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

APPELLATE DIVISION
CASE NO. 19-167-AP

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

MIAMI-DADE COUNTY,

Petitioner,

v.

CITY OF MIAMI,

Respondent.
_____/

MIAMI-DADE COUNTY'S REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Miami-Dade County, Florida (the "County") submits this reply in support of its Petition for Writ of Certiorari to address the arguments in the City's response.

I. Introduction

If there is one obvious undertone to the City's brief, it is that the City cannot really defend the City Mayor's decision on the merits. Instead, the City launches a series of spurious "gotcha" arguments relating to jurisdiction, waiver, and other procedural technicalities. As explained below, each of these arguments proves too clever by half, and must be rejected as unsupported by law, inconsistent with the facts, or, in most cases, both. The City's perfunctory arguments on the merits fare no better. Because, in the end, the City cannot escape the serious errors committed by the City Mayor and the Historic and Environmental Preservation Board (HEPB), which the City Mayor expressly incorporated into his decision, the Court must grant the petition and quash the veto.

II. Argument

A. This Court has Jurisdiction to Review the City Mayor's Veto

The City begins by repeating, practically verbatim, its argument from its pending motion to dismiss that the City Mayor's veto is not quasi-judicial and is therefore beyond this Court's jurisdiction. Resp. at 32-39. The City's argument rests solely on its view that the City Mayor did not have to, and did not in fact, hold a public hearing before issuing the veto. In the City's view, if no public hearing was

held, then the matter cannot be quasi-judicial. The Court must reject this now-trite and entirely circular argument, which cannot be squared with due process.

To be sure, the City is correct that where notice and a hearing are required, a proceeding is quasi-judicial rather than legislative or executive. *See, e.g.*, *De Groot v. Sheffield*, 95 So. 2d 912, 915 (Fla. 1957). But here, as the City concedes, two quasi-judicial public hearings on the County's application and related appeal were required, and were in fact held, and the decisions were "contingent on the showing made at the hearing." *See Braden Woods Homeowners Ass'n, Inc. v. Mavard Trading, Ltd.*, 277 So. 3d 664, 672 (Fla. 2d DCA 2019) (citation omitted).

As a consequence, when the matter landed on the City Mayor's desk, he wasn't working off of a blank slate. Instead, the City Mayor had before him an extensive record formulated during those quasi-judicial hearings, and he inserted himself as a decision-maker into a proceeding that was contingent on that hearing record. Given this posture, the City has not explained, in three attempts at this argument now,[1] why the City Mayor wasn't simply bound to review the record from the prior quasi-judicial public hearings and base his decision upon the evidence in

[1] The City first advanced its jurisdictional argument in its motion to dismiss. Then, after this Court issued an order deferring ruling on the motion and carrying it with the case, the City presented the argument a second time to the Third District Court of Appeal, seeking a writ of prohibition directing this Court to rule on its motion to dismiss—a request the Third District promptly denied. Accordingly, this marks the City's third attempt at the argument.

the record. *See GTECH Corp. v. State Dep't of Lottery*, 737 So. 2d 615, 621 (Fla. 1st DCA 1999).

In *GTECH Corp. v. State Dep't of Lottery*, 737 So. 2d 615, 621 (Fla. 1st DCA 1999), the Secretary of the Lottery reviewed the record of two prior public hearings and considered the recommendation of an administrative law judge in bid protest proceedings. Even though the Secretary did not personally hold those public hearings, the court determined that she was acting in a quasi-judicial capacity when she made her decision based on the record below. The City has attempted to distinguish *GTECH* by arguing that, in the administrative agency setting, "the agency head in entering a final order is acting as the culmination of the quasi-judicial process," and, thus, "[n]o additional hearing before the agency head is expected, or needed—it is all one process, netting one ultimate decision." Dismiss Mot. Reply at 7-8. But that is a distinction without a difference here: both the hearing and veto in this matter were part of the same City-Code-prescribed process governing Certificate of Appropriateness applications.

More significantly, the City does not explain how the City Mayor's failure to hold a third public hearing before exercising his veto magically converted a quasi-judicial proceeding into an executive one. How can this view be squared with due process? How can a quasi-judicial applicant, who is entitled to due process all the way through very extensive public hearing proceedings, inexplicably lose due

process rights when the City Mayor exercises his veto power as part of that very same process? The City offers no answer, and the cases it cites do not support its view. Indeed, the City has not identified any case from any jurisdiction holding that a mayor's veto of a board's quasi-judicial decision is itself executive or legislative, rather than quasi-judicial. That is because, so far as the County is aware, no such case exists.

The City Mayor is not a monarch: when he vetoes a quasi-judicial decision, he must observe due process, apply the correct law, and base his decision only upon the record evidence. His participation in what began as a quasi-judicial process remains subject to the same requirements attendant to the rest of the proceeding and is subject to challenge in this appeal. The City's wholly unsubstantiated and radical argument must be rejected.

B. The City Mayor's Veto Violated the Essential Requirements of the Law

As the County explained in its petition, the City Mayor applied the wrong law in relying on DHR's opinion letter, because DHR expressly premised its analysis on the National Register Listing application, not the local historic site designation. The National Register has no regulatory significance or authority: it is the City's local designation that constitutes the governing law for this proceeding, and the City Code requires the County's Certificate of Appropriateness application to be measured against that local designation.

Nevertheless, the City argues that its Mayor properly considered DHR's opinion because the City Code expressly provides for consideration of the Secretary of the Interior's Standards in this proceeding. Resp. at 42. But this completely misunderstands the County's argument. The County did not challenge the City Mayor's consideration of the Secretary of the Interior's Standards; rather, the County argued that those standards must be evaluated in reference to the governing local designation, and not the non-regulatory National Register Listing narrative.

In *Playhouse I*, the Court recognized that the County's application for a Certificate of Appropriateness must be analyzed in reference to the governing local historic designation, the scope of which is described in the 2005 designation report. *See Miami-Dade Cnty. v. City of Miami*, 26 Fla. L. Weekly Supp. 800b (Fla. 11th Cir. Ct. App. Div. Dec. 3, 2018) ("*Playhouse I*"). But DHR disregarded this ruling and evaluated the County's application against the National Register application instead. As the Court also made clear in *Playhouse I*, "[t]he 2005 Designation Report did not include the interior of the building," and "preservation of the interior of the building was thus not within the purview of the Historical Board." *Id.* Yet, problematically, when DHR analyzed the County's application under the Secretary of the Interior's Standards, it expressly took into account purported impacts of the County's project to the Playhouse interior. *See* Pet. App. II, Ex. L.

In sum, because DHR's opinion is expressly premised on the non-governing,

nor-regulatory National Register Listing narrative and analyzes impacts to the Playhouse interior, the City Mayor was legally foreclosed from relying upon it. Because he did so anyway, he departed from the essential requirements of the law. *Playhouse I* at 800b.

As explained in the County's petition, the City Mayor applied the wrong law in several other ways as well: by basing his veto on the mistaken belief that the County's appeal to the City Commission was premature when it was not; by basing his veto on the mistaken belief that the County had not applied for demolition as part of its final application, when it in fact did so; by incorrectly relying upon section 267.061(2)(b), Florida Statutes, when that statute applies only to state agencies; and by improperly considering the source and amount of funding for the County's project, when such matters are not among the Certificate of Appropriateness criteria. Pet. at 45-47. The City does not address any of the foregoing arguments and, accordingly, they should be deemed conceded.

C. No Competent Substantial Evidence Supports the City Mayor's Veto

The only evidence in the record finding the County's application inconsistent with the Secretary of the Interior's Standards and, thus, ineligible for a Certificate of Appropriateness is DHR's opinion letter.[2] As explained in the County's petition,

[2] The City does not contend otherwise, nor could it. Indeed, as the County noted in its petition, the other professional opinions in the record—those of the

DHR's opinion did not constitute competent substantial evidence supporting the veto. To the contrary, DHR's analysis was incompetent, inapposite, and irrelevant in the context of this proceeding. The City contends otherwise, and also argues that the County waived the right to complain about DHR's opinion because, it asserts, the County failed to object during the HEPB hearing. Resp. at 43-46. In both respects, the City is wrong.

To begin, the City's waiver argument lacks merit. The County did in fact object to DHR's opinion in multiple ways, multiple times: the County sent a letter to the HEPB in advance of its March 2019 public hearing explaining the flaws with DHR's analysis (Pet. App. II Ex. M, Attchmt. 2); the undersigned Assistant County Attorney stated on the record at the HEPB hearing that DHR's analysis was "legally problematic" and "suffers from several analytical and practical flaws" (Pet. App. II Ex. H at 64); DHR's flawed analysis was a basis for the County's appeal to the City Commission (Pet. App. II. Ex. M); and the County objected to consideration of the letter during that appeal proceeding (Pet. App. II. Ex. N at 194).

Moreover, the appeal proceeding to the City Commission was de novo, meaning that the Commission was not bound by the record below and could consider new evidence and arguments. Accordingly, even if the County had not objected

---

City's historic preservation officer, the County's historic preservation chief, and historic preservation expert Jorge Hernandez—reached the opposite conclusion of DHR: that the County's plan did, in fact, satisfy the relevant standards.

during the HEPB hearing (as it did), the County cannot be deemed to have waived its argument because it was an express basis for the City Commission appeal, and the County objected to DHR's opinion on the record during that appeal proceeding.[3]

On the merits, the City's argument fails because DHR's letter does not constitute competent substantial evidence. Competent substantial evidence is such evidence as is "sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached." *Smith v. Dep't of Health & Rehab. Servs.*, 555 So. 2d 1254, 1255 (Fla. 3d DCA 1989) (citation omitted).

DHR's letter does not meet this definition. The letter itself is conclusory, as it merely recites the Secretary of the Interior's Standards without any supporting analysis. The City points to DHR's citation to a November 2017 email as supporting

[3] In any event, on first-tier review, the Court's task is to comb the record and determine whether the record contains any competent substantial evidence supporting the decision under review. *See Dusseau v. Metro. Dade Cnty. Bd. of County Comm'r*s, 794 So. 2d 1270, 1276 (Fla. 2001) (on first-tier review, "court must review the record to assess the evidentiary support for the agency's decision"). Either the record contains such evidence or, as here, it does not. The question before this Court, then, is not whether the County objected to any particular piece of evidence, but whether the record as a whole contains competent substantial evidence supporting the City Mayor's decision. The Court's duty to review the record and make such a determination does not hinge on a party's objection in the proceeding below. *Cf. Lee Cnty. v. Sunbelt Equities, II, Ltd. P'ship*, 619 So. 2d 996, 1003 (Fla. 2d DCA 1993) (determining whether competent substantial evidence exists "involves a purely legal question," namely "whether the record contains the necessary quantum of evidence"). And for the reasons explained herein, the record contains no such evidence here.

its conclusion that the County's application does not satisfy the Secretary of the Interior's Standards. But that citation makes matters worse, not better: as explained above, the referenced email plainly indicates that DHR's reasoning rests on the project's purported impacts to the Playhouse interior. Even though the interior was not included in the designation report and, thus, not subject to regulation here, the City remarkably defends DHR's analysis and argues that "it constitutes the professional evaluation of an expert in the field as to whether the County plan is consistent with the Standards." Resp. at 46. This argument is circular and totally ignores the principal point of the County's position. The County does not dispute that DHR's opinion is a professional evaluation by an expert; rather, the County contends that the letter was conclusory and, to the extent it contained any actual analysis, was incompetently based on the wrong legal standards—that is, the National Register narrative and not the governing local designation.

The question before the City Mayor was not whether the County's application would impact the Playhouse interior as described in the National Register narrative, but whether the County's project meets the Secretary of the Interior's Standards within the scope of the governing local designation. Because DHR analyzed the former and not the latter, its professional evaluation was not "sufficiently relevant and material that a reasonable mind would accept it as adequate to support" denial of the County's application, and the City Mayor should not have relied upon it.

A simple hypothetical further illustrates the incompetency of DHR's opinion: had the County not sought to demolish the auditorium building, but instead ***only*** to gut the interior and replace it with, say, an H&M retail store, that interior renovation would "not be subject to review" under the City's Historic Preservation ordinance and, thus, the County would not have had to seek the City's permission. City Code § 23-4(c)(2)c. But, under DHR's analysis, such a project would not be consistent with the Secretary of the Interior's Standards either since, as with the County's proposed demolition, "[t]he ***entire interior*** of the building would be replaced as part of the proposed structural work." Pet. App. II, Ex. L (emphasis supplied). Thus, a project that the County could do as of right, without obtaining HEPB approval, would be deemed inconsistent with the Secretary's of the Interior's Standards merely because it renovates the interior—a space that is not preserved under the governing local designation. That DHR's opinion would lead to such an absurd result further demonstrates that it is not competent evidence. *See, e.g.*, *Wiggins v. Florida Dep't of Hghwy. Safety & Motor Vehicles*, 209 So. 3d 1165, 1173 (Fla. 2017) ("Competent, substantial evidence must be reasonable and logical.").

D. The City Mayor's Veto Violated Due Process

1. The City Mayor Improperly Expanded the Scope of the Hearing

In *Playhouse I*, the Court found that "the County was not afforded procedural due process" before the City Commission, because "[c]onsideration of preservation

of the interior of the [Playhouse] was outside the purview of the appeal and expanded the scope of the hearing without proper notice." *Playhouse I* at 800b. As the County explained in its petition, the same thing happened here when the City Mayor vetoed in reliance on DHR's opinion, which improperly considered the Playhouse interior. In response, the City again argues that DHR's "reasoning stands independent of any analysis of the architectural integrity of the auditorium interior" and "is based on the fact that the auditorium space is the location of the historic theatrical performances that make the Playhouse historically significant." Resp. at 47-48. But this characterization is belied by the very text of the referenced opinion.

DHR's analysis, as set forth in the November 2017 email, is based entirely on purported impacts to the Playhouse's interior spaces. Indeed, DHR's concern about "the historic theater space where the activities that make this property significant [occurred]," Pet. App. II, Ex. L, is plainly a reference to the interior—which was ***not*** designated and, therefore, beyond the purview of the HEPB and City Mayor to consider. *See Playhouse I* at 800b. Trying to regulate the interior by saying that is where the historical activities occurred, even though the City Code expressly prohibits further regulation of interior spaces when not called out in the designation report, would be attempting to do indirectly what could not be done directly in this proceeding. Indeed, it cannot be read any other way.

Moreover, the County's project respects the historical significance of the site

by replacing a theater with a theater, meaning that the site's historic use will be restored and theatric performances will once again occur in the same footprint as they historically did. As such, the County's plan advances the site's significance as a historic place of theater. So if the City were nevertheless allowed to regulate the interior in the name of an exception to protect "the activities that make this property significant" despite its express Code prohibition on regulating interiors beyond the governing designation report, the exception would make the rule mere surplusage. *See, e.g.*, *Heart of Adoptions, Inc. v. J.A.*, 963 So. 2d 189, 198–99 (Fla. 2007).

The City's argument also completely ignores the other portion of the same email that states "this project will result in the loss of integrity of the building," as "[t]he ***entire interior*** of the building would be replaced as part of the proposed structural work." Pet. App. II, Ex. L (emphasis supplied). That DHR's analysis was in any respect premised on impacts to the interior of the Playhouse means that the City Mayor was foreclosed from relying upon it. When he did so, the scope of the hearing was necessarily expanded in violation of the County's right to due process.

2. The City Mayor was Not Sufficiently Familiar with the Record

Due process requires of a quasi-judicial decision-maker "[r]easonable familiarity and study of the transcript before making an independent decision in vote form." *Sheffey v. Futch*, 250 So. 2d 907, 910 (Fla. 4th DCA 1971). The City contends that the City Mayor considered the record and that "[t]he veto message

suggests that [he] was deeply familiar with the issues presented by the County's application." Resp. at 48. But the actual veto statement demonstrates otherwise.

Therein, the City Mayor asserted that the County's application did not include demolition—an assertion that is belied by even a cursory review of the County's application. Pet. at 28-29. Moreover, the County expressly pointed out at the HEPB hearing that it had applied for demolition and showed the application form to the HEPB members. Pet. App. II, Ex. H at 59. This is reflected in the recording and transcript of that proceeding, which the City Mayor would have been aware of had he adequately reviewed and familiarized himself with the record upon which his decision should have been based. His failure to do so violated the County's due process rights. *See Sheffey*, 250 So. 2d at 910.

3. The City Mayor's Failure to Disclose Ex Parte Communications Violated Due Process

As argued in the petition, the City Mayor's veto violated due process because he received, and engaged in, *ex parte* communications that he did not disclose in a public hearing setting prior to making his decision. The City contends that, because those *ex parte* communications are not part of the record below, the County may only raise that issue in an original action and not in this certiorari proceeding. Resp. at 49-52. The City cites *Jennings v. Dade County*, 589 So. 2d 1337 (Fla. 3d DCA 1991), but the City misunderstands both *Jennings* and the County's actual argument.

In *Jennings*, the court held that a party to a quasi-judicial proceeding may file

an original action to challenge *ex parte* communications. *Jennings*, 589 So. 2d at 1341. But *Jennings* did not hold that a due process challenge based on *ex parte* communications can never be raised on first-tier certiorari. In fact, such challenges have been permitted. *See, e.g.*, *Mafera v. Manatee Cnty.*, 27 Fla. L. Weekly Supp. 511b (Fla. 12th Cir. Ct. App. Div. June 27, 2019) ("[T]he Court rejects the County's argument that, as a general rule, claims that officials failed to disclose ex parte communications cannot be raised in a petition for writ of certiorari.").

In *The Vizcayans v. City of Miami*, 15 Fla. L. Weekly Supp. 657a (Fla. 11th Cir. Ct. App. Div. July 3, 2014), a panel of this Court considered, in a first-tier certiorari proceeding, whether the then-City Mayor's *ex parte* communications during the ten-day veto period on a quasi-judicial land use matter violated due process. The Court rejected the argument that the due process claim had been waived because the petitioners failed to object to the communications on the record below, noting that such an objection was not possible because the communications "occurred ***after*** the public hearings, and therefore, could not have been disclosed and addressed during those hearings." *Id.* (emphasis original). Ultimately, the Court held that the mayor's *ex parte* communications violated due process because they "all took place after the hearings had concluded, away from public earshot[.]" *Id.*[4]

[4] The City contends that *Vizcayans* is inapposite because there, unlike here, the City Mayor did not ultimately veto. But that is again a distinction without a

In *Friends of the Oleta River, Inc. v. City of North Miami Beach*, Case No. 13-343-AP (Fla. 11th Cir. Ct. App. Div. Oct. 16, 2014), a panel of this Court also considered, on first-tier certiorari review, due process claims premised on the failure to properly disclose *ex parte* communications. The Court found due process violated where city council members failed to disclose on the record substantive details about their *ex parte* communications. While the city had adopted a procedure allowing for disclosure of *ex parte* communications, as authorized by state law, the council members' disclosures had insufficient detail to comport with the procedure. Even though those details were not disclosed in the course of the hearing and, thus, were not made part of the record below, the Court nevertheless entertained the due process claim on first-tier review. The Court held that "[the city's] failure to follow its own procedural safeguards regarding ex parte communications did not afford the Petitioners a reasonable opportunity to refute or respond to the communication," meaning that "[t]he basic notion of due process was not afforded to Petitioners." *Id.*

Similarly here, the County is not asking the Court to conduct an evidentiary hearing based on materials outside the record and reach a conclusion as to whether the *ex parte* communications were, or were not, prejudicial in substance. Rather, the County argues that the City Mayor violated due process by the mere act of engaging

---

difference. The import of *Vizcayans* is that the Court considered, on first-tier review, a challenge to *ex parte* communications occurring during the mayoral veto period and found a due process violation based thereon.

in *ex parte* communications that he would have no opportunity to disclose in accordance with state law and the City's Code, and thus the County was not afforded a reasonable opportunity to inquire about, and respond to, those communications. The City has adopted a procedure pursuant to section 286.0015, Florida Statutes, which purports to remove the presumption of prejudice for *ex parte* communications through their disclosure. But the City Mayor could not and did not use that procedure here because his communications all occurred ***after*** the City Commission's public hearing, and there was no public forum where he could make the necessary disclosure ***before*** exercising his veto authority.

Although the City does not make the argument, one might question how the City Mayor was supposed to disclose his *ex parte* communications since there was no public hearing or meeting between the City Commission's approval and the veto at which such a disclosure could be made (nor was a public hearing required before issuing the veto, as explained above). But even formulating the issue that way misses the point. Due process is not about protecting a quasi-judicial decision-maker's ability to engage in *ex parte* communications: it is about protecting the parties' rights to a fair proceeding. And *ex parte* communications are by their very nature "anathema" to due process in any event. *Jennings*, 589 So. 2d at 1341. So if the City Mayor had no opportunity to disclose his *ex parte* communications prior to issuing his decision consistent with due process, then the solution was for him to

avoid having ex parte communications.

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

E. The HEPB's Decision, Which the City Mayor's Veto Purports to Reinstate, Also Violated All of the Certiorari Review Standards

As the County explained in its petition, the Court must also consider the legal deficiencies inherent in the HEPB's decision because the City Mayor's veto statement indicates that he is reinstating that decision. The City attempts to defend the HEPB's decision, but its responses fail.

1. The HEPB Applied the Wrong Law

In relying on DHR's opinion regarding the Secretary of the Interior's Standards to deny the County's application, the HEPB—like the City Mayor, and for the same reasons—departed from the essential requirements of the law.

In addition, as the County explained in its petition, the HEPB applied the wrong law when it disregarded its own procedural rules on reconsidering a prior

decision. Pet. App. II, Ex. M at Attchmt. 3. The City responds that the HEPB could properly revisit the 2017 approval because it was conditional and, therefore, the County could not have really relied on it. But while the 2017 approval was conditional, it did not provide that the HEPB could revisit its approval of demolition. As is evident from the title of the 2017 resolution, the HEP Board approved the County's master plan "TO INCLUDE THE PARTIAL DEMOLITION" of the site, albeit with the condition that no demolition permit be issued until the final plans were presented and approved. Pet. App. I, Ex. H. That condition only makes sense if the resolution in fact granted permission to demolish; otherwise, why provide a limitation on when and how such permission may be exercised? Moreover, the resolution also expressly reserved the HEPB's authority to later require different configurations of heights, setbacks, and the like as to new construction, but it did not reserve any authority to revisit the demolition approval. *Id.* Consistent with the *expressio unius* canon of construction, the HEPB's mention of only the right to later require different configurations and setbacks excluded the ability to later rescind the demolition approval. *See, e.g., 1000 Friends of Florida, Inc. v. Palm Beach Cnty.*, 69 So. 3d 1123, 1127 (Fla. 4th DCA 2011).

The HEPB thus could only reconsider its 2017 demolition approval in accordance with its rules of procedure, which prevent such reconsideration where the applicant has expended substantial monies in reliance on the prior approval or

where reconsideration would violate due process—both of which are true here. In denying the County's current application because the HEPB sought to undo its prior demolition approval, the HEPB unlawfully reconsidered that prior approval and thereby departed from the essential requirements of the law.

2. No Competent Substantial Evidence Supports the HEPB's Decision

The HEPB's decision, like the Mayor's veto, is unsupported by any competent substantial evidence. The HEPB's decision was "based on the expert testimony that the plan does not satisfy the standard of the Secretary of the Interior." Pet. App. II, Ex. H at 318, 321; HEPB Res. No. HEPB-R-19-010. But, again, the only such evidence in the record against the County's plan is DHR's incompetent opinion.[5]

3. The HEPB Violated the County's Due Process Rights

a. The HEPB impermissibly expanded the scope of the hearing

Like the City Mayor, the HEPB failed to afford due process because, in relying on DHR's opinion, it impermissibly expanded the scope of the hearing to include consideration of the Playhouse interior. Arguing otherwise, the City maintains that DHR's "opinion is not based on the interior architectural features of the auditorium, but, rather, on the historic significance of the entire auditorium structure," as "the location of the historic events that took place in the theater[.]"

[5] Contrary to the City's contention and for the reasons explained above, this argument has not been waived. *See supra*. at 7-8, 8 n.3.

Resp. at 54-55. But, as explained above, DHR did not cabin its analysis in such a manner. To the contrary, its opinion was expressly based, at least in part, on impacts to the interior portions of the Playhouse. *See* Pet. App. II, Ex. L (DHR opining that "this project will result in the loss of integrity of the building," as "[t]he ***entire interior*** of the building would be replaced as part of the proposed structural work") (emphasis supplied). Moreover, to say that the Playhouse is historically significant because of "the historic events that took place in the theater" is simply another way of saying that the auditorium is significant because of what happened in the interior, which is not subject to historic protection. *See supra* at 10-12.

b. The HEPB Vice Chair was biased

The City contends that the County waived its claim of bias against HEPB Vice Chair Lewis because it failed to seek a writ of prohibition ***before*** the HEPB issued its adverse decision. Resp. at 55. This argument is absurd and contrary to law.

The County made an extensive record of the vice chair's bias and sought her recusal. It is absurd to say that when she refused, the County had to do more and actually stop the hearing—further prejudicing its own construction timeline—to seek court intervention to preserve its objection to her participation. The City cites to cases about judicial disqualification, but those decisions are inapposite because this is a ***quasi***-judicial matter. In such matters, a party need not seek a writ of prohibition before the quasi-judicial body acts, as the court made clear in *Florida*

Water Services Corp. v. Robinson, 856 So. 2d 1035 (Fla. 5th DCA 2003).

There, an applicant in a quasi-judicial proceeding asserted that the county commission was biased and motivated by self-interest in denying its application. The court held that the applicant's remedy was not a contemporaneous writ of prohibition disqualifying the board from considering its application, but, rather, a subsequent writ of certiorari to review the board's decision for due process; indeed, a writ of prohibition was improper in this context:

> [The applicant's] remedy for redress of its claim the Board is biased and motivated by self-interest is to seek certiorari review of the Board's decision and present its due process claims to the circuit court at that time. . . . [The applicant] has no right to a writ of prohibition disqualifying the Board from considering its [ ] applications.

Id. at 1040. The City's waiver argument therefore lacks merit.

Similarly without merit is the City's contention that the vice chair's bias "is insufficient to warrant reversal." Resp. at 56. The City essentially argues that the County consented to the vice chair's bias because it knew she was on the Florida Trust, which advocated for saving the Playhouse. But whether the County knew that the vice chair was on the Florida Trust and that the organization advocates for preservation does not mean that the County consented to her participating in advocacy about the application before her. The County had a right to expect that the vice chair would conduct herself in a non-biased manner and to avoid involvement with Florida Trust matters that could be perceived as affecting her ability to

impartially consider quasi-judicial applications that come before the HEPB. It was the vice chair's obligation to govern her outside activities in a manner that would not draw into question her impartiality as a HEPB member, not the applicant's obligation to police her. Thus, that the County was aware of her involvement with the Florida Trust does not somehow waive the County's right to her impartiality.

The City also argues that the vice chair's "inclination to preserve" did not demonstrate bias because she said that she will consider the evidence presented. Resp. at 57. But the City's cramped reading of her testimony is belied by everything else that transpired. The vice chair ***did*** ignore evidence that demolition was appropriate and instead went about soliciting an opinion from DHR that she could use to deny the County's application. And she did much more than that, as detailed in the County's petition. Pet. 56-60. It is the cumulative effect of her actions and statements—not just her "inclination to preserve"—that demonstrates her bias, rising to the level of a due process violation. *See, e.g., Villages, LLC v. Enfield Planning & Zoning Comm'n*, 89 A.3d 405, 414 (Conn. App. Ct. 2014) (evidence of bias may be cumulative; specific evidence of bias is not examined in isolation).

Finally, the City wrongly contends that the vice chair's bias was harmless because the HEPB denied the County's application by 6-votes-to-4. The only material in the record supporting denial was DHR's incompetent opinion, which the vice chair used as the basis for her motion to deny. And the DHR letter is only in

evidence because of the machinations of this very biased board member As her many *ex parte* email exchanges demonstrated, she had been coordinating with DHR prior to the hearing, so when she asked the HEPB to request comments from DHR, she already knew that the comments would not be favorable to the County. And during the HEPB's deliberations on her motion to deny the application, she attempted to rebut comments favorable to the County made by other HEPB members, which may have swayed the vote of those, or other, board members. Pet. App. II, Ex. H at 288-89.

Thus, her bias was the opposite of harmless: it tainted the entire hearing and violated due process. *See Dellinger v. Lincoln Cnty.*, 832 S.E.2d 172, 179 (N.C. Ct. App. 2019) (rejecting claim that board member's bias and refusal to recuse was harmless error, where board's vote was 4-to-1 to deny application; "[board member's] biased recitation of his 'condensed evidence' could have influenced the votes of the two other commissioners who also voted against issuing the permit after his presentation," and thus "[his] bias and commitment to deny Petitioners' request . . . is sufficient basis to reverse and remand").

II. Conclusion

For the reasons explained in the County's petition and this reply, the Court should issue a writ of certiorari and quash the decision of the City Mayor below, thereby reinstating the City Commission's approval of the County's application.

Dated: December 20, 2019

Respectfully Submitted,

ABIGAIL PRICE-WILLIAMS
Miami-Dade County Attorney
Stephen P. Clark Center
111 N.W. 1st Street, Suite 2810
Miami, Florida 33128

By *James Edwin Kirtley, Jr.*

James Edwin Kirtley, Jr.
Fla. Bar. No. 30433
kirtley@miamidade.gov
Telephone: (305) 375-5151
Dennis A. Kerbel
Fla. Bar No. 610429
dkerbel@miamidade.gov
Telephone: (305) 375-5151
Assistant County Attorneys
Counsel for Miami-Dade County

Certificate of Service

I certify that a true and correct copy of this ***Reply in Support of Petition for Writ of Certiorari*** was served upon the counsel listed below by e-mail generated by My Florida Courts E-Filing Portal on December 20, 2019:

John A. Greco, Esq.
Deputy City Attorney
Office of the City Attorney
444 S.W. 2nd Avenue, Suite 945
Miami, Florida 33130
Email: jagreco@miamigov.com

Kerri L. McNulty, Esq.
Senior Appellate Counsel
Office of the City Attorney
444 S.W. 2nd Avenue, Suite 945
Miami, Florida 33130
Email: klmcnulty@miamigov.com
Secondary Email: CSantos@miamigov.com

James Edwin Kirtley, Jr.
Assistant County Attorney

Certificate of Compliance Regarding Computer Briefs

I certify this brief complies with the computer-generated rule from Florida Rule of Appellate Procedure 9.100(l). It is double-spaced, in Times New Roman 14-point font, and has 1-inch margins.

James Edwin Kirtley, Jr.
Assistant County Attorney