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

APPELLATE DIVISION

CASE NO.: 19-167 AP 01

MIAMI-DADE COUNTY,

Petitioner,

vs.

CITY OF MIAMI,

Respondent.
_____/

CITY OF MIAMI'S MOTION FOR REHEARING OR CLARIFICATION

Respondent, the City of Miami ("the City"), pursuant to Florida Rule of Appellate Procedure 9.330, hereby moves this Honorable Court for Rehearing or Clarification with respect to this Court's decision regarding Jennings v. Miami-Dade County, and as grounds therefore states:

INTRODUCTION

This case arises from a Petition for Writ of Certiorari by Miami-Dade County seeking to quash the Mayor's veto and reinstate the decision of the Miami City Commission regarding the County's application for a Certificate of Appropriateness to develop the Coconut Grove Playhouse.

On remand from the Third District Court of Appeal for a consideration of the case on the merits, and applying the three-fold standard of review, this Court found that the Veto was supported by competent substantial evidence and complied with the essential requirements of the law. Nevertheless, this Court found a violation of due process and quashed the Veto and reinstated the decision of the Miami City Commission. This Court based the due process violation on five unsolicited emails to the Mayor, non-substantive replies to the emails from the Mayor, and the principles of Jennings v. Miami-Dade County, 589 So. 2d 1337 (Fla. 3d DCA 1991).

As will be stated below, the City submits that this Court should grant rehearing or clarification of that holding. A violation of Jennings cannot be determined absent an evidentiary hearing via a separate lawsuit or a hearing whereby the Mayor has the opportunity

to rebut any assertion of prejudice. This Court erred by directing reinstatement of the Commission's decision. Absent an evidentiary hearing, the bare unsolicited emails relied upon by the Court do not conclusively establish that the communications were prejudicial. Finally, in order for elected officials to comply in the future, this Court's determination of a Jennings violation without the requisite evidentiary proceeding requires clarification of exactly what circumstances result in a Jennings violation mandating reversal without explanation from the elected official.

ARGUMENT

Under the authority of Jennings v. Dade County, 589 So.2d 1337 (Fla. 3d DCA 1991), this Court quashed the Mayoral Veto based upon alleged ex parte communications consisting of unsolicited emails to the Mayor and non-substantive email replies from the Mayor. This determination was erroneous as Jennings does not permit an appellate court to invalidate an administrative decision without an evidentiary proceeding to determine prejudice.

In Jennings, a property owner 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 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 granted leave to amend as to Dade County and transferred the matter to the appellate division of the circuit court. Jennings sought review from the Third District Court of Appeal.

In accepting jurisdiction over the appeal in Jennings, the Third District Court of Appeal 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).

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, the remedy is pursuit of a civil action and an evidentiary hearing to ascertain the impact of the communications on the administrative determination.[1]

[1] Scott v. Polk County, 793 So. 2d 85 (Fla. 2d DCA 2001), provides an example of the proper way to challenge an administrative decision based on an ex parte communication. See id. at 86 ("The instant judicial action involves a § 1983 due process claim, which, in the context of a zoning case, may be viewed as an action independent and distinct from the judicial review process relating to the approval

In the present matter, this Court conducted its own de novo evaluation of the proffered facts and determined without the requisite evidentiary proceeding which would enable the Mayor to rebut any presumption of prejudice. This is directly contrary to Jennings. At a minimum, this Court should have relinquished jurisdiction for an evidentiary hearing regarding this issue. Instead, this Court directed reinstatement of the Commission decision which was contrary to Jennings. See Jennings at 1339 ("We hold that upon proof that a quasi-judicial officer received an ex parte contact, a presumption arises … that the contact was prejudicial. The aggrieved party will be entitled to a new and complete hearing before the commission unless the defendant proves that the communication was not, in fact, prejudicial.") (emphasis added). Ironically, the imposition of a presumption in this case without an opportunity for rebuttal resulted in a deprivation of the Mayor's due process rights.

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or denial of a zoning request. See Jennings v. Dade County, 589 So. 2d 1337 (Fla. 3d DCA 1991) (holding that an original judicial action for declaratory and injunctive relief regarding due process violations in a quasi-judicial zoning proceeding before a county board can be maintained apart from the judicial review process of the board's actual zoning decision).").

This Court's application of Jennings on appeal is inconsistent with the conduct of appellate proceedings. Fundamental and well-settled principles of appellate practice provide that reviewing courts are prohibited from making factual findings or reviewing evidence not included in the record before the lower tribunal. See, e.g., Altchiler v. State, Dept. of Professional Regulation, Division of Professions, Board of Dentistry, 442 So.2d 349 (Fla. 1st DCA 1983) (elemental that appellate court cannot consider matters outside record; no excuse for lawyer to attempt to bring outside matters to court's attention); Hillsborough County Board of County Commissioners v. Public Employees Relations Commission, 424 So. 2d 132, 134 (Fla. 1st DCA 1982) ("An appeal has never been an evidentiary proceeding; it is a proceeding to review a judgment or order of a lower tribunal based upon the record made before the lower tribunal. An appellate court will not consider evidence that was not presented to the lower tribunal because the function of the appellate court is to determine whether the lower tribunal committed error based on the issues and evidence before it."). The rules of appellate procedure governing administrative appeals similarly restrict review to materials that were before the lower tribunal. See Fla. R. App. P. 9.190(c)(1) ("As further

described in this rule, the record shall include only materials furnished to and reviewed by the lower tribunal in advance of the administrative action to be reviewed by the court."). This Court's holding – reviewing materials that were not part of the record before the Miami City Commission – departed from these principles of appellate review.[2]

Even if Jennings were to be applied to this case, the ex parte communications identified in this case – five unsolicited emails and non-substantive email replies from the Mayor – would not be deemed "prejudicial" under the high bar set by the Jennings case.

The Jennings opinion adopts the following criteria to determine the prejudicial effect of an ex parte communication:

> [w]hether, as a result of improper ex parte communications, the agency's decisionmaking process was irrevocably tainted so as to make the ultimate judgment of the agency unfair, either as to an innocent

[2] The County relied 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). The City submits that the holding in The Viscayans misapplied Jennings for the reasons addressed in this Motion.

> party or to the public interest that the agency was obliged to protect. In making this determination, a number of considerations may be relevant: the gravity of the ex parte communications; whether the contacts may have influenced the agency's ultimate decision; whether the party making the improper contacts benefitted from the agency's ultimate decision; whether the contents of the communications were unknown to opposing parties, who therefore had no opportunity to respond; and whether vacation of the agency's decision and remand for new proceedings would serve a useful purpose.

Jennings, 589 So. 2d at 1341 (quoting Professional Air Traffic Controllers Org. v. Federal Labor Relations Auth., 685 F.2d 547 (D.C. Cir. 1982) (emphasis added).

Thus, the Jennings opinion sets a high bar for the type of prejudice that would invalidate an administrative decision.

Here, this Court determined that the communications required invalidation of the Mayoral Veto without any opportunity for rebuttal. Further, this Court did not and could not find that the communications were deemed conclusively prejudicial with regard to the factors set forth in Jennings. Hence, the ex parte communications identified by this Court did not meet the high bar set by Jennings to demonstrate the degree of prejudice necessary to invalidate the decision.

Finally, this Court should not allow the decision to stand without rehearing or clarification because the current decision creates confusion as to what facts constitute a presumption of prejudice, what facts dispel the presumption, and what ultimate facts demonstrate prejudice or lack of prejudice. Given that elected officials constantly receive communications from their constituents, the answers to these questions are crucial to guide elected officials in the future. The City submits that following the letter of Jennings and requiring an evidentiary proceeding would have obviated the need for the answers to these questions. But in the absence of a hearing which would have required proof, this Court's ruling in a vacuum begs the need for answers.

The following are examples of the intricate problems posed by a one-sided ruling without full and fair litigation of the issues. In this case, the Mayor received unsolicited emails and sent non-substantive responses. The City submits, as stated above, that this, without more evidence, does not constitute a violation under Jennings. Do said unsolicited emails without a response by the elected official amount to a Jennings violation? If there was evidence that the elected official never met with or had any discussion with the constituents rebut a

Jennings violation? Would meetings between the elected official's staff only or email responses by staff only result in a Jennings violation? Does it make a difference if the elected official or staff meets with constituents on both sides of an issue? All these examples point to the need for an evidentiary proceeding. All the examples demonstrate the problems and lack of clarity caused by making a Jennings finding with a one-sided record.

CONCLUSION

Jennings does not authorize an appellate court, without evidence or a complete record, to invalidate an administrative decision based on violation of due process. The vacuum created by proceeding in this fashion leaves many issues undetermined and unexplained. The holding in Jennings required evidence and a complete record to make the determination of prejudice. Based on the foregoing arguments and authorities, the City respectfully requests that his Court grant rehearing find that due process was followed without prejudice to the County filing an appropriate action in circuit court, and failing that, to clarify its opinion with respect to

when an elected official is subject to Jennings without the opportunity to rebut the claim.

Respectfully submitted,

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By: */s/ John A. Greco*
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to those individuals listed below by e-mail this 22nd day of April 2021.

By: */s/ John A. Greco*
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