interpreting its own code requirements. *Cf. Metro. Dade County v. P.J. Birds, Inc.*, 654 So. 2d 170, 175 (Fla. 3d DCA 1995) (local government's interpretation of its own regulation is entitled to deference, so long as it is reasonable and consistent with legislative intent).

review when it, sua sponte," decided "an issue neither party raised in any phase of the proceedings." Below, neither party argued that the Playhouse interior had been designated; in fact, the City has repeatedly acknowledged that the 2005 designation report does not encompass the interior. *See* Pet. App. Ex. H at 248:11-14.; Ex. K.

By reaching an issue that the parties did not contest, this Court misapprehended its certiorari jurisdiction, contrary to the Florida Supreme Court's decision in *Omnipoint*.

b. The Court improperly made independent factual findings.

Second, the Court exceeded its certiorari jurisdiction by "embark[ing] on an independent review of the [designation report] and ma[king] its own factual finding based on the cold record." *Broward Cnty. v. G.B.V. Int'l, Ltd.*, 787 So. 2d 838, 844 (Fla. 2001). In *G.B.V.*, the circuit court denied a petition for certiorari upon finding that an applicant who had made misrepresentations to the county commission was estopped from challenging the county's partial denial of a plat application. On second-tier review, the district court granted the petition. Accepting review but quashing on other grounds, the Florida Supreme Court held that the circuit court had exceeded the proper scope of its review:

> [R]ather than limiting its review of the [county's] decision to the three "first-tier" factors [for certiorari review], ***the [circuit] court embarked on an independent review of the plat application and made its own factual finding based on the cold record*** (i.e., the court determined that [the applicant] had misrepresented its position on [an issue]). . . .
>
> At the district court level, the court granted certiorari and quashed the circuit court decision, concluding that the decision "was a departure from the essential requirements of law." ***This ruling was proper.*** As explained above, according to the plain language of its order, ***the circuit court made its own factual finding based on the cold record. The circuit court thus applied the wrong law ([by] appl[ying] an independent standard of review), and this is tantamount to departing from the essential requirements of law (as the district court ruled)***.

Id. at 844-45 (emphasis supplied).

Like the circuit court in *G.B.V.*, the Court here exceeded its review authority and applied the wrong law when it made its own factual finding as to the scope of the 2005 designation, contrary to the record. *See also Evergreen Tree Treasurers of Charlotte County, Inc. v. Charlotte County Bd. of County Comm'rs*, 810 So. 2d 526, 530 (Fla. 2d DCA 2002) ("Seated in its appellate capacity, the circuit court has no jurisdiction, in certiorari, to make factual findings or to enter a judgment on the merits of the underlying controversy.").

As the City Code provides, a historic designation does not include interior areas, unless the designation report ***expressly*** provides otherwise.

Sec. 23-4(2)(c) of the City Code ("The designation report shall describe precisely those features subject to review and shall set forth standards and guidelines for such regulations. Interior spaces not so described shall not be subject to review under this chapter."). The Court, reaching a factual issue not raised by either party, latched onto the designation report's descriptive narrative of the Playhouse's history and then used that narrative to improperly conclude that the interior may be regulated. Op. at 6, 18. But the designation report did not "precisely describe" any interior features in any portion of the site that would be subject to review and did not "set forth standards and guidelines" for such regulation, as required by the City Code. The Court did not identify any such provision in the designation report, and, in fact, no such provision exists.

Thus, the Court misapprehended the governing certiorari standard when it rewrote the designation report to fit its, and only its, interpretation of the facts.

c. The Court overlooked the law of the case doctrine.

Finally, as noted above, the panel in *Playhouse I* also recognized, and expressly held, that the 2005 designation did not encompass the interior. While circuit court panel decisions are typically not binding on future circuit court panels, the rule is different when a later panel hears a subsequent

appeal in the same matter involving the same parties. In that instance, the Third District has held that the prior decision becomes the law of the case. Under the law of the case doctrine, the later panel is bound by the former's decision, and if the later panel deviates from it, second-tier certiorari relief is warranted.

"The lower court's failure to follow the law of the case warrants certiorari because such failure exceeds the court's role in the appellate process." *Dougherty ex rel. Eisenberg v. City of Miami*, 89 So. 3d 963, 966 (Fla. 3d DCA 2012); *see also United Auto. Ins. Co. v. Comprehensive Health Ctr.*, 173 So. 3d 1061, 1068 (Fla. 3d DCA 2015) (granting second-tier certiorari and quashing lower court's decision because it violated law of the case doctrine by disregarding earlier panel's decision; finding it "irrelevant—despite the suggestion of the appellate division panel in [the second appeal]—that different appellate division panels of the circuit court heard and ruled on [the two appeals]"); *Dougherty ex rel. Eisenberg v. City of Miami*, 23 So. 3d 156, 158 (Fla. 3d DCA 2009) ("the 2008 appellate decision failed to apply the correct law when it failed to enforce its prior decision").

The parties agreed that *Playhouse I* is the law of the case in the proceedings before the City below. *See* Pet. App. Ex. H at 248:11-14 (assistant city attorney advising, "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"). And, in fact, *Playhouse I* was law of the case because it was an earlier decision in the same matter, involving the same parties. *See United Auto. Ins. Co.*, 173 So. 3d at 1065.

It is irrelevant whether this Court agrees with the prior panel's decision or regards that decision as correct. *Id.* In making its own independent finding that the Playhouse interior is subject to regulation, this Court improperly overlooked the law of the case. *Dougherty*, 89 So. 3d at 966.

2. The Court misapprehended the applicable code-prescribed criteria for certificates of appropriateness in finding that the City Mayor applied the correct law

In finding that the City Mayor applied the correct legal standard, the opinion attempts to separate the City Mayor's reference to the applicable code criteria from his reference to the National Register designation. Op. at 14-15. In particular, the Court finds, "it is clear that the Mayor did not veto the resolution relying upon the legal criteria set by the National Register, but rather, justified his veto, in part, based upon his concern that the demolition of the theater would jeopardize the property's listing on the National Register, a loss for the City and its residents." Op. at 15.

But the Court overlooked that the City Mayor's veto statement identified no basis for rejecting the application under the applicable criteria,

and instead was based only on his desire to "reinstate [the HEP Board's] decision" and his concern about the effect the application would purportedly have on the Playhouse's National Register status. *Id.* The HEP Board decision, of course, was itself supported only by the State's legally irrelevant analysis of the County's application based on the Playhouse's National Register status. *See infra*. But the governing code criteria does not include National Register status as an applicable consideration. Thus, the City Mayor was not permitted to veto based on "his concern that the demolition of the theater would jeopardize the property's listing on the National Register[.]" Op. at 15. Rather, the City's decision must be governed by whether the application satisfies the Secretary of the Interior's standards as measured against the governing local designation, not the National Register Listing. *See* Sec. 23-6.2(h)(1) of the City Code.

The Court overlooked that the only competent substantial evidence in the record is that the County's project satisfies that code criteria. Indeed, other than its rewrite of the record facts to improperly suggest that the Playhouse interior was preserved, *see supra*, the Court identifies no other

support in the record for the City Mayor's determination that the County's application did not satisfy the actual code criteria.

3. The Court misapprehended the competence of the record evidence to support denial of the County's application

In finding that the City Mayor's decision was supported by competent substantial evidence, the Court cites to only two things: the 2005 designation report itself; and the State's March 2019 opinion that the County's project "may affect the Playhouse's National Register designation." Op. at 18-19. But for the reasons explained above, any analysis that relies on preservation of the interior is incompetent to address the code-prescribed criteria here, because the interior was not in fact designated.

To begin, the designation report, standing alone, does not support denial of the County's application, because it does not, on its own terms, include any analysis of any purported impacts of the County's project. In addition, the record contains no analysis that measures the County's proposal against the governing designation and finds that it does not meet the applicable code-prescribed standards. And neither the City Mayor, nor this Court, is competent to make an independent finding, not supported by the record, that the County's project is inconsistent with the governing designation report. See *G.B.V. Int'l*, 787 So. 2d at 844-45. Thus, the Court overlooked that the designation report itself cannot support the mayoral veto.

The only other evidence the Court identifies is the State's March 2019 opinion. But that opinion cannot constitute competent substantial evidence as to compliance with the code-prescribed criteria, because the State's opinion improperly measures the County plan against the National Register nomination document, not the 2005 designation report. Moreover, the State's analysis on its face addresses preservation of the interior, which is beyond the scope of the governing designation, as explained above. Because the State's opinion is premised on matters that are not part of the code-prescribed criteria, that opinion cannot be competent substantial evidence to support a veto decision that is bound by the code-prescribed criteria. In ruling otherwise, and in apparent reliance of its rewritten version of the governing designation report, the Court misapprehended the incompetence of the record evidence to sustain the City Mayor's veto.

4. In finding that the Mayor applied the correct legal criteria based on his intent to reinstate the HEP Board decision, the Court overlooked that the HEP Board decision itself violated the same legal standards.

In finding that the City Mayor applied the correct legal standard, the Court expressly referenced the City Mayor's desire to reinstate the HEP Board's decision. Op. at 14. Yet, the Court declined to consider whether that very same HEP Board decision complied with the law. Op. 8 n.4. Although the Court correctly determined that doing so was unnecessary because its

ultimate result was to quash the veto and reinstate the City Commission's decision, *id.*, the Court overlooked that this portion of its analysis is entirely and inextricably intertwined with its determination that the City Mayor applied the correct law. Accordingly, to the extent the Court does not simply delete any analysis beyond its due process determination, it must address the legal deficiencies inherent in the HEP Board's decision—particularly the argument that the HEP Board vice-chair's participation violated due process.

In declining to address these issues, the Court overlooked that the only material in the record supporting denial is the State's incompetent March 2019 opinion, which the HEP Board vice-chair used as the basis for her motion to deny. And the March 2019 letter is only in evidence because of the machinations of this very biased board member. As her many *ex parte* email exchanges demonstrated, she had been coordinating with the State prior to the hearing to solicit aid in defeating the application. And during the HEP Board's deliberations on her motion to deny the application, she attempted to rebut comments favorable to the County made by other HEP Board members, which may have swayed the vote of those, or other, Board members. Pet. App. II, Ex. H at 288-89. And she did much more than that, as detailed in the County's petition. Pet. at 56-60. It is the cumulative effect of her actions and statements that demonstrates her bias, rising to the level

of a due process violation and tainting the entire hearing process, up through the City Mayor's veto, which expressly sought to reinstate the results of her prejudice. *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); *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"). Indeed, she is the "but for" cause of this entire proceeding, and the City Mayor's express embrace of the decision she engineered means he could not have applied the correct law.

Accordingly, in finding that the City Mayor applied the correct law by seeking to reinstate the HEP Board's decision, this Court improperly overlooked that that board's underlying decision itself violated the applicable standards. Moreover, the opinion provides only a cursory description of the HEP Board decision itself and nowhere addresses whether the HEP Board

decision complied with the law. Accordingly, the Court misapprehended and overlooked that the City Mayor's mere reference to reinstatement of that decision is insufficient to show that he applied the correct law.

III. Conclusion

The City's Motion should be denied as the paradigmatic improper rehearing motion that reargues points but fails to identify anything the Court actually misapprehended. It should also be denied on the merits, because, contrary to the City's Motion, the Court appropriately considered the insufficiency—indeed, the absence—of the City Mayor's *Jennings* disclosure as part of its first-tier due process review, and it correctly determined that the City Mayor violated due process by actively considering *ex parte* communications when he knew he would have no proper forum in which to disclose them.

To the extent that the Court nevertheless decides to reconsider its opinion on due process, the Court should also revisit the remainder of its decision. The Court's rulings on the essential requirements of the law and substantial competent evidence, and the attendant factual findings, are unnecessary to the Court's ultimate, and correct, conclusion to reinstate the City Commission decision because the City Mayor violated due process. Moreover, those unnecessary rulings are themselves the result of

misapprehending the governing certiorari review standard and overlooking legally dispositive matters. Accordingly, they should be eliminated or revised.

Dated: May 5, 2021

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on this 5th day of May, 2021 via e-mail generated by My Florida Courts E-Filing Portal to all parties listed below:

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I hereby certify that this brief complies with the applicable font and word limit requirements for computer generated briefs set forth in the Florida Rules of Appellate Procedure.

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