APPEAL CASE NO.: **19-167 AP**
Lower Tribunal No.: Mayoral Veto of City of Miami Resolution No. R-19-0169

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

APPELLATE DIVISION

MIAMI-DADE COUNTY.,

Petitioner,

vs.

CITY OF MIAMI,

Respondent.

CITY OF MIAMI'S RESPONSE TO PETITION FOR WRIT OF CERTIORARI

VICTORIA MÉNDEZ, City Attorney
JOHN A. GRECO, Deputy City Attorney
KERRI L. McNULTY, Senior Appellate Counsel
444 S.W. 2nd Avenue, Suite 945
Miami, FL 33130-1910
Tel.: (305) 416-1800
Fax: (305) 416-1801
Attorneys for Respondent City of Miami

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

The Respondent, City of Miami (the "City"), by and through its undersigned counsel, hereby files this Response to Petitioner Miami-Dade County's Petition for Writ of Certiorari, and in support thereof states as follows:

INTRODUCTION

This appeal arises from the mayoral veto of a resolution of the City Commission that granted the County's appeal of a decision of the City's Historic and Environmental Preservation Board ("the Board"), which had denied the County an approval—called a certificate of appropriateness—necessary to allow the County to move forward with its proposed plan to redevelop the Coconut Grove Playhouse ("the Playhouse"). The certificate of appropriateness was required in this circumstance because the Playhouse had been designated as a historic site by the City in 2005.

The County asserts that both the mayoral veto and the Board decision that it revived depart from the essential requirements of law, are not supported by competent substantial evidence, and did not afford the County due process. The County's arguments center on that fact that the Board decision and the mayoral veto were based on a determination that the County's plans to redevelop the Playhouse were inconsistent with the Secretary of the Interior's Standards for Treatment of Historic Properties, which are required to be considered under the

City Code in making a decision on such applications. The crux of the County's argument is its assertion that the information relied on was supplied by an entity that considered the interior of the Playhouse to be historically designated, whereas the City had specifically not designated the interior space. As will be explained in more detail below, the County assumes that the only reason the Playhouse was designated by the City is architectural significance. In fact, the *entire Playhouse* was designed by the City based in large part on the historical significance of the entire structure—including the auditorium where the historic events that warranted designation took place. When viewed through the lens of the historic basis for the City's designation of the Playhouse, the County's appeal is not well taken.

FACTS & PROCEDURAL BACKGROUND

The Historic Preservation Code

Designation of historic resources and the varied processes and procedures related to those resources is governed within the City by Article I, Chapter 23 of the City of Miami Code—titled "Historic Preservation." Ch. 23, City of Miami Code. (RA. 730-779).[1] That chapter states that

> The intent of this chapter is to preserve and protect the heritage of the city through the identification, evaluation, rehabilitation, adaptive use,

[1] Because the County failed to submit a consecutively paginated appendix, the City has submitted an appendix to this response for ease of reference to key documents cited in the response. Citations to the appendix will be made as "RA." followed by the pertinent page number(s).

> restoration, and public awareness of Miami's historic, architectural, and archaeological resources.

§ 23-1(a), City of Miami Code; (RA. 730). That section goes on to specify additional goals of the chapter, including

> (1) Effect and accomplish the protection, enhancement, perpetuation, and use of structures, landscape features, archaeological and pale ontological resources, areas, neighborhoods, and scenic vistas which represent distinctive elements of the city's historic, cultural, archaeological, pale ontological, aesthetic, and architectural heritage.
>
> (2) Foster civic pride in the accomplishments of the past.

§ 23-1(a)(1)-(2), City of Miami Code; (RA. 730-31). Among the criteria for historic designation are properties that

> (2) Are the site of a historic event with significant effect upon the community, city, state, or nation;
>
> (3) Exemplify the historical, cultural, political, economic, or social trends of the community;
>
> . . . .
>
> (6) Are an outstanding work of a prominent designer or builder.

§ 23-4(a), City of Miami Code; (RA. 739). Historic preservation is as much about history as it is about architecture.

The Code defines "historic site" as "[t]he location of a significant event, a prehistoric or historic occupation or activity, or a vanished structure, where the location itself possesses historic, cultural, archaeological, or paleontological

value." § 23-2, City of Miami Code; (RA. 735). A "locally designated historic resource" under the Code is

> Any archaeological site or zone; individual building; structure, object, landscape feature, historic district, or multiple property designation that has been approved for designation by the city's HEPB, as prescribed by the provisions of this chapter, and shown in the historic and environmental preservation atlas.

Id.; (RA. 736). Under the Code, when a property or district is designated, specific structures or features within the property or district can be designated as either contributing or non-contributing. The Code defines "contributing resource/ landscape feature" as

> A building, landscape feature, site, structure or object that adds to the historical/architectural qualities, historic associations, or archaeological values for which a district is significant because: it was present during the period of significance of the district, and possesses historic integrity, reflecting its character at that time; or it is capable of providing important information about the period; or it independently meets the National Register of Historic Places criteria for evaluation set forth in 36 CFR Part 60.4 incorporated by reference.

Id.; (RA. 733-34). A "non-contributing resource" is defined as

> A building, landscape feature, object, structure, or archaeological resource that does not add to the historic architectural qualities, historic associations, or archaeological values for which a district is significant because it was not present during the period of significance of the district; due to alterations, disturbances, additions or other changes, it no longer possesses historic integrity reflecting its character at that time, or is incapable of yielding important information about the period; or does not independently meet the national register of historic places criteria for evaluation.

Id.; (RA. 737).

The Code states with respect to interiors:

> Interior spaces that have exceptional architectural, artistic, or historic importance and that are regularly open to the public may be subject to regulation under this chapter. 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.

§ 23-4(c)(2)(c.), City of Miami Code; (RA. 743).

With respect to any construction or alteration of a historic property, the Code states that "[a] certificate of appropriateness shall be required for any new construction, alteration, relocation, or demolition within a designated historic site or historic district or for thematically-related historic resources within a multiple property designation." § 23-6.2(a), City of Miami Code; (RA. 765). The Code adds that "[a]ll certificates of appropriateness and certificates to dig shall be subject to the applicable criteria in this section and any other applicable criteria specified in this chapter, as amended." *Id*. The Code addresses special certificates of appropriateness, as follows:

> Where the action proposed in an application involves a major addition, alteration, relocation, or demolition, as specified by the rules of procedure of the board; where the preservation officer finds that the action proposed in an application involving a minor alteration is not clearly in accord with the guidelines as set forth in subsection (c); or when the applicant is requesting a waiver, or exception or exclusion from the requirements of the zoning code the application shall be classified as a special certificate of appropriateness, and the following procedures shall govern.

§ 23-6.2(b)(4), City of Miami Code; (RA. 766). The Code demands that

> [t]he decision of the board shall be based upon the guidelines set forth in subsection (c), as well as the general purpose and intent of this chapter and any specific design guidelines officially adopted for the particular historic resource, historic district, multiple property designation, or archaeological site or zone.

§ 23-6.2(b)(4)(b.), City of Miami Code; (RA. 767). The Code includes guidelines for issuing certificates of appropriateness, which state:

> Generally, for applications relating to alterations or new construction as required in subsection (a) the proposed work shall not adversely affect the historic, architectural, or aesthetic character of the subject structure or the relationship and congruity between the subject structure and its neighboring structures and surroundings.

§ 23-6.2(h)(1), City of Miami Code; (RA. 769). That section adds:

> nor shall the proposed work adversely affect the special character or special historic, architectural or aesthetic interest or value of the overall historic site, historic district, or multiple property designation.

Id. The Code requires that

> decisions relating to alterations or new construction shall be guided by the U.S. Secretary of the Interior's "Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings."

Id.; (RA. 770).

The Code also states that "[t]he board may seek technical advice from outside its members on any application." § 23-6.2(b)(4)(b.), City of Miami Code; (RA. 767).

The City of Miami Historic and Environmental Preservation Board

The City of Miami Historic and Environmental Preservation Board ("the Board") is established and governed by Article VII, Chapter 62 of the City of Miami Code. (RA. 780-88). The Code states that "[i]t is intended that members and alternate members of the board established by this article be persons of knowledge, experience, mature judgment, and background, having ability and desire to act in the public interest and representing, insofar as may be possible, the various special professional training, experience, and interests required to make informed and equitable decisions concerning preservation and protection of the physical environment." § 62-27(b), City of Miami Code; (RA. 780). The membership of the Board is:

> (1) One member shall be an architect who is or has been registered in the state.
>
> (2) One member shall be a landscape architect who is or has been registered in the state.
>
> (3) One member shall be a historian or architectural historian qualified by means of education or experience and having demonstrated knowledge and interest in county history or architectural history.
>
> (4) One member shall be an architect or architectural historian having demonstrated knowledge and experience in architectural restoration and historic preservation.
>
> (5) One member shall be an experienced real estate broker who is or has been licensed by the state.

> (6) One member shall be a person experienced in the field of business and finance or law.
>
> (7) Three members shall be citizens with demonstrated knowledge and interest in the historic and architectural heritage of the city and/or conservation of the natural environment, and may also qualify under any of the above categories.
>
> (8) One alternate member shall qualify under one of the above categories.

Id.; (RA. 780-81). The functions of the Board include:

> (1) Maintain and update files from the county historic survey within the city for the purpose of identifying and preserving those properties and neighborhoods of special historic, aesthetic, architectural, archeological, paleontological, cultural, social, or political value or interest. It shall endeavor to improve and expand the survey with additional sites, documentary information, oral histories, and other such materials as may become available; and to periodically reevaluate the survey to determine whether changing times and values warrant recognition of new or different areas of significance.
>
> (2) Serve as a quasi-judicial instrument to designate historic sites, historic resources, historic districts, and archeological zones pursuant to chapter 23 of the City Code.
>
> (3) Serve as a quasi-judicial instrument to approve or deny certificates of appropriateness pursuant to chapter 23 of the City Code and article 7 of the zoning ordinance.
>
> . . . .
>
> (6) Maintain a record of unique environmentally significant lands or sites within the city.
>
> (7) Increase public awareness of the value of historic and environmental preservation by developing and participating in public information programs.

> . . . .
>
> (12) Promote and encourage communication and exchange of ideas and information between the board and owners of historically and environmentally significant properties, potential developers, public officials, financial institutions, etc.

§ 62-28, City of Miami Code; (RA. 782-83).

With respect to potential conflicts of the Board members, the City Code states:

> Disqualification of members or alternate member. If any member of the board or the alternate member called on to sit in a particular matter shall find that his/her private or personal interests are involved in the matter coming before the board, he/she shall, prior to the opening of the discussion on the matter, disqualify himself/herself from all participation of whatsoever nature in the cause; or he/she may be disqualified by the votes of not less than a majority of total membership of the board, not including the member or alternate member about whom the question of disqualification has been raised.

§ 62-29(f), City of Miami Code; (RA. 785).

U.S. Secretary of the Interior's Standards for Rehabilitation

As referenced in Section 23-6.2(h)(1), the decision of whether to grant or deny a certificate of appropriateness is guided by the U.S. Secretary of the Interior's Standards for Rehabilitation. The Standards for Rehabilitation are set forth below:

> (a) The following Standards for Rehabilitation are the criteria used to determine if a rehabilitation project qualifies as a certified rehabilitation. The intent of the Standards is to assist the long-term

preservation of a property's significance through the preservation of historic materials and features. The Standards pertain to historic buildings of all materials, construction types, sizes, and occupancy and encompass the exterior and the interior of historic buildings. The Standards also encompass related landscape features and the building's site and environment, as well as attached, adjacent, or related new construction. To be certified, a rehabilitation project must be determined by the Secretary to be consistent with the historic character of the structure(s) and, where applicable, the district in which it is located.

(b) The following Standards are to be applied to specific rehabilitation projects in a reasonable manner, taking into consideration economic and technical feasibility. (The application of these Standards to rehabilitation projects is to be the same as under the previous version so that a project previously acceptable would continue to be acceptable under these Standards.)

(1) A property shall be used for its historic purpose or be placed in a new use that requires minimal change to the defining characteristics of the building and its site and environment.

(2) The historic character of a property shall be retained and preserved. The removal of historic materials or alteration of features and spaces that characterize a property shall be avoided.

(3) Each property shall be recognized as a physical record of its time, place, and use. Changes that create a false sense of historical development, such as adding conjectural features or architectural elements from other buildings, shall not be undertaken.

(4) Most properties change over time; those changes that have acquired historic significance in their own right shall be retained and preserved.

(5) Distinctive features, finishes, and construction techniques or examples of craftsmanship that characterize a historic property shall be preserved.

(6) Deteriorated historic features shall be repaired rather than replaced. Where the severity of deterioration requires replacement of a distinctive feature, the new feature shall match the old in design, color, texture, and other visual qualities and, where possible, materials. Replacement of missing features shall be substantiated by documentary, physical, or pictorial evidence.

(7) Chemical or physical treatments, such as sandblasting, that cause damage to historic materials shall not be used. The surface cleaning of structures, if appropriate, shall be undertaken using the gentlest means possible.

(8) Significant archeological resources affected by a project shall be protected and preserved. If such resources must be disturbed, mitigation measures shall be undertaken.

(9) New additions, exterior alterations, or related new construction shall not destroy historic materials that characterize the property. The new work shall be differentiated from the old and shall be compatible with the massing, size, scale, and architectural features to protect the historic integrity of the property and its environment.

(10) New additions and adjacent or related new construction shall be undertaken in such a manner that if removed in the future, the essential form and integrity of the historic property and its environment would be unimpaired.

36 C.F.R. § 67.7.

Historic Designation of the Playhouse

The Playhouse was originally designated as a historic site by the City in 2005. (RA. 31-32). The designation report contains a lengthy "statement of significance," which details both the historical and architectural significance of the theater. (RA. 19-23). The report identifies three designation criteria that made the Playhouse eligible for historic designation. (RA. 23-24). First, the report asserts that the Playhouse "exemplifies the historical, cultural, political, economical, or social trends of the community," stating that

> The Coconut Grove Playhouse exemplifies the historical, cultural, economical, and social trends of Coconut Grove during the twentieth century, particularly the Boom and Bust cycles that characterize the history of Miami. The theater was built as the Coconut Grove Theater during the heyday of the 1920s real estate boom. Designed in a flamboyant "Spanish Baroque" style, the theater reflects the optimism and disposable wealth of Miami's citizens and the fascination with Mediterranean architectural precedents. Reborn in 1955 as Miami's first live, legitimate theater, the Coconut Grove Playhouse evolved into one of the most important regional theaters in the county.

(RA. 24). The report also indicates that the Playhouse is eligible for designation because "[t]he design of the Coconut Grove Playhouse embodies the Mediterranean Revival style, and featured a highly decorative entrance, enriched window surrounds, and decorative detail associated with the design." *Id*. Finally, the report advocates for designation because the Playhouse "is associated with two of South Florida's most prominent architects"—Richard Kiehnel, who designed the original building, and Alfred Browning Parker, who remodeled the interior of

the theater when it was converted to a live theater venue. *Id*. The designation report supports designation based on *both* historical and architectural bases. *Id*. In the section describing "contributing structures and/or landscape features," the report states:

> Contributing structures within the site include the Coconut Grove Playhouse itself. Only the south and east facades possess architectural significance. There are no contributing landscape features.

(RA. 26). The designation report, therefore, identifies the *entire Playhouse* as a "contributing structure." The fact that the report indicates that only the south and west facades have "architectural significance" does not mean that the entire Playhouse was not recommended for historic designation because of the *historical significance* of the property.

The Board resolution which designated the Playhouse—Resolution No. HEPB-2005-60—states that it is "designating the Coconut Grove Playhouse . . . as a historic site, after finding that it has significance in the historical heritage of the City of Miami, possesses integrity of design, setting, materials, workmanship, feeling and association; and meets criteria 3, 5, and 6 of Section 23-4(a) of the Miami City Code." (RA. 31-32). That resolution specifically "incorporate[ed] herein the designation report" for the Playhouse. *Id*. The Playhouse in its entirety was designated as a historic site by the City in 2005.

The Conditional Certificate of Appropriateness

On April 4, 2017, the County submitted a letter of intent and application to the City ("the 2017 Application"). (RA. 33-38). The letter of intent indicated that the County was seeking a certificate of approval for a "masterplan concept." The conceptual masterplan, as explained in the letter of intent, proposed that the County:

- Restore the entire front historic building to the original 1927 Kiehnel & Elliot design and re-introduce the original uses of these spaces conducive to an active pedestrian environment (e.g., ground floor cafes and retail, and offices and residential for the upper levels);

- Re-establish the footprint of the original crescent-shaped lobby of the movie house as a lush, tropical courtyard, where the memory, history and interpretation of the site will be displayed;

- Survey, document and incorporate the remaining historic interior and architectural elements (e.g., the proscenium arch, Solomonic columns and other features that will be investigated in the subsequent design phases being undertaken) into the design of a new state-of-the-art theater and orient the theater on an axis with the original theater and its corner entrance through the historic front building.

(RA. 35). It is clear from the letter of intent that the design of this proposed redevelopment of the Playhouse was still ongoing, at the time the County submitted its application—the design of the project is referenced as still ongoing and the letter indicates that "[d]uring the design and construction process, the Department of Cultural Affairs will be maintaining updates on the progress of the

project on its website." *Id*. Interestingly, the 2017 Application did not indicate under "application type" that the application was for either "demolition," "new construction," or "alteration" of a historic property. (RA. 36). Rather, the application had the box "other" selected, and the line for explanation of what the application is for is left blank. *Id*.

On April 4, 2017, the Board conducted a hearing on the 2017 Application. (RA. 39-294). During that hearing, it was made very clear by representatives for the County that they were only presenting a conceptual master plan and that the County would have to come back to the Board for approval of actual, finalized plans before any remodeling actions could be taken. Jorge Hernandez, a consultant on the master plan, acknowledged that

> This is for a master plan. And I think that the important issue here is that we're continuing to do research, we're continuing to meet with people. We'll have better access to the site, particularly, as we know if we're going along this line after your decision today.

(RA. 113). Michael Spring, the director of the County department of cultural affairs, when asked if the County wanted an up or down vote on the 2017 Application that day, replied:

> we do, but also with the understanding that we're going to be back. And I think one of the things that have been slightly misstated today is that we're asking for a certificate of appropriateness for the master plan and we've been very explicit about that. We also know that we need to be back once we have more drawing developed for the project that begin to answer some of the questions that got raised today that are very good questions that are—that will be answered when we get

> farther along with the design. But in order for us to proceed to that point, as both a courtesy to you and advice of your staff, we're here today with the master plan so that we're beginning this communication with you as early as possible in the process. We're fully aware that we have got to be back.

(RA. 155-56).

With respect to the issue of demolition, the following exchange was had between Board Member Tragash and Michael Spring:

> Board Member Tragash: And then my next question is, the granting of a certificate of appropriateness today for the master plan would pave the way for them getting a demolition permit to demolish the portions that aren't being preserved? I'm just trying to understand the meaning, because you say you're going to come back. I'm trying to understand the meaning of, if we vote for the certificate of appropriateness for what's before us that is, in effect, giving them the right to then get a demolition permit.
>
> Mr. Spring: Well it's not our intention to proceed with demolition of the building. And I'm glad you asked the question so I can put this on the record, until we come back to you with more evolved drawing and get a full certificate of appropriateness for the set of drawings that will give you the level of detail that you need to make that ultimate determination.

(RA. 158-59).

During that meeting, the issues of the historic significance of the auditorium and the potential need to preserve the auditorium rather than demolish were discussed. A speaker named Rick Gonzalez, a board member on the Florida Trust for Historic Preservation ("the Trust"), indicated that the Trust had included the Playhouse on its "most endangered" list, and wanted to offer its services to the

City's preservation staff and the Board to find a way to preserve the Playhouse. (RA. 152-53). Board Vice Chair Lynn Lewis was also identified as a board member of the Trust. (RA. 152). Vice Chair Lewis asked the County whether it would oppose the involvement of the Trust in this manner. (RA. 154). The following exchange took place:

> Vice Chair Lewis: . . . the Florida Trust, through its representative, is offering, and I'm going to put words in the Florida Trust's mouth, I'm speaking as a member of the HEPB Board, is offering to do more legwork, gather more data, dig deeper, to advocate, and to assist with advocacy. Is that something that is inconsistent with the County and FIU's timeline, preference, druthers?
>
> Mr. Spring: Well, we're here today for consultation with you in order to move the project forward. We've committed to the State with a strict timeline of moving the project forward. Certainly we have every intention of cooperating with and communicating with the state and its division of historic places—historic preservation. So we have no objection to that consultation continuing to occur . . .

(RA. 154-55). Later in the meeting, Michael Spring indicated that the County was collaborating with the State in order to have the Playhouse listed on the National Register. (RA. 227). The County also revealed that it had a pending grant application with the State Division of Historical Resources for the Playhouse. (RA. 154).

At the conclusion of the public hearing, Board Member Tragash moved to approve the certificate of appropriateness, with a plethora of conditions, as follows:

> The original Kiehnel structure containing the south and east façade shall be preserved, the south and east façade shall be restored to the

> Kiehnel phase of architecture, the storefronts on the ground floor shall be reopened. Any additions to the original buildings shall be in keeping with the Secretary of Interior Standards for new additions to midsize buildings. Glass shall be clear with option of low E coding. All windows and doors that are visible from the right-of-way as determined by staff must match the configuration as shown in the historic photo attached hereto as exhibit B. Any ground disturbing work associated with the Master Plan shall be monitored by an archeologist or an archeological report detailing the monitoring, which shall be submitted to the Historic Preservation Office. This historic appropriateness is subject to approval by Zoning, Building, and all other required City and County departments. The restoration of the facades of the historic structure shall be in accordance with the plans prepared by Arquitectonica entitled Coconut Grove Playhouse, consisting of 16 pages stamped by receipt by the Preservation Office on March 6, 2016.
>
> ….
>
> The final master plan shall be developed in accordance with Section 5.7.2 entitled Civic Institutional of the Miami 21 Code. On 11, that no demolition permit will be issued until the plan comes back to us and is approved. And that this concept that we're approving in this plan is in concept only and that the Board has the purview to require different configurations, height, setbacks, et cetera, for the development of each individual building. And, lastly, that all the buildings will come collectively in one application to this Board.

(RA. 258-59). The motion passed by a vote of four to one. (RA. 263).

The 2017 Appeals

Barbara Lange and Katrina Morris, two nearby residents of Coconut Grove, took an appeal of the Board's decision to the City Commission. A public hearing on that appeal was conducted by the Commission. The Commission first determined that Barbara Lange and Katrina Morris had standing to bring the appeal. Following the public hearing on the merits of the appeal, the Commission

rendered its decision adopting Resolution R-17-0622, which affirmed in part and denied in part the appeal of Barbara Lange and Katrina Morris. (RA. 297-99). The Commission found that the appellants had standing to bring the appeal. Furthermore, the Commission found imposed some additional conditions on the County's conceptual plan, as follows:

> a. The Theatre portion of the Playhouse shall be developed with a minimum of six hundred (600) seats, which number of seats, while it presents a compromise and reduction from the traditional seating, is more in keeping with the historic number of seats in effect during the active operations of the Playhouse as a renowned and celebrated theatre. …
>
> ***
>
> d. The Owner shall protect, restore, and maintain the Solomonic Columns, Proscenium Arches, and Cherubs currently present in the interior of the Playhouse.
>
> e. The Owners and agents are to preserve the entire Playhouse structure. At a minimum, the exterior shell of the Theatre, along with the decorative features mentioned, should be preserved for the community, patrons, and for future generations, due to meeting the applicable criteria of Chapter 23 of the City Code.

(Ra. 297-99).

The County Appealed the Commission's decision to this Court, which rendered an opinion on December 3, 2018, reversing the Commission. (RA 300-303). The panel in that case determined that the Commission had erred in determining that the Grove residents had standing to bring the appeal. (RA. 301-

02). The prior panel also determined that the Commission had denied the County due process by considering the issue of preservation of the interior of the Playhouse, because the appeal was "governed by the existing designations" and the interior of the building had not been specifically included in the 2005 designation report. (RA. 303). This brief discussion was made in the context of what the prior panel determined that the City Commission's imposition of additional conditions on the conditional certificate of appropriateness was a due process violations, where the Board had specifically not considered those conditions below. *Id*.

Listing on the National Register

Following the proceedings on the conditional certificate of appropriateness, and in keeping with the discussion had during the public hearing on that matter, the Florida Trust began advocacy efforts to have the Playhouse listed on the National Register. As explained above, the County indicated its consent to these actions taking place, even after the fact that Vice Chair Lewis was a member of the board of the Trust was fully disclosed during those proceedings. (RA. 154-55).

The registration form for the National Register listing indicates two criteria under which the Playhouse was being considered for inclusion on the National Register:

> A. Property is associated with events that have made a significant contribution to the broad patterns of our history.
> . . . .

> C. Property embodies the distinctive characteristics of a type, period, or method of construction or represents the work of a master, or possesses high artistic values, or represents a significant and distinguishable entity whose components lack individual distinction.

(RA. 306). The registration form identifies "areas of significance" as 1) Entertainment/recreation; and (2) architecture. *Id*. The narrative of the report has entirely different sections for the historical and architectural significance of the Playhouse. Under "Historical Significance: Entertainment/Recreation," the report states:

> The Coconut grove Playhouse is significant at the local level under Criterion A in the area of Entertainment/Recreation. Since 1927, the building has housed various forms of entertainment, including movies, television and radio programs, and plays. Each successive owner of the building approached it with grand designs, intended for it to be a cultural center for the City of Miami and perhaps the nation. In some senses, they succeeded, with the playhouse premiering numerous theatrical productions, many of which found their way to New York City. The Coconut Grove Playhouse was, for a time, a staging ground where kinks were worked out of productions before moving to more traditional venues. From 1927 to 2006, through economic booms and busts, the Coconut Grove Playhouse served as the heart of the Coconut Grove community, its distinctive façade drawing visitors with the promise of quality entertainment. Between 1955 and 1970, under the leadership of George Engle and Zev Buffman, the playhouse was a popular and prominent theater in the Miami community.

(RA. 325). The report goes on for five additional pages to detail the history of the Playhouse and the historic significance of the property. *Id.* The report also, separately details the architectural significance that would qualify the Playhouse

for listing on the National Register. (RA. 335). The report included some discussion of the Playhouse interior in the section on architectural significance. *Id.*

The state reached out to the City with regard to the nomination, because the Board is required under state law and the City Code to consider such nominations, notify and receive input from the property owner, and prepare a report as to whether the property meets eligibility criteria. The state division of historic resources was provided with ample input from the County with regard to the nomination. (RA. 304-423). The County recommended approval of the nomination, but wanted the nomination documents to be revised in two ways: (1) to reflect the period of significance "should extend continuously from 1927-1970," and (2) "the analysis of the integrity should note that the interior of the Playhouse exhibits a low level of integrity to Alfred Browning Parker's design." (RA. 361).

The August 9, 2018, staff comments from the state Division of Historical Resources notes that "the Criterion A significance in the field of Entertainment/Recreation places the highest importance for evaluation within the building in the auditorium space, where the significant activities within the playhouse occurred. The auditorium's key features, including its stage, proscenium seats, and balcony remain relatively unchanged from the end of the period of significance, which extends from 1955 to 1970 under Criterion A." (RA. 414). The

nomination was approved by the Division on August 9, 2018, and forwarded to the National Park Service. (RA. 408).

The Playhouse was ultimately listed on the National Register in October 2018. (RA. 421).

The Current Application

Shortly following that decision of the prior panel of the appellate division, on December 17, 2018, the County submitted a letter of intent and application for a special certificate of appropriateness to the Board. (RA. 424-433). This application, unlike the prior application for the conceptual master plan, indicated under "application type" that it was for "new construction," "alteration," and "demolition." (RA. 429). Clearly, and in keeping with the representations it had made during the public hearing on the conditional certificate of appropriateness, the County was moving forward with the understanding that this current special certificate of appropriateness would be necessary for any of these things—new construction, alteration, or demolition, to happen with respect to the Playhouse. *Id*. The County's letter of intent with respect to the current application raises the issue of the historic integrity of the interior of the Playhouse, and asserts based on the opinion of this Court in the prior appeal that the 2005 designation report precluded consideration of the Playhouse interior as a basis for issuing the certificate of appropriateness. (RA. 427). The letter of intent references "detailed plans" that

"incorporate and expand upon the masterplan concept previously approved by the [Board]." *Id*. The plan, now supported by detailed drawings and renderings pursuant to the Code, was to restore the front building—which includes the south and east facades—to the 1927 original Kiehnel and Elliot design, including retail spaces; demolish the existing auditorium and replace it with a new 300-seat theater, which would incorporate historic interior architectural elements—the proscenium arch, Solomic columns, fish fountain, and concrete grills; create an outdoor area "with lush tropical landscaping" between the façade and the new theater; and to build a parking garage, which was to include retail spaces. *Id*.

The Hearings Before the Board

The current application first came for a public hearing before the Board on February 5, 2019. (RA. 434-477). During that meeting, the Board ultimately voted to defer the item to the March 5, 2019, Board meeting, because the application materials and supporting documentation had not been received by the Board members prior to the meetings because of a technical glitch. (RA. 447). Vice Chair Lewis then brought a motion for the Board to direct staff to request guidance from the state Division of Historic Resources with regard to the current application, because the Playhouse had been listed on the National Register since the conditional certificate of appropriateness for the conceptual master plan has been voted on, and the Division of Historic Resources was statutorily mandated to give

its opinion as to the potential demolition of any such listed historic property. (RA. 447-48). The County voiced no objection to the motion or the concept that guidance from the Division of Historic Resources would be sought as to whether demolition of the Playhouse was appropriate, and the motion passed. (RA. 448).

On March 1, 2019, the City received a response from the Division of Historic Resources, which opined that demolition of the Playhouse was not consistent with the Secretary of the Interior's Standards. (RA. 1-12). The Letter opined that demolition would violate standards 1, 2, 4, 5, 6, 9, and 10. (RA. 1). The letter attached a November 7, 2017, e-mail from Dr. Timothy Parsons to Michael Spring, which elaborated on these inconsistencies. (RA. 5-7). After listing the relevant standards, that e-mail states:

> As proposed, this project will result in the loss of integrity of the building. The entire interior of the building would be replaced as part of the proposed structural work. Plans submitted with the application show the complete loss of the interior organization of the front building. In Addition, the historic theater space where the activities that make this property significant would be demolished to construct a new building. This would render the property ineligible for the National Register under its significance as a theater.

(RA. 6). The Letter recommends

> Restoring the Playhouse in a manner consistent with the Standards. This will allow the property to retain the historic character and integrity that are the basis for the Playhouse's National Register designation. The Standards are flexible and allow for property to be modernized and improved to meet current needs while still maintaining the historic nature of the property.

(RA. 2). The Letter, therefore, emphasizes that the "historic theater space"—meaning the Auditorium building—should not be demolished because the activities that took place there over the decades served as the historical basis for listing of the Property on the National Register.

The Board conducted a public hearing on the merits of the current application on March 5, 2019. (RA. 478 - 723). At the outset of the meeting, the County attorney conducted a colloquy of Vice Chair Lewis related to various ex parte communications that she had disclosed at the start of the meeting. (RA. 484-90). Vice Chair Lewis stated during the colloquy that

> My initial inclination to preserve rather than to demolish does not mean that I can ignore, should ignore, will ignore evidence, testimony that establishes that demolition is appropriate, again, under the standards of the Secretary of the Interior. So, I respectfully disagree with you that I have a bias one way or the other.

(RA. 491).

The County moved to disqualify Vice Chair Lewis. (RA. 490). Vice Chair Lewis indicated that she would not disqualify herself. (RA. 491). Vice Chair Lewis then left the room so that the other Board members could determine whether they felt that she should be disqualified. The members informally polled themselves and determined that no motion to disqualify would be entertained. (RA. 492). The County attorney voiced the County's objection to Vice Chair Lewis's participation in the proceedings, (RA. 493), but did not ask for a continuance of the hearing.

Addressing the merits of the County's application, the Board held a lengthy and robust hearing that included opinions—both expert and lay—on all sides of the issue. There was much testimony on the whether the auditorium should be restored, instead of demolished and replaced. One piece of evidence that was submitted on the record was the March 1, 2019 Letter from the state Division of Historical Resources. (RA. 617). The members and various speakers during the public comment period discussed the significance of the Letter, and it featured prominently in the debate. One Board member pointed out that the Playhouse's listing on the National Register postdated the conditional certificate of appropriateness granted in 2017. (RA. 629). At the conclusion of the public hearing, a motion was made to deny the County's application because "the plans do not satisfy the standard of the Secretary of the Interior." (RA. 636). That motion passed by a vote of six-to-four. (RA. 637).

The County's Appeal to City Commission

The County appealed the Board's decision to the City Commission. Following a public hearing on May 8, 2019, the Commission adopted resolution R-19-0169, which granted the County's appeal. (RA. 724-26).

The Mayoral Veto

On May 17, 2019, the mayor vetoed resolution R-19-0169. (Cite veto memo). The veto message and memo, which must accompany the veto per the City Code, express a number of bases for the veto. *Id*. Among the reasons provided was:

> My veto that seeks to affirm the HEP Board's decision is supported by competent substantial evidence. Based on the record before the HEP Board and Commission, the County's proposal would jeopardize the National Register of Historic Places designation for the Coconut Grove Playhouse because the proposal is not consistent with the guidance provided by the secretary of the Interior's Standards for the Treatment of Historic Properties. See March 1, 2019, letter from Mr. Aldridge, Deputy State Historic Preservation Officer. National Register provided significant benefits for the designated properties, including but not limited to federal tax incentives, grant eligibility, and the prestige of recognition.

(RA. 727-29).

The City Commission considered the veto for an override on May 23, 2019, but the veto was not overridden.

Proceedings Before This Court

The County subsequently filed the instant petition.

The City initially filed a motion to dismiss based on lack of jurisdiction, which has been fully briefed. On November 30, 2019, this Court entered an order deferring ruling on the Motion to Dismiss, and directing the City to file this Response.

STANDARD OF REVIEW

This Court reviews an administrative agency's decision for whether the agency afforded due process, whether the decision is supported by competent substantial evidence, and whether the decision complies with the essential requirements of the law. *See City of Deerfield Beach v. Vaillant*, 419 So. 2d 624 (Fla. 1982); *Haines City Community Development v. Heggs*, 658 So. 2d 523 (Fla. 1995).

Competent substantial evidence is "such evidence as will establish a substantial basis of fact from which the fact at issue can reasonably be inferred (or) … such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *Duval Utility Co. v. Florida Public Serv. Comm'n*, 380 So. 2d 1028, 1031 (Fla. 1980) (citing *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957)). The Supreme Court of Florida has described competent substantial evidence as "tantamount to legally sufficient evidence." *Florida Power & Light Co. v. City of Dania*, 761 So. 2d 1089, 1092 (Fla. 2000).

Florida courts have cautioned that:

> the "competent substantial evidence" standard cannot be used by a reviewing court as a mechanism for exerting covert control over the policy determinations and factual findings of the local agency. Rather, this standard requires the reviewing court to defer to the agency's superior technical expertise and special vantage point in such matters. The issue before the court is not whether the agency's decision is the "best" decision or the "right" decision or even a "wise" decision, for

> these are technical and policy-based determinations properly within the purview of the agency. The circuit court has no training or experience-and is inherently unsuited-to sit as a roving "super agency" with plenary oversight in such matters.
>
> The sole issue before the court on first-tier certiorari review is whether the agency's decision is lawful. *The court's task vis-a-vis the third prong of Vaillant is simple: The court must review the record to assess the evidentiary support for the agency's decision. Evidence contrary to the agency's decision is outside the scope of the inquiry at this point, for the reviewing court above all cannot reweigh the "pros and cons" of conflicting evidence.* While contrary evidence may be relevant to the wisdom of the decision, it is irrelevant to the lawfulness of the decision. As long as the record contains competent substantial evidence to support the agency's decision, the decision is presumed lawful and the court's job is ended.

Town of Manalapan v. Gyongyosi, 828 So. 2d 1029, 1032-33 (Fla. 4th DCA 2002) (emphasis in original) (quoting *Dusseau v. Metro. Dade County Bd. of County Com'rs*, 794 So. 2d 1270, 1275-76 (Fla. 2001)).

Generally, a ruling constitutes a departure from the essential requirements of law when it amounts to a violation of a *clearly established* principle of law resulting in a miscarriage of justice. *See Combs v. State*, 436 So. 2d 93, 96 (Fla. 1983) (emphasis added). The Third District has explained that this prong of the analysis considers "whether the administrative agency followed its laws and regulations." *City of Miami Beach v. Beach Blitz, Co*., 279 So. 3d 776, 778 (Fla. 3d DCA 2019)

Added to this overlay is the fact that a petition for writ of certiorari from a municipal agency decision is essentially an appeal of right. *Broward County v. G.B.V. Intern., Ltd.*, 787 So. 2d 838, 843 (Fla. 2001) ("first-tier certiorari review is not discretionary but rather is a matter of right and is akin in many respects to a plenary appeal"). As such, the appellant bears the burden of establishing that the decision on appeal is wrong, for any reason supported by the record. As explained by the Florida Supreme Court:

> This longstanding principle of appellate law, sometimes referred to as the "tipsy coachman" doctrine, allows an appellate court to affirm a trial court that "reaches the right result, but for the wrong reasons" so long as "there is any basis which would support the judgment in the record."

Robertson v. State, 829 So. 2d 901, 906 (Fla. 2002) (*quoting Dade County Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644 (Fla. 1999)).

ARGUMENT

I. THIS COURT SHOULD DISMISS THE COUNTY'S APPEAL FOR LACK OF JURISDICTION[2]

This Court should dismiss the County's appeal, because this Court lacks jurisdiction over this matter. The County invoked the appellate division's jurisdiction pursuant to Florida Rules of Appellate Procedure 9.030(c)(2)-(3) and 9.100(c)(2). (A. 18). Under Florida Rule of Appellate Procedure 9.100(c), titled, in

[2] The City has made this argument in its pending motion to dismiss. Because this Court has deferred ruling on the City's motion, the City incorporates those arguments herein, without waiving the pending motion to dismiss.

part, "petitions for certiorari," "a petition to review quasi-judicial action of agencies, boards, and commissions of local government, which action is not directly appealable under any other provision of general law but may be subject to review by certiorari," "shall be filed within thirty days of rendition of the order to be reviewed." Fla. R. App. P. 9.100(c). Under Rule 9.100(c), *quasi-judicial* decisions of municipal "agencies, boards, and commissions," are reviewable by petition for writ of certiorari to the appellate division. *See, e.g., Teston v. City of Tampa*, 143 So. 2d 473, 476 (Fla. 1962) ("If the order is quasi-judicial, . . . then it is subject to review by certiorari."); *De Groot v. Sheffield*, 95 So. 2d 912, 916 (Fla. 1957) ("commenting that for quasi-judicial decisions of agencies, "[i]t is clear that certiorari is in the nature of an appellate process. It is a method of obtaining review, as contrasted to a collateral assault."); *Terry v. Bd. of Trustees of City Pension Fund*, 854 So. 2d 273, 274 (Fla. 4th DCA 2003) ("certiorari will not lie to review legislative decisions"); *MRO Software, Inc. v. Miami-Dade County*, 895 So. 2d 1086, 1086 (Fla. 3d DCA 2004) (affirming transfer to general division of circuit court because "such an award is the exercise of an executive function, rather than a quasi-judicial act subject to certiorari review by the Appellate Division"). Because, however, the mayoral veto provided by the City Charter and Code is not quasi-judicial, review by way of a petition for writ of certiorari is unavailable here.

The Florida Supreme Court, in addressing the issue of how various administrative decisions are reviewed, has stated:

> The initial problem involved in deciding the appropriate method of obtaining relief against administrative action is to look first to the statute under which the administrative agency operates. If a valid method of review is there prescribed it should be followed. In the absence of specific valid statutory appellate procedures to review the particular order, it becomes necessary to ascertain whether the order is quasi-judicial or quasi-legislative. If the order is quasi-judicial, that is, if it has been entered pursuant to a statutory notice and hearing involving quasi-judicial determinations, then it is subject to review by certiorari.

Teston v. City of Tampa, 143 So. 2d 473, 475–76 (Fla. 1962) (internal citations omitted). The issue presented, therefore, is whether mayoral veto is quasi-judicial. Based on the clear language of the City Charter and City Code, as well as relevant precedent, the mayoral veto is not quasi-judicial.

The Board and City Commission Decisions At Issue Were Quasi-Judicial

To start, it is important to acknowledge that the decisions of the Board—in denying the certificate of appropriateness, and the City Commission—in granting the County's appeal, were both quasi-judicial decisions. The City Code, addressing applications for certificates of appropriateness, states:

> When a complete application is received, the preservation officer shall place the application on the next regularly scheduled meeting of the board. The board shall hold a public hearing to review the application. All public hearings on all certificates of appropriateness conducted by the board and hearings on appeals of board decisions to the city commission regarding certificates of appropriateness shall be noticed as follows:

> 1. The applicant shall be notified by mail at least ten calendar days prior to the hearing.
>
> 2. Any individual or organization requesting such notification and paying any established fees therefore shall be notified by mail at least ten calendar days prior to the hearing.
>
> 3. An advertisement shall be placed in a newspaper at least ten calendar days prior to the hearing.
>
> 4. Any additional notice deemed appropriate by the board.

§ 23-6.2(b)(4)(a), City of Miami Code; (RA. 766). Florida Courts have made very clear that:

> when notice and a hearing are required and the judgment of the board is contingent on the showing made at the hearing, then its judgment becomes judicial or quasi-judicial as distinguished from being purely executive.

De Groot v. Sheffield, 95 So. 2d 912, 915 (Fla. 1957); *see also Broward County v. La Rosa*, 505 So. 2d 422, 423 (Fla. 1987) ("An administrative agency conducts a quasi-judicial proceeding in order to investigate and ascertain the existence of facts, hold hearings, and draw conclusions from those hearings as a basis for their official actions."); *Anoll v. Pomerance*, 363 So. 2d 329, 331 (Fla. 1978) ("a judgment becomes judicial or quasi-judicial, as distinguished from executive, when notice and hearing are required and the judgment of the board is contingent on the showing made at the hearing"); *Teston v. City of Tampa*, 143 So. 2d 473, 476 (Fla. 1962) (quasi-judicial actions are "entered pursuant to a statutory notice and hearing

involving quasi-judicial determinations"). Here, the decision of the Board, which followed a robust noticed hearing, meets this definition of quasi-judicial.

Similarly, the City Commission hearing on the County's appeal of the Board's decision was also quasi-judicial. Under the City Code,

> The applicant, the planning department, or any aggrieved party may appeal to the city commission any decision of the board on matters relating to designations and certificates of appropriateness by filing within fifteen (15) calendar days after the date of the decision a written notice of appeal with the hearing boards department, with a copy to the preservation officer. The notice of appeal shall set forth concisely the decision appealed from and the reasons or grounds for the appeal. Each appeal shall be accompanied by a fee of $525.00, plus $3.50 per mailed notice required pursuant to 23-4. The city commission shall hear and consider all facts material to the appeal and render a decision as promptly as possible. The appeal shall be de novo hearing and the city commission may consider new evidence or materials. The city commission may affirm, modify, or reverse the board's decision. The decision of the city commission shall constitute final administrative review, and no petition for rehearing or reconsideration shall be considered by the city. Appeals from decisions of the city commission may be made to the courts as provided by the Florida Rules of Appellate Procedure.

§ 23-6.2(e), City of Miami Code; (RA. 768-69). The City Commission's May 8, 2019, hearing on the County's appeal was a quasi-judicial public hearing, following required notice, during which the County was permitted to introduce evidence and testimony upon which the City Commission's decision was rendered.

The Mayoral Veto is Not Quasi-Judicial

In contrast to the underlying Board and City Commission decisions, however, the mayoral veto does not meet the definition of quasi-judicial found in the case law. Under the City Charter,

> The mayor shall, within ten days of final adoption by the city commission, have veto authority over any legislative, quasi-judicial, zoning, master plan or land use decision of the city commission. . . .

§ 4(g)(5), City of Miami Charter. Under the City Code, "[t]he veto provisions of Section 4(g)(5) of the City Charter shall be exercised exclusively in accordance with the terms and conditions herein." § 2-36, City of Miami Code. That code section goes on to explain the timing and format of the veto and veto message. *Id*. Noticeably absent from this process, however, is any required notice or opportunity to be heard (through either public hearing or written submissions) on the mayoral veto.

Similarly, section 2-36 of the City Code also explains the timing and process for the City Commission to consider an override of the veto. *Id*. Specifically, the Code states with respect to City Commission consideration of any vetoed item that

> Notwithstanding any other rule of the commission, *items vetoed by the mayor shall* not be subject to the "5 day rule" as provided in section 2-33; not be deferred to a future meeting; not require committee review; not be subject to a motion to reconsider, except at the same meeting; not require first reading; *not require publication or additional public hearings*; or not be amended if the item required special publication or a public hearing to be originally adopted or enacted. Members of the public shall have a reasonable opportunity to speak on vetoed items

> consistent with F.S. § 286.0114, and subsection 2-33(c)(2) of the City Code.

§ 2-36(5), City of Miami Code (emphasis supplied).

Under the Code, therefore, it is clear that no notice or hearing is required for consideration of either the mayoral veto or the veto override. As such, these two stages of any commission action—the mayoral veto and the City Commission consideration of whether to override that veto, are different in nature from the hearings before the Board or the City Commission in considering the County's appeal. Because no "notice and a hearing are required" and the decision of the mayor to veto and/or the City Commission to override that veto, if exercised, are not "contingent on the showing made at [a] hearing," the mayoral veto is not quasi-judicial, but, rather, executive. *De Groot*, 95 So. 2d at 915 ("when notice and a hearing are required and the judgment of the board is contingent on the showing made at the hearing, then its judgment becomes judicial or quasi-judicial as distinguished from being purely executive").

There is no *binding* Florida precedent addressing the specific issue of whether a mayoral veto of quasi-judicial action is itself quasi-judicial. In *The Viscayans, et al. v. City of Miami, et al*., 15 Fla. L. Weekly Supp. 657a (Fla. 11th Jud. Cir. App. Div. July 3, 2014), a panel of the appellate division reversed a decision of the City Commission with respect to a zoning matter, in part because it determined that *ex parte* communications by the mayor during the ten-day veto

period constituted a denial of due process. (RA. 789-95). The dissenting judge disagreed, noting that:

> The Mayor of Miami did not argue in *ex parte* communications, because he was not one of the "arbitrators" of the zoning case, as he did not participate in the hearings in any way. Rather, he was properly acting in his executive capacity, and lawfully governing the city by attempting to incorporate the concerns of a group of residents in a city decision.

(RA. 794). First, it should be noted that in *The Viscayans*, the actions under review were an ordinance and a resolution of the City Commission acting in its quasi-judicial capacity—not a mayoral veto, because the mayor there did not exercise his veto authority. There was, therefore, no issue in that case with respect to the jurisdiction of the appellate division to review the matter. And although a partial basis for the decision was the panel's conclusion that the mayoral veto period of quasi-judicial decisions of the City Commission is subject to the same prohibition on *ex parte* communications as the City Commission's consideration of the matter, that decision is inconsistent with the City Charter and Code provisions addressing the mayoral veto authority, and is not binding on this Court. *See Allstate Fire & Cas. Ins. Co. v. Hallandale Open MRI, LLC*, 253 So. 3d 36, 38 n.2 & 41-49 (Fla. 3d DCA 2017) (majority and dissenting opinions discuss issue of intra-circuit conflict between appellate division decisions, which are not binding on other appellate division panels).

II. THE MAYORAL VETO APPLIES THE CORRECT LAW, IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE, AND AFFORDED THE COUNTY DUE PROCESS

The County asserts on appeal that the mayoral veto is subject to reversal under all three appellate review standards applicable to quasi-judicial decisions of municipal boards—failure to apply the correct law; lack of competent substantial evidence; and denial of due process. As will be explained in further detail below, the County's arguments on this point are largely based on its reliance on isolated evidence in the record. When the record is viewed through the proper lens of the appellate standard, the County's arguments fail.

The Mayoral Veto Applied the Correct Law

The County asserts that the mayor departed from the essential requirements of law by, among other things, improperly basing the veto on the Playhouse's National Register status and in considering the National Register application in his decision. Pet. at 42-47. Because the mayoral veto asserted a number of bases for the veto decision, the veto should not be overturned so long as any of those bases is proper. *See Johnson v. Allstate Ins. Co*., 961 So. 2d 1113, 1115 (Fla. 2d DCA 2007) ("even if a trial court's ruling is based on erroneous reasoning, its decision will be upheld 'if there is any basis which would support the judgment in the record'").

As an initial point, this basis for review determines whether the agency decision "amounts to a violation of a *clearly established* principle of law resulting in a miscarriage of justice." *See Combs*, 436 So. 2d at 96 (emphasis added). The Third District has explained that this prong of the analysis considers "whether the administrative agency followed its laws and regulations." *City of Miami Beach*, 279 So. 3d at 778. The alleged departure from the essential requirements of law asserted by the County does not assert any failure of the City to follow "its laws and regulations." The County does not assert that the mayoral veto was not entered in compliance with the pertinent City Charter and Code provisions. Rather, the County essentially asserts that the veto is not supported by competent substantial evidence—which will be addressed later in this brief.

The County asserts that the mayoral veto departed from the essential requirements of law in considering the Playhouse's National Register listing, and the application materials related to that listing, as a basis for the veto. Pet. at 43. This argument mischaracterizes the veto on this point. The veto message states in this regard that

> Based on the record before the HEP Board and Commission, the County's proposal would jeopardize the National Register of Historic Places designation for the Coconut Grove Playhouse because the proposal is not consistent with the guidance provided by the secretary of the Interior's Standards for the Treatment of Historic Properties. See March 1, 2019, letter from Mr. Aldridge, Deputy State Historic Preservation Officer. National Register provided significant benefits

> for the designated properties, including but not limited to federal tax incentives, grant eligibility, and the prestige of recognition.

Veto message at 1-2. This portion of the veto message indicates that the mayor vetoed the Commission resolution because: (1) the County proposal is not consistent with the Standards; and (2) the County proposal would jeopardize the Playhouse's National Register listing. *Id*. The veto did not depart from the essential requirements of law on this point, because the City Code requires with respect to certificates of appropriateness that

> decisions relating to alterations or new construction shall be guided by the U.S. Secretary of the Interior's "Standards for Rehabilitation and Guidelines for Rehabilitating Historic Buildings."

§ 23-6.2(h)(1), City of Miami Code; (RA. 770). The mayoral veto was based on the inconsistency of the County plan with the Standards, which was a *required* consideration for this application under the Code.

Contrary to the assertions of the County, the mayor did not "turn a non-regulatory, honorary designation into a new, additional, uncodified layer of local regulatory control." Pet. at 43. Rather, following the listing of the Playhouse on the National Register, the Board sought guidance from the Division of Historical Resources as to whether the proposed plan was consistent with the Standards. (RA. 1-12). The consideration of the Standards was required under the express provisions of Chapter 23, which also states that "[t]he board may seek technical advice from outside its members on any application." § 23-6.2(b)(4)(b.), City of

Miami Code. Neither the consideration of the County plan's consistency with the Standards, nor the consultation with the Division on that point constituted a departure from the essential requirements of law.

The Mayoral Veto is Supported By Competent Substantial Evidence

The County asserts that the mayoral veto is not supported by competent substantial evidence because the Letter from the Division of Historic Resources is "incompetent, inapposite, and irrelevant in the context of this proceeding." Pet. at 47.

First, the County has waived this issue on appeal. The Letter at issue was the result of a Board vote to seek guidance from the Division as to the consistency of the County's plan with the Standards. (RA. 447-48). The County was present for the vote and voiced no objection to the Board's action. (RA. 448). Further, the County did not object to the Letter being included in the record before the Board or raise any arguments to the Board that the Letter was incompetent or irrelevant, despite the Board member's expressed reliance on the Letter in denying the County's application. In failing to make such an objection, the County waived this issue on appeal. *See Rinker Materials Corp. v. Hill*, 471 So. 2d 119, 120 (Fla. 1st DCA 1985) ("only by making a contemporaneous objection on proper grounds can the error be properly reviewed on appeal").

Under Florida law, litigants are required to make objections on the record in order to preserve any error for appellate review. *See Castor v. State*, 365 So. 2d 701 (Fla. 1978); *Clear Channel Communications, Inc. v. City of North Bay Village*, 911 So. 2d 188 (Fla. 3d DCA 2005); *Cortes v. City of Miami*, 995 So. 2d 604 (Fla. 3d DCA 2008). "The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of the judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings. Delay and an unnecessary use of the appellate process result from a failure to cure early that which must be cured eventually." *Castor*, 365 So. 2d at 703. The contemporaneous objection requirement is fully applicable to litigants before an administrative body. *See Clear Channel Communications*, 911 So. 2d 188 (affirming decision of appellate division of circuit court that determined that appellants failed to preserve legal challenges for review by failing to make contemporaneous objections before city commission); *Cortes*, 995 So.2d 604 (pro se litigant waived error by failing to object to evidence and ask to cross-examine witnesses).

In *Rinker Materials Corp*., the First District held that a party cannot fail to make a contemporaneous objection to allegedly incompetent evidence presented to a Judge of Compensation Claims in order to later argue on appeal that the judge's

ruling was not supported by competent substantial evidence. *Id*. The district court noted that "[t]he deputy and the opposing party are entitled to know what evidence is considered objectionable so that the objection can be addressed and perhaps obviated during the hearing." *Id*. Here too, the County was required to object to the admission of the Letter if it felt that the Letter was not proper evidence to be considered by the Board. This would have allowed the Board an opportunity to address any such concern prior to its vote.

Further, even if this issue was properly preserved for appeal, the Letter is competent substantial evidence sufficient to support the Board's decision—and the mayoral veto. The Letter does not, as asserted by the County, simply list the Standards with no further analysis. Pet. at 47. Rather, the letter first opines that demolition would violate Standards 1, 2, 4, 5, 6, 9, and 10. (RA. 1), but also attaches a November 7, 2017, e-mail from Dr. Timothy Parsons to Michael Spring, which elaborated on these inconsistencies. (RA. 5-7). After listing the relevant standards, the Letter states:

> As proposed, this project will result in the loss of integrity of the building. The entire interior of the building would be replaced as part of the proposed structural work. Plans submitted with the application show the complete loss of the interior organization of the front building. In Addition, the historic theater space where the activities that make this property significant would be demolished to construct a new building. This would render the property ineligible for the National Register under its significance as a theater.

(RA. 6). The letter is not inapposite or irrelevant because it constitutes the professional evaluation of an expert in the field as to whether the County plan is consistent with the Standards. As explained above, evaluation for such consistency is required under the City Code. § 23-6.2(h)(1), City of Miami Code; (RA. 770).

The Mayoral Veto Afforded the County Due Process

The County asserts that the mayoral veto denied it due process because: (1) the mayor expanded to scope of the hearing by relying on an analysis related to the interior of the Playhouse (the Letter); (2) the mayor vetoed the item without considering the entire record; and (3) the mayor engaged in *ex parte* communications during the veto period, in violation of *Jennings*. Pet. at 50-53. As will be explained more fully below, the mayor did not impermissibly expand the scope of the hearing by relying on the Letter, which supports the Board decision that the County plan is inconsistent with the Standards. Further, there is simply no evidence to support the County's assertion that the mayor vetoed the item without reviewing the record. Finally, this Court lacks jurisdiction over the alleged Jennings violation—related to the asserted *ex parte* communications.

The Mayor Did Not Expand the Scope of the Hearing

The consideration of the Letter by the mayor and the Board was not a denial of due process. The County asserts that the consideration of the Letter improperly "expanded the scope of the hearing," such that its due process rights were violated.

This is similar to the argument the County raised in the prior appeal related to the Playhouse, in which the prior panel of this Court held that the City Commission's consideration of issues related to the interior of the Playhouse constituted a violation of due process because that issue was not considered by the Board below. (RA. 300-03). But even if this Court is convinced that the prior panel was correct as to the due process violation it found there, the manner in which the Letter was admitted below and the content of the Letter that were relied upon by the Board distinguish this appeal from the prior appeal in this respect.

Here, the County asserts that the mayor's consideration of the Letter impermissibly expanded the scope of the hearing. Pet. at 50. But the Letter was admitted into the record before the Board, discussed at length during the public hearing, and relied upon by the Board in rendering its decision—all without any objection on the part of the County. The mayor's consideration of the Letter was proper, because the Letter was in the record and was considered by the Board. Although the County characterizes the Letter as being based on different standards than those governing the Board's consideration of its application, the Letter is clearly based on the Division's conclusion that the County plan—specifically the aspect calling for demolition of the auditorium—is inconsistent with the Standards. As explained above, the Letter explains the reasoning for that opinion. And that reasoning stands independent of any analysis of the architectural integrity of the auditorium interior,

because the opinion is based on the fact that the auditorium space is the location of the historic theatrical performances that make the Playhouse *historically significant*. (RA. 6). The City Code *required* that the Board consider the plan's consistency with the Standards in considering whether to grant the certificate of appropriateness. § 23-6.2(h)(1), City of Miami Code; (RA. 770).

The Mayor Considered the Record

The County asserts that it was denied due process because the mayor did not consider the entire record on review. Taking aside the fact that a mayoral veto—as an executive action—is not held to the standard of whether the entire record of the decision below has been reviewed, the County's assertion that the mayor was not a "fully informed decision-maker" is mildly insulting and bears no support in the record. The mayoral veto clearly reflects that the mayor considered the record of the proceedings before the Board and the Commission. The veto memo suggests that the mayor was deeply familiar with the issues presented by the County's application, and based his decision on both the policy preference to not allow an action that would jeopardize the Playhouse's listing on the National Register, and his determination that the Board correctly determined that the County plan was inconsistent with the Standards. (RA. 727-29).

The Alleged Jennings Violations

With respect to the alleged *Jennings* violations, the circuit court, acting in its appellate capacity, is not authorized to weigh or reweigh conflicting evidence or substitute its own judgment in place of the fact-finders (here the Board or the Commission) in the quasi-judicial proceedings. *Dusseau v. Metro Dade County Bd. Of County Comm'rs*, 794 So. 2d 1270 (Fla. 2001).

The County asserts in their Petition to this Court, for the first time, that the Mayor engaged in *ex parte* communications *after* the Board and City Commission conducted the hearings. The issue of any communication between the Mayor and the third parties was not addressed at any of the hearings of the Board or Commission, and it is therefore not part of the record of the quasi-judicial proceedings. Based upon the above law limiting the appellate review of the quasi-judicial decision at issue, the circuit court was without jurisdiction to review any alleged *ex parte* communication not adjudicated at the hearings of the Board or Commission.

The County relies on *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991), in holding that the allegation of the Mayor's communication was grounds for that court to invalidate the veto. However, Jennings is not applicable under the present facts and the posture of the case before this Court.

In *Jennings*, Schatzman applied for a variance to allow him to conduct an oil change business on his property adjacent to the property of Jennings. The zoning appeals board granted his request. The Dade County Commission voted to uphold the board's decision. Thereafter, Jennings sought declaratory and injunctive relief in circuit court where he alleged that a lobbyist communicated with some or all of the Dade County Commissioners *before the vote* of the Commission. The trial court dismissed the portion of Jennings' complaint alleging *ex parte* communications by the lobbyist and gave leave to amend as to Dade County and transfer the matter to the appellate division. Jennings instead filed a petition for certiorari with this Court.

In accepting jurisdiction over the appeal in *Jennings*, the Third District stated:

> The trial court's order dismissed Jennings' equitable claim of non-record ex parte communications while it simultaneously reserved jurisdiction for Jennings to amend his complaint so as to seek common law certiorari review pursuant to *Dade County v. Marca, S.A.*, 326 So. 2d 183 (Fla. 1976). Under *Marca*, Jennings would be entitled solely to a review of the record as it now exists. *However, since the content of ex parte contacts is not part of the existing record, such review would prohibit the ascertainment of the contacts' impact on the commission's determination*.

Id. at 1340 (emphasis added).

In reaching its decision, the *Jennings* Court held that the remedy for an allegation of a prejudicial *ex parte* communication in a quasi-judicial proceeding was the following:

> [W]e hold that *the allegation of a prejudicial ex parte communication in a quasi-judicial proceeding before the Dade County Commission will enable a party to maintain an original equitable cause of action* to establish its claim.
>
> … [W]e direct that upon remand Jennings shall be afforded an opportunity to amend his complaint. Upon such an amendment, *Jennings shall be provided an evidentiary hearing to present his prima facie case that ex parte contacts occurred*. Upon such proof, prejudice shall be presumed. The burden will then shift to the respondents to rebut the presumption that prejudice occurred to the claimant. Should the respondents produce enough evidence to dispel the presumption, then it will become the duty of the trial judge to determine the claim in light of all the evidence in the case.

Id. at 1341-1342 (emphasis added).

Under *Jennings*, therefore, the County's remedy was pursuit of a declaratory action to prove, after an evidentiary hearing, the existence of a prejudicial *ex parte* communication. In the present matter, the County is asking this Court to conduct its own *de novo* evaluation of the proffered facts. This is not contemplated nor permitted by *Jennings*.

The City recognizes that the County relies for this argument on the prior decision in *The Viscayans, et al. v. City of Miami, et al*., 15 Fla. L. Weekly Supp. 657a (Fla. 11th Jud. Cir. App. Div. July 3, 2014), in which a panel of the appellate

division reversed a decision of the City Commission with respect to a zoning matter, in part because it determined that *ex parte* communications by the mayor during the ten-day veto period constituted a denial of due process. (RA. 789-95). But, as asserted in Section I, supra, in *The Viscayans*, the actions under review were an ordinance and a resolution of the City Commission acting in its quasi-judicial capacity—not a mayoral veto, because the mayor there did not exercise his veto authority. There was, therefore, no issue in that case with respect to the jurisdiction of the appellate division to review the matter. Such is not the case here, where this Court lacks jurisdiction to consider this alleged *Jennings* violation, both because such an alleged violation must be brought as an original action and because the mayoral veto is not subject to review by this Court on a petition for writ of certiorari to begin with.

III. THE BOARD DECISION APPLIES THE CORRECT LAW, IS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE, AND AFFORDED THE COUNTY DUE PROCESS

The County asserts that the decision of the Board also fails under all three of the appellate standards. These arguments are infirm as to the Board decision in the same ways that they were as to the mayoral veto.

The Board Decision Applied the Correct Law

The County asserts that the Board departed from the essential requirements of law in denying its application, asserting the same reasoning as it did with respect

to the mayoral veto—that the Board's consideration of the Letter to conclude that the County plan was inconsistent with the Standards expanded the scope of the hearing. Pet. at 54. As explained above with respect to the mayoral veto, the Letter was properly admitted into evidence and the Board was required under the Code to consider the consistency of the plan with the Standards. There is simply no misapplication of the law on this point.

The County also asserts that the City could not revisit the prior conditional certificate of appropriateness in rendering a decision on the current application, because the County had relied to its detriment on that prior approval. While it is true that sometimes a party may be estopped from revisiting prior decisions where another party relied on those decisions to their detriment, this argument really misses the mark here. The conditional certificate of appropriateness made very clear that: (1) no demolition permit will be issued until the plan came back to the Board and is approved; and (2) that the master plan approved by the vote was "in concept only." The County did not expend money in reliance on the 2017 conditional certificate of appropriateness such that estoppel could apply, where that approval was clearly conditioned on final approval before any demolition or construction would be permitted.

The Board Decision Is Supported by Competent Substantial Evidence

The County asserts that the Board decision was not supported by competent substantial evidence, arguing the same point that it did with respect to the mayoral veto—that the Letter was not competent substantial evidence. As explained above with respect to the mayoral veto, however, the County waived any objection to the Letter's use as support by not raising this issue below. And even if the issue were preserved for appeal, the Letter is competent substantial evidence.

The Board Decision Afforded the County Due Process

The County asserts that the Board decision violated due process in two ways: (1) the Board decision considered the interior of the Playhouse, which expanded the scope of the hearing on the certificate of appropriateness; and (2) Vice Chair Lewis's participation in the proceedings violated due process. Pet. at 55-60.

As with the mayoral veto, the Board decision was not impermissibly based on the interior of the Playhouse. The Letter, which was admitted into the record before the Board without objection by the County, opines that the County plan is inconsistent with the Standards because the auditorium, the location of the historic events that took place in the theater—should not be demolished. (RA. 6). Any such demolition would eliminate the historic significance of the theater. The opinion is not based on the interior architectural features of the auditorium, but, rather, on the

historic significance of the entire auditorium structure. *Id*. The Board was required to consider the Standards in determining whether to grant the certificate of appropriateness, and the Letter was evidence that the plans were inconsistent with those Standards. § 23-6.2(h)(1), City of Miami Code; (RA. 770).

With regard to the alleged due process violation stemming from Vice Chair Lewis's participation in the hearing, the County has waived this argument by not seeking review of the Board's decision to allow Vice Chair Lewis to participate until after the County suffered an adverse ruling. The First District has explained:

> The general rule of timeliness for judicial disqualifications requires action "at [the] first opportunity to do so in a proceeding before that judge." *St. Pierre v. State*, 966 So. 2d 972, 975 (Fla. 2d DCA 2007). We have stated the rule as requiring action "as soon as practicable." *People Against Tax Revenue Mismanagement, Inc. v. Reynolds*, 571 So. 2d 493, 496 (Fla. 1st DCA 1990) (denying a petition for writ of prohibition on the merits but noting that "[w]hen the motion was denied and movants elected to challenge that ruling by seeking a writ of prohibition rather than waiting to raise the issue on plenary appeal, a petition should have been filed as soon as practicable" *citing Carr v. Miner*, 375 So. 2d 64 (Fla. 1st DCA 1979))). A party having knowledge of grounds to disqualify a judge may not delay taking preventive action until after suffering an adverse ruling. "A motion for recusal is considered untimely when delayed until after the moving party has suffered an adverse ruling unless good cause for delay is shown." *Fischer v. Knuck*, 497 So. 2d 240, 243 (Fla. 1986); *Lawson v. Longo*, 547 So. 2d 1279, 1281 (Fla. 3d DCA 1989) (holding that party waives right to seek removal of judge "[b]y doing nothing to affirmatively promote or protect the issue of the possible recusal"); *Data Lease Fin. Corp. v. Blackhawk Heating & Plumbing Co., Inc*., 325 So.2d 475, 479 (Fla. 4th DCA 1975) (holding a motion is untimely if not filed after the party has knowledge to support disqualification and after the party suffers an adverse ruling).

Jackson v. Leon County Elections Canvassing Bd., 214 So. 3d 705, 706–07 (Fla. 1st DCA 2016). These rules apply equally to quasi-judicial proceedings. *See Broward County v. Florida Nat. Properties*, 613 So. 2d 587, 588 (Fla. 4th DCA 1993) ("Prohibition lies only to prevent judicial or *quasi-judicial* actions, not legislative, executive or administerial actions.") (citations omitted, emphasis supplied). Here, the County should have requested a continuance to seek a writ of prohibition if the County intended to further pursue the issue of Vice Chair Lewis's disqualification. In fact, a continuance was offered by the Board prior to its vote, and the County declined the offer. (RA. 634-35). Instead, the County waited until an adverse ruling by the Board, its successful appeal of that ruling, and a mayoral veto before challenging whether Vice Chair Lewis should have been permitted to participate in this matter. This issue has not been raised by the County in a timely manner, and so is waived.

But even if this issue has not been waived, the bias alleged by the County is insufficient to warrant reversal. The County essentially argues that Vice Chair Lewis engaged in a two-year advocacy campaign to save the Playhouse, and that, in doing so, she demonstrated that was not impartial. Pet. at 56-59. But Vice Chair Lewis engaged in these activities in her capacity as a board member on the Florida Trust—a fact that she disclosed during the proceedings. (RA. 152). In fact, she indicated during the proceedings on the 2017 conditional certificate of

appropriateness that the Florida Trust was interested in advocating to save the Playhouse, and solicited the County's position on that proposed course of action. The County, having been previously informed that Vice Chair Lewis was a board member on the Trust, consented to that court of action. (Ra. 154-55). Only now, after suffering an adverse ruling on its application, is the County taking issue with those activities.

The County also asserts that Vice Chair Lewis could not be impartial because she admitted that she starts with "an initial inclination to preserve rather than to demolish." Pet. at 57. But Vice Chair Lewis also stated during that same hearing:

> My initial inclination to preserve rather than to demolish does not mean that I can ignore, should ignore, will ignore evidence, testimony that establishes that demolition is appropriate, again, under the standards of the Secretary of the Interior. So, I respectfully disagree with you that I have a bias one way or the other.

(RA. 491). And the purpose of the Board is to facilitate preservation, so it would make sense that a Board member would favor preservation over demolition. This statement, taken with her indication that she will always consider the evidence before her, demonstrates that Vice Chair Lewis was not biased.

Further, any alleged error here was harmless. The vote on the County's application passed by a vote of six-to-four. (RA. 637). Even without Vice Chair

Lewis's vote, the motion would have prevailed. As such, the County cannot demonstrate prejudice.

CONCLUSION

Based on the foregoing, the City respectfully requests that this Court dismiss this appeal for lack of jurisdiction. In the alternative, the petition must be denied because both the mayoral veto and the Board decision it revises were supported by competent, substantial evidence, applied the correct law, and afforded due process. Accordingly, the Respondent City of Miami respectfully requests that this Court deny Miami-Dade County's Petition for Writ of Certiorari.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to those individuals on the attached Service List by e-mail this 2nd day of December, 2019.

By: *s/Kerri L. McNulty*
Kerri L. McNulty, Senior Appellate Counsel
Florida Bar No. 16171

SERVICE LIST

Abigail Price-Williams, Miami Dade County Attorney
James Edwin Kirtley, Jr., Assistant County Attorney
Dennis A. Kerbel, Assistant County Attorney
Stephen P. Clark Center
111 N.W. 1st Street, Suite 2810
Miami, FL 33128
Email: kirtley@miamidade.gov
dkerbel@miamidade.gov
Counsel for Miami-Dade County